

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ELLEN M. COIN

PRESENT: _____
Justice

PART 6

Index Number : 653588/2011
ORC INTERNATIONAL, INC.
vs.
CLEMENTE, PETER
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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.*

Dated: 8/16/12

EC, J.S.C.

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

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

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

-----X
ORC INTERNATIONAL, INC.,

Plaintiff,

Index Number: 653588/2011

Submission Date: May 16, 2012

Mot. Seq.: 001

- against -

PETER CLEMENTE AND DOMANI VENTURES, INC.,

Defendants.
-----X

For Plaintiff :

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Papers considered in review of this motion to dismiss :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Memorandum of Law in Support of Motion to Dismiss.....	<u>2</u>
Lasky Affidavit in Opposition.....	<u>3</u>
Memorandum of Law in Opposition.....	<u>4</u>
Clement Affidavit. in Reply.....	<u>5</u>
Memorandum of Law in Reply.....	<u>6</u>

ELLEN M. COIN, J.:

In this breach of contract action, defendants Peter Clemente (Clemente) and Domani Ventures, Inc. (Domani) move to dismiss the complaint, pursuant to CPLR 3211 (a) (8), for want of personal jurisdiction, or, if jurisdiction is found, pursuant to CPLR 3211 (a) (1) and (7), for lack of any claim on which to base damages.

Plaintiff ORC International, Inc. (ORC) describes itself as a global market research firm that provides customer strategy, market planning, and corporate brand services to national and international companies. ORC is a Delaware corporation with a business address in New York City.

Domani, established by Clemente and another individual, provides corporate development and strategic planning services to other businesses. Domani is a California corporation with an address in that state. Clemente, Domani's chief executive officer, lives in California. Defendants contend that they have no contacts with New York, that they were agents for a disclosed principal, and that the principal is liable for plaintiff's damages.

In February 2011, Clemente asked nonparty John Delaney, an ORC representative located in the New York office, to look at a proposal from one of ORC's competitors. The proposal was about researching the market appeal of a new sports mouthpiece made by nonparty Power Balance, LLC (PB), a California company. PB had hired Domani to find a researcher. Acting on Delaney's suggestion, Clemente called Sandy Lasky, ORC's senior vice-president, at her office in Boston. Clemente and Lasky engaged in numerous discussions and correspondences regarding the research project. According to Clemente, PB was involved in the discussions and negotiations. ORC and Domani finally agreed that ORC would conduct consumer research on the mouthpiece through online surveys and five in-person focus groups at a cost of \$100,000. Apparently, the parties did not enter into a formal written agreement, but stated their terms in the proposal and e-mails.

Clemente and a PB representative submit affidavits in which they state that, during the negotiations and while the project was proceeding, ORC was at all times informed and aware that PB would pay the bill, that defendants were acting as PB's agent, and that defendants were not responsible for payment. ORC claims that while it understood that PB created the product to be researched, it was never told that PB was the party responsible for payment. Allegedly, ORC was advised that Domani would pay for the project.

After the research ended, ORC sent an invoice for \$100,000 to Domani. A Domani representative informed ORC that Domani was not responsible for the bill and tried to obtain payment from PB for ORC. Soon after, PB filed for bankruptcy in California.

ORC asserts causes of action for breach of contract, for account stated, and for unjust enrichment. According to the complaint, Clemente is named as a defendant, along with Domani, because the agreement to do the research was entered into on March 15, 2011, while Domani was not legally incorporated until April 27, 2011. ORC asserts that Clemente is liable for the bill. That issue and whether defendants were PB's agents are points of dispute. The court notes that while both sides refer to Domani as a corporation, its Fictitious Business Name Statement, filed in California, identifies Domani as a general partnership rather than a corporation (Motion, Ex. A).

Regarding jurisdiction, Clemente alleges that defendants have never transacted business in New York, derive no revenue from here, and have no clients here. Lasky, the ORC vice-president with whom Clemente negotiated, is located in Boston. The ORC employee who acted as the project manager is located in New Jersey. Clemente says that none of the activities in which defendants participated, including negotiations, solicitations, and discussions, had any connection with New York, and that he did not go to New York for any reason connected with the project. ORC points out that defendants' solicitation of business started with communication to Delaney in ORC's New York office and that two of the five focus groups were held in New York; however, there is no allegation that Clemente attended those groups. On the contrary, defendants submit an affidavit by PB's former senior vice president Brent Granado, who attests that in April 2011, he traveled to New York together with PB's president, Keith Kato, to personally observe ORC's work with the focus groups in New York. Neither Clemente nor any other representative of Domani accompanied them.

Discussion

Because this is a pre-answer motion, the court is not prepared to assess the merits of plaintiff's allegations against defendants' contrary assertions in regard to the disclosure agency issue and Clemente's personal liability. (*See Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). 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]). However, the parties' assertions on jurisdiction may be entertained as to both defendants. 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. (*See MediaXposure Ltd. [Cayman] v Omnireliant Holdings, Inc.*, 2010 NY Slip Op 51835[U], *4 [Sup Ct, New York County 2010]).

"As 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)).

Defendants show that CPLR 301 cannot be employed to extend jurisdiction over them. Clemente does not reside in New York. Domani does not do business in New York and is not a New York domiciliary for purposes of CPLR 301. Defendants were not physically present in New York when served with process. (*See Rawstorne v Maguire*, 265 NY 204, 209 [1934]). Nor is there any allegation that they consented to jurisdiction here. (*See Banco do Commercio e Industria de Sao Paolo v Esusa Engenharia e Construcoes*, 173 AD2d 340, 341 [1st Dept 1991]). Indeed, ORC does not attempt to oppose defendants' contentions regarding CPLR 301, but confines its arguments to CPLR 302 (a) (1), the long-arm statute.

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).

Examination of the totality of the circumstances here fails to reveal that defendants purposefully transacted business in New York. That the initial solicitation of business took place here does not alter this result (*see Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434 [2d Dept 2006] [faxing executed contracts to New York and making a few telephone calls do not qualify as purposeful acts constituting the transacting of business]). The first e-mail to Delaney in the New York office was preliminary in nature. More thorough negotiations took place only after Delaney forwarded Clemente's email to Lasky in Orc's Boston office, and after Lasky discussed the market research proposal with Clemente on the phone from Boston. The ORC personnel involved with the research and with whom defendants had the most communication were also in other states.

The fact that Orc conducted some of the research in New York is also unavailing, as its market research activities do not bear a substantial relationship either to contract formation or breach. (*See Roper Starch Worldwide, Inc. v Reymer & Assocs., Inc.*, 2 F Supp 2d 470, 474 [SDNY 1998]). Further, it was PB's employees, and not Clemente, who attended the focus group activities in New York, not Clemente. Under these circumstances, it would not be fair for the Court to exercise jurisdiction over defendants, because Orc has not alleged the existence of sufficient facts to conclude that defendants' conduct and connection with New York are such that they should reasonably anticipate being haled into court here. (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000], quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]).

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted, and the Clerk is directed to enter judgment in favor of defendants dismissing this action without prejudice to its refiling in an appropriate jurisdiction, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

Dated: _____

8/16/12

ENTER:



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