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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

BERG AND DUFFY, LLP,

Plaintiff,

-against-

REPOSSI GROUP, ALBERTO REPOSSI, and ISABELLE FÉE,

Defendant.

Motion Sequence # 001, # 002
Submitted July 2, 2007
XXX

INDEX NO: 568/07

The following papers were read on these motions:

Defendants, REPOSSI GROUP, ALBERTO REPOSSI and ISABELLE FÉE, move for and order vacating an Inquest Order of this Court, dated March 7, 2007, which was granted based upon the defendants default in answering the Summons with Notice in the above captioned action. Defendants assert defective service. Plaintiff, BERG AND DUFFY, LLP. (hereinafter referred to as "B&D"), opposes the motion and cross-moves for an order of attachment. The motion and cross-motion are determined as follows:

This action by B&D seeks to recover attorneys fees pursuant to a Retainer Agreement (hereafter "the retainer") between B&D, located at 3000 Marcus Avenue, Suite 1 West 2, Lake Success, New York 11042, and its client Repossi Diffusion, S.A.M., located at 5 impasse de la Fontaine, Monte Carlo, Monaco. B&D, which also maintains an office in Monaco, was retained with respect to a dispute between Repossi Diffusion S.A.M. (hereafter referred to as "Diffusion") and GS Distribution, a seller of Diffusion jewelry in the United States. The retainer provides for a fee of €450 per hour for partners, and also provides that B&D may hold the retainer in its "general funds". The retainer refers clients to B&D's website for "more information" concerning the "rights" of the firm's clients. B&D's representation of Diffusion resulted in litigation in the Federal District Court and the return of an extensive consigned jewelry inventory to Diffusion in Monaco. Defendants herein, REPOSSI GROUP, ALBERTO REPOSSI and ISABELLE FÉE, are not parties to the retainer. ALBERTO REPOSSI, who resides in the Principality of Monaco, is the CEO of Diffusion, which was formed in 1999, to produce, license and distribute watches, jewelry, silverware and luxury accessories. REPOSSI did not sign a personal guarantee on behalf of Diffusion. ISABELLE FÉE resides in Beausoleil, France and is the general manager of

Sogeor S.A.M. She came to New York to identify Diffusion's inventory.

REPOSSI GROUP is alleged to be a European Economic Interest Grouping (EEIG), the nature of which is described in a "summary" of legislation submitted by B&D. EEIGs are described as being in the nature of a "consortium" which "must comprise at least two members from two different Member States who remain economically and legally independent throughout their cooperation". An EEIG does not "make profits for itself" and consists of "members" who "pool resources, activities or skills".

The "summary" submitted by B&D states that "[t]he EEIG must have at least two organs: the members acting collectively and the manager or managers. The managers represent and bind the EEIG in its dealings with third parties . . . ". Both Repossi Diffusion S.A.M. and Sogeor S.A.M. are members of the REPOSSI GROUP. The "summary" is silent with regard to the legal status of the EEIG as a separate legal entity capable of being sued in the EEIG's name (compare Partnership Law § 1025 ["Two or more persons conducting a business as a partnership may sue or be sued in the partnership name"]), and is also silent with regard to the ownership of assets. Thus B&D has not submitted evidence or authority to show that the EEIG is in the nature of a partnership, permitting service upon the REPOSSI GROUP. Although the "summary" states that all members of the Group are liable for each other's debts, that statement does not indicate, as noted, whether the REPOSSI GROUP has assets or may be sued in its own right.

Defendant, ALBERTO REPOSSI, states that the REPOSSI GROUP is not a legal entity (REPOSSI Affidavit ¶ 5). Assuming, *arguendo*, for purposes of this motion, that service in the name of the REPOSSI GROUP would be valid to secure jurisdiction and that the REPOSSI GROUP is an EEIG consortium, B&D has failed to secure jurisdiction

as it has failed to serve any member of the REPOSSI GROUP. Analogizing to either a joint venture or a partnership, such service would be required to secure jurisdiction.

With regard to a joint venture, service upon one of the members is necessary to secure jurisdiction over the venture (*see, e.g., Sullivan Realty Org. v Syart Trading Corp.*, 68 AD2d 756, 417 NYS2d 976 [2d Dept 1979]). Or, if a consortium is analogized to a partnership based upon a permanent rather than temporary nature of the association, a partner or the partnership's managing or general agent must be served to secure jurisdiction over the partnership (CPLR § 310[a]). B&D does not claim to have served a member, or managing or general agent for the REPOSSI GROUP. The Affidavits of Service do not reveal service upon Repossi Diffusion S.A.M. or Sogeor S.A.M. Rather, the individual defendants were served, not as agents or employees of member companies, but personally as individuals.

Defendants seek vacatur of the inquest order on the grounds that they were not properly served under Monaco law, are not subject to jurisdiction in the courts of this State, are not proper party defendants, and, in the alternative, are entitled to proceed to arbitration based upon the statement of client rights outlined on B&D's website and incorporated by reference in the retainer.

Defendants also contend that B&D overcharged Diffusion, both in the hourly rate charged and by inflating the hours of legal service provided, resulting in legal fees of $285,000 already paid, and legal fees of €382,163.80 (three hundred eighty two thousand one hundred sixty-three euros) outstanding. The latter figure includes close to $100,000 in "rebilling charges", i.e., compounded interest on outstanding sums.

B&D's website indicates that the hourly rate for partners is $450 per hour, while Diffusion was charged €450 per hour, a minimum of 30% more than the posted hourly rate. Defendant, ALBERTO REPOSSI, states that Diffusion became suspicious of B&D's charges when it was billed €1,035 (one thousand thirty five euros) for a meeting with ISABELLE FÉE, which she advised lasted only a few minutes for a litigation update and otherwise concerned "Mr. Duffy's purchase of jewelry for his fianceè" (REPOSSI Affidavit, p 5, ¶ 20).

With regard to allegations of defective service, defendants submit the affirmation of Joelle Pastor-Bensa, an attorney licensed to practice in Monaco since 1984, together with a translation of "article 969 of the Code of Civil Procedure" of Monaco. Pastor-Bensa states that "all papers" served in relation to proceedings in Monaco "must be drafted in French". The proffered translation of article 969 states in relevant part as follows:

> All writs of judges and officers of the Court as well as all written proceedings shall be drafted in French, under pain of nullity . . .

B&D's website supports this evidence. The site explains that service in Monaco is effected through marshals or bailiffs known as "huissiers". The site further states that foreign language process must be translated into French. The translation is described as an "important requirement" to prevent the person served from seeking "to have service voided . . . based on the *defective* service" (emphasis supplied). Defendants' point out that the Summons with Notice herein was in English without any translation into French.

In opposition to the motion, B&D contends that defendants do not have a reasonable excuse for their default in this proceeding, and that they have waived the claim of lack of personal jurisdiction based upon defective service. B&D states that Diffusion

intentionally defaulted by commencing an action in Monaco against B&D after it was served in this action. It also claims that, although defendants later removed that action to the District Court for the Eastern District, it did not do so until after the default order was entered. Based upon a District Court consent order, after a conference with the Hon. Leonard D. Wexler, the action was remanded to this court to allow defendants to seek vacatur of the default inquest order. The order did not provide for any other application, thus the cross-motion is improperly made.

Addressing the merits of the motion to vacate, service upon defendants is required to conform to the requisites of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS 6638 [hereinafter referred to as the "Hague Convention"]), as the Principality of Monaco is a civil law Nation, and a signatory of the Hague Convention (*Matter of Estate of Agusta*, 171 AD2d 595, 567 NYS2d 664 [1st Dept 1991]). The Hague Convention is a multilateral treaty "designed to simplify the methods for serving process abroad to assure that defendants sued in foreign jurisdictions receive actual and timely notice of suit and to facilitate proof of service abroad" (*Fernandez v Univan Leasing*, 15 AD3d 343, 790 NYS2d 155 [2d Dept 2005]). Where service of process is made in a foreign country that is a signatory of the Hague Convention "compliance with the procedures of the Hague Convention is mandatory in State court proceedings" (*Amerasia Bank v Saiko Enterprises*, 263 AD2d 519, 693 NYS2d 628 [2d Dept 1999]). The Convention's provisions are exclusive (*Wilson v Lufthansa German Airlines*, 108 AD2d 393, 489 NYS2d 575 [2 Dept 1985]). Article 19 permits, *inter-alia*, service by any method permitted by the internal laws of the country in which service is being made (*Fernandez v Univan Leasing, supra*).

B&D offers no excuse for its failure to provide a French translation of the Summons with Notice. Although the "affirmation" of James P. Duffy, III, claims that the translation requirement is routinely ignored, his "affirmation" does not constitute admissible evidence, as he is a party to this proceeding. "Although an attorney is authorized to submit an affirmation in lieu of an affidavit in most situations (CPLR 2106), 'even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action'" (*LaRusso v Katz*, 30 AD3d 240, 818 NYS2d 17 [1st Dept 2006]). It is noted that the defects in defendants' affidavits, pointed out by plaintiff, have been cured.

In sum, B&D's evidence in opposition to vacatur confirms defendants' contentions. With its own website, it acknowledges the importance and necessity of a French translation of process in Monaco. Accordingly, absent a waiver of the defect, service was invalid to secure personal jurisdiction. And, where the asserted ground for vacatur is "lack of personal jurisdiction" the defendants "need not demonstrate a reasonable excuse for . . . default or a meritorious defense" (*European American Bank & Trust Co. v Serota*, 242 AD2d 363, 661 NYS2d 282 [2d Dept 1997]).

In addition to the alleged jurisdictional infirmity, defendants claim that B&D failed to serve the appropriate party, i.e., Diffusion, or any member of the REPOSSI GROUP. While the summary of the relevant legislation regarding a European Economic Interest Group indicates that each member of the Group is liable for the debts of the other members, the summary does not state that jurisdiction may be acquired over the members without service upon one of them.

B&D has failed to show how any of the named defendants is liable for breach of a contract for legal fees between B&D and Diffusion. The claim of fraud is premised upon

alleged promises by ALBERTO ROSSI and ISABELLE FÉE that payment of outstanding legal fees would be forthcoming as soon as Diffusion's inventory was returned to Monaco.

It is well settled that a claim of fraud will not lie for a breach of contract. An action for breach of contract cannot be converted to one for fraud "merely by alleging that the contracting party did not intend to meet its contractual obligations" (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339. 634 NE2d 940 [C.A.1994]). A "mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud" (*WIT Holding Corp. v Klein*, 282 A.D.2d 527, 724 NYS2d 66 [2d Dept 2001]). No damages other than those for breach of contract have been alleged. Accordingly, the cause of action for fraud does not lie and furthermore, the cause of action for breach of contract does not lie against the named defendants as they were not parties "to the agreement in question" (*Black Car and Livery Ins. v H & W Brokerage*, 28 AD3d 595, 813 NYS2d 751[2nd Dept 2006]).

Turning to the issue of waiver, B&D claims that defendants have appeared in this action by letter. B&D also claims that the removal to the District Court constitutes an appearance.

The letter which defendant REPOSSI sent to this Court sought to advise that the REPOSSI GROUP "does not exist as a legal entity", that he personally had "nothing to do with" the contract between Diffusion and B&D, and that ISABELLE FÉE was "totally unrelated to the complaint". The letter sought dismissal of the complaint upon those grounds. The letter was clearly not treated as an appearance as it was not in proper form and was not acted upon.

With regard to removal to a Federal District Court, "it is well settled that a petition for removal . . . does not amount to a general appearance, but only a special appearance, and that after the removal the party securing it has the . . . right to invoke the . . . validity of the prior service . . . " (*General Inv. Co. v Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 268-269 [1922]). Accordingly, removal does not operate as a waiver of a personal jurisdiction defense.

Finally, B&D contends that, upon remand, defendants did not have to file a Notice of Appearance, but did so and thus waived the jurisdictional defense. Plaintiff's contention is contrary to law. CPLR §320(b) provides, in relevant part, that "an appearance of the defendant is equivalent to personal service of the summons upon him, *unless* an objection to jurisdiction under . . . rule 3211 is asserted by motion or in the answer as provided in rule 3211" (CPLR 320[b][emphasis supplied]). Accordingly, the filing of a notice of appearance "before the service of the complaint" does not confer "jurisdiction" upon the court or result in waiver of the jurisdictional defense (*Balassa v Benteler-Werke A.G.*, 23 AD2d 664, 257 NYS2d 211 [2d Dept 1965]). As no complaint has been served in this action, defendants have not waived the jurisdictional defense.

After a careful reading of the submissions herein, it is the judgment of the Court that defendants are entitled to vacatur of the default order directing an inquest and to dismissal of the action. Were the court not to find that service was defective, dismissal would be warranted based upon service upon non-signatories to the retainer. Additionally, B&D's website provides for arbitration to resolve fee disputes.

In relevant part it states:

> . . . to the extent not covered by Part 137 of the Rules of the Chief Administrator of the Courts, the disputes shall be resolved by arbitration in the English language before a single arbitrator in New York according to the then prevailing Commercial Rules of Arbitration of the American Arbitration Association.

In addition, not only are defendants entitled to arbitration of the fee dispute, the court rejects, as a matter of law, B&D's contention that a breach of contract action for attorneys' fees is not a commercial transaction subject to the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.* [the Act]). The Act provides that a written provision in any contract "evidencing a transaction involving commerce" to settle a controversy arising out of such contract by arbitration "shall be valid, irrevocable, and enforceable . . . " (9 U.S.C. § 2). The Act defines commerce as "commerce among the several States *or with foreign nations* . . ." and specifies exclusions not relevant here (9 U.S.C. § 1[emphasis supplied]). A breach of contract action for attorney's fees is a commercial transaction covered under the Act (*Rivera-Domenech v Calvesbert Law Offices PSC*, 402 F3d 246 [1st Cir (Puerto Rico) 2005] [arbitration of fee dispute between attorney and client required]; *Zhang v Wang*, 2006 WL 2927173 [EDNY 2006] [the retainer agreement at issue did not involve *interstate* commerce, therefore state arbitration law, rather than the Federal Arbitration Act, governed [emphasis supplied]).

Based upon the foregoing, it is hereby

ORDERED, that defendants motion to vacate the Inquest Order of the Court, dated March 7,2007, is granted and the action is dismissed, together with all other pending motions herein (Motion Sequence # 003, # 004); and it is further

ORDERED, that plaintiff's cross-motion for an order of attachment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 12, 2007

WILLIAM R. LaMARCA, J.S.C.

ENTERED

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