

Kingstown Capital Mgt. L.P. v CPI Prop. Group, S.A.
2021 NY Slip Op 31084(U)
April 6, 2021
Supreme Court, New York County
Docket Number: 153862/2020
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. BARBARA JAFFE</u>	PART	IAS MOTION 12
	<i>Justice</i>		
	-----X	INDEX NO.	<u>153862/2020</u>
	KINGSTOWN CAPITAL MANAGEMENT L.P., INVESTHOLD LTD.,	MOTION DATE	_____
	Plaintiffs,	MOTION SEQ. NO.	<u>001</u>

- v -

CPI PROPERTY GROUP, S.A., RADOVAN VITEK,	DECISION + ORDER ON MOTION
Defendants.	

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8-13, 15-18 were read on this motion to dismiss.

Defendants move pursuant to CPLR 3211(a)(7) and (8) for an order dismissing the complaint. Defendants oppose.

I. COMPLAINT (NYSCEF 1)

In September 2012, plaintiff Kingstown, an investment advisor, acquired a substantial interest in nonparty ORCO, a Luxembourg-based real estate development company. Starting in October 2012, through a series of corrupt transactions, defendant Vitek, a Czech Republic citizen, residing in, among other places, the Czech Republic, Switzerland, and the United Kingdom, gained control of more than 90 percent of ORCO. Thereafter, he took control of ORCO's most valuable assets, including certain real estate owned by ORCO's then-subsiary, ORCO Germany, now defendant CPI Property Group (CPIPG), also organized under the laws of Luxembourg, and sold the assets at below-market value to entities secretly controlled by him. Vitek also arranged for the shares in ORCO Germany to be issued for improper purposes, thereby diluting the interests held by Kingstown and others, and forcing them to sell their shares

in ORCO at a substantial loss. Through additional corrupt transactions, which involved lying and defrauding his business partners, Vitek seized control of CPIP and ORCO, and diverted more than a billion dollars in assets to entities he controlled.

In December 2013, a Luxembourg financial regulator launched an investigation into defendants, and on December 8, 2017, concluded that defendants had acted unlawfully. In 2019, the full report detailing its investigation and findings was made public.

On April 10, 2019, plaintiffs commenced an action against defendants in the United States District Court for the Southern District of New York (SDNY), alleging violations of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) and various New York laws. As a result, CPIP, at Vitek's direction, published a series of press releases in English on its website and distributed them through a nonparty German newswire service which, according to its website, uses nonparty Bloomberg, based in New York, as an outlet for distributing press releases. The press releases were published by Bloomberg.

In one of the press releases, published on April 11, 2019 and referencing the SDNY action, CPIP states, among other things:

The [SDNY] claims are further based on the allegations that Mr. Vitek engaged in certain financial transactions, but there is no factual basis or grounds for these claims.

...

In CPIP's view, Kingstown and Investhold have joined together to file suit in the U.S. for the sole purpose of inflicting maximum reputational damage to CPIP, including through various press coverage based on false allegations. Working together, Kingstown and Investhold are foisting highly flagrant "RICO" allegations to sensationalize their claims and generate publicity, with an excessively large damages claim not grounded in fact.

This lawsuit is meant to harm CPIP, damage the company's reputation in the eyes of its investors, and as such, CPIP will take all appropriate action to defend itself and its shareholders.

...

It is not surprising that plaintiffs have commenced this lawsuit while CPIPG is in the process of financing.

(NYSCEF 3).

Plaintiff alleges that CPIPG's public statements are false, as Vitek's corruption was confirmed by the Luxembourg regulator's investigation, and defendants do not deny Vitek's involvement in the transactions in the SDNY action.

Subsequently, CPIPG claimed that plaintiffs are "blackmailers."

Plaintiffs advance a cause of action for defamation, alleging that the April 11 press release, as a whole, is false and published with knowledge of its falsity or with reckless disregard for its truth. As a result of the press release, plaintiffs have been injured "in their trade and community standing." They assert that pursuant to CPLR 302(a), jurisdiction is properly based in New York County as "defendants have transacted business in New York County, and that business has given rise to plaintiff's [sic] claims."

II. CONTENTIONS

A. Defendants (NYSCEF 8-12)

Defendants deny that personal jurisdiction over them by the court has been obtained, as they are neither domiciled in New York nor have they a physical presence here. They observe that CPIPG is headquartered in and organized under the laws of Luxembourg, that all of its assets are located outside of the United States, and that its shares are traded on the Frankfurt stock exchange. Moreover, defendants have not transacted or solicited business in New York. That CPIPG posted press releases on its website in Europe, defendants argue, does not justify the exercise of jurisdiction over them, nor does their use of a German newswire which globally distributes its press materials constitute a sufficient basis for jurisdiction, even if CPIPG intended to have the press releases ultimately reach a New York audience, which it denies. In addition,

any contact with New York bondholders, they argue, is not directly related to the allegedly defamatory statement, which was a response to the SDNY action.

Also, according to defendants, the sole connection between Vitek and New York is his authorship of the press releases and direction that they be published, which does not constitute a transaction of business sufficient to demonstrate personal jurisdiction over him.

B. Plaintiffs (NYSCEF 16)

Plaintiffs argue that the court's personal jurisdiction over defendants is obtained given their maintenance of a targeted "campaign" of communications toward the New York bond market to solicit investors like plaintiffs, published a series of English-language press releases targeted at New York, used a newswire service that promised to publish the statement with Bloomberg in New York, expressly intended that the press releases be published in New York, accused plaintiffs of misconduct in New York, prosecuted the SDNY action in the New York press, sought to protect its reputation with New York's bond market, and caused them harm in New York. They assert that such conduct was a deliberate attempt to reach a New York audience with its communications.

The defamatory statements, plaintiffs allege, were used to buoy defendants' financing efforts targeted at New York, and thus, the defamation arises from defendants' contact with New York. They deny that the SDNY action constitutes the sole basis of defendants' contact with the state and contend that the dismissal of the SDNY action does not impact jurisdiction.

To the extent that there is an issue of fact concerning personal jurisdiction, plaintiffs seek jurisdictional discovery, by which they seek the disclosure of communications soliciting and reassuring investors in New York, and evidence of the retention of New York agents, public relations professionals, and legal counsel to draft the press releases and the existence of New

York investors in CPIPG.

C. Reply (NYSCEF 18)

Defendants allege that plaintiffs have not demonstrated, *prima facie*, that there is personal jurisdiction over them, and deny that the press releases were disseminated for the purpose of soliciting New York investors. In any event, they argue that the solicitation of business within New York does not constitute a basis for conferring jurisdiction unless it is supplemented by business within the state, and observe that plaintiffs do not claim that they engaged in any conduct beyond sending press releases into New York. They also maintain that reliance on a New York-based publication to circulate press materials intended to assist them financially does not establish personal jurisdiction. Their sole connection with Bloomberg, moreover, was through the German newswire, which distributes press releases to nearly 20 global media publishers, not only Bloomberg, and the press releases are republished electronically in every global market. In addition, defendants observe that plaintiffs do not allege that they created or published the press releases in New York. For all of these reasons, they argue that plaintiffs fail to offer a sufficient basis not only to confer jurisdiction in New York, but also for the purposes of seeking jurisdictional discovery.

III. ANALYSIS

Pursuant to CPLR 3211(a)(8), a cause of action may be dismissed on the ground that the court lacks personal jurisdiction over the defendant. If jurisdiction is challenged, the plaintiff bears the burden of establishing such jurisdiction over the defendant. (*Arroyo v Mountain School*, 68 AD3d 603 [1st Dept 2009]). Jurisdiction is a threshold issue, which must be determined before other defenses in a motion to dismiss. (*342 E. 67 Realty LLC v Jacobs*, 106 AD3d 610, 611 [1st Dept 2013]; *Howard v Spitalnik*, 68 AD2d 803 [1st Dept 1979]).

The court may exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, as pertinent here, transacts business within the state or contracts to supply services in the state. (CPLR 302[a][1]). That CPIPG relied on a German newswire to send press releases to Bloomberg in New York with the intention that they would be distributed specifically to a New York audience, even if true, does not constitute transacting business within the state, as the material is accessible to a global audience. (*See Best Van Lines, Inc. v Walker*, 490 F3d 239, 250 [2d Cir 2007] [posting of defamatory material on website accessible in New York does not, without more, constitute transacting business in New York for purposes of New York’s long-arm statute]). Moreover, the content of the press releases, although concerning New York litigation, is not of sole importance to New Yorkers, as allegations of fraud against a Luxembourg company with assets mainly in Europe would likely interest global investors. That the press releases were distributed solely in English does not support an inference that they were targeted solely at a New York audience as English is spoken throughout the world.

To the extent that plaintiffs allege that CPIPG previously sought investors through a campaign of communications, they must also demonstrate that they were accompanied by business transacted in New York or by sufficient “permanence and continuity” in New York. (*O’Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201 [1st Dept 2003]; *U.S. Immigr. Fund LLC v Litowitz*, 182 AD3d 505, 506 [1st Dept 2020] [no personal jurisdiction over defendants absent New York employees and maintenance of office, mailing address, and bank account in New York]). That Kingstown and other New York entities may have invested in CPIPG is also insufficient, absent evidence that they engaged in New-York based business transactions.

That harm may have resulted in New York due to defendants’ allegedly defamatory statements is insufficient to confer personal jurisdiction, as “[d]efamation claims are accorded

separate treatment to reflect the state’s policy of preventing disproportionate restrictions on freedom of expression” and “cannot form the basis for ‘tortious act’ jurisdiction.” (*SPCA of Upstate New York, Inc. v Am. Working Collie Ass’n*, 18 NY3d 400, 404 [2012], citing CPLR 302[a][2] and (3)).

Plaintiffs also fail to show that jurisdictional discovery would uncover facts demonstrating sufficient business transactions. Their belief that defendants retained agents or other professionals in New York is speculative and undermined by their allegations that the press releases were published using a German newswire, and they offer no affidavits or other evidence constituting a “sufficient start” for jurisdictional discovery. (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004]; *McBride v KPMG Int’l*, 135 AD3d 576, 577 [1st Dept 2016] [jurisdictional discovery unwarranted as plaintiff failed to submit affidavits specifying facts that might exist but could not then be stated that would support exercise of personal jurisdiction”]; *Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351, 352 [1st Dept 2004] [more than conjecture is needed for jurisdictional discovery]).

Absent personal jurisdiction over defendants, remaining contentions are not addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ motion to dismiss for lack of personal jurisdiction is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

4/6/2021
DATE


BARBARA JAFFE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE