SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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MOSDOT SHUVA ISRAEL and BEN ZION SUKY,

Index No. 156173/14

Plaintiffs,

-against-

ILANA DAYAN-ORBACH p/k/a ILANA DAYAN, KESHET BROADCASTING LTD., THE ISRAELI NETWORK, INC. and ISRAELI TV COMPANY,

Defendants.

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JENNIFER G. SCHECTER, J.:

Pursuant to, among other sections, CPLR 3211(a)(8) and 327, defendants Ilana Dayan-Orbach p/k/a Ilana Dayan (Dayan) and Keshet Broadcasting Ltd. (Keshet) (collectively Defendants) move to dismiss the complaint based on (1) lack of personal jurisdiction and (2) the doctrine of *forum non conveniens*. Their motion is granted.

Background

Uvda is an investigative television program that is broadcast in Israel, which is analogous to CBS' *60 Minutes* (Affirmation in Support of Defendants' Motion to Dismiss [Supp], Ex 1 [Complaint] at ¶ 5; Affidavit of Ilana Dayan-Orbach [Dayan Aff] at ¶ 5). Ilana Dayan "an Israeli investigative journalist, anchorwoman, and attorney" (Complaint at ¶ 4), is the host and chief investigative reporter of the program (Dayan Aff at ¶ 5). *Uvda* and Dayan "have won virtually every journalistic broadcast award in

Israel" (*id.*). Keshet, which has an office in Tel Aviv, Israel "is the owner" of *Uvda* (Complaint at ¶ 11).

In its May 2014 season finale, *Uvda* aired a story about Rabbi Yoshiyahu Pinto, "a scholar and religious leader in the Orthodox Jewish community" (the Pinto Report) (Complaint at ¶ 2). Mosdot Shuva Israel (Shuva) is a New York religious not-for-profit organization led by Rabbi Pinto with a "primary address" in Manhattan (Complaint at ¶¶ 1-2; Plaintiffs' Memorandum in Opposition [Opp] at 2). Ben Zion Suky (Suky), a New York resident, helped to create Shuva in New York and "donates time, money and resources to Shuva to further its objects and purposes" (Complaint at ¶ 3; Opp at 2).

Shuva and Suky commenced this action against Defendants, alleging that on *Uvda*'s 2014 finale Dayan "falsely asserted that Rabbi Pinto's 'Empire', i.e., Shuva, is not really a charity or religious organization, but rather a 'tangled web' and front for 'money and profit'" and "published false statements about . . . Suky" (Complaint at ¶¶ 49, 76). Plaintiffs assert causes of action against Defendants for defamation. They also seek recovery for prima facie tort, alleging that Defendants' conduct was "intentional to inflict harm upon the plaintiffs . . . resulted in special damages .

. . was without excuse or justification . . . [and was solely motivated by] malevolence" (Complaint at ¶¶ 107-110).

In their complaint, plaintiffs assert that there is jurisdiction over Defendants in New York because upon "information and belief" they and their "agents, servants and/or employees" "traveled and/or contacted various persons in the City and State of New York throughout 2013 and 2014, in an effort to conduct . . . business to wit: compiling information for the production of the season finale of *Uvda*" (Complaint at ¶¶ 15-16). Plaintiffs further contend that Dayan and Keshet transact business and earn substantial revenue in New York through their distribution of *Uvda* (Complaint at ¶¶ 31-34) and, more specifically, that:

- Defendants "contracted with The Israeli Network to provide content for The Israeli Network in New York, including the television show *Uvda*" (Complaint at ¶ 23);
- the "episode of *Uvda* at issue . . . was aired on the Israeli Network in New York" and on "Israeli TV in New York" (Complaint at ¶¶ 24, 29);
- Defendants "caused the episode . . . to be live streamed and available in New York via internet on www.mako.co.il," www.mytvil.com, and www.mytvil.net (Complaint at ¶¶ 25, 30);
- Defendants "contract with Israeli TV to provide content for Israeli TV in New York, including the television show *Uvda*" (Complaint at ¶ 28); and
- the claims in this case arose from Defendants' business activities in New York (Complaint at ¶ 35).

Defendants move to dismiss based on lack of personal jurisdiction. They explain that Keshet has no office, no employees and no other presence in New York. Additionally, Dayan does not live or do business in New York (Dayan Aff at ¶¶ 2, 13). Dayan swears that contrary to plaintiffs' "information and belief" neither she nor her staff traveled to New York, did research in New York or conducted any interviews in New York in connection with the Pinto Report. She emphasizes that "virtually all of the work on the report--and the entirety of the work that is allegedly defamatory--was undertaken in Israel" (Dayan Aff at ¶¶ 13, 15, 20-21 and 27). She states that the Pinto Report "was not licensed to, transmitted to, distributed by or cablecast by The Israeli Network" on any broadcast or cable network in New York and that Keshet does not have any relationship with Israeli TV Company and did not license or cause the Pinto Report to be displayed on mytvil.com or mytvil.net (Dayan Aff at ¶¶ 22-23). She makes clear that Keshet did not obtain any revenue from any distribution of the Pinto Report in New York (Dayan Aff at ¶ 24).

Dayan explains that, from Israel, she and other *Uvda* journalists attempted to contact people in the United States, including in New York, by telephone and email "mainly to get comments, reactions, and responses as to (allegedly

defamatory) statements made in Israel and as to research conducted in Israel" (Dayan Aff at ¶¶ 16-17, 20). She discloses that *Uvda* hired a videographer in New York to obtain visual footage of locations in New York for the broadcast (Dayan Aff at ¶ 28). Defendants further acknowledge that the Pinto Report was available through Mako.co.il for 36 hours between May 23 and May 25, 2014 and that it was viewed 260 times in New York and 12,430 times in Israel through the website (Supp at ¶ 5). To the extent that there are these minimal New York contacts, Defendants assert that they cannot serve as a basis for obtaining jurisdiction.

Plaintiffs oppose dismissal. They contend that Dayan's affidavit demonstrates purposeful transaction of business in New York that was substantially related to the Pinto Report (Opp at 8-9). They maintain that the phone calls and retention of a New York videographer subject Defendants to jurisdiction (Opp at 9). Plaintiffs point out that prior "to the airing, Suky was contacted in New York by Dayan's office to address certain allegations. . . [and he] provided hundreds of pages of documents to Dayan that refute the allegations" (Opp at 1). Finally, plaintiffs contend that they should be permitted an opportunity to conduct discovery to investigate the "nature and full extent" of Keshet and Dayan's business dealings in New York, "including the contractual and business

relationships between Keshet and defendants The Israeli Network, Inc. and Israeli TV Company" (Opp at 11).

Analysis

Personal Jurisdiction

CPLR 302 sets forth acts that can serve as a basis for obtaining jurisdiction over non-domiciliaries in New York (*SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 403-404 [2012]). Generally, long-arm "jurisdiction can be premised on the commission of a tortious act—perpetrated either within the state or outside the state, causing injury within the state" (*id.* at 403). Defamation, however, is specifically carved out of the rule "to reflect the State's policy of preventing disproportionate restrictions on freedom of expression" (*id.* at 404; *see also Legros v Irving*, 38 AD2d 53, 56 [1st Dept 1971] [Advisory Committee did not "wish New York to force newspapers published in other states to defend themselves in states where they had no substantial interests"], *appeal dismissed* 30 NY2d 653 [1972]).

Long-arm jurisdiction in defamation actions is governed by CPLR 302(a)(1), which provides that a court may exercise personal jurisdiction over a non-domiciliary that "transacts any business within the state" so long as the cause of action

arises from the in-State activity. "New York Courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation" (*SPCA of Upstate N.Y., Inc.*, 18 NY3d at 405; *Best Van Lines, Inc. v Walker*, 490 F3d 239, 248 [2d Cir 2007]).

Particular "care must be taken to make certain that non-domiciliaries are not haled into court in a manner that potentially chills free speech" (*SPCA of Upstate N.Y., Inc.*, 18 NY3d at 406). There must therefore be a showing that defendants engaged in purposeful activities within the State that would justify bringing them before New York courts and that there is a "substantial relationship" between these in-State activities and the defamation (*id.* at 404). When contacts are not directly related to the defamatory statements, defendants have prevailed in obtaining dismissal on jurisdictional grounds (*id.*).

There is no jurisdiction over Defendants in New York. The contacts here "are not as significant as the few cases finding long-arm jurisdiction when defamation was asserted" (*see SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 74 AD3d 1464, 1466 [3d Dept 2010], *affd* 18 NY3d 400 [2012]; *see also Trachtenberg v Failedmessiah.com*, 43 F Supp

transaction of business in New York in satisfaction of CPLR 302(a)(1) "when the content in question was based on research physically conducted in New York"]). In fact, the defamation cases that plaintiffs rely on are readily distinguishable.

In *Montgomery v Minarcin*, for example, it was undisputed that "all of the operative facts giving rise to plaintiff's claims occurred in this State. The television news reports were broadcast by Minarcin in this State . . . [and the] newscasts were researched, written, produced and reported by Minarcin in this State" (263 AD2d 665, 667 [3d Dept 1999]). Minarcin "extensively investigated" the reports over a six-week period in New York, interviewing New York residents and elected officials and reviewing documents located in New York. These activities were deemed substantial enough for purposes of concluding that Minarcin transacted business in New York "within the intendment of CPLR 302(a)(1)" (*id.* at 668).

Similarly, in *Legros v Irving*, New York jurisdiction was upheld as it was "clear that virtually all the work attendant upon publication of the [allegedly defamatory] book occurred in New York. The book was in part researched in this State by defendant . . . ; negotiations with McGraw-Hill [the publisher and distributer] took place in New York; the contract with McGraw-Hill was executed in New York [and] the book was printed in New York" (38 AD2d at 56).

Here, in stark contrast, Defendants have very minimal, attenuated New York contacts. They did not engage in substantial activities within New York, invoking the benefits and protections of its laws. Defendants did not enter the State to do any work on the Pinto Report. The statements about which plaintiffs complain were all made in Israel. All of the interviews were completed while Defendants were in Israel. Defendants did not broadcast *Uvda* in New York or target a New York audience (*see Best Van Lines, Inc.*, 490 F3d at 249 ["courts have found jurisdiction in cases where the defendants' out-of-state conduct involved defamatory statements projected into New York and targeting New Yorkers, but only where the conduct also included something more"]; *Symmetra Pty Ltd. v Human Facets, LLC*, 2013 WL 2896876 at *9 [SD NY 2013] [controlling "precedent establishes that jurisdiction over a claim for defamation will lie (under CPLR 302[a][1]) only if the plaintiff shows that: (1) the defamatory utterance was purposefully directed at New York, as opposed to reaching New York fortuitously; and (2) the defendant transacted other business in New York that was directly connected to the claim asserted"]).

The limited phone calls to New York to obtain comment on content that was obtained outside the State are insufficient

to establish transaction of business in the State (*see Talbot v Johnson Newspaper Corp.*, 71 NY2d 827, 829 [1988] [no jurisdiction over individual who participated in phone interview from California]; *Trachtenberg v Failedmessiah.com*, 43 F Supp 3d at 204 [reliance on a New York source and research through a New York State Court website insufficient]). Nor is retention of a videographer to provide shots of New York locations sufficient as it is insubstantial and the defamation does not arise from that business transaction.

That the Pinto Report was briefly available on Keshet's Israeli website for fewer than two days and viewed by a few hundred New Yorkers, is not a basis for conferring jurisdiction over Defendants in New York (*see SPCA of Upstate N.Y., Inc.*, 18 NY3d at 402 [no personal jurisdiction based on comments published on a website despite the fact that defendant had New York members]; *Best Van Lines, Inc.*, 490 F3d at 250; *Rakofsky v The Washington Post*, 39 Misc 3d 1226[A] [Sup Ct, NY County 2013] [no jurisdiction in New York as "defendants neither wrote the alleged defamatory statements in this state nor did they direct them to our state alone"]).

Plaintiffs' prima-facie-tort cause of action is subject

indistinguishable from the alleged defamation and plaintiffs may not circumvent jurisdictional statutes simply by casting defamation as a different tort (*Cantor Fitzgerald, L.P. v Peaslee*, 88 F3d 152, 157 [2d Cir 1996]; *Reich v Lopez*, 38 F Supp 3d 436, 458-459 [SD NY 2014], *reconsideration denied* 2015 WL 1632332; *cf. Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993]).

There is no basis, moreover, for granting discovery to investigate "issues regarding Keshet and Dayan's business dealings in New York, . . . including the contractual and business relationships between Keshet and defendants The Israeli Network, Inc. and Israeli TV Company" (Opp at 11). Defendants' general business dealings in New York have no bearing on the Pinto Report, which was created and broadcast outside New York (*see Findlay v Duthuit*, 86 AD2d 789, 791 [1st Dept 1982]).[1]

In the end, there is no authority for subjecting Defendants to jurisdiction in New York based on a broadcast created and aired outside New York for a non-New York audience. Virtually everything related to the Pinto Report--

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[1] In any event, disclosure is inappropriate as dismissal is warranted based on *forum non conveniens* (*see infra*).

and certainly everything of consequence to the alleged defamation--was done outside of the State.

Forum Non Conveniens

Defendants also established that the action should be dismissed based on the doctrine of *forum non conveniens*.

CPLR 327(a) codifies the doctrine of *forum non conveniens* (*see Mashreqbank PSC v Ahmad Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 135-136 [2014]). It provides that when "the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may . . . dismiss the action in whole or in part on any conditions that may be just" (CPLR 327[a]). Application of the doctrine is a matter of discretion (*Mashreqbank PSC*, 23 NY3d at 137; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 [1984]). The burden is on the defendant challenging the forum to demonstrate factors that militate against retention of the case in New York (*Islamic Republic of Iran*, 62 NY2d at 479). "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit" (*id.*). "No one factor is

controlling" and the doctrine is flexible based on the unique facts and circumstances of each case (*id.*).

The Pinto Report was created in Israel. It was broadcast in Israel and viewed on the internet in Israel almost 10,000 more times than in New York. Language is very important in this defamation action and the Pinto Report is in Hebrew. Almost all of the witnesses, including the interviewees, speak Hebrew and many, including Rabbi Pinto, would have to be deposed in Israel. Transcripts and documents would have to be translated into English if the case remained here.

Defendants are based in Israel and have no meaningful relationship with New York. Plaintiffs, though New York residents, do not dispute that they have significant ties to Israel. Shuva has operations in Israel and Suky is an Israeli citizen, who has Israeli counsel, has been a party to litigation in Israel in recent years and visits Israel. No one disputes that a court in Israel would be a suitable forum for this litigation.

In response to Defendants' detailed showing, plaintiffs urge that they are located in New York and that this is their choice of forum (Opp at 12). Though plaintiffs' choice is entitled to weight and should rarely be disturbed, all of the other factors weigh heavily in favor of dismissal (*see Stoomhammer Amsterdam N.V. v CLAL (Israel) Ltd.*, 204 AD2d 186

[1st Dept 1994]; *Westwood Assocs v. Deluxe General, Inc.*, 53 NY2d 618 [1st Dept 1981]).[2]

Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted and the complaint is dismissed in its entirety with costs and disbursements to Defendants as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Judgment of the Court.

Dated: December 31, 2015

HON. JENNIFER G. SCHECTER

[2] Had there been personal jurisdiction over Defendants, the Court would have conditioned dismissal on their agreement to submit to the jurisdiction of Israeli courts and waive any statute of limitations defense.