SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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MAGNA EQUITIES II, LLC, and
HANOVER HOLDINGS I, LLC,

Plaintiffs,

- against -

DECISION AND ORDER
Index No. 653808/2016
Mot. Seq. Nos.: 001 and 002

WRIT MEDIA GROUP INC.,
SIGNATURE STOCK TRANSFER, INC. and
PACIFIC STOCK TRANSFER COMPANY,

Defendants.

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O. PETER SHERWOOD, J.:

I. FACTS

As these are motions to dismiss, the following facts are taken from the Complaint and are accepted as true. Plaintiffs Magna Equities II, LLC (Magna) and Hanover Holdings I, LLC (Hanover) are the same entity, as Hanover's name was changed to Magna (Complaint at ¶¶ 8-9). Defendant Writ Media Group, Inc. (Writ) is a publicly traded company. Signature Stock Transfer, Inc. (Signature) and Pacific Stock Transfer Company (Pacific) are securities transfer agents.

Pursuant to a securities purchase agreement, Writ sold Hanover a convertible promissory note also giving Hanover a perfected security interest in certain assets of Writ (*id.*, ¶¶ 14-15). The note gives Hanover the right to convert the unpaid principal into shares of Writ common stock (*id.*, ¶ 20). To exercise this right, Hanover had to deliver a Notice of Conversion to Writ (*id.*, ¶ 21). Writ then has three trading days to deliver the certificates (*id.*, ¶ 21). Subsequently, Magna entered into three more securities purchase agreement with Writ (*id.*, ¶¶ 26, 38, 50). The notes associated with those transactions (together with the first promissory note, the Notes) contained similar conversion rights.

On July 10, 2014, Writ sent Signature a letter instructing it to reserve shares of Writ, and to issue such shares upon receipt of Hanover's conversion notice (*id.*, ¶¶ 62-64). In the event Signature resigns as Writ's transfer agent, Writ agreed to designate a replacement agent, which would agree to be bound by the terms of the instructions. Hanover is a third party beneficiary of

the instructions (*id.*, ¶ 66). Writ subsequently issued similar letters as to the other three notes (together, the Transfer Agent Instructions).

On June 20, 2016, plaintiffs delivered the First Notice of Conversion to Writ and Signature, seeking 835,065 shares of Writ common stock. On June 29, 2016, plaintiffs delivered the Second Notice of Conversion to Writ and Signature, seeking 705,992 shares of Writ common stock. No objections were made, but Signature did not issue the shares. Instead, Signature referred plaintiffs to Pacific, Writ's new transfer agent as of March 27, 2015, which also failed to issue the shares.

Plaintiffs now asserts the following claims:

1- Breach of contract (the Notes) against Writ for failing to honor the Notices of Conversion (seeking money damages)
2- Breach of contract (the Notes) against Writ for failing to honor the Notices of Conversion (alternatively, seeking specific performance)
3- Conversion against all defendants for failure to deliver the share of Writ stock
4- Violation of UCC §§ 8-401 and 407 against Signature for failure to issue the shares
5- Violation of UCC §§ 8-401 and 407 against Pacific for failure to issue the shares
6- Negligence against Pacific for failure to obtain all relevant transfer agent instructions
7- Declaratory Judgment that plaintiffs are the owners of shares of Writ stock
8- Breach of contract (the Notes) against Writ, seeking attorneys' fees and costs
9- Permanent Injunction- to convert the notes into shares of stock
10- Replevin of the shares

In motion sequence number 001, Pacific seeks dismissal of all claims addressed to it, i.e. the Third, Fifth and Sixth Causes of Action. In motion sequence number 002, Writ and Signature seek dismissal of the complaint for lack of proper service of process.

II. ARGUMENTS

A. Motion 001- Pacific's Motion to Dismiss

1. Motion

Pacific moved to dismiss the complaint as to it on the ground of failure to serve it properly, pursuant to CPLR § 311, as plaintiffs merely mailed the complaint to Pacific. Pacific abandoned this claim after plaintiffs effected personal service on September 30, 2016.

Pacific also argues that the court lacks jurisdiction over Pacific, as Pacific does no and has no business presence in New York (*id.* at 5). Nor, according to Pacific, is it subject to specific jurisdiction, under New York's long-arm statute, CPLR 302 as it has transacted no business in New York State which relates to the subject matter of the complaint (*id.* at 7). In fact, what plaintiffs really complain of is Pacific's *non*feasance, which happened, if it happened, at Pacific's principal place of business in Las Vegas, Nevada, and not in New York (*id.* at 8).

Finally, Pacific asserts that plaintiffs have failed to allege a claim against it, as Pacific was merely an agent of Writ, and so cannot be held liable for nonfeasance (*id.* at 9, citing *Lenhart Altschuler Assoc., Inc. v Benjamin*, 28 Misc 2d 602, 603 [Sup Ct, Nassau County 1961]["The general rule is that no action will lie against a stock transfer agent . . . for the wrongful or unjustified neglect or refusal to register or transfer stock at the request of the holder thereof. [A] stock transfer agent is the agent of the corporation by which it is employed, and owes no affirmative duty to a stockholder. It, therefore, incurs no personal liability to him by refusing to make the transfer at his request"]). Further, Pacific claims notable liable pursuant to the Uniform Commercial Code, as Article 8 refers to a transfer agent's failure to register the transfer of securities, but does not cover the issuance of new securities (Memo at 10, 12-13). As the transfer agents do not have an obligation to issue new securities, holders of convertible notes, such as plaintiffs here, sometimes demand irrevocable transfer agent instructions, so the transfer agent is contractually bound (*id.* at 10-11). As Pacific was not a party to the irrevocable Transfer Agent Instructions involving Writ stock, or to the Notes, it is not bound by the instructions. Accordingly, Pacific contends it had no common law, statutory or contractual obligation to plaintiffs, and the claims against it should be dismissed.

2. Opposition

Plaintiffs argue the court has general personal jurisdiction over Pacific based on the "exceptional" circumstances carve-out in *Daimler AG v Bauman* (134 S Ct 746, 748 [2014]) (*see* Opp at 4 n1) Pacific's history of doing business with New York companies, making stock transfers (implicating the New York Stock Exchange) and sponsoring conferences in New York, show a "continuous and systematic course of 'doing business' that [Pacific] is deemed 'present' in New York" (*id.* at 5 n1, quoting *Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc 3d 1217(A) [NY Sup 2014]). Plaintiffs also argue that Pacific reaches into New York, as shareholders may log on through Pacific's website to access their account information, update

their other information, print statements and other reports, and place proxy votes (Opp at 6). Further, twenty-three companies in New York State are associated with Pacific, as well as the stock exchange itself, indicating that Pacific must do significant business in New York. Finally, Pacific has listed Continental Stock Transfer, a company located in New York City which was, or would be, performing Pacific's transfer agent functions.

Plaintiffs also contend the conduct described above makes Pacific amenible to subject matter jurisdiction, pursuant to CPLR 302(a) (Opp at 8-9). Plaintiffs argue the conduct complained of in this action is connected to Pacific's actions in New York because the City is important to the stock market, Pacific had an agent doing transfers in New York, and "work related to the transfer of shares would be handled in New York" (*id.* at 9).

Finally, plaintiffs argue the forum selection clause in the Notes specify a New York venue and gives this court jurisdiction over Pacific (*id.* at 9-10). Although a non-signatory to the Notes, Pacific may be bound to the forum selection clause because it has "a sufficiently close relationship with the signatory and the dispute to which the forum selection clause applies" (Opp at 10, quoting *SRT Capital Ltd. v Soleil Capital Ltd.*, 2016 NY Slip Op 30593[U], 8 [Sup Ct, New York County 2016]). Pacific was aware of Writ's and Signature's obligations, making it foreseeable that Pacific would be party to any related dispute, and making Pacific subject to the forum selection clause (Opp at 10-11).

As to the claims being asserted, plaintiffs argue they have adequately stated claims against Pacific. Regarding the UCC claim, plaintiffs maintain that UCC 8-401 applies to the issuance of new security certificates, in addition to the explicit requirements regarding the transfer of securities (*id.* at 12). Plaintiffs rely on a Delaware case in which the court decided that the "defendant's argument that the registration of a transfer is not equivalent to the issuance of a new certificate ignores the realities of the securities transfer process. Where certificated stock is transferred, the issuance of a new certificate to the transferee is normally an integral step in that process. . . . Given those commercial realities, it is reasonable to construe the term "register the transfer", as used in § 8-401 of the UCC, to include those ministerial acts that normally accompany such registration, including, where applicable, the issuance of a new certificate." (*Bender v Memory Metals, Inc.*, 514 A2d 1109, 1115 [Del Ch 1986]). As to the lack of contractual privity between Pacific and plaintiffs, the UCC does not require privity. It places the transfer agent in the shoes of the issuer (Opp at 13). Concerning plaintiffs failure to present a

stock certificate, UCC 8-401(a) applies to an instruction regarding the transfer of an uncertificated security (*id.* at 13-14, quoting UCC 8-401[a]).

Plaintiffs argue they have properly stated a claim for conversion because a wrongful failure to turn over a stock certificate constitutes conversion of the shares represented by the certificate (Opp at 14). Plaintiffs also argue they have properly stated a cause of action for negligence because Pacific has a duty to register a transfer of securities, and there is no distinction between registration and issuance of stock (*id.* at 15). At oral argument on the motion, plaintiffs' counsel stated that this duty may be found in the UCC. Pacific had a duty to make sure it obtained all of Writ's transfer agent instruction, and it failed to do so, which was negligent to Writ and which interfered with plaintiffs' rights (*id.*).

3. Reply

Pacific emphasizes there is a difference between cancelling an existing stock certificate and issuing a new one as part of the process of transferring stock from one holder to another, and issuing new stock, which is what plaintiffs seek here (Reply at 1). Pacific had no statutory obligation to issue new stock, which is why plaintiffs required Writ to issue the irrevocable instruction letter to Signature, Pacific's predecessor. Pacific had been given no such instruction (*id.*). Article 8 of the UCC does not create a duty for a transfer agent to obey an investor's direction to issue shares (*id.* at 2). That is a matter which affects not just the transferor and the transferee, but the interests of every stockholder (*id.*). Both New York and Delaware law allow only the corporation, itself, to authorize the issuance of new stock (*id.* at 3). While plaintiffs conflate the ideas of not owning stock and owning uncertificated stock, the latter condition means the entity lacks a certificate, because ownership is recorded in the corporation's books and records (*id.* at 5). The owner of uncertificated stock still owns stock. Here, plaintiffs owned a convertible note. They were not owners of securities whether certificated or uncertificated. They did not own securities at all, as defined by Article 8 of the UCC.

As to jurisdiction, Pacific denies having a "permanent and continuous presence" in New York such that it is subject to general personal jurisdiction (*id.* at 7). It argues that, according to *Daimler AG*, the proper question is "whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State" (134 S. Ct. 746, 761 [2014]) and whether "the defendant has a permanent and continuous presence in the state, as opposed to merely occasional or casual contact with the state" (*Honig v RDCP Holdings, Inc.,*

2016 NY Misc LEXIS 3450, at *6 (1st Dept, Sept 26, 2016). For this purpose, courts have considered where an entity is incorporated, and the location of its principal place of business (*see, e.g., Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014][citing *Daimler*]).

As far as plaintiffs argue for long-arm jurisdiction, Pacific argues that any relationship it had with Continental Stock Transfer is irrelevant to this case, as the plaintiffs have not identified any relevant action or inaction by Pacific that occurred in New York (Opp at 9).

B. **Motion 002- Writ and Signature's Motion to Dismiss**

Writ and Signature (Writ Defendants) move to dismiss the claims against them on the ground that plaintiff's service by mail was insufficient and ineffective.[1] Pursuant to CPLR 312-a, service by mail must include two copies of the Statement of Service by Mail and Acknowledgement of Receipt by Mail of Summons and Complaint or Summons with Notice (Writ Memo at 3, citing CPLR 312-a). The Notice of Service and the Acknowledgement were not included in the envelope delivered by plaintiff. Writ Defendants argue that strict compliance with the terms of the rule is required, and so service is fatally flawed (Writ Memo at 4-5).

After the motion was filed and within the 120 days provided by CPLR 306-b for completion of service of process, plaintiffs filed affidavits as to service on both Writ and Signature (NYSCEF Docs. No. 80 and 81) performed on October 3 and 4, 2016, respectively, thereby rendering this motion moot.

III. DISCUSSION (Motion Sequence Number 001)

A. Jurisdiction

1. General Jurisdiction

General jurisdiction permits a court to exercise personal jurisdiction over a defendant in its "home" forum based on the defendant's overall contacts with that forum. The United States Supreme Court has held that, in order for a court to assert general jurisdiction over a nonresident defendant, the plaintiff must establish that the defendant has a substantial presence in the forum state so that the exercise of jurisdiction over the defendant would comport with traditional notions of fair play and substantial justice (*see World-wide Volkswagen Corp. v Woodson*, 444 US 286, 292 [1980], citing *Intl. Shoe Co. v Washington*, 326 US 310, 316 [1945]). New York law is essentially the same. With respect to CPLR 301, "the authority of the New York courts to

[1] Counsel for Writ and Signature failed to appear for oral argument on the motions. Their motion is being decided on the papers.

exercise jurisdiction over a foreign corporation is based solely upon the fact that the defendant is engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction" (*Laufer v Ostro*, 55 NY2d 305, 309-10 [1982] [brackets, quotation marks and citations omitted]).

In 2014, the U.S. Supreme Court modified the "continuous and systemic" standard in its analysis of general jurisdiction (*see Daimler AG,* 134 SCt 746). In that case, Daimler AG, a German corporation, was sued by Argentinian residents alleging that its Argentinian subsidiary committed tortious acts in Argentina. The suit was brought in a federal court in California based on services performed in California by Daimler's U.S. subsidiary, MBUSA (*see id.* at 750-51). The question before the Supreme Court was "whether Daimler's affiliations with California are sufficient to subject it to the general (all purpose) personal jurisdiction of that State's courts" (*id.* at 758). In its analysis, the Supreme Court stated that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there" (*id.* at 760). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile" and "[w]ith respect to a corporation, the place of incorporation and principal place of business" are the paradigm bases for general jurisdiction (*id.* [citations omitted, quotation marks in original]). In so holding, the Supreme Court disagreed with the formulation that would allow the exercise of general jurisdiction in every state in which a corporation "engages in a substantial, continuous, and systematic course of business," characterizing such a formulation as "unacceptably grasping" (*id.*).

While *Daimler* left open a possibility that, in exceptional circumstances, "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State," such contacts must be truly exceptional (*id.* at 756, 761 n19, citing *Perkins v Benguet Consol. Min. Co.*, 342 US 437 [1952]). In *Perkins*, the defendant entity, "a company incorporated under the laws of the Philippines, where it operated gold and silver mines," was unable to continue operations in the Philippines for a period (*Daimler*, 134 SCt at 756). "[I]ts president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities" (*id.,* citing *Perkins*, 342 US at 448). Ohio had become "the corporation's principal, if temporary, place of business" (*Daimler*, 134 SCt at 756, quoting *Keeton v Hustler Magazine, Inc.*, 465 US 770, 780, n11).

Here, the alleged contacts of defendant Pacific with New York do not approach the level of the exceptional circumstances described in *Perkins*. Having a website, hiring an agent in New York, and sponsoring conferences in New York are not such substantial operations that Pacific is rendered "at home" in New York.

2. Specific Jurisdiction

A court may exercise personal jurisdiction over a nondomiciliary if it transacts business within the state, supplies goods or services in the state, commits a tortious act in the state or engages in among other enumerated acts (CPLR 302[a] [1] and [2]). An occasional, or even a single, act may be enough to subject a corporation to specific jurisdiction for suits relating to that in-state activity (*see In re Estate of Stettiner*, 46 NYS3d 608, 614–15 [1st Dept 2017] citing *International Shoe Co. v Washington,* 326 US 310, 318 [1945]; *Daimler,* 134 SCt at 754, *LaMarca v Pak–Mor Mfg. Co.,* 95 NY2d 210, 214–216 [2000]). Plaintiffs argue the conduct complained of in this action is connected to Pacific's actions in New York because the City is important to the stock market, Pacific had an agent doing transfers in New York, and "work related to the transfer of shares would be handled in New York." Plaintiffs rely on *Gasarch v Ormand Indus., Inc.* (346 F Supp 550 [SDNY 1972]), in which the United States District Court for the Southern District of New York held that a "wrongful refusal to transfer is a tortious act which under CPLR § 302 may be imputed to Ormand rendering it amenable to suit in New York" where the plaintiff presented his certificates to the defendant's New York transfer agent, and the agent refused to make the requested transfer, at the defendant's instruction (*id.* at 551-53). *Gasarch* relied, in part on *Kanton v US Plastics, Inc.* (248 F Supp 353 [DNJ 1965]). In *Kanton*, a New Jersey transfer agent for the defendant acted on orders from its principal, the defendant, and declined to make the requested transfer (*id.* at 360). That court noted the "cause of action asserted here resulted from the orders given by Plastics [defendant] to Registrar [the transfer agent], which were intended to be carried out in New Jersey, and were in fact executed here" (*id.*).

Here, the plaintiffs do not allege they sought the certificates from a transfer agent in New York. They do not allege Pacific instructed its New York transfer agent to do anything in relation to the certificates at issue in this case. Nothing is alleged to have actually happened in New York, and the plaintiffs cite no support for their argument that jurisdiction may be based on

an event (issuance of the shares) that *would have happened* in New York, had Pacific acted as plaintiffs wanted.

3. Contractual Jurisdiction

As to plaintiffs' assertion that Pacific is subject to the forum selection clause in the Notes, New York courts have held that non-signatories may be bound by such a clause if they are "closely related" to the signatory party, "as well as to the dispute itself such that it was "reasonably foreseeable" that it would be bound by the forum selection clause" (*Tate & Lyle Ingredients Americas, Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401, 403 [1st Dept 2012]). In *Tate & Lyle,* the non-signatory was a signatory's parent company, which had been intimately involved in many phases of the agreement at issue, including in deciding to bring the suit in that case (*id.*). The non-signatory's "involvement in this matter was far more than a parent company's mere approval of a contract. After making all the critical decisions for its subsidiary in this matter from the signing of the contract to the commencement of litigation, [the parent] cannot seriously argue that it was not reasonably foreseeable that the forum selection clause in the contract it approved, would not be asserted against it" (*id.*). In the case relied upon by the plaintiffs, *SRT Capital Ltd. v. Soleil Capital Ltd.*, "the non-signatory [was] a principal of the signatory company and played an active role in the transaction" (2016 WL 1182111 [NYSup], 4, 2016 NY Slip Op. 30593[U], 8 [Sup Ct, New York County 2016]). Here, Pacific is not a closely related entity to Writ. Pacific was not involved when the transaction was consummated, and it was not reasonably foreseeable that Pacific would be bound by the forum selection clause in the Notes. The fact that Pacific may have received copies of the Notes when it began acting as Writ's transfer agent, does not make it subject to them.

The claims against Pacific must be dismissed for a lack of jurisdiction. Even if Pacific we subject to New York jurisdiction, it would still be dismissed, as plaintiffs have failed to state an actionable claim against Pacific.

B. Failure to State a Claim

1. UCC

Pacific argues that plaintiffs have failed to state a claim against it because transfer agents do not owe obligations to shareholders under common law, Article 8 of the UCC only creates an obligation to shareholders for transfer agents to execute transfers. It does not create an

obligation to issue new shares, and Pacific is not contractually bound by the Notes or the irrevocable transfer agent instructions signed by Writ and Signature.

Plaintiffs rely on Uniform Commercial Code Law § 8-407, which provides:

> "A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions."

This section and 8-401 refer to transfers of securities. The parties dispute whether they apply similarly to the issuance of new securities. Plaintiffs contend that issuance is covered, since issuing a new certificate is part of the transfer process. Pacific differentiates between the issuance of a new certificate to transfer ownership of previously issued stock and the issuance of a certificate representing new stock. Plaintiffs rely on two Delaware cases, *Bender v Memory Metals, Inc.* (514 A2d 1109, 1115 [Del Ch 1986]) and *CAMP Corp. Advisors AB v Protegrity Inc.* (C.A. No 18676-NC, 2001 Del Ch LEXIS 133 at 13-21 [Ch October 30, 2001]). In *Bender*, the court held that the act of registering a transfer "to include those ministerial acts that normally accompany such registration, including, where applicable, the issuance of a new certificate" (*id.*). However, the plaintiff in *Bender* was already a stockholder.[2] She was seeking the issuance of a new certificate for her stock, as her existing certificate contained restrictive language. Here, while plaintiffs may have had a contractual right to securities, they did not already hold securities.

In this case, the parties see the transaction from different perspectives. Pacific perceives plaintiffs as asking it to create new shares, thereby raising the number of existing shares in Writ. Plaintiffs describe the transaction as a mere transfer of shares from Writ to plaintiffs and points to the structure of the Notes as support for their position. Pursuant to the Notes, section 1.3, Writ was required to reserve shares to cover a potential conversion by plaintiffs, indicating that the transaction being proposed required merely a transfer of shares from Writ to plaintiffs, rather than the creation of new shares, as argued by Pacific. However, according to the Complaint,

[2] *CAMP Corp.* was no different. There plaintiff was "the record owner of and held a certificate for 1,250,000 shares of common stock of Defendant" *CAMP Corp. Advisors, Inc.*, 2001 Del Ch LEXIS 133 at *1.

Writ has stated that there are no available shares to transfer (Complaint, ¶7) and Writ has not asked Pacific (as opposed to Signature) to transfer stock to plaintiffs.

Pacific also argues that plaintiffs have not articulated a claim under UCC 8-401, as they did not present a certificated security, or other documentation to show ownership of securities. In this regard, UCC § 8-401 provides:

> "(a) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:
>
> (1) under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;
>
> (2) the indorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;
>
> (3) reasonable assurance is given that the indorsement or instruction is genuine and authorized (Section 8-402);
>
> (4) any applicable law relating to the collection of taxes has been complied with;
>
> (5) the transfer does not violate any restriction on transfer imposed by the issuer in accordance with Section 8-204;
>
> (6) a demand that the issuer not register transfer has not become effective under Section 8-403, or the issuer has complied with Section 8-403(b) but no legal process or indemnity bond is obtained as provided in Section 8-403(d); and
>
> (7) the transfer is in fact rightful or is to a protected purchaser"

In the Complaint, plaintiffs make no specific allegations about what they presented to Pacific, relying, instead, on the transfer agent instructions issued to Signature, and arguing that the securities at issue were uncertificated, so plaintiffs' instruction to register the transfer qualified, and the lack of the presentation of a certificate is not fatal. However, plaintiffs make no allegations or arguments regarding the other required elements of 8-401. Plaintiffs' claim based on Article 8 of the UCC shall be dismissed.

2. **Negligence**

The elements of a negligence claim are "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Plaintiffs appear to argue two separate events of negligence: that Pacific had a duty to register the transfer of securities which it failed to do; and that Pacific had an obligation to Writ to review the documentation related to this

transaction, but failed to do so, thereby infringing on plaintiffs' rights (Opp at 15). Neither argument is viable.

The case relied upon by the plaintiffs, *Campbell v Liberty Transfer Co.*, involves two theories of negligence (CV-02-3084, 2006 WL 3751529, at *17, 2006 US Dist LEXIS 91568 [EDNY Dec. 19, 2006]). *Campbell* involved a failure of Liberty Transfer Co. (Liberty) to process the transfer of shares of Panther Mountain Water Park, Inc. (PMWP) which Campbell sold on the open market. Liberty refused to perform the transfer on the ground that Campbell's stock certificate should have been marked "restricted" when Liberty issued it to Campbell. Liberty subsequently made the transfer, and Campbell sued for the loss in market value during the period of delay (*id.* at *6). The court noted the distinction between nonfeasance and misfeasance, explaining that a

> "refusal to transfer constitutes nonfeasance which . . . is arguably non-actionable under a separate common law theory of negligence. However, the situation is otherwise as to Liberty's issuance of the share certificate [to Campbell] absent the required restrictive legend, coupled with the seemingly feeble efforts thereafter to assure that Campbell knew of the mistake. Those shortcomings entail the actual performance of a recognized duty, viz. the issuance of stock, but in a negligent manner with resulting harm to a third party. As such, misfeasance is implicated. And misfeasance was at common law, and remains, a recognized basis for a lawsuit by a shareholder against a transfer agent"

(*id.* at *17).

Plaintiffs' claim here is not based on misfeasance, which is a duty performed badly. It is based on Pacific's nonfeasance, Pacific's alleged failure to transfer shares from Writ to plaintiffs. Insofar as plaintiffs argue that Pacific's misfeasance was its failure to review the files from Writ and "verify that transfer agent instructions specifically issued to Writ were obtained" (Opp at 15), such a failure is not the cause of plaintiffs' injury.

3. **Conversion**

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff's possessory right or interest in certain property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*Colavitov New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers' Fire Ins. Co. v Cotton,* 245 NY 102 [1927]). A plaintiff need only

allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). However, a conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

Plaintiffs argue that "a wrongful refusal to transfer stock is in essence a conversion" (Opp at 14, quoting *Gasarch v Ormand Indus., Inc.*, 346 F Supp 550, 552 [SDNY 1972] [citing *Kanton v U.S. Plastics, Inc.*, 248 F Supp 353, 360 [DNJ 1965]). For the predicate wrongful acts, plaintiffs point to their Complaint, in which they allege, in conclusory and vague fashion, that Pacific did "engage in the unauthorized and wrongful exercise of dominion or control over the shares of common stock . . . and interfere[d] with . . . Plaintiffs' absolute, exclusive, and unconditional right to possession and ownership of such shares of Writ common stock" (Complaint, ¶ 112). As it is not alleged that Pacific ever held Writ stock owned by plaintiffs or that it ever received an instruction from its principal to execute a transfer (in the form of a transfer agent instruction, or otherwise), plaintiffs have not alleged facts to support the conclusion that the refusal to transfer was wrongful.

Accordingly, it is hereby

ORDERED that the motion of defendant, Pacific Stock Transfer Company, to dismiss the complaint herein (motion sequence number 001) is GRANTED and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion to dismiss of defendants Writ Media Group, Inc. (Writ) and Signature Stock Transfer, Inc. (Signature) to dismiss the complaint is DENIED as moot; and it is further

ORDERED that the action is severed and continued against the remaining defendants Writ and Signature; and it is further

ORDERED that the action shall now bear the following caption:

SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF NEW YORK

MAGNA EQUITIES II, AND HANOVER HOLDINGS I, LLC,

Plaintiffs

-against-

WRITE MEDIA GROUP INC. AND SIGNATURE STOCK TRANSFER, INC.,

Defendants

----------; and it is further

ORDERED that defendants Writ and Signature shall file answers within twenty (20) days of the date of this order; and it is further

ORDERED that counsel for the remaining parties shall appear for a preliminary conference on Tuesday, May 16, 2017 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York; and it is further

ORDERED that counsel for the moving party in motion sequence number 001 shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the court.

DATED: March 30, 2017

ENTER,

O. PETER SHERWOOD J.S.C.