

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

NEW YORK MERCHANTS PROTECTIVE
CO., INC.,

Plaintiff,

INDEX No. 022771/07

MOTION DATE: March 31, 2008
Motion Sequence # 001

-against-

JOSEPH COLEMAN and SHANNON COLEMAN,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Opposition..... X
- Reply Affirmation X
- Memorandum of Law..... X

This motion, by defendants, for an order pursuant to the CPLR §3211(a) et. seq. dismissing the plaintiff's Complaint, as inter alia (1) the Court lacks subject matter jurisdiction, (2) lacks jurisdiction of the person of the defendants, (3) the Complaint fails to state a cause of action upon which relief must be granted, and (4) there is another action pending between the same parties in the Court of another state, and together with such other and further relief as to this Court may deem just and proper, is determined as hereinafter set forth.

This action arises out of a transaction in which an entity known as New York

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Merchants Protective Co., Inc. (a burglar alarm company) purchased alarm monitoring contracts from American Security Technologies (“American”), another New York company, for \$4,249,938.77. Secure Opportunities Group Inc. (“SOG”) acted as business broker, and collected \$80,480.81 as brokerage commission. These transactions occurred in February, 2002 and February, 2003.

The defendants seek dismissal on four grounds: that these defendants never transacted business with the plaintiff in their individual capacities; that there is a prior action pending between Mr. Coleman and this plaintiff (as defendant) in the State of Arizona; that this Court lacks subject matter jurisdiction herein; and that, due to improper service upon these defendants and improper filing of the Summons and Complaint, there is no in personam jurisdiction over these defendants. Additionally, with respect to Shannon Coleman, she was never a party to any corporate entity, nor did she ever work for SOG or provide any services for SOG, and there is no allegation of any wrongdoing by her in the complaint, and the action against her is meritless and should be dismissed. Mr. Coleman argues that he always conducted dealings and negotiations through SOG and that there is no basis for any fraud allegations against the individual, noting that SOG is not named in this action. Counsel asserts that there is no subject matter jurisdiction herein because there is an insufficient nexus with New York State.

In opposition, the principal of the plaintiff asserts that he negotiated directly with the defendant Joseph Coleman, in contrast with Coleman’s assertion that Coleman’s only involvement was to introduce American to an entity called Ram Capital. He also asserts that Coleman is the one who committed the fraud and “cannot hide behind a defunct corporation” (Wahrsager affidavit ¶ 5). He contends that the Arizona action arises out of a different transaction than the one at issue herein, and Arizona law bars a counterclaim from this transaction at issue. Relative to the allegation of a lack of subject matter jurisdiction, the plaintiff argues that this transaction was between two New York entities, the plaintiff and American, and Coleman approached the plaintiff, not the other way around. With respect to the issue of service, the plaintiff argues that service was properly made pursuant to New York law, and any defect is de minimus and the defendants have been apprised of the action as evidenced by their personal affidavits. He avers that Shannon Coleman was named as a defendant so that any judgment rendered herein would be enforceable against their marital property.

In reply, the defendants’ attorney reiterates the arguments and assertions already made in the moving papers, and offers that any claim should be made against SOG. He argues that

the plaintiff has not controverted that Joseph Coleman was acting on behalf of SOG.

DECISION

Initially, the Court addresses the status of the defendant Shannon Coleman. It is well-settled that

“In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (Rovello v Orofino Realty Co., supra, at 635) and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Guggenheimer v Ginzburg, 43 NY2d 268, 275; Rovello v Orofino Realty Co., supra, at 636)”.

(Leon v Martinez, 84 NY2d 83, 88, 614 NYS2d 972, 1994). The Court is in receipt of affidavits from the parties herein and they are in agreement that Shannon Coleman had no involvement with her husband’s business, SOG, Inc., and had no dealings or negotiations with the plaintiff or any other party to any relevant agreement. The sole basis for her inclusion as a defendant is, according to plaintiff’s counsel, “. . .that if and when a judgment is sought to be enforced, she can not raise a defense under Ariz. Rev. Stat §25-215 [that a judgment against one spouse does not bind the marital community] (Memorandum of Law, p.7)”. No cause of action cognizable under New York law is recited in the complaint against Shannon Coleman, and the complaint is **dismissed** as against said defendant.

Turning now to that portion of the motion which seeks dismissal against the defendant Joseph Coleman, the Court notes that nowhere in the amended complaint is the entity, SOG, Inc., mentioned as a participant and/or a party, and no document is submitted identifying Mr. Coleman, as an individual, acting as the agent conveying the purportedly fraudulent

information or misrepresentation. It is axiomatic that a corporation must always perform actions or services by or through a natural person, and such acts do not necessarily create personal liability. That is the intent and purpose for the creation of a corporation (see, Bartle v Home Owners Cooperative, Inc., 309 N.Y. 123, 1955; see also, Matter of Morris v NYS Department of Taxation, 82 NY2d 135, 140, 603 NYS2d 807, 1993). The corporate entity, SOG, Inc., is not named in the amended complaint and, perforce, there is no allegation that the defendant Joseph Coleman used the corporation to defraud the plaintiff. Instead, the plaintiff attempts to sidestep its burden of demonstrating acts by the individual defendant to pierce the corporate veil by simply not alleging any corporate involvement at all. Nor does the plaintiff support, by any admissible evidence (see, Rovello v Orofino Realty Co., 40 NY2d 633, 1976) support the bare allegations of its complaint, that there were any personal actions by the individual defendant that would vitiate corporate involvement to the degree that it would be unnecessary to name it as a defendant. (see, generally, Stewart Tenants Corp. v Square Industries, Inc., 269 AD2d 246, 703 NYS2d 453, 1st Dept., 2000). Therefore, the action against the defendant Joseph Coleman is **dismissed** and that part of the motion is **granted**.

With respect to that part of the motion which seeks dismissal on the grounds that a prior action is pending between these parties in the State of Arizona, there is no documentation which substantiates that such action exists or that such action arises out of the same transaction as herein. Therefore, such portion of the instant motion is **denied**.

Procedurally, that part of the defendants' application which seeks dismissal for lack of subject matter jurisdiction, is based upon the defendants' assertion that "there is insufficient nexus with the State of New York". A proper definition of subject matter jurisdiction, more rigid in concept than other theories of jurisdiction, is that a court must be granted such jurisdiction by the constitution and law of this State (see Siegel, New York Practice, 4th Edition, § 8). It appears that the essence of the defendant's claim is that neither he nor SOG, Inc., had any contacts within New York State or did no business in this State as set forth in CPLR 302. Such lack of jurisdiction argument is supported by nothing more than the defendant's affidavit, and the defendant has not sustained his burden.

With respect to the last prong of the defendant's motion, failure to properly effectuate service upon him, the defendant asserts that the affidavit of service was never filed. Counsel for plaintiff has provided proof of such service, and the affidavit of service demonstrates proper service, clearly controverting the defendant's assertions.

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Inasmuch as dismissal requires an affirmative ruling on only one of the grounds brought by the defendant, and dismissal is warranted pursuant to CPLR 3211(a)(7) as to the defendant Joseph Coleman; and similar relief is granted as to the defendant Shannon Coleman, the motion is **granted** and the action is **dismissed**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated JUN 10 2008

Stephen A. Bucarelli
XXX J.S.C.

ENTERED

JUN 13 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**