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United States District Court, S.D. New York.

GOLDEN GULF CORPORATION, Plaintiff,
v.
JORDACHE ENTERPRISES, INC. and Lucky–Goldstar International (U.K.) Limited, Defendants.

No. 91 Civ. 8506 (LAP).
|
Feb. 24, 1994.

OPINION AND ORDER

PRESKA, District Judge:

***1** Plaintiff Golden Gulf Corporation ("Golden Gulf") has brought this diversity action for declaratory relief and money damages against Jordache Enterprises, Inc. ("Jordache"). On March 12, 1993, plaintiff filed an amended complaint joining Lucky–Goldstar International (U.K.) Limited ("LGI(UK)") as a defendant and adding fraud and breach of warranty claims against LGI(UK). Amended Complaint at ¶¶ 3, 26–33. On March 29, 1993, the claims for money damages against Jordache were dismissed without prejudice pursuant to Fed.R.Civ.P. 41(a)(1).

Defendant LGI(UK) has moved to dismiss the action against it for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2). [1] For the reasons stated below, defendant's motion is granted and the action against LGI(UK) is dismissed.

Background

Plaintiff Golden Gulf is a Panamanian corporation with its principal place of business in Panama City, Panama. Amended Complaint at ¶ 1. It is engaged in the sale and distribution of clothing and apparel. *Id.*

LGI(UK) is a British company based in London and engaged in the importing and exporting of various products, including electronic goods, metals, machinery, chemicals, semiconductors and textiles. Affidavit of S.K. Chung in Support of Motion to Dismiss for Lack of Personal Jurisdiction Sworn to on May 28, 1993 ("Chung Aff.") at ¶ 2. LGI(UK) is a wholly-owned subsidiary of Lucky Goldstar International Corp. ("LGI(International)"), a Korean corporation based in Seoul, Korea. *Id.* at ¶ 4 Pursuant to a Licensing Agreement with Jordache, LGI(International) is authorized to use the "Jordache" trademark on certain types of garments to be manufactured in the Republic of Korea. Reply Affidavit of Jeffrey A. Conciatori Sworn to on July 15, 1993 ("Reply Aff.") at ¶¶ 3, 5.

The transaction at issue involves the manufacture of certain "Jordache" brand merchandise by LGI(UK). Amended Complaint ¶ 6. LGI(UK) sold the goods to Express Wholesale Supplies Ltd. ("Express Wholesale"), a British company located in London, which in turn sold them to plaintiff. *Id.* at ¶¶ 10, 12. The goods were shipped from Korea to Italy, and no part of the transaction is alleged to have taken place in New York State. *Id.* at Ex. A. The sale to Golden Gulf was conducted pursuant to a certificate issued by LGI(UK) representing that no trademark restrictions attached to the merchandise. *Id.* Plaintiff alleges that it relied on LGI(UK)'s representation when it purchased the goods from Express Wholesale. Amended Complaint at ¶ 8.

Golden Gulf desired to resell the merchandise in the United States, but was notified by Jordache that such an action would be construed as a trademark infringement. Amended Complaint ¶ 13, Ex. C. Plaintiff commenced this action for a judgment declaring its right to sell the product in question in any market it sees fit or, in the alternative, a judgement in the amount of $2.5 million against LGI(UK) for fraud and breach of warranty. LGI(UK) moves for dismissal for lack of personal jurisdiction.

Discussion

***2** Personal jurisdiction in a diversity case is determined by the law of the state in which the district court sits. *Landoil Resources Corp. v. Alexander & Alexander Services, Inc.,* 918 F.2d 1039, 1043 (2d Cir.1990); *Arrowsmith v. U.P.I.,* 320 F.2d 219, 223 (2d Cir.1963).

In deciding a motion to dismiss, the court has the discretion to either rule on the motion based on the affidavits submitted by the parties or to conduct an evidentiary hearing. *Cutco Indus., Inc. v. Naughton,* 806 F.2d 361, 364 (2d Cir.1986); *Visual Sciences, Inc. v. Integrated Communications, Inc.,* 660 F.2d 56, 58 (2d Cir.1981). If the defendant contests the plaintiff's factual allegations, a hearing must be held. *Ball v. Metallurgie*

Hoboken–Overpelt, S.A., 902 F.2d 194, 197 (2d Cir.1990). For the purposes of this motion to dismiss, the parties are not disputing any material facts, consequently no hearing is presently required, and a ruling on affidavits is appropriate. [2]

The burden of proof rests on the plaintiff to show the existence of personal jurisdiction. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.,* 763 F.2d 55, 57 (2d Cir.1985). Where the issue is addressed on affidavits, the plaintiff must only make a prima facie showing of personal jurisdiction to survive a motion to dismiss. *A.I. Trade Finance, Inc. v. Petra Bank,* 989 F.2d 76, 79 (2d Cir.1993); *Ball,* 902 F.2d at 197. All allegations will be construed in the light most favorable to the non-moving party, the plaintiff, and all doubts resolved in its favor. *A.I. Trade Finance, Inc.,* 989 F.2d at 79, 80. Personal jurisdiction will ultimately have to be established by a preponderance of the evidence, either at an evidentiary hearing or at trial. *Id.*

New York's Civil Practice Law and Rules ("CPLR") sections 301 and 302 provide for personal jurisdiction over a non-domiciled defendant through the application of the traditional "doing business" doctrine or through the state's long-arm statutes. [3]

A. CPLR § 301

Plaintiff argues for the existence of general jurisdiction predicated on CPLR § 301. [4] Supplement to Plaintiff's Memorandum in Opposition to Motion to Dismiss ("Plaintiff's Supp.Mem.") at II. In ascertaining whether CPLR § 301 provides grounds for jurisdiction, the New York courts employ the "doing business" test. *Beja v. Jahangiri,* 453 F.2d 959, 961 (2d Cir.1972). To "do business" in New York, the defendant must be "engaged in such a continuous and systematic course of 'doing business' here that a finding of its '*presence* ' in this jurisdiction is warranted." *Keramchemie GMbH v. Keramchemie (Canada) Ltd.,* 771 F.Supp. 618, 622 (S.D.N.Y.1991) (emphasis added) (quoting *Landoil Resources Corp. v. Alexander & Alexander Serv., Inc.,* 77 N.Y.2d 28, 33, 565 N.E.2d 488, 490, 563 N.Y.S.2d 739, 741 (1990)); *see Mareno v. Rowe,* 910 F.2d 1043, 1046 (2d Cir.1990) ("an entity is amenable to jurisdiction in New York if it is 'doing business' in New York so as to establish its presence in the state").

***3** The defendant must be present in New York, not occasionally or casually, but with a fair measure of permanence and continuity. *Hoffritz for Cutlery,* 763 F.2d at 58. Furthermore, to be subject to *in personam* jurisdiction, the Constitution requires the quality and nature of the defendant's contacts with the state to be such that "the maintenance of the suit [in that forum] does not offend traditional notions of fair play and substantial justice." *International Shoe v. State of Washington, Etc.,* 326 U.S. 310, 316 (1945). *See Diskin v. Starck,* 538 F.Supp. 877, 880 (E.D.N.Y.1982); *Laufer v. Ostrow,* 55 N.Y.2d 305, 309–310, 449 N.Y.S.2d 456, 458, 434 N.E.2d 692, 694 (1982).

LGI(UK) does not have an office, telephone number, bank account, employees, real estate or other assets located in New York State. Chung Aff. ¶ 3. Plaintiff's allegations of LGI(UK)'s presence in the state are based on the Jordache Licensing Agreement. Plaintiff's Supp.Mem. at II, III. In its submissions, plaintiff fails to address directly the question of the identity of the parties to the Licensing Agreement. According to defendant, however, the contract was entered into by Jordache and LGI(International). Reply Aff. at ¶¶ 3, 5, 7. LGI(UK) is not a party to the Agreement. *Id.* at ¶ 5. Consequently, defendant argues that no matter what obligations are alleged to flow from the Licensing Agreement, they have no impact on the jurisdictional status of the defendant. *Id.*

As long as corporate formalities are observed, operations and responsibilities are distinctly maintained and no agency relationship exists, the court will not view distinct corporations as a single entity. McKinney's Consolidated Laws of New York Annotated C301:3 at 13 (1990). *Cf. Landoil Resources Corp.,* 918 F.2d at 1046 (in the absence of showing that defendant was an agent or a division of a New York entity, the court found no *in personam* jurisdiction); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.,* 751 F.2d 117, 121 (2d Cir.1984) (personal jurisdiction found to exist where, *inter alia,* the parent corporation controlled subsidiary's executive personnel hiring and corporate formalities were not observed); *Dogan v. Harbert Construction Corp.,* 507 F.Supp. 254, 258 (S.D.N.Y.1980) ("A foreign corporation may be present in New York by virtue of the activities of its agent."). "[T]he 'doing business' test does not subject a subsidiary corporation to personal jurisdiction simply because a state has jurisdiction over the parent, even if the parent is the sole shareholder of the subsidiary." *Schenck v. Walt Disney Co.,* 742 F.Supp 838, 842 (S.D.N.Y.1990) (quoting *Saraceno v. S.C. Johnson & Son, Inc.,* 83 F.R.D. 65, 67 (S.D.N.Y.1979); *see Ross v. Colorado Outward Bound Schools, Inc.,* 603 F.Supp 306, 310 (W.D.N.Y.1985) ("mere existence of a garden-variety parent-subsidiary or franchisor-franchisee

relationship is not sufficient to establish jurisdiction ..."). *Also see Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.,* 751 F.2d at 120.

***4** Furthermore, even if LGI(UK) were a party to the Licensing Agreement, § 301 jurisdiction still would not exist. The "doing business" determination is unique to each case and requires the court to consider all relevant facts, without relying too heavily on any one factor. *Katz Agency, Inc. v. Evening News Ass'n,* 514 F.Supp 423, 427 (S.D.N.Y.1981), *aff'd,* 705 F.2d 20 (2d Cir.1983). Golden Gulf argues that the following provisions in the Licensing Agreement amount to "doing business" in New York: (1) provision for payment of fees in New York state to Jordache; (2) requirement for samples, designs, advertising copy and annual statements to be furnished to Jordache in New York; (3) a New York arbitration clause; and (4) indemnification of Jordache for certain claims. Plaintiff's Supp.Mem. at II, III. These activities do not have the requisite level of permanence and continuity so as to vest general jurisdiction on the defendant and make LGI(UK) amenable to suit in New York. [5]

For instance, a New York court has recently held that a non-domiciliary's mailing of marketing material to travel agencies, infrequent advertising in newspapers and maintenance of bank account incidental to operations are not permanent and continuous activities within the meaning of § 301. *Weinstock v. Le Sport,* 194 A.D.2d 400, 598 N.Y.S.2d 511 (1st Dept.1993). *Cf. Mareno v. Rowe,* 910 F.2d 1043 (2d Cir.1990), *cert. denied,* 498 U.S. 1028 (1991) (finding a corporation is not "present" in New York where it did not solicit business, had offices, bank accounts, property, or employees within the forum); *Vendetti v. Fiat Auto S.P.A.,* 802 F.Supp 886 (W.D.N.Y.1992) (holding that an auto manufacturer's maintaining incidental bank accounts, indirect marketing expenditures, communication with dealers, and intercompany loans and cash transfers with a New York affiliate did not constitute "doing business").

Nor does the existence of a New York arbitration clause in the Licensing Agreement assist the plaintiff in establishing personal jurisdiction over LGI(UK). Consent to arbitration in New York may be a consent to personal jurisdiction of the courts in this forum pursuant to CPLR § 302(a)(1). *Intermeat, Inc. v. American Poultry Inc.,* 575 F.2d 1017, 1023 (2d Cir.1978). For the jurisdiction to vest, however, the action must arise out of the contract containing the arbitration agreement. *Cf. Intermeat, Inc. v. American Poultry Inc.,* 575 F.2d 1017; *Viacom Intern. v. Melvin Simon Productions,* 774 F.Supp 858, 865 (S.D.N.Y.1991).

Finally, the mere existence of a business relationship with entities within New York State is insufficient to establish "presence" therein. *Insurance Co. of State of Pa. v. Centaur Ins. Co.,* 590 F.Supp 1187, 1189 (S.D.N.Y.1984). To say that LGI(UK) is present in New York for purposes of answering any claim would be manifestly unjust according to traditional notions of fair play and substantial justice. *International Shoe,* 326 U.S. at 316.

B. CPLR § 302

***5** Defendant further argues that this court has no personal jurisdiction under CPLR § 302. Defendant's Memorandum of Law in support of Its Motion to Dismiss at 8. It is an established rule of law that for a state to exercise long-arm jurisdiction over a non-domiciliary, the cause of action must arise out of or be connected with the activity of the defendant within the state. *International Shoe,* 326 U.S. at 319; *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985) (finding minimum contacts to exist where a Michigan franchisee had contractual obligations to Florida franchisor and the litigation arose out of the franchise agreement).

Since no part of the instant transaction is alleged to have taken place in this forum, the only contacts possibly giving rise to personal jurisdiction in New York must arise from the Licensing Agreement between LGI(International) and Jordache. Section 302(a)(1) requires not only that the defendant transacted business in the state, but also "the cause of action must 'arise' from the business so transacted." *McShan v. Omega Louis Brandt Et Frere, S.A.,* 536 F.2d 516, 517 (2d Cir.1976); *Fontanetta v. American Board of Internal Medicine,* 421 F.2d 355, 357 (2d Cir.1970).

Regardless of whether the alleged provisions of the Licensing Agreement constitute "transacting business" within the meaning of CPLR § 302(a)(1), the causes of action did not arise from the Agreement. The fraud claim, the breach of warranty claim and the breach of contract claim all arose out of the sales transaction involving LGI(UK), Express Wholesale and Golden Gulf. Amended Complaint ¶¶ 17–33. The elements of the causes of action asserted against LGI(UK) are not dependent on the existence of the Agreement, but on representations made by LGI(UK). Amended Complaint ¶¶ 18, 21, 23, 26–29. Thus CPLR § 302(a)(1) does not provide this Court with personal jurisdiction. Likewise, neither CPLR § 302(a)(2) nor § 302(a)

(3) apply to the facts as presented to this court. The tortious act complained of, fraud, is not alleged to have taken place in New York, nor cause an injury within the forum.

Conclusion

For the foregoing reasons, the plaintiff has failed to make a prima facie showing of personal jurisdiction over the defendant LGI(UK). Defendant LGI(UK)'s motion to dismiss is granted, and the action is dismissed as to LGI(UK).

SO ORDERED.

All Citations

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Footnotes

1 LGI(UK)'s Notice of Motion specifies Fed.R.Civ.P. 12(b)(6) as the pertinent rule, but it is clear from its memorandum of law and affidavits that the motion is made pursuant to Fed.R.Civ.P. 12(b)(2).

2 The plaintiff Golden Gulf has not submitted any affidavits in opposition to LGI(UK)'s motion. Its position is stated in the Plaintiff's Memorandum of Law and the Supplement to Plaintiff's Memorandum of Law (together "Plaintiff's Memoranda").

3 CPLR § 301 states:

"A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

CPLR § 302(a) provides in relevant part that New York may exercise jurisdiction over a non-domiciliary who in person or through an agent:

> "1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3. commits a tortious act without 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 (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 ..."

4 Unlike specific jurisdiction, general jurisdiction allows a state to exercise personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, n. 9 (1984).

5 As demonstrated below, these provisions do not subject defendant to specific jurisdiction either, as the dispute at issue does not arise out of these contacts.