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

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LI QUN DIAO-TIN,

Plaintiff,

-against-

EXPRESS TRADE CAPITAL, INC., MICHAEL ROLNICK, KRISTIAN ANDERSEN, AND ANDERSEN & STOKKE LLC,

Defendants.

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DECISION AND ORDER
Index No.: 652808/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the facts are taken from the Amended Complaint and documentary evidence submitted by the parties (Complaint, NYSCEF Doc. No. 10) (*see Monroe v Monroe*, 50 NY 2d 481, 484 [1980]).

Plaintiff Li Qun Diao-Tin ("Plaintiff"), defendant Michael Rolnick ("Rolnick"), and defendant Kristian Andersen ("Andersen"), were all members of defendant Andersen & Stokke LLC (A&S). Plaintiff and her husband ran businesses which manufactured goods for sale, including to Costco Wholesale (Costco). In 2013, Rolnick approached Plaintiff and her husband suggesting they form a business to manufacture and sell outdoor furniture to Costco. They created a brand using the name Andersen & Stokke, referring to two individuals with experience in the business. Plaintiff formed A&S Ltd. Hong Kong ("A&S Hong Kong"), a Hong Kong entity, owned by Plaintiff's family and Rolnick, which designed, manufactured, and sold outdoor furniture to Costco. Andersen had no equity interest in A&S Hong Kong but received commissions based on the company's sales.

Defendant Express Trade Capital (Express) is in the business of factoring. In 2014, Rolnick and Andersen, and companies each owned, owed Express significant amounts of money. In 2014, Rolnick informed Plaintiff's family that as a result of a change of policy by Costco, authorized vendors needed to be incorporated in the United States. On August 4, 2014, the parties executed a Limited Liability Company Operating Agreement for Andersen & Stokke LLC (the LLC Agreement) with Plaintiff, Rolnick, and Andersen each having a 1/3 interest in the company.

Rolnick and Andersen suggested A&S obtain factoring services from Express for liquidity purposes, and Plaintiff agreed. A&S entered into a factoring agreement with Express. Each member agreed to assume full responsibility for his/her proportional share of any debt to Express.

Simultaneously, unbeknownst to Plaintiff, Andersen and Rolnick caused A&S to enter into an additional agreement with Express, the Assumption and Guarantee Agreement (Assumption and Guarantee). The Assumption and Guarantee references debts of old entities owned by Rolnick and Andersen and a settlement of those debts with Express, noting forgiveness of $2 million of the debt as to the Rolnick companies and $200,000 as to the Andersen entity. Under the Assumption and Guarantee, A&S assumed and guaranteed the payment of that $2.2 million to Express (NYSCEF Doc. No. 34 at p. 2). Rolnick and Andersen entered into the Assumption and Guarantee without Plaintiff's consent, despite a provision in the LLC Agreement requiring unanimous consent for such agreements. Shortly after the signing of the Assumption and Guarantee, the parties amended the A&S LLC Agreement, to give each member of A&S the ability to bind the company to contracts with Express, and to make the provision applicable to present and future loans involving Express (the Amended LLC Agreement). Had Plaintiff known about the Assumption and Guarantee, she would not have agreed to the Amended LLC Agreement.

Pursuant to the Assumption and Guarantee, Express kept A&S's receivables worth $2.26 million, in apparent satisfaction of the money owed Express by Rolnick, Andersen, and their prior entities.

Rolnick and Andersen siphoned additional money from A&S as consulting or management fees, including $1.45 million in 2016, when profits from the business were down significantly. Under the terms of the LLC Agreement, each partner was to receive $12,000 per month as base salary. Partners providing services to A&S were to be compensated commensurate with the value of those services, as unanimously agreed upon by the members (*see* LLC Agreement, Art. V, NYSCEF Doc. No. 32). Plaintiff never agreed to pay any consulting fees to either Rolnick or Andersen and believes they provided no services which would entitle them to that money. Rolnick also charged over $100,000 in expenses to A&S for purchases which benefitted his other business interests, rather than A&S.

Plaintiff asserts six claims:

1) Fraud against Rolnick and Andersen for failing to disclose their debts to Express, failing to disclose the Assumption and Guarantee, and falsely telling Plaintiff A&S would only engage Express for liquidity purposes.

2) Aiding and Abetting Fraud against Express for drafting the Assumption and Guarantee, using that agreement to satisfy the debts of Rolnick and Andersen, failing to disclose the Assumption and Guarantee to Plaintiff, and taking A&S's receivables.

3) Conspiracy to Commit Fraud against all defendants.

4) Unjust Enrichment as against all defendants.

5) Conversion against all defendants

6) Breach of Fiduciary Duty against Rolnick and Andersen

II. ARGUMENTS

A. Defendants' Arguments

Defendants Rolnick and Andersen move to dismiss all claims against them pursuant to CPLR 3211(a)(3), (7), and (8), and Florida Revised Limited Liability Company Act sections 605.0801 and 605.0802, for failure to properly plead a derivative action and for lack of jurisdiction over the moving defendants. The parties appear to agree that Florida law applies, but it is not clear why. The Amended LLC Agreement provides that it is governed by the laws of the State of New York (*see* Amended LLC Agreement, NYSCEF Doc. No. 36, ¶ 12).

1. Derivative Claims are Improperly Pleaded

Moving defendants argue that these claims must fail because all of the claims seek to recover personally for injuries to A&S. The complaint does not allege any injury to Plaintiff, directly (Opp at 3). The injuries alleged are to A&S. Accordingly, these claims can only be brought derivatively (*id.* at 5, citing Florida law, Fla Stat Ann § 605.0801 ["A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company"]). Here, the claims improperly seek remedies for Plaintiff, not A&S.

Assuming these are considered as derivative claims, they too must fail, as Plaintiff has not alleged that she made any demand of moving defendants, or that the demand would have been

futile (*id.*at 3-4, 6 citing Fla Stat Ann § 605.0802). Nor does she allege irreparable injury would result from making a demand (*id.* at 4).

2. **Lack of Personal Jurisdiction**

Moving defendants also assert that they are not New York domiciliaries nor is Plaintiff. The complaint alleges Rolnick and Andersen live in Florida. Further, neither the events alleged in the complaint nor the injury are alleged to have happened in New York. Thus, this court is without personal jurisdiction over either Rolnick or Andersen. A&S is a Florida Limited Liability Corporation and Express is a New York company. Owing money to a New York entity is not a proper basis for jurisdiction over the moving defendants (*id.* at 4). Finally, no tort upon which to base jurisdiction is alleged to have happened in New York (*id.* at 7-8).

B. Plaintiff's Opposition

1. Derivative Actions are Properly Stated

Plaintiff maintains that Florida law allows one member of an LLC to sue another to enforce rights where the Plaintiff pleads "an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company" (Fla Stat Ann § 605.0801). The Plaintiff must show a direct injury and a special injury, separate from those suffered by the other members (*see Strazzulla v Riverside Banking Co.*, 175 So 3d 879, 881 [Fla Dist Ct App 2015]). Plaintiff claims her injury is special because she is the only member who invested in the LLC under false pretenses and relied on the individual defendants' false representations (Opp at 15, citing *In re Palm Ave. Partners, LLC*, 576 BR 239, 256 [Bankr MD Fla 2017]). Plaintiff notes that, in addition to money, her relationship with a manufacturer to which A&S owed $2.26 million in unpaid invoices has been damaged (Opp at 15). These are not derivative harms, but instead are direct injuries to Plaintiff, so are properly pleaded as direct causes of action.

To the extent the court finds Plaintiff "should not have pleaded both direct and derivative claims in the alternative," Plaintiff asks for leave to amend and explicitly separate the claims (Opp at 16 n.6).

2. The Court has Personal Jurisdiction over Moving Defendants

Plaintiff claims the court has jurisdiction over moving defendants pursuant to CPLR 302(a)(1). That section allows jurisdiction over a non-domiciliary who "transacts any business within the

state or contracts anywhere to supply goods or services in the state." Plaintiff must show the defendants purposefully availed themselves of "the privilege of conducting activities within the forum State" and an "articulable nexus" between the claim and the defendants' transaction of business in the state (Opp at 7, quoting *D & R Glob. Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 297 [2017]). Then, the court must consider whether jurisdiction comports with the requirements of federal due process (Opp at 7).

Plaintiff argues that moving defendants have purposefully availed themselves of the New York forum. Express is located in New York, and the parties' relationship with Express is the basis for jurisdiction in New York. Moving defendants, purporting to speak for A&S, entered into agreements with Express in New York. The Factoring Agreement, the Assumption and Guarantee and the Amended LLC Agreement all specify New York Law, and the first two specify the parties' consent to New York jurisdiction (Opp at 8). By choosing a New York factor and signing these agreements, the individual defendants show they intended to avail themselves of the forum and establish a purposeful, ongoing relationship with Express and New York (Opp at 9). Defendants' transaction of business in New York is related to the claims at issue here (*id.* at 10). The misrepresentations made in relation to the agreements with Express are the basis for the fraud, fiduciary duty, and conversion claims (*id.*).

Jurisdiction also comports with federal due process law as long as the non-domiciliary defendants can foresee a need to defend a suit in New York, due to the various agreements they signed (*id.* at 11). Such is the case here.

Once Plaintiff has made her showing, defendants have the burden to present "a compelling case that . . . some other consideration would render jurisdiction unreasonable" (*id.* at 12, quoting *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 217 [2000]). Moving defendants have made no such showing. In fact, Rolnick has significant contacts in New York. The LLC Agreement lists his address as being in New York (NYSCEF Doc. No. 32, last page). He also operates multiple businesses in New York State (Opp at 12). These companies are explicitly named in the Assumption and Guarantee (Opp at 12-13).

As to Plaintiff's derivative claims, she was not required to make a demand, because it would have been futile, and she was not required to specifically plead futility, as long as she pleaded facts to support that conclusion (*id.* at 13). Based on the pleading, Plaintiff has alleged the moving

defendants exercised control of A&S and acted for their own benefit, against A&S's interests (*id.* at 14). To ask Plaintiffs effectively to sue themselves is laughable (*id.*).

C. Moving Defendants' Reply

1. The Individual Claims Fail

In reply, moving defendants argue that Plaintiff's alleged damages are neither direct nor special. Thus, she has failed to allege individual damages (Reply at 1). She relies on a case which is inapplicable, since it dealt with a claim for fraudulent inducement and Plaintiff has not alleged she was fraudulently induced to invest in A&S, but instead into agreeing to let A&S enter into the Factoring Agreement (*id.* at 2). Further, the damages she seeks is the amount of money she claims Express held back from A&S (*id.*, citing Complaint ¶¶ 65-70). The injury here is to the company, not to Plaintiff. Additionally, as far as Plaintiff alleges damage to her relationships with the Chinese manufacturer and Costco, those are reputational injuries and non-actionable. (*see GEICO Gen. Ins. Co. v Hoy*, 136 So 3d 647, 651 [Fla Dist Ct App 2013] ["Generally speaking, to satisfy the element of an injury, the claimant must establish that he or she has sustained pecuniary damage or injury by which he or she has been placed in a worse position than he or she would have been absent the fraud"]).

2. Derivative Claims Fail

Defendants contend Plaintiff is, in fact, required to explicitly plead demand futility and, as she has failed to do so, all claims should be dismissed (Reply at 5).

3. Lack of Jurisdiction

Defendants Rolnick and Andersen did not engage in sustained and substantial transaction of business in New York in relation to this action (*id.* at 6). Nor does jurisdiction comport with federal due process, as individual defendants could not have foreseen having to defend an action related to the Florida LLC in New York (*id.*). Further, Plaintiff does not counter defendants' argument that there is no jurisdiction under CPLR 302(a)(2) (jurisdiction based on commission of a tort). As far as Plaintiff relies on the individual defendants having signed the Factoring Agreement, Assumption and Guarantee, and Amended LLC Agreement, the last is merely an amendment to the LLC Agreement of a Florida LLC, and Express was not a party to that agreement (Reply at 6-7). Plaintiff has not made any allegations about where any of those agreements were negotiated or executed. This is similar to a situation where an entity borrows money which is

payable in New York. That obligation does not confer jurisdiction on the borrower (*id.* at 7, citing *First Nat. Bank and Tr. Co. v Wilson*, 171 AD2d 616, 618 [1st Dept 1991] ["an out-of-state note made payable in New York does not, in and of itself, confer personal jurisdiction over the non-domiciliary"]). Additionally, the claims do not arise out of the Factoring Agreements, but from Plaintiff's membership in A&S, so the relevant agreements are the A&S Operating Agreement and the Amended LLC Agreement, neither of which has a clause consenting to New York jurisdiction (Reply at 7). The allegations do not add up to a conclusion or inference that any negotiations or signing took place in New York (*id.* at 8). To the contrary, the agreements appear to be Express's standard boilerplate agreements, with little negotiations having been done at all (*id.*).

The forum clauses in the Factoring Agreements are irrelevant to this action, as Plaintiff is not suing for a breach of those agreements but instead based on her membership in A&S (*id.* at 9). Accordingly, the relevant agreements are the LLC Agreement and the Amended LLC Agreement, neither of which has a connection to New York. Defendants also distinguish the cases cited by Plaintiff, arguing that defendants' contacts with New York were minimal, and did not reach the level of those in the cases cited by Plaintiff (*id.* at 10-14).

III. DISCUSSION

1. Lack of Legal Capacity

"Capacity concerns a plaintiff's power to appear before and bring an action in court" (CPLR 3211 Commentary C3211:12, at 29 [main vol.]). This is separate from the question of standing that comes into play in relation to a plaintiff's disability or whether a given legislatively-created governmental entity has the capacity to commence an action (Notes to CPLR 3211). The question of capacity asks whether the plaintiff has the power to bring a suit. The question of standing asks whether the plaintiff has a sufficient stake in the outcome of the litigation (*id.*). "Legal capacity to sue, or lack thereof, often depends purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or, as in this case, a business corporation" (*Sec. Pac. Nat. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]).

Here the moving defendants are not arguing that Plaintiff lacks capacity. They argue she lacks standing to bring this suit as an individual, as the injuries alleged are to A&S (*see* Memo at 5-6). Accordingly, the portion of the motion based on CPLR 3211(a)(3) (lack of legal capacity) fails.

2. Failure to State a Claim

On a motion to dismiss pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide Plaintiff the benefit of every possible inference" [citation omitted]. Whether a Plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

First, moving defendants claim Plaintiff lacks standing to bring claims in her individual capacity, as the injuries asserted are to A&S, not Plaintiff Diao-Tin. In the complaint, Plaintiff does not distinguish between claims brought in an individual capacity and those brought derivatively on behalf of A&S. In her opposition to the motion, she clarifies that she asserts all of the claims in an individual capacity, which she argues is allowed by Florida Statute 605.0801, which provides that

> "a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this chapter or arising independently of the membership relationship [if the member can] plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company."

Interpreting this statute, Florida courts have held, that "an action may be brought directly only if (1) there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company and (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members" (*Dinuro Investments, LLC v Camacho*, 141 So 3d 731, 739–40 [Fla Dist Ct App 2014]). Plaintiff argues that she has suffered special injuries because the other two members (Rolnick and Andersen) engaged in the misconduct and so did not suffer the same damage (Opp at 15-16). Plaintiff ignores the first prong of the test, that the injury not flow from an initial harm to the company. All of the damage alleged by the Plaintiff is to A&S, either from individual defendants causing A&S to assume their indebtedness to Express, or taking unearned management

fees and reimbursements for unrelated expenses. Accordingly, none of the claims asserted satisfy the two-prong test. Plaintiff has failed to state an individual claim under Florida law.

Plaintiff's individual claims also fail under New York law, where "the pertinent inquiry . . . is whether the thrust of the Plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation" (*Craven v Rigas*, 85 AD3d 1524, 1527 [3d Dept 2011]). As the injuries complained of are to A&S, the complaint is about A&S's rights, not those belonging directly to Plaintiff.[1]

3. Derivative Claims

Moving defendants argue the derivative claims fail for lack of allegations that Plaintiff made a demand of A&S that such a demand would have been futile (*see Belcher v Schilling*, 309 So 2d 32, 35 [Fla Dist Ct App 1975]). Plaintiff contends that her allegations that the individual defendants control A&S is sufficient, as asking them to take action against their own fraud and bad acts would be futile (Opp at 14). Florida law does not require a shareholder bringing a derivative claim to make the demand "if the directors . . . whether by reason of hostile interest or guilty participation in the wrongs complained of, cannot be expected to institute suit, or, if they do, it is apparent they will not be the proper parties to conduct the litigation" (*Belcher*, 309 So 2d at 35). While Plaintiff has not used the word "futility," Plaintiff has pleaded facts which indicate

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[1] Although not alleged in the complaint, Plaintiff may well be able to assert a direct claim against Rolnick and Andersen. The Assumption and Guarantee signed by Rolnick and Andersen allegedly without the knowledge and consent of Plaintiff, revives reduced and settled debts of the Rolnick Companies and SJM (owned by Andersen) "that was not required to be repaid by such companies . . . as if such [debts] were still outstanding" (NYSCEF Doc. No. 34). The Assumption and Guarantee also shields Rolnick and Andersen from individual liability (*see id*). It also provides that the rights and Assumed Indebtedness of Express and A&S "shall be governed and construed in accordance with the laws . . . of the State of New York" and A&S "hereby consents to the jurisdiction of the Supreme Court of the State of New York" (*id*) as to matters relating to that instrument.

The Amended LLC Agreement obligates each member of A&S to notify Express of "the occurrence of any event specified in the LLC's Articles of Organization [and] the LLC's Operating Agreement (NYSCEF Doc. No. 36). It then requires the express prior written consent of Express before the members may exercise their rights of ownership or governance in A&S (*id* ¶ 7). Should any member default in his/her obligation to Express, the Amended LLC Agreement authorizes Express to take enforcement action "*in the name of any Member of LLC*, without the requirement that [Express] first obtain[ing an] order from a court of competent jurisdiction" (emphasis added) (*id* ¶ 10).

Accordingly, the Amended LLC Agreement not only renders A&S responsible for the revived debts but also appears to grant Express the right to step into the shoes of Plaintiff and exercise her rights as a member of A&S in connection with the allegedly unauthorized actions of Rolnick and Andersen. By its terms, the rights ceded to Express impairs the personal rights of members of A&S and in that light, the fraud alleged may not be solely derivative.

such a demand would have been a waste of time. Defendants cite no caselaw suggesting an explicit statement of futility is required.

Under New York law, "(1) demand is excused because of futility when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction. Director interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is controlled by a self-interested director. (2) Demand is excused because of futility when a complaint alleges with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances. The long-standing rule is that a director does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers. (3) Demand is excused because of futility when a complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (*Marx v Akers*, 88 NY2d 189, 200–01 [1996] [internal quotations and citations omitted]). Plaintiff's allegations satisfy the first part of the test, making her derivative claims sufficient to survive.

4. Jurisdiction over Moving Defendants

CPLR 3211 [a] [8] provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211 [a] [8], "the party seeking to assert personal jurisdiction, the Plaintiff[,] bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011], citing *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

Moving defendants are alleged to live in Florida (Complaint, ¶¶ 3-4). Plaintiff argues this court has jurisdiction because the moving defendants "transact[] . . . business within the state or contract[] anywhere to supply goods or services in the state" (CPLR 302[a][1]).

CPLR 302(a)(1) is a single transaction statute, meaning "one transaction" in New York is sufficient to invoke jurisdiction, 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 (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71, 818 NYS2d 164 [2006]; *Bunkoff v State Auto. Mut. Ins. Co.*, 296 AD2d 699 [2002]; *Lebel v Tello*, 272 AD2d 103, 707 NYS2d 426 [1st Dept 2000]; *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 806 NYS2d 84 [2d Dept 2005]; *see also Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467, 527 NYS2d 195 [1988] [one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, provided the defendant's activities here were purposeful, and there is a substantial relationship between the transaction and the claim asserted]).

With respect to the first part of the test, courts look to "the totality of the defendant's activities within the forum" (*Deutsche Bank*, 7 NY3d 65, 818 NYS2d 164 [2006]; *Sterling Nat'l Bank & Trust Co. of N.Y. v Fidelity Mortgage Investors*, 510 F2d 870, 873 [2d Cir1975]), to determine whether a defendant has transacted business in such a way that it constitutes "purposeful activity," defined as "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*McKee Electric Co. Inc. v Rauland-Borg Corp*, 20 NY2d 377, 382 [1967], *quoting Hanson v Denckla*, 357 US 235, 253 [1958]; *accord Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). As for the second part of the test, "[a] suit will be deemed to *have arisen out* of a party's activities in New York if there is an articulable nexus, or a substantial relationship, between the claim asserted and the actions that occurred in New York" (*Deutsche Bank; Henderson v INS*, 157 F3d 106, 123 [2d Cir1998] [internal quotation marks omitted]).

Plaintiff argues that moving defendants did business in New York with Express and then brought Express to do business with A&S (Opp at 7-8). The Factoring Agreement and the Assumption and Guarantee contain jurisdictional clauses selecting New York as the forum for resolving disputes (*id.* at 8). Plaintiff argues that those agreements state that "any Person signing this Agreement agrees to be bound hereby," expressly binding the individual defendants who signed (*id.*). The relationship with Express was to be ongoing, establishing a "purposeful, repeated, and continuing relationship with Express Trade, and therefore with New York" (*id.* at 9).

However, the individual defendants are not parties to either the Factoring Agreement or the Assumption and Guarantee. While the Assumption and Guarantee recites that each Person signing is bound, including to the jurisdictional clause, "Person" is a defined term. The Assumption and Guarantee refers to the definition in the Factoring Agreement, which defines "Person" as "any individual, sole proprietorship, joint venture, trust . . . or any other entity" (Factoring Agreement at 13). Considering that definition, the sentence in the Assumption and Guarantee is better read as "any [individual or entity] signing this Agreement agrees to be bound hereby" (Assumption and Guarantee at 4). The individual defendants did not sign in their personal capacities. They signed on behalf of A&S, and are not personally bound by those agreements. The business relationship upon which the Plaintiff relies is between Express and A&S. Moving defendants are not parties to that relationship. They are alleged to have previously done some business with Express, through different entities, resulting in the debts owed to Express. The instant dispute does not arise from those underlying transactions (even assuming the transactions can confer jurisdiction on the individual defendants), but from the LLC Agreement, which lacks a jurisdictional clause [*see* NYSCEF Doc. No. 36, ¶ 12] and the fact that unrelated entities owned by the moving defendants owed money to Express.[2]

Assuming that defendants transacted business within the meaning of CPLR § 302 (a)(1), the court must further ascertain whether the exercise of jurisdiction comports with due process (*International Finance B.V. v National Reserve Bank*, 98 NY2d 238, 746 NYS2d 631 [2002]; *LaMarca v Pak-Mor Manufacturing Company*, 95 NY2d 210, 713 NYS2d 304 [2000]). Due process is not offended "[so] long as the party avails itself of the benefits of the forum, has sufficient minimum contacts with it and, should reasonably expect to defend its action there [. . .] even if not present in the state (*McGee v International Life Ins. Co.*, 355 US 220, 222-223 [1957]). To satisfy the minimum contacts requirement, it is essential that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Hanson v Deckla*, 357 US 235, 253 [1958]).

Plaintiff has not alleged such an act, as none of the acts taking place in New York are alleged to be attributable to the individual defendants in their personal capacities. Rather they are attributable to entities with which the individual defendants were affiliated. Accordingly, Plaintiff

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[2] Rolnick subscribed to the LLC Agreement and listed a New York address thereon (*see* NYSCEF Doc., No. 32)

has failed to meet her burden of showing jurisdiction over the individual defendants at this time and the complaint must be dismissed as to them.

Because the record now before the court does not reveal whether the parties had contacts with New York in connection with creation of A&S and their operation of the business, the court will allow discovery limited to the issue of jurisdiction over Rolnick[3] and Andersen. Further, leave is granted for Plaintiff to move for leave to amend her complaint so she may separately plead her derivative and individual claims.

Accordingly, it is hereby

ORDERED that the motion of Michael Rolnick and Kristian Andersen to dismiss the complaint as against them is granted without prejudice to plaintiff seeking leave to file an amended complaint.

This constitutes the decision and order of the court.

DATED: June 15, 2018

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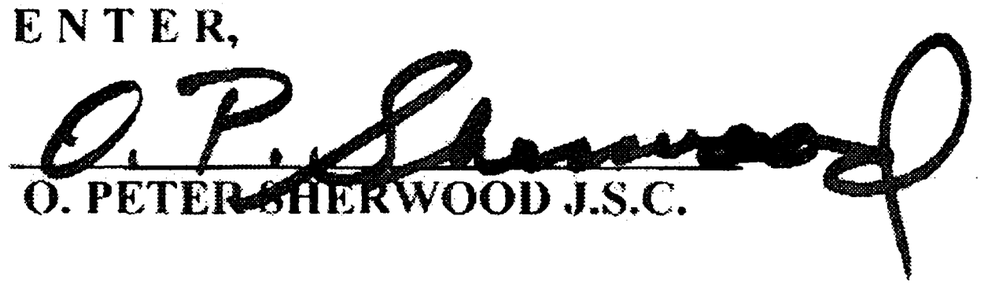

O. PETER SHERWOOD J.S.C.

[3] The Operating Agreement recites a New York address for Rolnick but his signature does not appear thereon.