

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 3

Index Number : 650441/2008

ARGOS CAPITAL APPRECIATION

vs.

GILO, DAVIDI

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO.

650441/2008

MOTION DATE

8/30/10

MOTION SEQ. NO.

2

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for Defendant's Motion to Dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

Repeating Affidavits _____

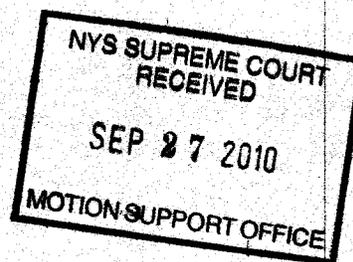
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION



Dated: 9-24-10

Eileen Bransten
HON. EILEEN BRANSTEN

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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: PART THREE

-----X
ARGOS CAPITAL APPRECIATION
MASTER FUND, L.P.

Plaintiff,

Index No.: 650441/2008
Motion Date: 08/30/10
Motion Sequence No.: 002

-against-

DAVIDI GILO,

Defendant.

-----X
PRESENT: EILEEN BRANSTEN, J.:

In motion sequence no. 002, defendant Davidi Gilo moves for an order dismissing the complaint. Defendant's motion to dismiss is granted.

PROCEDURAL HISTORY

On November 18, 2008, Plaintiff Argos Capital Appreciation Master Fund, L.P. ("Plaintiff") filed a complaint against Defendant Davidi Gilo ("Defendant") alleging fraud, breach of contract and breach of the duty of good faith and fair dealing. On September 8, 2009, Defendant filed the instant motion to dismiss. On November 5, 2009, Plaintiff filed its opposition. On November 13, 2009, Defendant filed a reply in further support. The court heard oral argument on February 17, 2010, where Plaintiff asked for and was granted permission to supplement its filings. Five months later, on July 30, 2010, Plaintiff filed a memorandum of law in further opposition. On August 27, 2010, Defendant filed a

supplemental memorandum of law in further support of its motion. The motion was fully submitted on August 30, 2010.

FACTUAL BACKGROUND

Plaintiff is a limited partnership formed in Delaware with offices in New York (Complaint, ¶ 1). Defendant is the former Chief Executive Officer of Vyyo, Inc. (“Vyyo”), and also served once on Vyyo’s Board of Directors and owned Vyyo stock (Complaint, ¶ 5). Vyyo is a Delaware corporation, that, during all times relevant, was headquartered in Georgia and did not have an office in New York (Affidavit of Davidi Gilo [“Def. Aff.”], Sept. 7, 2009, ¶ 6).

Defendant lives in Italy, does not own or rent land in New York and does not maintain a bank account, P.O. box, or telephone number in New York (Def. Aff., ¶ 2). None of Defendant’s business entities are registered to do business in New York (Def. Aff., ¶ 7). While Defendant has previously served as Chairman of Arcadian Networks, Inc. (“Arcadian”), a company that does business in Valhalla, NY, Defendant has not visited Arcadian’s offices since 2007, and then for only a few hours (Def. Aff., ¶ 11). Defendant has not been in New York regularly; during 2007, when Defendant met with Plaintiff, Defendant was in New York only nine days (Def. Aff., ¶ 8). Defendant does not employ any agents or employees in New York, nor has Defendant designated an agent for service in New York (Def. Aff., ¶ 13).

On March 17, 2007, Defendant invited Plaintiff's president, Ephraim Gildor ("Gildor"), to a meeting in New York (Complaint, ¶ 2, 7) to discuss Vyvo's stock. This is the one and only meeting between Defendant and Plaintiff's representatives. At this meeting, Defendant allegedly told Gildor: that Goldman Sachs had an interest in buying shares of Vyvo; that in the near future Goldman Sachs would purchase shares of Vyvo; that Goldman Sachs had previously offered to buy shares of Vyvo at \$15/share, but Defendant thought its shares of stock were worth more; that Vyvo possessed "important proprietary technology" vital to cable companies; that Vyvo had several major deals in the works with communications companies, including one specific deal pending with Cox Communications; and that Defendant would hold his Vyvo shares and not sell (Complaint, ¶ 8).

On May 11, 2007, nearly two months after the lone New York meeting, Plaintiff bought 790,000 shares of Vyvo stock at \$6.50/share, for a total cost of \$5,154,895 (Complaint, ¶ 10). Defendant assisted Plaintiff in finding a third party from whom to buy these shares, but did not sell his own shares to Plaintiff (Complaint, ¶ 11). Five days later, Plaintiff purchased an additional 1000 shares of Vyvo at \$6.405/share, for a total cost of \$6,405 (Complaint, ¶ 12). The value of Vyvo's stock plummeted thereafter. Plaintiff tried to stem its losses by selling some stock as the fall occurred, but ultimately tendered its remaining shares at \$0.17/share (Complaint, ¶ 20).

Plaintiff now sues for breach of contract, breach of the duty of good faith and fair dealing and for fraud. Plaintiff claims that Defendant misrepresented facts about Vyvo and,

in doing so, violated a contract between Defendant and Plaintiff. Defendant has moved for dismissal under CPLR 3211 (a) (7) and (8), claiming that New York does not have jurisdiction over Defendant and that, even if it did have jurisdiction, Plaintiff has failed to state a claim upon which relief may be granted.

STANDARD FOR MOTION TO DISMISS

In a CPLR 3211 motion to dismiss, a plaintiff is not required to make a prima facie showing of jurisdiction. Such a requirement could “impose undue obstacles for a plaintiff, particularly one seeking to confer jurisdiction under the long arm statute... [because] the jurisdictional issue is likely to be complex” (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974] [internal citations and quotations omitted]). In order to defeat a dismissal motion, a plaintiff needs to show that jurisdictional facts “may exist” and that it is entitled to the disclosure expressly sanctioned by CPLR 3211 (d) (*id.* at 466). In determining whether Plaintiff has carried this minimal burden, the Court must view the jurisdictional allegations in the pleadings and supporting affidavits in the light most favorable to the plaintiff and resolve all doubts in its favor (*see Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]). “Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

ANALYSIS

Viewing the pleadings and affidavits in the light most favorable to Plaintiff, the court finds that the Defendant is not subject to the jurisdiction of New York courts under CPLR §§ 301, 302 (a) (1) or (2). No facts exist that would grant jurisdiction over Defendant. As such, Defendant's motion for summary judgment is granted.

1. CPLR § 301

Under CPLR § 301, a "court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

Defendant is not subject to jurisdiction under CPLR § 301. To the extent that Defendant may have conducted business in New York, he did not do so during the relevant time period in his personal capacity. Defendant acted as a corporate agent, not as an individual, and therefore cannot be held liable individually under CPLR § 301.

CPLR § 301 is a statute of general jurisdiction, not specific jurisdiction. "Courts require a higher level of contacts in cases of general jurisdiction than in cases of specific jurisdiction, as plaintiffs must show that those contacts are continuous and systematic in cases of general jurisdiction" (*MWL Brasil Rodas & Eixos Ltda v K-IV Enters. LLC*, 661 F Supp 2d 419, 425 [SD NY 2009]). "Extensive case law has evolved defining the nature and quality of the corporate activities which would be necessary to establish that a corporation is within New York not occasionally or casually, but with a fair measure of permanence and continuity so as to show that it is doing business... [A] fundamental *sine qua non* of all such

holdings is the requirement that defendant be shown to have been doing business at the time when the action was commenced” (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 156 [1st Dept 1992] [internal citation and quotation marks omitted]).

Even if a person does business in New York, he may not be subject to jurisdiction under CPLR § 301. An agent of a corporation is protected from CPLR § 301 jurisdiction if he is doing business as an agent of the corporation. “Although a corporation can act only through an employee or agent, the employee or agent being a live rather than a fictional being can act on behalf of himself or his employer or principal. He does not subject himself, individually, to the CPLR [§] 301 jurisdiction of our courts, however, unless he is doing business in our State individually” (*Laufer v Ostrow* 55 NY2d 305, 313 [1982]). “[W]hile it has been held that a nonresident individual, like a corporation, can be deemed present for jurisdictional purposes by virtue of doing business in this State, even as to causes of action unrelated to the business done within the State, the individual cannot be subject to such jurisdiction unless doing business here individually, rather than on behalf of a corporation” (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 159 [1st Dept 1992] [internal citations and quotation marks omitted]; see also *Warin v Wildenstein & Co.*, 2001 NY Slip Op 40127[U], *17-18 [Sup Ct, New York County Sept. 4, 2001]).

Plaintiff claims that Defendant has the following ties to New York: that Defendant derived \$940,000 in revenue from New York; that Defendant paid income taxes in New York from 2006-2008; that Defendant bought real property in New York in 2007, which he then

sold in 2008; that the LLC through which Defendant bought real property designated an agent for service in New York; that Defendant retained both a New York real estate agent and New York attorneys in buying the property in 2007; that Defendant received consulting fees from a New York-based corporation; that Defendant managed a New York-based corporation; that Defendant met with Plaintiff in New York regarding the purchase of Vyyo stock and thereafter Defendant emailed and called Plaintiff about that stock; that Defendant visited his wife and children while they were in New York from 2006-2008; and, finally, that Defendant's wife maintained an apartment in New York in 2007 (Memorandum of Law in Further Opposition of the Motion to Dismiss, pp. 9-10).

These facts fail to amount to the continuous and systematic contacts with New York required for general jurisdiction under CPLR § 301. Defendant paid taxes to New York as a non-resident, listing California or Italy as his place of residence on his tax forms. Such taxes were due because of Defendant's investments that were managed by New York companies; Defendant earned no wages and paid no employees in New York (Affidavit of Davida S. Scher ["Scher Aff."], ¶ 26-30, Exs. I-M). Defendant rarely and infrequently visited New York between 2006 and 2008, no more than two to three weeks per year, and then primarily to visit family. What Defendant's wife and children did or owned in New York is irrelevant to Defendant's own standing under New York law—the question is what contacts Defendant had with New York, not Defendant's family. Defendant never opened an office or designated an agent in New York for any of his businesses (Def. Aff., ¶ 7, 13).

Many of the facts cited by Plaintiff took place and had ended before the instant action occurred, rendering them irrelevant to the question of jurisdiction under § 301 (*see Lancaster*, 177 AD2d at 156). In sum, the totality of the circumstances and facts indicate that Defendant was not doing business in New York such that he would be subject to personal jurisdiction pursuant to CPLR § 301. Defendant did not have a systematic and continuous presence in New York during the relevant time period.

Finally, even if the March 17, 2007 meeting in New York between Plaintiff and Defendant and Defendant's work as a chairman of Arcadian were considered doing business in New York, the court would still not have jurisdiction over Defendant under CPLR § 301. Defendant's actions in talking with Plaintiff and in his rare appearances at Arcadian were undertaken as a corporate agent, not as an individual. Defendant was then the CEO of Vyyo and chairman of Arcadian, and his actions were undertaken on Vyyo's and Arcadian's behalf. Defendant did not subject himself to § 301 jurisdiction as an individual (*Laufer*, 55 NY2d at 313; *Lancaster*, 177 AD2d at 159; *Warin*, 2001 NY Slip Op 40127[U] at *17-18). Taking the pleadings in the light most favorable to Plaintiff, Plaintiff has not shown personal jurisdiction over Defendant pursuant to CPLR § 301.

2. CPLR § 302 (a)(1)

CPLR § 302 (a) (1) states that "[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any

non-domiciliary, or his executor or administrator, who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state.”

Plaintiff argues that CPLR § 302 (a) (1) grants jurisdiction over Defendant because Plaintiff and Defendant “transacted business” during their meeting in New York. However, CPLR § 302 (a) (1) does not grant personal jurisdiction over Defendant. There was no business transaction between Plaintiff and Defendant; at best, there was mere solicitation.

CPLR § 302 (a) (1) grants jurisdiction over nondomiciliaries for tort and contract claims where only a single act in New York need be alleged, “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]). Solicitation in New York alone is not a transaction, unless the solicitation leads to a business transaction in New York or else the Defendant “establishes a New York presence” with permanence and continuity (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201 [1st Dept 2003]). A business transaction in a contract matter consists of the signing of a contract; mere solicitation is not a transaction (*Irgang v Pelton & Crane Co.*, 42 Misc 2d 70, 73 [Sup Ct, Nassau County 1964]).

At best, Defendant's lone New York meeting with Plaintiff could be considered solicitation. Plaintiff and Defendant never entered into a contract together; there was no business transaction. Defendant merely informed Plaintiff of Vyyo's business positions and encouraged Plaintiff to invest in Defendant's business. Defendant transacted no business

with Plaintiff. No payment was exchanged between Plaintiff and Defendant in New York or as a result of the discussion in New York. Because there was no business transaction between Plaintiff and Defendant personally, New York courts have no jurisdiction over Defendant pursuant to CPLR § 302 (a) (1).

3. CPLR § 302 (a) (2)

CPLR § 302 (a) (2) states that “[a]s to a cause of action arising from any of the acts enumerated in this section, 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 within the state, except as to a cause of action for defamation of character arising from the act.”

A tortious act must be pled in order for CPLR § 302 (a) (2) to grant jurisdiction (*Platt Corp. v Platt*, 17 NY2d 234, 237 [1966]). “CPLR § 302 (a) (2) reaches only tortious acts performed by a defendant who was physically present in New York when he performed the wrongful act” (*Maranga v Vira*, 386 F Supp 2d 299, 310 [SD NY 2005] [internal citations and quotations omitted]).

In order to receive the benefits of long-arm jurisdiction under CPLR § 302 (a) (2), Plaintiff must state a claim for a tort. Plaintiff has not done so.

First, Plaintiff’s allegation of breach of contract fails to state a claim. Plaintiff does not allege any contract between Plaintiff and Defendant, nor does Plaintiff allege any specific provisions of a contract that Defendant supposedly breached. Plaintiff did not attach any

contract to his pleadings. Plaintiff solely alleges that Defendant put Plaintiff in contact with a third party who then sold shares of Vyyo to Plaintiff. Plaintiff's failure to state the provisions of a contract allegedly breached or to attach the alleged contract that was breached to the pleadings is a failure to state a cause of action for breach of contract (*Kraus v Visa Intern. Serv. Assoc.*, 304 AD2d 408, 408 [1st Dept 2003]; *see also Lebow v Kakalios*, 156 AD2d 301, 302 [1st Dept 1989]); *900 Unlimited, Inc. v MCI Telecommunications Corp.*, 215 AD2d 227 [1st Dept 1995]). Because Plaintiff has not stated a cause of action for breach of contract, Defendant is not subject to CPLR § 302 (a) (2) jurisdiction for Plaintiff's first cause of action.

Second, Plaintiff does not state a cause of action for breach of the duty of good faith and fair dealing. "Because the existence of a valid and binding contract is not alleged, the complaint fails to state a cause of action for ... breach of the implied covenant of good faith and fair dealing" (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448 [1st Dept 2009]; *see also American-European Art Associates, Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 171, [1st Dept 1996]). No contract existed between Plaintiff and Defendant, and thus there can be no duty of good faith and fair dealing. Because Plaintiff has not stated a cause of action for breach of the duty of good faith and fair dealing, Defendant is not subject to CPLR § 302 (a) (2) jurisdiction for Plaintiff's second cause of action.

Finally, Plaintiff attempts to state a cause of action for fraud. However, Plaintiff does not plead fraud with the requisite particularity as required by CPLR 3016 (b).

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP* 12 NY3d 553, 559 [2009] [internal citations and quotation marks omitted]). “[A] prediction of something which is [] expected to occur in the future will not sustain an action for fraud” (*Dragon Inv. Co. II LLC v Shanahan* 49 AD3d 403, 403 [1st Dept 2008]). In addition, “[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)” (*Eurycleia Partners, LP*, 12 NY3d at 559). CPLR 3016 (b) states that where fraud is a cause of action, “the circumstances constituting the wrong shall be stated in detail.” However, “[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege the basic facts to establish the elements of the cause of action” (*Eurycleia Partners, LP*, 12 NY3d at 559). A mere conclusory allegation fails to satisfy CPLR 3016’s requirement that fraud be pleaded with particularity (*Dragon Inv. Co. II LLC*, 49 AD3d at 403).

Plaintiff claims that at their only meeting with Defendant in New York, Defendant made the following false statements:

- 1) that Goldman Sachs had a definite interest in purchasing a large block of shares in Vyvo, but was restricted from making such a purchase;
- 2) that the restriction would be removed in the near future and Goldman Sachs would then purchase a large block of Vyvo’s shares;
- 3) that Goldman had previously made an offer to buy Vyvo’s shares at \$15/share but that Defendant refused because Defendant believed the shares were worth more than \$20/share;

4) that Vyyo possessed important proprietary technology which was “vital” to cable companies;

5) that Vyyo was about to enter into an agreement with Cox Communications, a major cable company, to allow Cox to use this technology;

6) that Vyyo would be involved in other major deals with other major cable/communication companies involving Vyyo’s technology in the near future;

7) and that Defendant would not sell his Vyyo shares and would not try to sell them (Complaint, ¶ 8).

These are the only seven points upon which Plaintiff’s fraud claim rests. Plaintiff claims the following four points show that Defendant’s representation was fraudulent:

1) that Goldman Sachs did not purchase Vyyo’s shares;

2) that Goldman Sachs did not offer to purchase Vyyo at \$15/share;

3) that Vyyo did not make a deal with Cox Communications or any other major communication company;

4) and that Defendant sold some of his Vyyo shares through an entity he controlled (Complaint, ¶ 16).

Plaintiff claims that Defendant violated his promise to Plaintiff when Defendant sold certain of his Vyyo shares. However, according to the SEC, and unrebutted by Plaintiff, as of September 2007, six months after their March 2007 meeting and four months after Plaintiff bought shares in Vyyo, Defendant had not sold any of his shares. Instead, less than one-tenth of his shares had been transferred, not sold. Defendant transferred 418,000 shares to his wife via a domestic relations agreement and an additional 75,000 shares were transferred to a charitable organization (Affirmation of Tiffany A. Buxton [“Buxton Aff.”]),

Ex. 2). As of September 2007, Defendant still owned 4,9969,439 shares of Vyyo. Plaintiff offers no detailed argument how Defendant “sold” his shares in Vyyo beyond a bare assertion that the portion he transferred was somehow a “sale” in disguise. Because Plaintiff’s claim is wholly unsupported by the plain facts and because Plaintiff makes no detail as to how Defendant sold his shares, his claim for fraud on this point has no merit.

Plaintiff’s remaining arguments claiming fraud are also without merit. Plaintiff claims that because Goldman Sachs did not buy Vyyo’s shares and did not offer to buy them at \$15/share, Defendant’s statement that Goldman had an “interest” in buying the shares and would do so in the future was fraudulent. Defendant’s words and Goldman’s inaction do not contradict one another. Defendant merely offered to Plaintiff his belief in a third party’s interest and an expectation of the future. “[A] prediction of something which is [] expected to occur in the future will not sustain an action for fraud” (*Dragon Inv. Co. II LLC*, 49 AD3d at 403). Nowhere does Plaintiff allege, beyond merely conclusory statements, that Defendant knew that his statements of intent and future actions by Goldman were false. Similarly, Plaintiff makes no showing that Defendant’s claims about potential deals with cable and communication companies or Defendant’s claims about Vyyo’s proprietary technology were known falsehoods. Plaintiff has offered nothing beyond bare assertion that Defendant’s future predictions were known lies. As such, Plaintiff has failed to establish a claim for fraud.

Plaintiff has failed to state a claim for fraud with the particularity required by CPLR 3016 (b). Plaintiff offers merely conclusory allegations, and, in one instance (the alleged sale

of shares) the allegation is rebutted by the evidence. Because Plaintiff failed to state a claim for fraud, there is no jurisdiction over Defendant under CPLR § 302 (a) (2) for fraud.

Because Plaintiff has failed to state a claim for breach of contract, for breach of good faith and fair dealing or for fraud Plaintiff has failed to allege that Defendant committed a tortious act while in the state. Therefore, there is no jurisdiction over Defendant pursuant to CPLR § 302 (a) (2).

Viewing the pleadings in the light most favorable to Plaintiff, it is clear that Defendant is not subject to New York jurisdiction under CPLR §§ 301, 302 (a) (1) or (2). Defendant's motion to dismiss the complaint is therefore granted.

(ORDER ON NEXT PAGE)

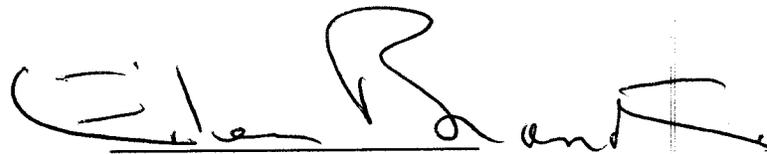
Accordingly, it is

ORDERED that Defendant's motion to dismiss the complaint is GRANTED. The Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
September 24, 2010.

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.