Freeway Ins. Servs., Inc. v Quidachay

2013 NY Slip Op 30245(U)

January 14, 2013

Sup Ct, New York County

Docket Number: 651026/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN
Justice

PART 63

FreeWay Insurance Services Inc. et al

-v-

Quidachay, Abel

INDEX NO. 651026/12
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____
Answering Affidavits — Exhibits ____ | No(s). ____
Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and Order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____ FOR THE FOLLOWING REASON(S):

Dated: 1/14/13

EM, J.S.C.
HON. ELLEN M. COIN

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

---X

FREEWAY INSURANCE SERVICES, INC and
CONFIE SEGUROS HOLDING CO.,

Plaintiffs,

-against-

ABEL A. QUIDACHAY, and DOES 1 TO 10,

Defendants.

---X

Index Number: 651026/2012
Submission Date: September 12, 2012
Motion Sequence: 001

For Plaintiffs :
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For Defendant
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Papers considered in review of this motion for summary judgment in lieu of complaint:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Reply Affidavit	3

ELLEN M. COIN, J.:

In this action for breach of non-solicitation clauses in three consecutive stock option agreements, as well as breach of fiduciary duty, misappropriation of trade secrets, tortious interference with contractual relations and prospective economic relations, unfair competition, prima facie tort, conversion and unjust enrichment, defendant Abel A. Quidachay, plaintiff's former executive vice president for mergers and acquisitions, moves to dismiss this action pursuant to CPLR 3211(a)(8) for lack of personal long-arm jurisdiction.

According to the complaint, plaintiff Confie Seguros Holding Co.("Confie"), a Delaware corporation headquartered in New York City, alleges that Quidachay, a resident of California,

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commenced employment with its subsidiary, Freeway Insurance Services, Inc. ("Freeway"), a California corporation, on December 7, 2002. Until May 12, 2009, Quidachay held the position of district manager for the local regional market. When defendant received the position of vice president of sales, he entered into a stock option agreement directly with Confie on May 12, 2009. Paragraph 15 of the agreement provides for non-solicitation of employees, agents and customers by Quidachay for the period of two years after his termination. Paragraph 23 sets out the respective addresses for giving any requisite notices pursuant to the agreement: to Confie in New York and to Quidachay in California.

On March 12, 2011, Quidachay was promoted to the position of president for the southwestern market, a position he held until November 1, 2011, when he was made executive vice president for mergers and acquisitions. In this period, Confie and Quidachay entered into two additional stock option agreements, dated May 25, 2010 and October 10, 2010. Both of these agreements contained the said non-solicitation clause in Paragraph 15. All stock options agreements in Paragraph 22 provide for New York law as governing the agreements, but are devoid of a forum-selection clause. Aside from these three agreements, no other written employment agreements exist between the parties. Plaintiffs allege that a draft of the bonus agreement was circulated between the parties some time in 2011 but was never executed.

Plaintiffs further alleges in the complaint that in his various positions for Freeway and Confie, Quidachay had direct access to confidential and proprietary trade secrets. On March 14, 2012, Quidachay was terminated, allegedly for cause. Confie alleges that shortly after the termination, Quidachay solicited and recruited Freeway employees and disclosed its trade secrets to unspecified third parties.

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In opposition to the current motion, plaintiffs submit an affidavit of Martin Rothberg, Confie's president. Rothberg avers that Confie has been headquartered in New York since 2008 and that since that time, New York has been "the center of operations for Confie's nationwide operations where executive and annual meetings took place for Confie and its subsidiaries." (Rothberg Affid., ¶ 6). Rothberg further asserts that when Quidachay assumed the position of executive vice president, they had weekly telephone conversations, and in October and December 2011[1], Quidachay traveled to New York to discuss joint business strategy with him, as well as with Matt Grossberg, who was responsible for Northeastern operations.(Rothberg Affid., ¶ 13) Also, Rothberg alleges that he traveled to three trade shows with Quidachay, where Quidachay handed out a business card indicating that his office was in New York.(Rothberg Affid., ¶¶ 15-17).

In reply, Quidachay argues that at all times, Quidachay worked out of Freeway's offices in California, received all compensation only from Freeway, and received and executed the stock option agreements in California. Quidachay also argues that two trips to New York in ten years do not justify exercise of personal jurisdiction in New York.

Discussion.

The criterion for deciding a CPLR 3211 motion is whether the complaint states a legal cause of action. (*Held v Kaufman,* 91 NY2d 425, 432 [1998]). The court's role is simply to determine whether the facts, as alleged, fit into any valid legal theory. (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). While, generally, on pre-answer motions extrinsic evidence such as a defendant's affidavits are not considered, such evidence is proper to prove lack of jurisdiction.

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[1]Rothberg's includes an apparent typographical error, referring to the second meeting as having occurred in December 2012.

(*See MediaXposure Ltd. [Cayman] v Omnireliant Holdings, Inc.*, 2010 NY Slip Op 51835[U], *4 [Sup Ct, New York County 2010]).

"On this record, made upon a preanswer motion to dismiss the action under CPLR3211 (a) (8), the plaintiff need only make a prima facie showing that personal jurisdiction exists." (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2nd Dept 2005][citation omitted]). However, "[a]s the party seeking to assert personal jurisdiction, the plaintiff bears the burden of proof on that issue but . . . to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts exist to exercise personal jurisdiction over the defendant[s]." (*People v Frisco Marketing of NY LLC*, 93 AD3d 1352, 1353 [4th Dept 2012] (citations omitted); *D & R Global Selections, S.L. v Bodeaga Olegario Falcon Pinero*, 90 AD3d 403, 405 [1st Dept 2011]). "In this connection, the court interprets the pleadings and affidavits in the light most favorable to the plaintiffs." (*Central Sports Army Club v Arena Assocs., Inc*, 952 F Supp 181, 187 [SDNY 1997] (citations omitted)).

CPLR 302 (a) (1) enables personal jurisdiction over a non-domiciliary who, in person or through an agent, "transacts any business" within New York, provided that the plaintiff's causes of action arise out of the transaction of business. (*Lebel v Tello*, 272 AD2d 103, 103-104 [1st Dept 2000]). Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). "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 quotation marks and citations omitted]).

In breach of contract actions, the defendant's purposeful acts must be in relation to the contract, and may be performed before or after the contract is made. (*Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 457, *cert denied* 382 US 905 [1965]). Purposeful acts involving a contract may be found even when the last act marking the formal execution of a contract did not occur in New York (*id.*), and may include contract negotiations between the parties, meetings at which the defendant was present, or letters and phone calls by the defendant to the plaintiff in New York. (*Scholastic, Inc. v Stouffer*, 2000 WL 1154252, *4 [SDNY 2000]; *see also Agency Rent A Car Sys., Inc. v Grand Rent A Car Corp.*, 98 F3d 25, 29 [2d Cir 1996] [factors for consideration include whether defendant had an on-going contractual relationship with a New York entity, whether the contract was negotiated or executed in New York, and whether defendant attended meetings here]). While limited contacts through telephone calls, mailings, and facsimile, on their own, are usually insufficient to confer personal jurisdiction under CPLR 302 (a) (1) (*see International Customs Assoc., Inc. v Ford Motor Co.*, 893 F Supp 1251, 1261 [SD NY 1995], *affd* 201 F3d 431 [2d Cir 1999], *cert denied* 530 US 1264 [2000]; *Granat v Bochner*, 268 AD2d 365, 365 [1st Dept 2000]), such contacts may provide a basis for jurisdiction where the defendant otherwise projected itself into the state, and the nature and the quality of its New York contacts show that it meant to avail itself of the benefits and protections of New York laws. (*Fischbarg*, 9 NY3d at 382-383).

The First and Second Departments have both ruled that in the context of employment arrangements, out-of-state employees of New York-based corporations who have substantial interaction with the headquarters in New York are deemed to have "transacted business [in New York] by entering into agreements which, in each case, gave rise to substantial relationships, both

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substantively and temporally, with a New York employer," irrespective of where the agreements were actually negotiated and executed. (*Opticare Acquisition corp. v Castillo*, 25 AD3d 238, 244 [2nd Dept 2005]; *see also Olympus America, Inc. v Fujinon, Inc.*, 8 AD3d 76, 77 [1st Dept 2004]).

Applying the above-cited principles and crediting the allegations in the complaint and Rothberg affidavit, the Court finds that plaintiff has sufficiently alleged a prima facie showing that exercise of personal jurisdiction over Quidachay comports with both New York law and the due process clause of the federal constitution. This case is closely analogous to a factual scenario in *Olympus America, Inc.* While Quidachay did not physically work out of Confie's offices in New York, over a ten-year period he became fully acquainted with the nature and scope of the relationship between Freeway and Confie, and he allegedly knew that since 2008 Confie was based in New York. Although the sales of insurance policies Quidachay originated were all centered on the western coast, he was aware that these business activities "generated a stream of commerce" leading directly to Confie in New York. (See *Olympus America, Inc.*, 8 AD3d at 185).

The fact that the stock option agreements were all delivered to Quidachay and executed in California does not alter this conclusion. (*See Opticare Acquisition Corp.*, 25 AD3d at 244). Further, the New York forum-selection clause, although by itself non-dispositive, is nonetheless indicative of the signatories' intent to avail themselves of the protection of New York law. The numerous interactions between Quidachay and Confie's headquarters, as well as an upward trajectory of Quidachay's professional growth within Freeway and Confie's corporate structure, culminating with appointment as vice president for mergers and acquisitions, all indicate that Quidachay was not a back-office employee of a regional representative with few connections to the parent company's headquarters, as such individuals are not ordinarily granted stock option sale opportunities. Instead,

Quidachay's increasingly substantial interactions directly with Confie's upper management in New York as part of his daily activities are sufficient to qualify as "conducting business" in New York, and the Court's exercise of jurisdiction over him will not offend traditional notions of fair play and substantial justice. (*See Id.* at 247; *see c.f.*, Fischbarg v Doucet, 38 AD3d 270, 275 [1st Dept 2007]; *see also 20@LLC Paul Misir v Lynde*, 2012 NY Slip Op 32114U, * 11 [Sup Ct, Nassau County 2012]).

Executive Life Ltd v Silverman (68 AD3d 715 [2nd Dept 2009]), relied upon by Quidachay, is inapposite, mainly because that case involved a New York plaintiff who was an independent contractor interacting with a client in Colorado only by phone, fax and email, and did not involve an employment relationship.

Further, plaintiffs have sufficiently alleged that underlying the business tort cause of action is Quidachay's possession of protected trade information, which was obtained in the course of his employment. This justifies exercise of the personal jurisdiction under CPLR 302(a)(3) as well, despite the fact that he allegedly misuses this information outside of New York, because the financial injury is poised to affect Confie in New York. (*See e.g., PDK Labs, Inc. v Proactive Labs, Inc.*, 325 F Supp 2d 176, 180 [EDNY 2004]).

Finally, the "articulable nexus" between Quidachay's employment activities and the asserted claims is evident on the face of the complaint.

In accordance with the foregoing, it is hereby

ORDERED that defendant's motion to dismiss pursuant to CPLR 3211(a)(8) is denied; and it is further

ORDERED that defendants is directed to serve an answer to the complaint within 20 days

after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on April 24, 2013 at 2:00 p.m.

This constitutes the decision and order of the court.

Dated: 1/14/13

ENTER:

Ellen M. Coin, A.J.S.C.