

Morse v LoveLive TV US, Inc.
2019 NY Slip Op 32333(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 650110/2017
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED **PART 43**

Justice

-----X

ELISABETH MORSE,

Plaintiff,

- v -

LOVELIVE TV US, INC., LOVELIVE TV LIMITED, RICHARD COHEN

Defendant.

-----X

INDEX NO. 650110/2017
MOTION DATE 11/27/2017
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion for DISMISSAL.

Upon the foregoing documents, it is ordered that this motion is granted in part and denied in part.

Plaintiff commenced this breach of contract action after alleging that, on November 15, 2016, defendant LoveLive TV US (LoveLive US), the wholly owned subsidiary of LoveLive TV Limited (LoveLive UK), terminated her employment and allegedly failed to award plaintiff the severance package provided for in her employment agreement.

Defendant corporation LoveLive UK and individual defendant Richard Cohen (together, the UK defendants) now move for an order, pursuant to CPLR 3211(a)(7), CPLR 3211(a)(8), CPLR 3012(d), CPLR 2004 and CPLR 2005, to dismiss all claims against them with prejudice, to dismiss all claims for lack of personal jurisdiction, or to grant an extension of time for defendants to appear and respond to the complaint. Plaintiff opposes, arguing that defendants have offered no acceptable documentary proof, other than the affidavits of the defendants themselves, and that said affidavits fail under CPLR 3211(a)(1) and CPLR 3211 (a)(8), as the

information affirmed in the affidavits does not constitute documentary proof that would establish a basis for dismissal as a matter of law.

In making this motion, the UK defendants assert, first, that the court does not have general jurisdiction over them. Plaintiff, in her response, does not oppose this argument. Thus, the court will not consider whether jurisdiction might be exercised over the UK defendants pursuant to CPLR 301. The UK defendants assert, in addition, that they may not be brought before this court based on any alleged specific jurisdiction. In evaluating specific jurisdiction, New York courts look to the New York long-arm statute, codified at CPLR 302. If jurisdiction over a defendant is available under the long arm statute, the court must determine whether the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment of the United States Constitution by analyzing whether jurisdiction would violate traditional notions of fair play and substantial justice as discussed in *International Shoe Company v. Washington*, 326 US 310.

Under CPLR 302(a)(1), jurisdiction may exist where (i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business (*Johnson v. Ward*, 4 NY3d 516). To establish jurisdiction under the “transacting business” provision, a plaintiff must show that a defendant’s contacts with New York with respect to the transaction at issue are sufficient and of the quality to establish that they “purposefully avail[ed] [themselves] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws” (*CMNY Capital, L.P. v. Perry*, 1998 US Dist. LEXIS 3523). A defendant must be shown to have purposefully availed itself of the privilege of conducting activities in the forum state by undertaking actions that result in a substantial connection in the forum (*see Asahi Metal Indus. Co. v. Superior Court*, 480 US 102).

Plaintiff alleges that she provided employment services to both LoveLive US and LoveLive UK, that plaintiff was the direct manager of an employee of LoveLive UK, and that plaintiff regularly teleconferenced or met in person with Richard Cohen (Cohen) regarding LoveLive UK matters. Plaintiff submits, in opposition to the motion, emails that purport to show her engaged in conversation with Cohen (while presumably in London) scheduling time for an interview. Moreover, plaintiff provides an affidavit of Marisa Bangash (Bangash), the former chief operating officer of LoveLive US, who attests that Cohen -- a member of the board of directors for LoveLive UK, the sole member of the board of directors for LoveLive US and the CEO for both corporations -- regularly traveled to New York to engage in and solicit business for both LoveLive UK and LoveLive US.

Plaintiff need not identify myriad contacts between the UK defendants and the forum to satisfy the long arm statute requirements. CPLR 302 (a) is “a ‘single act statute’ and proof of one transaction in New York is sufficient to invoke jurisdiction ... so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Kreutter v. McFadden Oil Corp.*, 71 NY2d 460). If Bangash’s affidavit and plaintiff’s allegations are to be credited, they would be sufficient to find that the UK defendants had sufficient contacts with New York to satisfy the transacting business provision of New York’s long arm statute and to show their purposeful availment of the laws and privileges of New York. Furthermore, it would show that the UK defendants engaged in the purposeful creation of a continuing relationship with a New York resident.

To determine whether the exercise of jurisdiction comports with due process requirements pursuant to *International Shoe Company v. Washington*, it is required that defendants have “certain minimum contacts with [the forum state] and that the maintenance of

the suit does not offend traditional notions of fair play and substantial justice” (*id.*) Where a non-domiciliary “avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend it’s actions there,” the court’s exercise of personal jurisdiction will not offend due process (*Kreutter, supra*) As discussed above, it is reasonable to conclude that the UK defendants have purposely transacted business within the forum. This conclusion supports the notion that there are minimum contacts by both UK defendants with New York.

To assess whether personal jurisdiction violates the notions of fair play and substantial justice the court considers: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of the controversy; and (5) the shared interests of the states in furthering substantive social policies (*Norvel Ltd. v. Ulstein Propeller AS*, 161 F Supp 2d 190). However, “where a plaintiff makes the threshold showing of the minimum contacts required for the first test, a defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable” (*Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F3d 120; *see also Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F3d 560).

In the matter at bar, the UK defendants have not proffered a persuasive enough argument to convince this court that exercising jurisdiction would be unreasonable. The UK defendants argue, first, that the burden placed on them by being required to litigate in New York would be a considerable one. However true that may be or may not be, the UK defendants have purposely availed themselves of the protections and benefits of New York by regularly traveling

and conducting business within the forum. New York courts have held that, though a defendant's burden of litigating a case in New York may be great, "the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago" (*see Minnie Rose LLC v. Yu*, 169 F Supp 3d 504). Second, New York has a great interest in adjudicating cases of alleged harm perpetrated against New York residents. Third, plaintiff has a strong interest in adjudicating her case in New York. The UK defendants' argument that England is a more suitable forum to adjudicate this matter because documentary evidence and witnesses are present there is not a compelling argument to sway the court's decision with regard to personal jurisdiction. Finally, the UK defendants have failed to assert any substantive social policies that would require this case to be heard in England. Therefore, personal jurisdiction comports with due process, and the UK defendants' motion to dismiss for lack of personal jurisdiction is denied.

In the instant action, plaintiff seeks to pierce the corporate veil and hold the parent company (LoveLive UK) liable for the contractual obligations of the subsidiary (LoveLive US) by alleging that LoveLive UK was the alter-ego of LoveLive US. Plaintiff also seeks to pierce the corporate veil pursuant to N.Y. Bus. Corp. Law 1006 (NYBCL 1006) and to hold Cohen liable. The court will first address the argument regarding whether to hold the parent company liable.

On a motion to dismiss pursuant to CPLR 3211 (a)(7), "the pleading is to be afforded a liberal construction (*see* CPLR 3026). The court accepts the facts as alleged in the pleading as true, accords plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87-88). Additionally, "in assessing a motion under CPLR 3211 (a)(7) ... the criterion is

whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*) However, where a complaint identifies a cognizable cause of action, but fails to plead all of the material elements of it, defendant is entitled to dismissal (*see* CPLR 3211(a)(7)).

“Generally, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against [plaintiff] which resulted in [plaintiff’s] injury” (*Island Seafood Company, Inc. v Golub Corporation*, 303 AD2d 892). Under New York law, the corporate veil will be pierced to achieve equity, even absent fraud, “when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator’s business instead of its own and can be called the other’s alter ego” (*id.*). Plaintiff alleges complete domination of LoveLive US by LoveLive UK, providing an affidavit asserting that there is an overlap in ownership, officers and directors, inadequate capitalization, and an absence of separate paraphernalia for both companies. While those factors are considered in whether the corporate veil should be pierced, those factors together without an adequate showing of intercorporate shuffling of assets constitute insufficient proof for this court to find that the corporate veil should be pierced. Moreover, plaintiff has failed to proffer sufficient evidence to show that LoveLive UK is using LoveLive US to transact its own business to render it its alter-ego. Giving plaintiff every favorable inference, she has failed to raise any triable issues of fact. The motion by defendant corporation LoveLive UK to dismiss all claims against it is granted.

Plaintiff seeks to pierce the corporate veil and hold Cohen liable, pursuant to NYBCL 1006. The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability

incurred before such dissolution (*see* NYBCL 1006.) Until dissolution is complete, title to the corporate assets remains in the corporation, and after dissolution the shareholders to whom are distributed the remaining assets of the corporation are said to “hold the assets which they received, in trust for the benefit of creditors (*see* NYBCL 1006[a][1]; *see also* *Rodgers v. Logan*, 121 AD2d 250). At any time after dissolution, the corporation may give a notice requiring all creditors and claimants to present their claims in writing ... and such notice shall be published at least once a week for two successive weeks in a newspaper of general circulation in the country in which the office of the corporation was located (NYBCL 1007). As a result, shareholders remain jointly and severally liable to existing creditors of the corporation and the cost of an informal dissolution is that directors cannot shield themselves against corporate creditor liability (*Rodgers v. Logan, supra* at 253).

It is generally believed that in actions by a creditor to satisfy a corporate liability, the creditor must deplete all possibilities of his remedies at law and procure a judgement against the corporation and return with an unsatisfied judgment. Nevertheless, “where it is impossible or futile to obtain such judgment, the creditor can maintain an action directly against the directors or shareholders, even though no judgment has been obtained” (*id.*). In the instant action, defendant corporation LoveLive US was informally dissolved by Cohen, the CEO and sole board member. It seems to this court, from what is alleged, that Cohen may have failed to provide for or to pay corporate liabilities for LoveLive US, and, thus, obtaining a judgment against LoveLive US by plaintiff may now be futile. As such, it would seem inefficient to require plaintiff to first obtain judgment against LoveLive US and then move the court to amend her complaint to include Cohen or, alternatively, to institute a new, plenary action against Cohen at some later

time. Defendants' motion to dismiss all claims against individual defendant Robert Cohen is, therefore, denied.

Defendants' motion to extend time to appear and to respond to the complaint is granted to the extent that the remaining defendants shall file an answer to the complaint within 20 days of the date of this decision,

Accordingly, it is

ORDERED that the motion of defendant LoveLive TV Limited (LoveLive UK) to dismiss for lack of personal jurisdiction is denied; and it is further

ORDERED that the motion of defendant LoveLive TV Limited (LoveLive UK) to dismiss all claims against it is granted; and it is further

ORDERED that the motion of defendant Richard Cohen to dismiss for lack of personal jurisdiction is denied; and it is further

ORDERED that the motion of defendant Richard Cohen to dismiss all claims against him is denied; and it is further

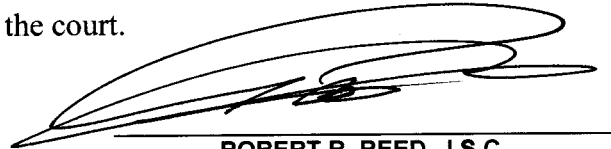
ORDERED that defendants' motion to extend the time to appear and respond to the complaint is granted, to the extent that defendants shall file an answer to the complaint within 20 days of the date of this motion; and it is further

ORDERED that plaintiff and defendants LoveLive TV US, Inc. and Richard Cohen shall appear by counsel for a preliminary conference to be held on August 22, 2019, in Part 43, Room 412, at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

7/31/2019

DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: