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California Defendants Transacted Business in New York by Negotiating Agreement by Fax, E-Mail

A DISPUTE involving claims to escrowed funds deposited into a California law firm's trust account arose in an action involving the reconstitution of a New York limited liability company. Plaintiffs sought an order directing that the escrowed funds be disbursed pursuant to a membership interest redemption agreement entered into with the defendants. Emphasizing the out-of-state aspects of the case, defendants challenged the court's jurisdiction The court held that the negotiations underlying the agreement, conducted through telephone, fax and e-mail, constituted the transaction of business in New York sufficient for long-arm jurisdiction pursuant to Civil Practice Law and Rules §302(a)(l). In determining that New York had an interest in asserting jurisdiction, the court ruled that prior to their lawful release the escrowed funds remain the property of their depositor, the New York limited liability company.

Entertainment Media Partners LLC v. BCI Eclipse LLC, Supreme Court, IA Part 49, Justice Cahn.

Justice Cahn

DECISION OF INTEREST

ENTERTAINMENT MEDIA PARTNERS, LLC v. BCI ECLIPSE, LLC - Motion by plaintiffs for an order directing defendants to disburse escrowed funds pursuant to a membership interest redemption agreement with BCI Eclipse, LLC

Background

Plaintiffs allege the following facts Plaintiffs Alan Weiner and Martin Mair, and defendant David Catlin, were members in defendant BCI Eclipse, LLC ("BCI"), a New York limited liability company formed in September 2000 In August 2002, Weiner and Mair entered into an agreement with BCI and Catlin governing their withdrawal from the membership of BCI Pursuant to the agreement, BCI would buy out the Weiner/Mair interests in exchange for certain inventory and property rights, and the sum of $570,000.00, which would be paid by $100,000.00 in cash; a promissory note for an additional $100,000.00; and the remaining $370,000.00 to be deposited into an escrow account pending the satisfaction of certain conditions. The gravamen of this action is that the escrow agent, defendant Kestenbaum & Hoffman, LLP (a California law firm), through one of its partners, defendant Paul Kestenbaum, Esq. (a California attorney), is wrongfully withholding the escrowed funds despite the satisfaction of substantially all conditions to their release.

Defendants have not responded to the complaint, despite the expiration of their time to do so Nevertheless, defendants' counsel orally raised an issue concerning personal jurisdiction during a conference before the court. The court, therefore, determined to resolve any threshold issue in that regard, prior to any further proceedings, based on a stipulation of undisputed facts submitted by the parties, and facts and documents recognized in defendants' submission in opposition to the motion. The undisputed facts relevant to jurisdictional analysis are as follows.

In April 2002, Kestenbaum, in California, e-mailed Weiner, in New York, a proposal concerning the prospective withdrawal of Weiner and Mair from BCI (Stip. ¶1; Kestenbaum Decl. Exs. A-C).[1] Mair, located in California, and Weiner, located in New York, retained Michael A. Schlesinger, Esq., of the Washington, D.C. office of Latham & Watkins (Stip. ¶2; Kestenbaum Decl. Exs. A-C) Negotiations continued throughout June 2002, during which Kestenbaum, Mair, and Catlin, BCI's manager, were in California, and Weiner was In New York (Stip. ¶2).

In early July 2002, Catlin and his associates came to New York for the purpose of seizing control of, and

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closing, BCI's New York office (Stip. ¶3). On July 8, 2002, Catlin and Weiner met at BCI's New York office. There was a subse-quent meeting the following day in the offices of Catlin's New York counsel in order to conduct further withdrawal negotiations. This meeting was attended by all the parties and their respective counsel (id. ¶¶4-5). The following day, July 10, 2002, negotiations continued in the New York offices of Latham & Watkins, counsel for Weiner and Mair, again attended by all the parties and their respec-tive counsel (id. ¶6). Throughout the duration of July 2002 and early August 2002, the parties con-tinued to negotiate through conference calls and e-mails. Weiner, a participant in those comm-unications, was, at all times, located in New York (id. ¶¶7-9).

The Membership Interests Redemption Agreement was finally executed on August 16, 2002. Kestenbaum e-mailed counterpart execution pages to all parties, including to Weiner in New York (id.).

On August 29, 2002, the parties entered into an agreement contained in a Closing Instruction Letter in connection with "escrow and closing instructions ... to be followed by Kestenbaum & Hoffman LLP ... in relation to the transactions contemplated under the Redemption Agreement." (Kestenbaum Decl. ¶3, Ex. A.) Kestenbaum, who signed that letter, identifies himself as "the agent of [all the parties] to close a transaction among them evidenced by the Membership Interests Redemption Agreement ..." (Id. ¶3.) Kestenbaum makes specific reference to Weiner and BCI in connection with his foregoing agency (id.). The Closing Instruction Letter, addressed to Kestenbaum, makes specific reference to an Escrow Agreement between Kestenbaum & Hoffman LLP and BCI (Kestenbaum Decl. Ex. A).

On August 30, 2002, the parties entered into an agreement contained in a follow-up letter to the Closing Instruction Letter (Kestenbaum Decl. ¶4, Ex. B). This letter, again addressed to Kestenbaum and signed by him as a partner of Kestenbaum & Hoffman LLP, expressly requires that firm to maintain $370,000 00 in its escrow account until the satisfaction of certain conditions (id.). On that same day, Kestenbaum & Hoffman LLP entered into the Escrow Agreement (id. ¶4, Ex. C). It unambiguously identifies BCI, "a New York limited liability company," as a co-depositor of the escrowed funds (id. Ex. C). Weiner co-signed on behalf of plaintiff Entertainment Media Partners, LLC (id.). On that day, Kestenbaum & Hoffman LLP received and deposited the escrowed funds into its trust account in California (Stip. ¶¶10, 12; Kestenbaum Decl. ¶6). Kestenbaum is obligated, as escrow agent, to release the funds from escrow upon the satisfaction of agreed upon conditions (Stip. ¶¶10, 12).

Kestenbaum has recognized that the Closing Instruction Letter, the follow-up letter, and the Escrow Agreement "were all integral parts of the closing of the redemption transaction evidenced by the Redemption Agreement." (Kestenbaum Decl. ¶4.)

Discussion

New York's long-arm statute, CPLR 302 (a) (1), provides for personal jurisdiction over non-domiciliary defendants for claims arising out of the defendants' transaction of business in New York. "It is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York ..." (Kreutter v. McFadden Oil Corp., 71 NY2d 460, 467 [1988].) As the Court of Appeals recognized, "[w]ith the growth of national markets for commercial trade and technological advances in communication and travel systems ... an enormous volume of business may be transacted within a State without a party ever entering it." (Id. at 466.) Accordingly, the courts of this state have repeatedly upheld long-arm jurisdiction over non-domiciliaries who transact the subject matter activity from out of state by way of telephone or other means of long-distance comm-unication, electronic or otherwise, transmitted to New York (e.g., Corporate Campaign, Inc. v. Local 7837, United Paperworkers Intl. Union, 265 AD2d 274 [1st Dept 1999]; Courtroom Television Network v. Focus Media, Inc., 264 AD2d 351 [1st Dept 1999]). "Even one instance of purposeful activity directed at New York is sufficient to create jurisdiction, whether or not defendant was physically present in the State, as long as that activity bears a substantial relationship to the cause of action." (Corporate Campaign, supra, at 274-75.)

The California defendants have sufficiently transacted activities in New York so as to be amenable to the jurisdiction of this court in connection therewith. This action arises out of the various agreements negotiated, and entered into, by the parties relating to BCI's redemption of Weiner's and Mair's membership interests. It is undisputed that BCI is a New York limited liability company, and that all the individual parties, including Catlin, its manager, are members of BCI. One of those members, Weiner, is also domiciled in New York. Kestenbaum and the Kestenbaum Firm, serving as escrow agents pursuant to the agreements with BCI, are fiduciary trustees for all the parties, which include BCI and Weiner (T.T.S.G., Inc. v. Kubic, 226 AD2d 132 [1st Dept 1996]; National Union Fire Ins. Co. v. Proskauer Rose Goetz & Mendelsohn, 165 Misc 2d 539 [Sup Ct NY County 1994], affd 227 AD2d 106 [1st Dept 1996]).[2] Indeed, until the escrowed funds are released, they are still deemed the property of BCI, a New York entity, despite the fact that the physical locus of the funds is Kestenbaum's California trust account (National Union Fire Ins. Co., supra). Accordingly, this case involves not only the reconstitution of a New York LLC; but also the parties' rights in a New York res - the escrowed funds themselves. New York has an interest in asserting jurisdiction over defendants whose acts affect property having a nexus to the state (see, e.g., Courtroom Television Network, supra; Black River Assocs. v. Newman, 218 AD2d 273 [4th Dept 1996]).

The course of negotiations is also significant. It is undisputed that Kestenbaum and Catlin participated in a variety of long-distance communications with Weiner, who was, at all times, in New York, concerning the redemption of his membership interest (and Mair's) in BCI, spanning the course of months. Catlin and Kestenbaum physically came to New York and engaged in face-to-face negotiations relating to the redemption agreements, together with all counsel. The final agreements were transmitted to Weiner in New York, for execution. Such factors strongly militate in favor of finding long-arm jurisdiction over the California defendants (Courtroom Television Network, supra; Black River Assocs., supra; Morrissey v. Sostar, S.A., 63 AD2d 944 [1st Dept 1978]).

Kestenbaum's opposing declaration prominently announces his status as a California attorney. However, personal jurisdiction can attach to the transaction of business without proper licensure from the forum state, and without any official presence altogether in that forum (Courtroom Television Network, supra). Kestenbaum's role in the transaction, and his contacts with New York in connection therewith, were not just passive or tenuous. Rather, as the designated escrow agent pursuant to the parties redemption agreements, he "played a crucial role in creating the substance of the transaction ..." (Id., 264 AD2d at 353.) As observed above, an escrow agent is a fiduciary of both the depositor and the beneficiary, and the trust res remains the property of the depositor until Its release from escrow. The depositor in this case is BCI, a New York entity. Weiner, a New York domiciliary, is a co-beneficiary of that res. In like fashion, Catlin's presence and participation in the negotiations cannot reasonably be considered merely passive or tenuous (Stip. ¶¶1-6; Kestenbaum Decl. Exs. B-C).

Not only did the commercial transaction cross into New York, the California defendants and their counsel physically came into New York to facilitate the transaction. Because the redemption-related transaction forms the basis of this action, personal jurisdiction may be predicated thereon under CPLR 302 (a) (1).

Accordingly, it is

ORDERED that the action shall continue before this court; and it is further

ORDERED that the parties shall appear for an evidentiary hearing in connection with plaintiff's motion on March 5, 2003 at 9:30 am

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(1) References to "Stip." are to the parties' stipulation of undisputed facts. References to "Kestenbaum Decl." are to the Declaration of Paul Kestenbaum submitted in opposition to the motion.

(2) Kestenbaum has openly acknowledged his fiduciary status flowing to both sides of the transaction (Kestenbaum Decl. 13, Ex. A).

ties Credit Corp LLC; FIRSI DOMINION CAPITAL LLC v. First Dominion Funding 1; SB AMERICA INC v. Sun Bong Textile Co. Ltd; TRUSTEES OF THE UNITED TEAMSTERS FUN v. I-Tock General, Inc.; HURRICAN ENTERTAINMENT v. Bank of NY; OIL HEAT INSTITUTE OF LONG ISLAND INC v. Island Group Adminsitrator; BRODERv. NYNEX Information Resources Co.; DELAFONTAINE v. Toms; KOLON AMERICA INC v. Zeiouf International Corp. – See memorandum on file.