SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

----------X

BLUE SEABREEZE LLC and ADAM BAUMAN,
Plaintiffs,

-against-

ALLIED TELESIS HOLDINGS, K.K., ALLIED TELESIS INC., and TAKAYOSHI OSHIMA,
Defendants.

----------X

DECISION/ORDER

Index No.: 650001/2018
Motion Seq. Nos.: 002 and 003

HON. TANYA R. KENNEDY, J.S.C.:

This action arises out of a Consulting Agreement (the Agreement) between Defendant, Allied Telesis Holdings, K.K. ("Holdings"), and Plaintiff, Blue Seabreeze LLC ("Blue Seabreeze"), for Blue Seabreeze to provide consulting services to Holdings.

Blue Seabreeze is a New York limited liability company that is in the business of providing strategic management consulting services, including assisting clients with securing financing (*see* Amended Complaint, ¶3; Bauman Opposing Affidavit, ¶3). Plaintiff, Adam Bauman ("Bauman"), is the managing member of Blue Seabreeze (*see* Bauman Opposing Affidavit, ¶1).

Holdings is a foreign corporation based in Japan, which is listed on the Tokyo Stock Exchange and is in the business of manufacturing network equipment and providing network solutions worldwide (*see* Amended Complaint, ¶¶6, 10). Holdings is also a majority shareholder of Defendant, Allied Telesis, Inc. ("ATI") (*see* Oshima Supporting Affidavit, ¶5). However, Holdings does not conduct business in the United States or the State of New York, and is not authorized to do business in New York (*see* Kirchick Supporting Affidavit, ¶3).

ATI is a Delaware corporation, with its principal place of business in San Jose, California, which has no place of business in the State of New York and is not authorized to do business in New York (*see* Amended Complaint, ¶7; Kirchick Supporting Affidavit, ¶5). Defendant, Takayosi

Oshima ("Oshima"), is the Chief Executive Officer ("CEO") of both Holdings and ATI (*see* Oshima Supporting Affidavit, ¶2; Amended Complaint, ¶8).

Holdings and ATI (collectively, the "Allied Defendants" or "Defendants"), as well as Oshima each move, pursuant to CPLR 3211(a)(1), (3), (7) and (8), to dismiss the Amended Complaint (motion sequences #002 and #003, respectively), which asserts causes of action for breach of contract; account stated; unjust enrichment; fraudulent inducement and fraudulent misrepresentation; detrimental reliance; intentional, reckless or negligent conduct, failure to supervise; damage to personal and professional reputation; loss business opportunities; and recoupment of attorneys' fees.[1] Although Plaintiffs submitted opposition to both motions, Plaintiffs now withdraw all claims which Bauman asserts, as well as the claims for detrimental reliance; intentional, reckless or negligent conduct, failure to supervise; damage to personal and professional reputation; loss business opportunities; and recoupment of attorneys' fees (*see* Plaintiffs' Memorandum in Opposition, p. 1 n 2).

Both motion sequences are consolidated for disposition, which are granted to the extent that the Amended Complaint is dismissed against the Allied Defendants for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8). The remaining branches of both motions are denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that Oshima contacted a Blue Seabreeze consultant and agent, Abbas Shah ("Shah") in November 2015 about engaging Blue Seabreeze to provide consulting services to

[1] Plaintiffs filed this instant action after the initial action was discontinued once the Allied Defendants sought to dismiss the initial complaint (*see* Exhibits F and G of Supporting Affidavit of Michael A. Ellenberg, Esq.). The Allied Defendants now move to dismiss on the grounds that: (1) this Court lacks personal jurisdiction over each Defendant; (2) the Amended Complaint should be dismissed as to all Defendants other than Holdings, the only Defendant which is a party to the Agreement; (3) Holdings was not properly served with process; (4) the claims Bauman asserts should be dismissed because he is not a party to the Agreement; and (5) all claims, except the first cause of action for breach of contract, fail to state a cause of action.

Holdings (*see* Shah Opposing Affidavit, ¶¶1, 4; Amended Complaint, ¶15). Thereafter, Oshima, while in California, engaged in telephone negotiations with Shah, who was in New York (*see* Shah Opposing Affidavit, ¶5).

In mid-November 2015, Blue Seabreeze prepared a draft of the Agreement at its New York office, which Oshima, in his capacity as Holdings' CEO, and Shah, on behalf of Blue Seabreeze, executed at ATI's California headquarters on November 20, 2015 (*id.*, ¶6 and Exhibit A, Agreement, dated November 20, 2015; Amended Complaint, ¶¶18, 26).

Under the terms of the Agreement, Blue Seabreeze was to provide consulting services to Holdings pertaining to financing and sales, in which Blue Seabreeze would "provide the best options . . . to secure short-term and long-term financing and reasonable best efforts for financing" and "filter sales opportunities to [Holdings], including high-level introductions to corporations and government leaders" (*see* Amended Complaint, ¶¶19-20).

The Agreement, which commenced on November 20, 2015 and ended on November 19, 2016, required that Holdings pay an initial $45,000.00 retainer and a monthly $15,000.00 retainer, which would be offset by earned consulting fees from proposed deliverables (*id.*, ¶¶23-24; Exhibit A of Shah Opposing Affidavit). The Agreement further provided, *inter alia*, that "[a]ny contracts which result in sales or financing for [Holdings] through [Blue Seabreeze's] efforts will require [Holdings] to pay a consulting fee of 2% to [Blue Seabreeze]" and "[a]ll sales deals or financing which result from [Blue Seabreeze's] contracts will survive the termination of this Agreement" (*see* Exhibit A of Shah Opposing Affidavit).

Plaintiffs allege that Shah and Oshima met with Sharda Enterprises, a qualified lender, at the Dallas-Fort Worth airport, which agreed to provide Holdings with a $10,000,000.00 line of credit (*id.*, ¶¶28-29, 32). Plaintiffs also allege that Blue Seabreeze forwarded Holdings an invoice

in the sum of $60,000.00 for monthly retainer fees from May 2016 through August 2016, and a subsequent invoice in the sum of $45,000.00 for monthly retainer fees from September 2016 through November 2016, which Holdings retained without objection (*id.*, ¶¶35-38). Lastly, Plaintiffs maintain that Blue Seabreeze is entitled to receive $105,000.00 for unpaid monthly retainer fees, as well as additional compensation of $200,000.00 for identifying a qualified lender which agreed to provide Holdings with a $10,000,000.00 line of credit (*id.*, ¶¶40-41).

Defendants' primary argument in support of dismissal is that this Court lacks personal jurisdiction over them. However, Plaintiffs argue in opposition that this Court has jurisdiction over all Defendants under CPLR 302(a)(1) and (a)(3).

DISCUSSION

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." Where, as here, a defendant is not domiciled in New York, a plaintiff must allege jurisdictional contacts that, if proven, would be sufficient to demonstrate that an exercise of personal jurisdiction would be proper under either CPLR 301 (New York's general jurisdiction statute) or CPLR 302 (New York's long-arm jurisdiction statute).

On a motion to dismiss for lack of personal jurisdiction, the court is required to accept as true all the allegations as set forth in the plaintiff's complaint and opposition papers, and accord the plaintiff the benefit of every favorable inference (*see Weitz v Weitz*, 85 AD3d 1153, 1153-1154 [2d Dept 2011]; *Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]).

Viewing the allegations in the light most favorable to the non-moving party, the plaintiff need only make a prima facie showing that the defendant is subject to the court's personal jurisdiction (*see Weitz v Weitz*, *supra* at 1153). As the party seeking to assert personal jurisdiction,

plaintiffs bear the burden of proof on this issue (*see O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003] [on a motion to dismiss for lack of personal jurisdiction, "the burden rests on plaintiff as the party asserting jurisdiction"]). Here, Plaintiffs fail to meet this burden.

Personal jurisdiction over non-domiciliaries on a contract claim is governed by CPLR 302 (a)(1), New York's long-arm statute (*see Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]). Pursuant to CPLR 302 (a)(1), New York courts can exercise personal jurisdiction over any non-domiciliary who, in person or through his agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state."

New York courts have set forth the standard for determining whether a defendant has transacted business or has contacts sufficient to assert jurisdiction:

> "Whether a non-domiciliary is transacting business within the meaning of CPLR 302(a)(1) is a fact based determination and requires a finding that the non-domiciliary's activities were purposeful and established a substantial relationship between the transaction and the claim asserted. Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York"

(*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014] [internal quotation marks and citations omitted]; *see Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986, 986 [2d Dept 2007] [personal jurisdiction does not exist unless the non-domiciliary "has purposefully transacted business within the state, and there is a 'substantial relationship' between this activity and the plaintiff's cause of action"]).

Thus, it is "[e]ssential to the maintenance of a suit against a non-domiciliary under" CPLR 302 (a)(1) that there exists "some articulable nexus between the business transacted and the cause

of action sued upon" (*McGowan v Smith*, 52 NY2d 268, 272 [1981]; *accord Kreutter v McFadden Oil Corp.*, 71 NY2d 460 [1988]). "[J]urisdiction is not justified where the relationship between the claim and the transaction is too attenuated" or "merely coincidental" (*Johnson v Ward*, 4 NY3d 516, 520 [2005]).

Applying the above-cited principles and crediting the Plaintiffs' non-conclusory allegations (*see Brandt v Toraby*, 273 AD2d 429 [2d Dept 2000]), it is apparent that Defendants' minimal contacts with New York are insufficient to constitute the purposeful activity required for long-arm jurisdiction pursuant to CPLR 302(a)(1).

It is undisputed that Defendants did not execute the Agreement in New York, and the Amended Complaint fails to allege any volitional acts by any Defendant in this state. ATI is a Delaware corporation, with its principal place of business in California, that did not conduct any business in this state (*see* Kirchick Supporting Affidavit, ¶5). Holdings does not conduct any business in the United States and has no place of business in and is not authorized to do business in New York (*id.*, ¶3). Further, no director, officer, employee, agent or other representative of Holdings had any contact with anyone in New York regarding the Agreement, which is the subject of this action (other than the possibility that telephonic or electronic communications may have passed through or into New York) (*id.*, ¶6). Therefore, Defendants have little or no connection to New York.

Plaintiffs argue in opposition that Holdings conducted and transacted substantial business in New York through its subsidiaries, including ATI. Plaintiffs also contend that Holdings' email and telephone activities were enough to subject it to personal jurisdiction in New York under CPLR 302 (a)(1) (*see* Plaintiffs' Memorandum in Opposition, P. 10). In making this assertion, Plaintiffs rely on Shah's representation that Oshima contacted him in New York via telephone and

that the parties engaged in telephone negotiations and other communications in New York (*see* Shah Opposing Affidavit, ¶5). Plaintiffs also assert that Blue Seabreeze provided services in New York under the Agreement, and that Oshima frequently contacted Blue Seabreeze at its New York office regarding such services (*id.*, ¶8). As such, Plaintiffs argue that based upon the foregoing, Holdings "projected itself into New York and purposefully availed itself of the privilege of doing business in New York" (*see* Plaintiffs' Memorandum in Opposition, P. 11).

However, New York courts have consistently refused to exercise jurisdiction over a non-domiciliary under CPLR 302(a)(1) where a contracting party has no New York presence other than sending oral or electronic communications into the state on the ground that these contacts are insufficient to confer personal jurisdiction (*see Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434 [2d Dept 2006] [faxing executed contracts to New York and placing a few telephone calls "do not qualify as purposeful acts constituting the transaction of business"]; *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 21 AD3d 90, 94 [1st Dept 2005], *affd* 7 NY3d 65 [2006], *cert denied* 549 US 1095 [2006] ["electronic communications, telephone calls or letters, in and of themselves, are generally not enough to establish jurisdiction"]; *Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351, 352 [1st Dept 2004] ["The various telephone, fax and e-mail communications upon which plaintiff relies, purportedly concerning defendants' exhibition and sale of her art, are not, under the circumstances herein, adequate transactional predicates for an assertion of jurisdiction under CPLR 302(a)(1)"]).

Moreover, Plaintiffs never identify which services they performed in New York, and the only service Plaintiffs set forth in the Amended Complaint is their introduction to a qualified lender at the Dallas-Fort Worth airport (*see* Amended Complaint, ¶28). Nothing in Plaintiffs' pleading

and submissions identifies a single activity where Holdings invoked the benefits and protections of New York's laws.

Plaintiffs also argue that this Court has jurisdiction over Holdings and Oshima pursuant to CPLR 302(a)(3), based upon Defendants' tortious activity outside New York which caused injury within New York.

Long-arm jurisdiction pursuant to CPLR 302(a)(3) is appropriate where a defendant "commits a tortious act without the state causing injury to person or property within the state." Further, to avail itself of CPLR 302(a)(3), a plaintiff must also allege that the defendant "(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."

Plaintiffs contend that they sufficiently allege that Oshima and Holdings made fraudulent representations outside New York which caused injury in this state. Plaintiffs assert that the Amended Complaint alleges that Holdings represented that it would make payments as required under the Agreement and, in June 2016, Oshima and Holdings represented that they wished to continue with the Agreement (*id.*, ¶¶51, 139-143). Plaintiffs argue that while these statements were made outside of New York, the economic impact of such misrepresentations, and Plaintiffs' reliance thereon, occurred in New York, where the services were rendered, and where Blue Seabreeze failed to receive payment for such services (*see* Plaintiffs' Memorandum in Opposition, P. 13). This argument, however, is insufficient to confer jurisdiction.

For long-arm purposes, "'the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt'" (*Cotia*

(USA) Ltd. v Lynn Steel Corp., *supra* at 484 [internal citations omitted]; *accord CRT Invs, Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011] ["[i]n the context of a commercial tort, where the damage is only economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred"]). Here, the critical events associated with Defendants' allegedly fraudulent conduct – the purported misrepresentations – occurred outside of New York and are insufficient to establish jurisdiction pursuant to CPLR 302 (a)(3).

Accepting Plaintiffs' allegations as true that Defendants' actions caused harm in New York, mere allegations of committing a tort or injury outside New York are insufficient to establish personal jurisdiction unless the defendant also does business in this state or has significant ties in this state:

> "Accepting as true the plaintiff's allegations that [defendant] committed tortious acts without New York State causing injury to the plaintiff within the State, the plaintiff failed to present any evidence that [defendant] regularly did or solicited business, or engaged in any persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in this State, or derived substantial revenue from interstate or international commerce"

(*Shatara v Ephraim*, 137 AD3d 1248, 1249 [2d Dept 2016] [internal citations omitted] [dismissing case for lack of personal jurisdiction]; *see Waggaman v Arauzo*, 117 AD3d 724, 725 [2d Dept 2014]; *Muse Collections, Inc. v Carissima Bijoux, Inc.*, 86 AD3d 631, 632 [2d Dept 2011]).

Similarly herein, other than Plaintiffs' conclusory statement that Holdings and Oshima "derive substantial revenue from interstate and international commerce" (*see* Plaintiffs' Memorandum in Opposition, P. 13), Plaintiffs fail to present any evidence that Defendants regularly conducted or solicited business, engaged in any persistent course of conduct, derived substantial revenue from goods used or consumed or services rendered in this state, or derived

substantial revenue from interstate or international commerce. The extremely limited contacts between Defendants and New York are insufficient to sustain personal jurisdiction over them. As such, Defendants' motions to dismiss the complaint are granted.

Since this Court has no jurisdiction over Defendants, this Court is without authority to consider the other remaining branches of Defendants' motions, which are denied as moot (*see Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]; *Wyser-Pratte Mgt. Co., Inc. v Babcok Borsig AG*, 23 AD3d 269, 269-270 [1st Dept 2005]).

Considering the foregoing reasons, it is

ORDERED that the motion of Defendants Allied Telesis Holdings, K.K. and Allied Telesis Inc., to dismiss is granted to the extent that the Amended Complaint is dismissed in its entirety as against said Defendants pursuant to CPLR 3211(a)(8), and the remaining branches of the motion are denied as moot (motion sequence #002); and it is further

ORDERED that the motion of Defendant Takayoshi Oshima to dismiss is granted to the extent that the Amended Complaint is dismissed in its entirety as against said Defendant pursuant to CPLR 3211(a)(8), and the remaining branches of the motion are denied as moot (motion sequence #003).

This constitutes the Decision and Order of the Court.

Dated: New York, New York
December 5, 2019

ENTER:

Hon. Tanya R. Kennedy

Hon. Tanya R. Kennedy, J.S.C.

HON. TANYA R. KENNEDY