STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

HOWARD M. KOFF J.D. LL.M (Tax) P.C.,
and HOWARD M. KOFF,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 266-11
RJI NO. 01-11-103226

THE ESTATE OF WILLIAM CHARLES HORN,
Deceased, SLOAN BRAUN, Personal Representative,

Defendant.

Supreme Court Albany County All Purpose Term, June 6, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Tabner, Ryan and Keniry, LLP
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TERESI, J.:

On this record it is uncontested that Charles Horn, now deceased, retained Plaintiffs to negotiate his federal tax liability with the Internal Revenue Service (hereinafter "IRS"). Claiming non-payment of monies owed under their retainer agreement, Plaintiffs commenced this breach of contract action against Mr. Horn's estate (hereinafter "Defendant"), which is being administered in Florida. Prior to answering, Defendant moves to dismiss, pursuant to CPLR §§ 3211(a)(8) and 327, claiming Plaintiffs lack personal jurisdiction over it and upon a theory of

forum non conveniens. Plaintiffs oppose the motion. Because Defendant failed to demonstrate its entitlement to dismissal, its motion is denied.

Considering Defendant's jurisdictional motion first, "[w]here a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff need only make a prima facie showing that such jurisdiction exists." (Lang v. Wycoff Heights Medical Center, 55 AD3d 793[2d Dept. 2008], quoting Cornely v Dynamic HVAC Supply, LLC, 44 AD3d 986 [2d Dept. 2007]).

"It is well settled that one need not be physically present [in New York] . . . to be subject to the jurisdiction of our courts under CPLR 302." (Fischbarg v. Doucet, 9 NY3d 375, 381-82 [2007], quoting Parke-Bernet Galleries, Inc. v. Franklyn, 26 N2d 13 [1970][internal quotation marks omitted]). Instead, CPLR §302(a)(1) jurisdiction is predicated upon a showing that "(i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business." (Andrew Greenberg, Inc. v. Sirtech Canada, Ltd., 79 AD3d 1419, 1421 [3d Dept. 2010], quoting Johnson v. Ward, 4 NY3d 516 [2005]). "[T]he overriding criterion necessary to establish a transaction of business is some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York]." (Ehrenfeld v. Bin Mahfouz, 9 NY3d 501, 508 [2007], quoting McKee Elec. Co. v. Rauland-Borg Corp., 20 NY2d 377 [1967][internal quotation marks omitted]). "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, supra at 380, quoting McKee Elec. Co. v. Rauland-Borg Corp., supra [internal quotation marks omitted]).

Here, Plaintiffs established that Defendant engaged in purposeful activities that invoked the benefits of this State's laws. Plaintiffs' complaint, similar to the Fischbarg v. Doucet complaint, alleged that Mr. Horn was a resident of Florida but doing business in this State. Although the instant complaint limited such allegation by its "consisting of" language, on this motion Plaintiffs set forth sufficient allegations to make a prima facie showing of Defendant's purposeful activities. Upon his personal knowledge, Mr. Koff alleged that Mr. Horn contacted him in early 2007 in his New York office. By the end of 2007, the two had entered the retainer agreement at issue herein and then supplemented it in 2009. Mr. Koff recounted his three years of representing Mr. Horn, i.e. an "ongoing attorney-client relationship" (Fischbarg v. Doucet, supra at 381), and alleged a successful outcome to such representation. He further detailed that, over the course of the representation Mr. Horn sent him "no less than six packages containing substantial and important documents", "no less than forty-five e-mails", four draft letters and "at least seven additional letters or facsimiles." Additionally, Mr. Koff, or his staff, spoke on the phone with Mr. Horn on "at least twenty-five to thirty-five occasions." As a result of such purposeful activities, Mr. Koff correctly asserted that due to Mr. Horn's "many communications with me in my Albany, New York office" he was present in New York. Mr. Horn thereby "invok[ed] the benefits and protections of [our] laws' relating to the attorney-client relationship." (Id., quoting Parke-Bernet Galleries, Inc. v. Franklyn, supra [internal quotation marks omitted]).

Plaintiffs also established the nexus between their cause of action and Defendant's contacts with New York. There is an obvious and substantial relationship between this action for the attorney's fees Plaintiffs allegedly earned in the course of representing Defendant before the IRS, and Defendant's communications with Plaintiffs in furtherance of such representation.

"These are not 'merely coincidental' occurrences that have a tangential relationship to the present case. They form the basis of this action and, indeed, plaintiffs claims for legal fees are directly dependent upon them." (Id. at 384, quoting Johnson v. Ward, supra).

In support of its motion, Defendant offers no affirmative proof to rebut Plaintiffs' prima facie showing. Defendant's motion is supported only by its attorney's affirmation, which is of no probative value (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]), and the affidavit of its duly appointed "personal representative" (hereinafter "Ms. Braun"). Ms. Braun candidly admits her lack of personal knowledge of Mr. Horn's New York contacts by stating that "I did not once hear [Mr. Horn] mention the name Howard Koff nor do I recall [Mr. Horn] mentioning his 'attorney in New York'." Defendant's singular reliance upon Ms. Braun's lack of knowledge of Mr. Horn's New York contacts is unavailing and does not rebut Plaintiffs' prima facie showing.

Defendant similarly failed to establish its entitlement to a *forum non conveniens* dismissal.

"A court may dismiss an action based on the doctrine of *forum non conveniens* if it determines that in the interest of substantial justice the action should be heard in another forum... [which finding] requires the balancing of relevant factors such as the availability of an alternative forum, the potential hardship to the defendant, the parties' residency, the jurisdiction in which the cause of action arose and the burden on New York courts in entertaining the action." (Gozzo v. First American Title Ins. Co., 75 AD3d 953, 954 [3d Dept. 2010], quoting National Bank & Trust Co. of N. Am. v Banco De Vizcaya, 72 NY2d 1005 [1988], cert denied 489 US 1067 [1989], quoting CPLR §327 [internal quotation marks omitted]). "[U]nless these factors weigh

heavily in the defendant's favor, the plaintiff's choice of forum will not be rejected and the action will not be dismissed under this doctrine." (Markov v Markov, 274 AD2d 870, 871 [3d Dept. 2000]).

On this record, Defendant failed to establish that the *forum non conveniens* factors weigh heavily in its favor. Although the Florida Courts provide an alternative forum for this dispute and Florida is Defendant's residence, Defendant submitted no further proof that any of the other factors weigh in its favor. As Ms. Braun admitted her own lack of knowledge of the dispute herein, her presence in Florida will not cause the Defendant to suffer a hardship. Similarly, Defendant did not show that it will suffer a hardship by retaining New York counsel, as opposed to an attorney in Florida. As explained above, this cause of action arose in New York, it is a New York retainer agreement, and appears to depend upon the construction of New York law. This action does not present an undue burden for the New York Courts.

Accordingly, Defendant's motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 14, 2011
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 22, 2011 Affidavit of Christine Carsky, dated March 22, 2011, with attached Exhibit A; Affidavit of Sloan Braun, dated March 17, 2011.
2. Affirmation of John Tabner, dated May 3, 2011; Affidavit of Howard Koff, dated May 4, 2011.