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University Sports Publications Co. Inc. v. Rizzo

012063/06

SUPREME COURT OF NEW YORK, NASSAU COUNTY*2006 N.Y. Misc. LEXIS 3781; 236 N.Y.L.J. 112***November 21, 2006, Decided****CASE SUMMARY:**

PROCEDURAL POSTURE: Plaintiff advertising company brought an action against defendants, a former employee and a competitor, alleging that defendants conspired to steal the company's accounts for advertising in a game program and yearbook for a professional basketball team. The competitor filed a motion for an order pursuant to *CPLR 3211(a)(8)* and 327 to dismiss the complaint for lack of personal jurisdiction or inconvenient forum.

OVERVIEW: The company contended that the complaint met the requirements of *CPLR 302(a)* in that the alleged tortious conduct caused injury in the state and that at least one customer of the company was contacted directly by the competitor. The court granted the competitor's motion to dismiss because the company failed to demonstrate that the court had personal jurisdiction over defendants pursuant to *CPLR 302*. The complaint did not allege that the competitor was present or doing business in New York, and the only mention of New York was that it was the principal place of business of the company. The fact that the company was domiciled in New York was an insufficient basis for personal jurisdiction. Further, New York courts were not permitted to retain jurisdiction of an action that had no substantial nexus to the state, pursuant to *CPLR 327(a)*. Both defendants were out of state residents. Additionally, potential witnesses, documents, and transactions relevant to the claims were located, or took place, in states other than New York. Thus, the fact that the company was domiciled in the state was insufficient to retain jurisdiction based on forum non conveniens.

OUTCOME: The court granted the competitor's motion to dismiss the complaint and terminated all proceedings in the matter.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts

[HN1] See *CPLR 302(a)(3)(ii)*.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Purposeful Availment

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Substantial Contacts

Evidence > Procedural Considerations > Burdens of Proof > Allocation

[HN2] In order to invoke jurisdiction under *CPLR 302(a)(3)(ii)*, the evidence must demonstrate that a defendant's activities in New York are purposeful and there is a substantial relationship between the transaction and the claim asserted. A substantial relationship must be established between a defendant's transactions in New York and a plaintiff's cause of action in order to satisfy the nexus requirement of the statute. An essential criterion in all cases is whether the quality and nature of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in that State. The party seeking to assert personal jurisdiction bears the burden of proof on this issue.

Civil Procedure > Venue > Forum Non Conveniens

[HN3] The factors which a court must weigh when deciding a motion to dismiss on forum non conveniens, include the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts. New York courts may not retain jurisdiction of an action that has no substantial nexus to New York, and by express statutory authority this extends to cases where a party is a resident or is domiciled in the state. *CPLR 327(a)*.

JUDGES: [*1] Justice Robbins

OPINION BY: Robbins

OPINION:

Motion by the attorneys for the defendant Skies America Publishing Co., Inc. (Skies) for an order pursuant to *CPLR 3211 (a)(8)* and *CPLR 327* dismissing the complaint on the grounds that the Court lacks personal jurisdiction over the defendant, and alternatively that this Court constitutes an inconvenient forum is granted.

Plaintiff, University Sports Publications Co., Inc. (USP) is in the business of selling game-day, game-site advertising for collegiate and professional sports events to customers who are seeking exposure to spectators at these venues. On or about December 9, 2004, USP purchased all the interest in Professional Sports Publications, Inc. (PSP) through a purchase of all outstanding PSP stock. Since December 9, 2004, PSP was a wholly-owned subsidiary of USP. Defendant Richard Thomas Rizzo is a resident of the State of California. From on or about April 16, 2001, up to and including April 19, 2005, Rizzo was an employee of PSP and (following December 9, 2004) its parent USP. Rizzo's [*2] title at PSP was Regional Sales Director of the West Coast Region. Defendant Skies American Publishing Co., Inc.(Skies) is an Oregon corporation which maintains its principal place of business in Beaverton, Oregon. Skies is in the business of providing publishing and Communications services to clients (complaint P1-4).

The complaint alleges that defendant Skies conspired with co-defendant Richard Thomas Rizzo, while an employee of USP to steal USP's accounts for advertising in the game program and yearbook of the Los Angeles Lakers. The complaint further alleges Skies and Rizzo used USP's proprietary customer lists to contact USP customers and interfere with USP's relationship with them. As a result of these alleged tortious actions USP claims it suffered considerable harm. Defendant Skies claims this Court has no jurisdiction over it, and that in any event New York is an inappropriate and inconvenient forum for the adjudication of this dispute.

[HN1] *CPLR* § 302(a)(3) (ii) provides that

A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent...commits a tortious act without [*3] the state causing injury to person or

property within the state, except as to a cause of action for defamation of character arising from the act, if he ... expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

The attorney for the plaintiff argues that the complaint meets the criteria set forth in *CPLR 302(a)*. Plaintiff claims the alleged tortious conduct of the defendant was committed outside of New York State causing injury in the State. Plaintiff alleges at least one USP customer in New York was contacted directly by Skies. USP has submitted a list of USP customers based in New York that advertised in either the game program or the yearbook of the Los Angeles Lakers basketball team from 2002 through 2005. The plaintiff also submitted a printed reproduction of the content of Skies' 2004 Interest site.

[HN2] In order to invoke jurisdiction, the evidence must demonstrate that "the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Wright v. 299 Union Ave. Corp.*, 288 A.D.2d 382, 383, 733 N.Y.S.2d 223, quoting [*4] *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 at 467, 522 N.E.2d 40, 527 N.Y.S.2d 195; see also *Johnson v. Ward*, 4 N.Y.3d 516, 829 N.E.2d 1201, 797 N.Y.S.2d 33; *Armouth International, Inc. v. Haband Co., Inc.*, 277 A.D.2d 189, 715 N.Y.S.2d 438. "A 'substantial relationship' must be established between a defendant's transactions in New York and a plaintiff's cause of action in order to satisfy the nexus requirement of the statute." *Johnson v. Ward*, supra at 519. "An essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in that State." *Riblet Products Corp. v. Nagy*, 191 A.D.2d 626, 595 N.Y.S.2d 228; *Liberatore v. Calvino*, 293 A.D.2d 217, 742 N.Y.S.2d 291; *Courtroom Television Network v. Focus Media, Inc.*, 264 A.D.2d 351, 695 N.Y.S.2d 17. As the party seeking to assert personal jurisdiction, the plaintiff bears the burden of proof on this issue, *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 796 N.Y.S.2d 126; *Brandt v. Toraby*, 273 A.D.2d 429, 710 N.Y.S.2d 115. Applying the above-cited principles, and crediting the non-conclusory allegations advanced by USP (*Brandt v. Toraby*, 273 A.D.2d 429, 710 N.Y.S.2d 115; *Maas v. Cornell University*, 94 N.Y.2d 87, 721 N.E.2d 966, 699 N.Y.S.2d 716), [*5] the court agrees that plaintiff has failed to demonstrate that the court has personal jurisdiction over the defendants pursuant to *CPLR 302*.

Defendant Richard Thomas Rizzo was a resident of California (complaint P3). Defendant Skies is an Oregon corporation that maintains its principal place of business

in Beaverton, Oregon (complaint P4). The complaint does not allege that defendant Skies was present or doing business in New York. The complaint does not allege that New York has jurisdiction. The only mention of New York in the complaint is that New York is the principal place of business of the plaintiff. Plaintiff does not dispute the following: defendant Skies was not present in New York; plaintiff's former employee defendant Rizzo never resided in New York and was not employed by the plaintiff in New York; no contact between defendant Skies and defendant Rizzo took place in New York; no contacts between the defendants and the Lakers took place in New York. The attorney for the defendant claims that while the plaintiff lists 14 New York-based advertisers that have advertised in the Laker's publications produced by USP between 2002 and 2005, only two, by plaintiff's [*6] own admission, published ads in 2005: Calvin Klein, Inc. and Tangible Media Group (i.e. Midway Games, Inc.) (Wong affidavit Exhibit A). Further, other than the reference to one unnamed New York based customer of USP in 2005 who allegedly inquired about the future placement of advertising in the Lakers game program or yearbook (Wong Affidavit P3), there is no allegation, either in the complaint or in plaintiff's opposition papers, that Skies obtained any of the alleged New York advertisers for the Lakers publication to be prepared for the 2006-2007 season.

There is no allegation that the situs, or the original event which caused plaintiff's alleged injury occurred in New York. The claims against Skies rest on plaintiff's charge that defendant Rizzo misappropriated plaintiff's confidential information, and disclosed it to Skies, and that Skies used this confidential information to acquire the Lakers account. Even accepting these conclusory allegations as true for purposes of this motion, the original event which caused plaintiff's alleged injury is defendant Rizzo's alleged disclosure of plaintiff's confidential information to Skies, and it is not alleged that any contact between Skies [*7] and Rizzo took place in New York. Defendant, a non-domiciliary of New York, denies any significant contacts with New York State. The plaintiff, who had the burden on this issue, has provided no evidence to justify the exercise of personal jurisdiction over the defendant. See *Carte v.*

Parkoff, 152 A.D.2d 615, 543 N.Y.S.2d 718. The attorneys for the plaintiff's reference to over 41 printed pages from Skies' website does not demonstrate Skies' significant contact to New York (see Affirmation of Kathryn S. Catenacci, Exhibit A, at 1, 8, 11, 12, 15, 16, 19, 21, 32, 33, 34, d36, 37, 41). *Carte v. Parkoff*, *supra*.

The only connection between the alleged tort claims asserted against Skies and any injury or foreseeable consequence in New York is the fact that plaintiff is domiciled here. This is an insufficient basis for personal jurisdiction. See *Fantis Foods, Inc. v. Standard Importing Co., Inc.*, 49 N.Y.2d 317, 402 N.E.2d 122, 425 N.Y.S.2d 783; *Bill-Jay Machine Tool Corp. v. Koster Industries*, 29 A.D.3d 504, 816 N.Y.S.2d 115.

[HN3] The factors which the court must weigh when deciding a motion to dismiss on forum non conveniens, include "the residency of the parties, the potential hardship to proposed witnesses, the availability [*8] of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts." *Wentzel v. Allen Machinery, Inc.*, 277 A.D.2d 446, 716 N.Y.S.2d 699, citing *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398; *Cheggour v. R'Kiki*, 293 A.D.2d 507, 740 N.Y.S.2d 391. In opposing this aspect of the motion, plaintiff relies on the fact that it is domiciled in this State. New York courts may not retain jurisdiction of an action that has no substantial nexus to New York (see *Wentzel v. Allen Machinery, Inc.*, *supra* at 447; *Cheggour v. R'Kiki*, *supra* at 508) and by express statutory authority this extends to cases where a party is a resident or is domiciled in the state. See *CPLR 327(a)*. Both of the defendants are out of state residents. Moreover, potential witnesses, documents, and transactions relevant to plaintiff's claims are located, or took place, in either Oregon or California. The fact that the plaintiff is domiciled in this state is insufficient for this court to retain jurisdiction.

The motion to dismiss the complaint pursuant to *CPLR 3211(a)(8)* and *CPLR 327* [*9] is granted. This decision is the order of the Court and terminates all proceedings under index no. 012063/06.