SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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TRANSNATIONAL MANAGEMENT SYSTEMS, LLC,

Plaintiff,

Index No.: 653543/2016

-against-

Mot. Seq. No. 001

TIM PRERO and PEGASUS ELITE AVIATION, INC.,

Defendants.

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MELISSA A. CRANE, J.S.C.:

Defendants Tim Prero (Prero) and Pegasus Elite Aviation, Inc. (Pegasus) move, pursuant to CPLR 3211 (a) (3), (a) (5), (a) (7), and (a) (8), to dismiss the amended complaint of plaintiff Transnational Management Systems, LLC (TMS) based on lack of capacity to sue, the statute of limitations, failure to state a cause of action, and lack of personal jurisdiction.[1]

Background

TMS is a Delaware Limited Liability Company (LLC), that owns and operates a Gulfstream IV private jet (the plane), and whose principal is Adam Victor (Victor) (complaint, ¶ 9). TMS alleges that Pegasus is a Nevada corporation, with a principal place of business in Van Nuys, CA (*id.*, ¶ 10), and that Prero is its principal (*id.*, ¶ 11).

In 2009, Victor sought to purchase the plane TMS now operates (*id.*, ¶ 15). Prero, who Victor knew to be a pilot in the air charter business and who was an expert in "the valuation of charter jets," informed Victor at two separate meetings that he knew where to find a plane, offered to "check[] out" the plane, and later recommended nonparty, Anthony Carcione, to Victor as "an individual who could arrange the financing and closing of TMS's purchase of the

[1] Defendants also move pursuant to CPLR 3211 (a) (2), but make no arguments as to the court's subject matter jurisdiction.

plane (*id.*, ¶¶ 16-22; Victor aff dated 6/1/17, ¶ 18). Carcione and TMS then entered into an agreement, pursuant to which Carcione would be paid $50,000 for "providing certain services in connection with [TMS's] intention to purchase an airplane" (complaint, ¶ 24). Carcione suggested that a company he founded, nonparty BizJet Consultants LLC (BizJet), would purchase the plane, and immediately sell it to TMS (*id.*, ¶¶ 29-30; Victor aff, ¶ 26). Carcione then acted as Victor's agent in "brokering the sale" (Victor aff, ¶ 28). Prero allegedly assisted in this process by evaluating the plane and related records (complaint, ¶ 45). TMS alleges that, while ostensibly assisting Carcione with the sale, Prero conspired with Carcione to charge TMS $1,000,000 more for the plane than BizJet paid to acquire it, and then split the difference (*id.*, ¶¶ 50-51). Prero also allegedly concealed that the plane had suffered a fire in 2007, requiring the replacement of the landing gear and hydraulic lines, costing approximately $700,000 (*id.*, ¶¶ 62-63).

Prior to TMS executing an agreement with Carcione, Prero represented to TMS that, in October 2009, he had evaluated the plane and related records in Manassas, Virginia, and that the plane had no major prior repairs (*id.*, ¶¶ 64-65, 75, 86, 108; Victor aff, ¶ 47). TMS claims that, during this evaluation, Prero obtained information about the prior fire and concealed that information from TMS, instead stating that the aircraft had no significant damage in its history (complaint, ¶¶ 66-76). Prero believed that revealing the fire would both lower the value of the plane, and make TMS less likely to buy it, as it would have diminished resale value (*id.*, ¶¶ 72-73, 124). Because TMS claims it was unaware of this information, it also claims that the subsequent procurement agreement entered into with Carcione was fraudulently induced.

In November 2009, TMS purchased the plane from BizJet for $8,450,000 plus transaction costs, for approximately $1,000,000 more than BizJet paid to acquire it (*id.*, ¶¶ 85, 102; Victor

aff, ¶¶ 30-32, 38). At the closing, Prero received $562,000 as a "customer acquisition fee" from BizJet (*id.*, ¶ 126; Victor aff, ¶ 38). TMS alleges that Prero then removed information regarding the fire from the plane's records, though TMS does not allege how or when this was done (complaint, ¶ 129).

After purchasing the plane, TMS and Pegasus entered into an agreement (the Lease Agreement), pursuant to which Pegasus would operate the plane for TMS (Victor aff, exhibit B, Lease Agreement). TMS paid for maintenance, flight crew training, and other expenses (*id.*, ¶¶ 2.2., 2.3, 2.6). Pegasus paid TMS $5,000 per flight hour that the plane was rented, plus a fuel surcharge of $500 per hour (*id.*, ¶ 2.6). The parties agreed that Pegasus would operate the plane out of Wilmington, Delaware (*id.*, ¶ 4.2).

TMS alleges that, in September 2014, it discovered Prero had received an additional $500,000 from the sale of the plane (*id.*, ¶ 132). In September 2016, TMS allegedly discovered the fact of the prior fire, and Prero's failure to mention it (*id.*, ¶ 134). In both cases, TMS claims that it could not have previously discovered this information (*id.*, ¶¶ 133, 135).

Procedural History

On July 6, 2016, TMS filed a summons with notice with the court (NYSCEF Doc No. 1, summons with notice dated 7/6/16), having served the defendants on October 6, 2016 (NYSCEF Doc. No. 2, affidavit of service). The summons provides that:

> "the nature of this action includes, but is not limited to, causes of action for fraud and unjust enrichment for injuries and damages sustained by plaintiff including, but not limited to, the unlawful undisclosed kickback of $562,500 that you received from Anthony Carcione and Biz Jet Consultants, LLC on the sale of a certain 1992 Gulfstream IV aircraft, with FAA Registration Number N771AV (formerly N4753), Serial Number 1197 (the "771 Plane") to plaintiff and damages related to defendant PEGASUS ELITE AVIATION, INC.'s utilization of plaintiff's identity in order to obtain credit"

(summons with notice). On November 4, 2016, defendants appeared and demanded a

complaint (NYSCEF Doc. No. 3, notice of appearance dated 11/4/16). TMS filed a complaint on February 15, 2017, asserting four causes of action for fraud related to the fire (first cause of action), fraudulent concealment (second cause of action), fraud related to the price of the plane (third cause of action), and unjust enrichment (fourth cause of action). Defendants now move to dismiss the complaint based on lack of capacity to sue, the statute of limitations, failure to state a cause of action, and lack of personal jurisdiction.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Lack of Capacity to Sue

Defendants first argue that TMS lacks legal capacity to commence an action in New York. Specifically, they claim that, at the time this action was commenced, TMS did not have a certificate of authority to conduct business in New York. Accordingly, they claim that Limited Liability Company Law § 808 (a) prevents TMS, a Delaware LLC, from maintaining an action in the New York courts. In opposition, TMS claims it was unaware of this requirement until defendants raised it, and has since obtained a certificate of authority. Further, TMS asserts that

the lack of a certificate is not a fatal defect.

"A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action . . . in any court of this state unless and until such [LLC] shall have received a certificate of authority" (Limited Liability Company Law § 808 [a]). Where the LLC in question subsequently obtains a certificate of authority after commencing suit, the jurisdictional defect may be cured (*Basile v Mulholland*, 73 AD3d 597, 597 [1st Dept 2010]). Here, TMS obtained a certificate of authority on May 30, 2017 (Jordan affirmation dated 6/9/17, exhibit A, certificate of authority), approximately a month and a half after defendants raised the issue and three months after filing the complaint. Thus, TMS has cured the failure to obtain a certificate of authority prior to commencing this action. Defendants' reliance on *Highfill, Inc. v Bruce & Iris, Inc.* (50 AD3d 742, 743 [2d Dept 2008]) is unavailing, as there, the plaintiff never attempted to obtain a certificate of authority. Accordingly, the court denies that branch of defendants' motion to dismiss the complaint for lack of capacity to sue.

The Summons with Notice

Defendants next argue that the summons with notice TMS served is defective. Specifically, they claim that the summons provides insufficient notice of the nature of the action, as the summons states that it "includes, but is not limited to, causes of action for fraud and unjust enrichment" (summons with notice). Defendants state that there are numerous causes of action that could be brought based on that description, therefore, making the summons defective. In opposition, TMS argues that the summons provides adequate notice, as it matches the causes of action set forth in the complaint.

CPLR 305 (b) provides that a summons served without a complaint must include "a

notice stating the nature of the action and the relief sought, and . . . the sum of money for which judgment may be taken in case of default." Failure to provide sufficient notice is a jurisdictional defect (*Roth v State Univ. of N.Y.*, 61 AD3d 476, 476 [1st Dept 2009] ["In thus failing to comply with the notice requirements of CPLR 305(b), the summons was jurisdictionally defective"]). "[As] the purpose of the notice is simply to provide the defendant with at least basic information concerning the nature of plaintiff's claim and the relief sought, absolute precision is not necessary" (*Viscosi v Merritt*, 125 AD2d 814, 814 [3d Dept 1986] [internal quotation marks and citations omitted]: *see also Bal v Court Empl. Project*, 73 AD2d 69, 71[1st Dept 1980] ["CPLR 305 [b] was intended as a shield to protect an unwary defendant from default judgment without proper notice, not a sword to trap a tardy or inattentive plaintiff into dismissal"]). A broad description of the action is generally sufficient (*Grace v Bay Crane Serv. of Long Is., Inc.*, 12 AD3d 566, 566 [2d Dept 2004] [notice stating action was for personal injury and sought $3,000,000 in damages "complied with statutory requirements"]). A general description of the nature of the case has been found sufficient even where multiple theories of liability may arise out of the same fact pattern (*Tello v Mental Health Assn. of Westchester, Inc.*, 52 AD3d 499, 500 [2d Dept 2008] [summons stating that nature of the action was "causes of action sounding in tort/negligence in connection with injuries sustained by Decedent . . . resulting in his death . . . as a result of Defendant's negligence" was sufficient to provide notice of both claim for conscious pain and suffering and claim for wrongful death]).

Here, the summons provides that TMS is suing defendants for fraud and unjust enrichment related to the sale of the airplane, and Pegasus's "utilization of plaintiff's identity in order to obtain credit and seeking monetary damages of $562,500 (summons with notice). This is broadly sufficient to satisfy the statutory requirements. Defendants argue that the summons is

defective because it is not entirely reflective of the causes of action ultimately asserted in the complaint, but they cite no authority for this proposition. The statutory language does not support so narrow a reading: CPLR 305 (b) is meant to protect defendants from vague lawsuits, not punish plaintiffs for imperfect drafting (*Bal*, 73 AD2d at 71). Defendants' reliance to the contrary on *Roth* is unavailing. In *Roth*, the summons with notice described the action based on "violations of federal, New York State, and New York City human rights laws, including but not limited to various named statutes" (*Roth*, 61 AD3d at 476 [internal quotation marks omitted]). The Court held that this summons with notice was defective because many different causes of action existed under each of the named statutes, and, therefore simply listing the various statutes did not sufficiently alert the defendant to the nature of the action (*id.*). However, in this case, the summons lists causes of action for fraud and unjust enrichment, as does the complaint. That TMS allegedly discovered evidence of the fire after filing the summons with notice does not render the summons with notice defective. The fact of the fire relates to the sale of the airplane, which is the basis for the action stated in the summons. Therefore, the summons with notice adequately states "the nature of the action" (CPLR 305 [b]). Accordingly, the court denies that branch of defendants' motion to dismiss the complaint based on a defective summons with notice.

Jurisdiction under the Long-arm Statute

Next, defendants argue that they are not subject to personal jurisdiction in New York for several reasons. First, they claim that Pegasus was not incorporated until December 16, 2009, after the sale of the airplane. Second, they assert that neither defendant regularly does business in New York, engages in commercial conduct directed towards New York, nor derives substantial revenue from goods consumed or services rendered in New York or from interstate

commerce generally. Defendants point out that the only location mentioned in the complaint where the events giving rise to the action took place is Manassas, Virginia. Further, they state that merely because Victor was in New York when Prero allegedly misrepresented the plane's condition to him is insufficient to confer jurisdiction.

In opposition, TMS argues that Prero signed agreements as President of Pegasus even before Pegasus existed, and that Pegasus allegedly benefited from Prero's tortious conduct. Moreover, TMS claims that the purchase of the plane was planned based on phone calls and two meetings between Victor and Prero in New York, which is sufficient purposeful conduct to invoke jurisdiction under CPLR 302 [a] [1]. Further, it asserts that Prero's actions outside of New York injured it inside of New York, because TMS's principle place of business is in New York. Finally, TMS states that defendants derive substantial revenue from services rendered in New York, and from interstate commerce, by operating private planes out of New York airports. Thus, TMS argues, jurisdiction is proper under CPLR 302 (a) (3).

CPLR 302 (a) (1) provides that a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state" may be subject to the Court's personal jurisdiction. "CPLR 302 [a] [1] jurisdiction is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks and citation omitted]). A defendant must "avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.* [internal quotation marks and citation omitted]). "[E]ven when physical presence is lacking, jurisdiction may still be proper if the defendant on his [or her] own initiative . . . project[s] himself [or herself] into this state to engage in a

sustained and substantial transaction of business" (*id.* at 382 [internal quotation marks and citation omitted]). "[I]t is not the quantity but the quality of the contacts that matters . . . ." (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 378 [2014]).

Here, leaving aside the parties' arguments as to when Pegasus came into being for purposes of this motion, defendants have not sufficiently availed themselves of the privilege of doing business in New York. The most TMS alleges is that Prero suggested the plane was available and would be a good deal during two meetings in New York (Victor aff, ¶ 18), and that Prero made misrepresentations regarding the plane to Victor over the phone while Victor was in New York (complaint, ¶¶ 66-76). In light of Prero's small role in a transaction that was negotiated by nonparty Carcione, the fact that the inspection occurred in Virginia, and that the plane has operated out of Wilmington, Delaware (Lease Agreement, ¶ 4.2), these brief contacts with New York are insufficient to exercise jurisdiction under CPLR 302 (a) (1). To the extent TMS argues that Prero solicited its business by introducing it to Carcione, the

> "mere solicitation of business within the state does not constitute the transaction of business within the state, unless the solicitation in New York is supplemented by business transactions occurring in the state, or the solicitation is accompanied by a fair measure of the defendant's permanence and continuity in New York"

(*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201 [1st Dept 2003]). It is settled that a New York meeting is an insufficient jurisdictional predicate by itself (*see Presidential Realty Corp. v Michael Sq. W.*, 44 NY2d 672, 673 [1978] ["physical presence alone cannot talismanically transform any and all business dealings into business transactions" under CPLR 302 (a) (1)]). Telephonic or electronic communications of a similar nature as those herein are likewise insufficient (*e.g. Magwitch, L.L.C. v Pusser's Inc.*, 84 AD3d 529, 531 [1st Dept 2011] ["The acts of sending payments to a New York bank account and correspondence to a New York address, and engaging in telephone discussions with plaintiff's principal, who also was

defendants' legal advisor while he was in New York, were not a sufficient basis to satisfy the statutory requirements"]). Accordingly, the court cannot exercise jurisdiction over defendants pursuant to CPLR 302 (a) (1).

Defendants also claim that the court lacks jurisdiction pursuant to CPLR 302 (a) (3), that confers jurisdiction over a defendant who:

> "commits a tortious act without the state causing injury to person or property within the state . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

Here, assuming arguendo that TMS successfully alleges a tortious act committed without the state by defendants, they fail to establish that defendants do or solicit business in New York, or derive substantial revenue from services rendered in New York, pursuant to CPLR 302 (a) (3) (i). Pegasus operated the plane out of Wilmington, Delaware pursuant to the Lease Agreement (Lease Agreement, ¶ 4.2). TMS argues that Pegasus frequently operates flights out of New York, but the only evidence it provides in response to this motion is one invoice and three quotes for a flight out of MacArthur Airport in Long Island (Victor aff, exhibit C, invoice dated 7/26/12), and the front page of Pegasus' website, which lists Van Nuys, California and Teterboro, New Jersey as Pegasus' only domestic locations (Victor aff, exhibit D, Pegasus website front page). These documents are insufficient to show that Pegasus or Prero draw substantial revenue from New York. TMS' remaining suppositions regarding defendants' income are conclusory and, thus, insufficient (*Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015] ["Plaintiff has offered nothing but conclusory assertions to support long-arm jurisdiction . . . as the party seeking to assert jurisdiction, the burden belongs to plaintiff to present sufficient facts to demonstrate jurisdiction"]).

Moreover, assuming arguendo that TMS established that defendants derived substantial revenue from interstate commerce generally, it fails to establish that defendants expected or should reasonably have expected their alleged acts to have an effect in New York. "[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him" (*Walden v Fiore*, 571 US 277, 134 S Ct 1115, 1122 [2014]). "[F]oreseeability relates to forum consequences generally and not to the specific event which produced injury within the state" (*Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 326 n 4 [1980] [internal quotation marks and citation omitted]).

> "[T]he residence or domicile of the injured party within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there"

(*id.* at 326). Put simply, where a defendant has not purposefully availed itself of the privilege of conducting business in New York, that defendant cannot have foreseen any New York consequences to his actions (*Cooperstein v Pan-Oceanic Mar.*, 124 AD2d 632, 634 [2d Dept 1986]). Defendants have not purposefully availed themselves of the privilege of doing business in New York. The record before the court does not suggest substantial New York operations other than occasional charter flights; Pegasus operated the plane out of Delaware, the plane was inspected in Virginia, and the only connection to New York is Victor's presence in state when Prero allegedly misrepresented the condition of the plane and its price. TMS' showing is, thus, insufficient to satisfy the statutory predicate, and the court cannot exercise jurisdiction over defendants pursuant to CPLR 302 (a) (3) (*Fantis Foods*, 49 NY2d at 326; *Cooperstein*, 124 AD2d at 633-34).

Accordingly, the court grants defendants' motion to dismiss the complaint against them for lack of personal jurisdiction. As this constitutes an independent basis for dismissal, the court need not address the balance of this application. The court has considered the remaining arguments of the parties and finds them to be unavailing.

Accordingly, it is hereby,

ORDERED that the motion of defendants Tim Prero and Pegasus Elite Aviation, Inc., to dismiss the complaint against them, is granted, and the complaint is dismissed in its entirety against the defendants, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing this action accordingly.

Dated: May 29, 2018

New York, New York

ENTER:

HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.