SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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CONTINUUM ENERGY TECHNOLOGIES, LLC, JOHN PRESTON,

Plaintiffs,

- v -

IRON OAK, INC. (USA), IRON OAK, INC. (FRANCE), CETECH HOLDING LIMITED, VISUALISE HOLDINGS LTD., RAJIV GOSAIN,

Defendants.

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INDEX NO. 657219/2021

MOTION DATE 05/26/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

IRON OAK, INC. (USA)

Plaintiff,

-against-

LECLAIR RYAN PLLC, NEIL HARTZELL, MICHAEL CASE, ROGER CHARI, EDWIN MERKEL

Defendant.

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Third-Party
Index No. 595270/2022

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 02, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to DISMISS.

Plaintiffs Continuum Energy Technologies, LLC ("CET") and John Preston ("Preston") (collectively "Plaintiffs") commenced this action seeking to recover over $30 million in losses relating to a series of agreements and two confessed judgments, which allege were obtained by fraud and in violation of Defendants Iron Oak, Inc. (USA)'s and Rajiv Gosain's fiduciary duties to CET (NYSCEF 2, ¶¶ 1-2). In this motion, Defendants Iron Oak, Inc. (France), CETech Holding Limited ("CETech"), Visualise Holdings Ltd. ("Visualise") and Rajiv Gosain

("Gosain") (collectively "Defendants") move to dismiss Plaintiffs' Complaint for lack of personal jurisdiction pursuant to CPLR 3211[a][8]. Defendants Visualise and Gosain also move to dismiss for improper service pursuant to CPLR 3211[a][9].

Plaintiffs assert that Defendants waived any challenge to service of process or jurisdiction by appearing in this Court and seeking affirmative relief, waived any challenge to service of process by failing to assert it as an affirmative defense in their answer, and that in any event Defendants are subject to personal jurisdiction because they acted in concert with other parties in the commission of a tort in New York (NYSCEF 74, at 1-3).

For the reasons set forth below, the motion is **granted in part**.

a. Waiver of Defenses

Plaintiffs' argument that Defendants waived the defenses of lack of jurisdiction is unavailing. Plaintiffs rely on Defendants' cross-motion for a stay of discovery filed on February 24, 2022 (Mot. Seq. 001), to advance the argument that Defendants acceded to the jurisdiction of this Court. The Notice of Cross-Motion reads, in pertinent part, "*defendants* will move this court…for an order (a) staying the action pursuant to CPLR § 2201" (NYSCEF 43 [emphasis added]). However, the Affirmation of Ambrose Madison Richardson filed in support of the cross-motion states that "[t]his affirmation is submitted in opposition to the plaintiffs' motion for partial summary judgment pursuant to CPLR §3212[f], and in support of *defendant Iron Oak's* cross motion for a stay pursuant to CPLR §2201" (NYSCEF 44, at ¶1 [emphasis added]). Putting aside the stray reference to "defendants" in the notice of motion, it is clear that the cross-motion was made on behalf of Defendant Iron Oak (USA), not the moving Defendants.

The Court, however, accepts Plaintiffs' argument that Defendants have waived any challenge to service of process by failing to preserve such objections. CPLR 3211[e] provides,

"an objection that the summons and complaint…was not properly served is waived if, having raised such an objection, the objecting party does not move for judgment on that ground within sixty days after serving the pleading." Here, Defendants filed an Amended Answer on February 28, 2022 asserting generally that the "Court lacks jurisdiction over" Defendants (NYSCEF 49, at 1-2). "Since a challenge to the basis of the court's jurisdiction is distinct from a claim of defective service of process, [Defendants] were required to plead this defense with particularity (*Hatch v Tu Thi Tran*, 170 AD2d 649, 650 [2d Dept 1991]; *see also J.G. Jewelry Pte. Ltd. v TJC Jewelry, Inc.*, 194 AD3d 413, 414 [1st Dept 2021] [affirming a ruling that the affirmative defense of improper service was waived where defendants "fail[ed] to assert it, with specificity"][internal citation omitted]). Thus, the "affirmative defense actually pleaded did not fairly apprise [Plaintiffs] of the objections now made" and the Court finds the defense waived. (*Wiesener v Avis Rent-A-Car, Inc.*, 182 AD2d 372, 373 [1st Dept 1992] [internal citation omitted]).

b. *Personal Jurisdiction*

On a motion to dismiss, the Court must "accept the complaint's factual allegations as true, according plaintiff the benefit of every possible favorable inference, and determining 'only whether the facts as alleged fit within a cognizable legal theory'" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2014] [internal citation omitted]). While Plaintiffs ultimately have the burden of proving a basis for personal jurisdiction under CPLR 302, at this stage they "need only make a 'sufficient start' in demonstrating, prima facie, the existence of personal jurisdiction, since facts relevant to this determination are frequently in the exclusive control of the opposing party and will only be uncovered during discovery" (*Matter of James v iFinex Inc.*, 185 AD3d 22, 30 [1st Dept 2020]; *see also* CPLR 3211[d]).

As described below, with respect to Defendants Gosain and CETech, Plaintiffs, at a minimum, make a "sufficient start" warranting denial of Defendants' motion.

i. *Defendant Gosain*

Plaintiffs' Complaint (NYSCEF 2) contains numerous allegations that Gosain engaged in New York-directed conduct sufficient to subject him to the jurisdiction of this Court. Specifically, Plaintiffs allege "Gosain caused [both] the $4 million first Confessed Judgment" and "the $15.1 million Confessed Judgment to be filed in this Court," and that the "two Confessed Judgments…were obtained by fraud and the self-dealing of Iron Oak and Gosain" (NYSCEF 2, ¶¶ 11, 19, 2). This conduct forms the basis for Plaintiffs' breach of fiduciary duty claim against Iron Oak, Gosain and CETech (*see, e.g., id.*, ¶¶ 124, 126[c] and [g]). The Complaint alleges this conduct occurred while Gosain was "simultaneously a CET employee operating at the highest levels of CET and an Iron Oak Principal" (*id.*, ¶ 2). "[A] corporate officer who participates in the commission of a tort may be held individually liable…regardless of whether the corporate veil is pierced" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012] [internal citations omitted]).

Thus, by alleging that Gosain breached his fiduciary duties owed to Plaintiffs "individually and/or in concert [with Iron Oak and CETech] by "falsely obtaining the Confessed Judgments [in this Court]" (NYSCEF 2, ¶¶ 126-27), Plaintiffs "sufficiently allege[] jurisdiction over [Gosain] under CPLR 302(a)(2) insofar as the complaint pleads that [Gosain] was a part of a conspiracy involving the commission of…tortious acts in New York" (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]).

ii. *Defendant CETech*

Similarly, with respect to Defendant CETech, Plaintiffs have "made a sufficient start, and shown their [assertion of jurisdiction] not to be frivolous'" (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]). Plaintiffs' complaint alleges "[i]nsofar as Gosain engaged in the foregoing acts and omissions on behalf of Iron Oak and CETech, each entity is liable as the principal of its agents" (NYSCEF 2, ¶ 128). "The conduct of an agent may be attributed to the principal for jurisdictional purposes where the agent engaged in purposeful activities in this state in relation to the transaction at issue for the benefit of and with the knowledge and consent of the principal and the principal exercised some control over the agent in the matter" (*Morgan ex rel. Hunt v A Better Chance, Inc.*, 70 AD3d 481, 482 [1st Dept 2010]).

Here, Gosain allegedly "engaged in purposeful activities in this state in relation to the transaction at issue" (*Morgan*, 70 AD3d at 482). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007][internal citation omitted]). Gosain, as CETech's agent, invoked the benefit and protection of CPLR 3218 to commit the tort alleged by Plaintiff of fraudulently obtaining and filing the two confessed judgments at issue.

Further, Plaintiffs' allegation that "CETech is a Gosain-controlled Delaware company" (NYSCEF 2, ¶ 32) is entitled at the pleading stage to a reasonable inference that Gosain engaged in activity for the "benefit of and with the knowledge and consent of [CETech]" (*Morgan*, 70 AD3d at 482). Plaintiffs also allege despite being paid "roughly $1 million under [the] CET-CETech [December 1, 2015] Consulting Services Agreement" for CETech's management of three CET related litigations, the three litigations were cited "as justification for the May 2017

Confessed Judgment" (NYSCEF 2, ¶ 110). By justifying the May 2017 Confessed Judgment on the CETech-managed litigations, CETech also "invoked the benefit of [CPLR 3218] to commit [the alleged] tort" (NYSCEF 74, at 5).

Finally, Plaintiffs allege Gosain advised CET "on all [legal matters other than the von Schönau matter] as a principal of CETech" (NYSCEF 2, ¶ 64), which suggests CETech "exercised some control over [Gosain] in the matter (*Morgan*, 70 AD3d at 482). Plaintiffs have "demonstrate[d] that facts 'may exist' in opposition to the motion and are therefore entitled to the disclosure expressly sanctioned by CPLR 3211 (subd. [d])" (*Peterson*, 33 NY2d at 467).

iii. *Remaining Defendants*

Plaintiffs have, however, failed to "make a 'sufficient start'" in establishing personal jurisdiction over Iron Oak (France) and Visualise. As alleged in Plaintiffs' Complaint, "Defendant Iron Oak (France) is a French corporation that purports to be a corporation engaged in the business of real estate" (NYSCEF 2, ¶ 30). The only additional references to Iron Oak (France) in Plaintiffs' Complaint and Memorandum of Law in Opposition to this motion are general, conclusory allegations that fail to "demonstrate that facts 'may exist' to establish jurisdiction" (*Peterson*, 33 NY2d at 467). For example, Plaintiffs assert "all Defendants acting in concert committed fraud in obtaining the confessed judgment in this Court" (NYSCEF 74, at 4), and that the alleged "scam" was "perpetrated by all Defendants at Gosain's direction" (NYSCEF 2, ¶ 1). These blanket allegations, however, are insufficient to adequately plead jurisdiction over Iron Oak (France) under CPLR 301 or 302.

Plaintiffs' Complaint alleges "Defendant Visualise Holdings Ltd. is a Gosain-controlled corporation in Port Louis, Mauritius" (NYSCEF 2, ¶ 33). In addition to the blanket allegations above, Plaintiffs also claim "Iron Oak, through Gosain, required that the first $2.5 million

payment [under the March 12, 2018 Iron Oak-CET Agreement], half of IDL's first [settlement] payment to CET, be made to [an] entity called Visualise Holdings Ltd., a nonparty to any relevant agreement" (Id., ¶ 87). However, without more, allegations of receipt of payment due under the March 12, 2018 Agreement is insufficient to confer jurisdiction over Visualise (*see e.g., DirectTV LatinAm., LLC v Pratola*, 94 AD3d 628, 629 [1st Dept 2012] [finding plaintiffs' "sole allegation in support of their position [ ] that defendants deposited funds into a New York bank account owned by [defendant], from which they funneled money to [a non-domiciliary defendant]…insufficient to invoke personal jurisdiction"]).

In fact, Plaintiffs themselves allege that "[p]rior to the inclusion of the New York confession of judgment, New York had no connection to the parties' dealings" (NYSCEF 2, ¶ 70). Other than conclusory allegations against all Defendants generally, Plaintiffs do not adequately allege facts conferring jurisdiction over Iron Oak (France) or Visualise arising out of the confessed judgments at issue.

Accordingly, it is

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Complaint is **denied** as to the claims against Defendants Rajiv Gosain and CETech Holding Limited, and **granted** as to the claims against Defendants Iron Oak, Inc. (France) and Visualise Holdings Ltd.

This constitutes the Decision and Order of the Court.

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9/7/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**