

National Coll. Master Student Loan Trust I v Wilmington Trust Co.
2018 NY Slip Op 32194(U)
September 4, 2018
Supreme Court, New York County
Docket Number: 652165/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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THE NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST I, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2003-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4, CHAITMAN LLP

INDEX NO. 652165/2017

MOTION DATE _____

MOTION SEQ. NO. 001 & 002

DECISION AND ORDER

Plaintiff,

- v -

WILMINGTON TRUST COMPANY, GSS DATA SERVICES,

Defendant.

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The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 93

were read on this application to/for _____ Dismiss _____

HON. SALIANN SCARPULLA:

In this action for nonpayment of legal fees, defendant GSS Data Services, Inc. ("GSS") moves to dismiss the complaint against it pursuant to CPLR 3211(a)(3), (7) and (8), or, in the alternative, for a stay of the action pursuant to CPLR 2201. Defendant

Wilmington Trust Company (“Wilmington”) (GSS and Wilmington are collectively referred to as “Defendants”), also moves to dismiss the complaint against it pursuant to CPLR 3211(a)(1), (7) and (8), and, likewise, in the alternative, for a stay of the action pursuant to CPLR 2201.

Background

The following facts are taken from the complaint and assumed as true for purposes of this motion to dismiss. Each of the plaintiff Trusts¹ is a Delaware statutory trust formed to acquire pools of student loans and issue notes backed by the Trusts’ assets. GSS is the Administrator of the Trusts, and Wilmington is the Owner Trustee of the Trusts and is responsible for managing their affairs at the direction of the Trust Owners.² Plaintiff Chaitman LLP (“Chaitman”) is a New York law firm retained in November 2015 by Wilmington on behalf of the Trusts (Chaitman and the Trusts are collectively referred to as “Plaintiffs”).

The relationship between the parties is controlled by several interdependent documents (the “Trust Documents”). The relevant Trust Documents include: (1) the Indenture; (2) the Trust Agreement; and (3) the Administration Agreement. Trust Agreement §10.01 provides that GSS, as the Administrator of the Trusts, must reimburse

¹ Specifically, the following entities: The National Collegiate Master Student Loan Trust I, The National Collegiate Master Student Loan Trust 2003-1, 2004-1, 2004-2, 2005-1, 2005-2, 2005-3, 2006-1, 2006-2, 2006-3, 2006-4, 2007-1, 2007-2, 2007-3, and 2007-4, collectively.

² Although not relevant for purposes of its motion, Wilmington resigned as Owner Trustee by letter dated June 20, 2017, and it does not appear that a replacement Owner Trustee has been appointed yet. See Hornung Reply Aff., Exs. A-C.

Wilmington for certain expenses, including legal fees. Pursuant to Indenture §8.02(d), GSS is also obligated to effect distributions from the Trusts' Collection Accounts for the expenses of the Owner Trustee. Together, the Trust Documents require GSS to instruct the Trusts' Indenture Trustee to pay any attorney hired by Wilmington out of the Trusts' Collection Accounts. Trust Agreement, § 10.01; Administration Agreement § 1(a)(i)(C).

In November 2015, "at the request of the owners of the Trusts (the Owners)," Wilmington retained Chaitman to act as special counsel for and on behalf of the Trust by executing a retention agreement on behalf of the Trusts as Owner Trustee (the "Retention Agreement"). The Retention Agreement explicitly provides that it was being "executed and delivered by [Wilmington], not individually or personally but solely as Owner Trustee of the Trusts" and that the Trusts "shall solely be responsible" for Chaitman's legal fees and expenses.

In December of 2015, Chaitman began submitting legal invoices for legal services provided for the Trusts to Wilmington and GSS. These invoices were processed as follows: first, the Owners would Wilmington to send the bills to GSS; next, Wilmington would direct GSS to submit the bills to the Indenture Trustee for payment; finally, the Indenture Trustee would pay the bills received by GSS on the following distribution date for the Trusts. Chatman received compensation for its services through this process without any issues from December 2015 through August 2016.

In March 2016, there was a transfer of a minority of the ownership interest in the Trusts. Wilmington approved the transfer and issued Trust Certificates in the same month, listing the current – post-transfer – owners as 100% owners of the Trusts. That

same month, the Trusts sued the servicer of the Trusts, Pennsylvania Higher Education Assistance Agency (“PHEAA”), in Delaware Chancery Court for certain alleged gross violations of its agreement with the Trusts. In that proceeding, PHEAA argued that the ownership transfer was invalid because it effectively vested 100 % ownership in a single owner in alleged violation of the Trust Agreements.

By letter dated August 24, 2016, GSS informed Wilmington that, because of the ownership issue, it would not issue any further payments absent “further comfort” from Wilmington. On or about October 10, 2016, Chaitman informed Wilmington that it would be sending more invoices for Wilmington to process. On or about October 12, 2016, counsel for Wilmington advised Chaitman that it would not forward and process its invoices to GSS for payment until the ownership issue raised by PHEAA was resolved. As of the date of the complaint, Chaitman claimed legal fees in the amount of \$314,296.99, along with an additional \$1.1 million that is purportedly owed to counsel retained by Chaitman on the Trusts’ behalf.

The complaint asserts the following five causes of action: (1) breach of retention agreement by Chaitman against Wilmington; (2) breach of duty by Chaitman against GSS for refusing to certify invoices; (3) a claim in quasi contract for non-payment of fees by Chaitman against Defendants; (4) breach of the Trust Agreements by the Trusts against Wilmington; (5) for indemnification by the Trusts against Defendants.

Discussion

Defendants each move to dismiss this action for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Because the question of personal jurisdiction is a

threshold issue, it must be addressed first. *Matter of National Union Fire Ins. Co. of Pittsburgh, PA v St. Barnabas Community Enters., Inc.*, 48 AD3d 248, 249 (1st Dept 2008). “On a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction.” *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 (1st Dept 2017) (citations omitted); *see also Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 (1st Dept 2015).

Plaintiffs do not assert any basis for a New York court to establish general jurisdiction over Defendants, nor does any exist under CPLR 301: Wilmington is a Delaware corporation with its principal place of business in Delaware, and GSS is a Massachusetts corporation with its principal place of business in California. *See Magdalena v Lins*, 123 AD3d 600, 601 (1st Dept 2014) (citing *Daimler AG v Bauman*, 571 US 117, 136 (2014)).

Plaintiffs assert that this Court has personal jurisdiction over Defendants pursuant to CPLR 302(a)(1) because they transacted business within the state and pursuant to CPLR 302(a)(3) because Defendants’ tortious actions outside the state allegedly caused injury within the state.

I. CPLR 302(a)(1)

Under CPLR 302(a)(1), jurisdiction may only be exercised over an out-of-state defendant if that defendant “has purposefully transacted business within the state and there is a substantial relationship between the transaction and the claim asserted.” *Coast to Coast Energy, Inc.*, 149 AD3d at 486 (internal citation and 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*, 9 NY3d 375, 380 (2007) (internal citations and quotation marks omitted).

a. Wilmington

Plaintiffs assert that CPLR 302(a)(1) jurisdiction may be exercised over Wilmington because Wilmington transacted business in New York by signing a retainer agreement with a New York law firm on behalf of the Trusts, and the legal services were performed in New York. Plaintiffs maintain that Wilmington made innumerable telephone and e-mail communications to Chaitman in New York regarding Chaitman’s performance of legal services and payment for those services.

Wilmington executed the Retention Agreement in Delaware, solely in its representative capacity and at the direction of the Trusts’ Owners, to represent the Trusts.³ This action constitutes “neither the performance of any act within the state [n]or the transaction of any business here giving jurisdiction pursuant to CPLR 302.” *Law Research Serv., Inc. v Crook*, 36 AD2d 912, 912 (1st Dept 1971) (no long-arm jurisdiction over out-of-state attorney whose only connection to the state is that he hired New York attorney to represent his client in a Texas proceeding).

³ To the extent that Plaintiffs rely on a portion of the Retention Agreement which provides that, “[i]n the event that [Wilmington] is named in its individual capacity in any borrower lawsuit, Chaitman will take steps to have [Wilmington], in its individual capacity removed,” this alone does not provide an adequate basis to exercise jurisdiction over Wilmington absent any indication that such services were ever provided to Wilmington.

This situation is markedly different from other cases finding jurisdiction based on the engagement of a New York lawyer or law firm by an out-of-state entity. *Cf., e.g., Fischbarg*, 9 NY3d at 380-82 (defendant purposefully retained and “established a substantial ongoing professional commitment” with New York attorney by directly and frequently communicating with attorney for months regarding the representation); *Kaczorowski v Black and Adams*, 293 AD2d 358, 358 (1st Dept 2002) (defendant sought out New York attorney, and once attorney was retained he was “repeatedly consulted in New York by defendant respecting the matter in which he was retained”).

Moreover, no allegation in the complaint supports Plaintiffs’ claim, which was asserted in the opposition memorandum, that Wilmington “made innumerable communications via telephone and email to Chairman in New York with respect to Chaitman’s performance of legal services in the State of New York and concerning payment for those same services.” These unspecified communications are not sufficient to confer CPLR 302(a)(1) jurisdiction. *See Coast to Coast Energy, Inc.*, 149 AD3d at 487 (“plaintiff’s vague, conclusory and unsubstantiated allegations do not suffice to establish long arm jurisdiction”) (citations omitted); *see also Cotia (USA) Ltd.*, 134 AD3D at 484; *Gordon v Credno*, 102 AD3d 584, 586 (1st Dept 2013).

At most, the allegations in the complaint regarding two communications between Chaitman and Wilmington show that Chaitman initiated communications with Wilmington to collect legal fees, to which Wilmington responded. Chaitman’s “own New York activities . . . cannot be attributed to defendants” for purposes of establishing personal jurisdiction over an out-of-state defendant. *Kennedy v Yousaf*, 127 AD3d 519,

520 (1st Dept 2015); *Haar v Armendaris Corp.*, 40 AD2d 769, 770 (1st Dept 1972), *revd on dissent*, 31 NY2d 1040 (1973). Accordingly, there is an insufficient basis to exert CPLR 302(a)(1) jurisdiction over Wilmington.

b. GSS

As to GSS, Plaintiffs claim that this court has “successor jurisdiction” over GSS because First Marblehead Data Services, Inc. (“First Marblehead”), the original Administrator of the Trusts, was listed on the New York Stock Exchange and had an office in New York. Plaintiffs contend that because GSS became Administrator by acquiring First Marblehead’s business, this acquisition constituted a de facto merger and GSS assumed the jurisdictional contacts of First Marblehead.

Among the many problems with Plaintiffs’ argument is that the entity listed on the New York Stock Exchange was The First Marblehead Corporation, whereas GSS was formerly known as First Marblehead Data Services, Inc., a different and wholly separate entity that was never listed on the New York Stock Exchange and had no New York office. *See Doherty Reply Aff.*, Exs. A-C.

Accordingly, the factual premise for Plaintiffs’ basis for jurisdiction appears to be unfounded. In any event, the facts as alleged – a corporation listed on the New York Stock Exchange with an office in New York – are insufficient, without more, to form the basis for jurisdiction here as these contacts bear no relationship to the claims at issue, which is a prerequisite under CPLR §302.

II. CPLR 302(a)(3)

In support of CPLR 302(a)(3) jurisdiction, Plaintiffs argue that Defendants' failure to pay Chaitman's legal bills caused Chaitman injury in New York. At oral arguments, Plaintiffs also asserted that Defendants' refusal to certify and authorize Chaitman's payments constitutes tortious interference and breach of a ministerial duty sufficient to support jurisdiction, although these assertions are not supported by the complaint.

As a threshold matter, the complaint does not expressly contain a tort cause of action against either Wilmington or GSS. The first claim is for breach of the Retention Agreement against Wilmington; the second claim is for breach of the duty by GSS owed under the Trust Documents and Retention Agreement; the third claim, against both defendants, is a quantum meruit claim; the fourth claim is a contractual claim for breach of the administration agreement against both defendants; and the fifth is for indemnification.

To the extent any of these claims could be construed to be a tort cause of action, it would be the second cause of action against GSS, under which Plaintiffs alleges that, "[b]y refusing to certify Chaitman's invoices to the Indenture Trust for payment, GSS has breached duties owed to Chaitman under the Trust Document, the Retention Agreement, and by reason of the relationship of the parties." Complaint ¶ 46. However, even applying the most liberal pleading construction to this claim, it is insufficient as a basis for personal jurisdiction.

"For the purpose of determining the applicability of CPLR 302(a)(3), the situs of the injury is the location of the original event which caused the injury, not the location

where the resultant damages are subsequently felt by the plaintiff.” *Carte v Parkoff*, 152 AD2d 615, 616 (2d Dept 1989) (citations and quotation marks omitted). If the resultant damages are “solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred.” *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471-72 (1st Dept 2011) (citations omitted); *Deutsche Bank AG v Vik*, 163 AD3d 414 (1st Dept 2018) (“That plaintiff felt economic injury in New York, alone, is an insufficient basis to confer jurisdiction.”).

Here, the critical events – Defendants’ refusal to process and certify Chaitman’s invoices for legal services provided to the Trusts – all occurred outside of New York, in Delaware and California. As such, Plaintiffs cannot establish that Defendants are subject to jurisdiction in New York under CPLR 302(a)(3).⁴ See *CRT Invs., Ltd.*, 85 AD3d at 471-72; *Storch v Vigneau*, 162 AD2d 241, 242 (1st Dept 1990) (“an injury does not occur in New York within the meaning of CPLR § 302(a)(3) merely because a plaintiff is domiciled in New York and suffers a loss of income here) (citation omitted).

III. Jurisdictional Discovery

Insofar as Plaintiffs seek jurisdictional discovery in the alternative, they have not made a “‘sufficient start’ to warrant such discovery.” *Cotia (USA) Ltd.*, 134 AD3d at 485

⁴ Moreover, to the extent that the complaint may be construed to contain a claim for tortious interference with contract, plaintiffs fail to allege that defendants intentionally procured the breach “without justification” given the presently live issues surrounding the transfer of ownership. See *Lama Holdings Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996).

(citing *Peterson v Spartan Indus.*, 33 NY2d 463, 467 (1974); *SNS Bank v Citibank*, 7 AD3d 352, 353 (1st Dept 2004); see also *Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351, 352 (1st Dept 2004) (“discovery was not warranted since plaintiff failed to advance any non-conjectural ground to believe that the disclosure sought would be productive of evidence supporting an exercise of jurisdiction over defendants”).

Because I dismiss the complaint for lack of jurisdiction, I do not consider the remaining portion of Defendants’ motions to dismiss.

In accordance with the foregoing, it is

ORDERED that defendant GSS Data Services’ motion to dismiss (mot seq. 001) and defendant Wilmington Trust Company’s motion to dismiss (mot. seq. 002) are both granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

9/4/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

☒ CASE DISPOSED
☒ GRANTED
☐ SETTLE ORDER
☐ DO NOT POST

☐ DENIED

☐ NON-FINAL DISPOSITION
☐ GRANTED IN PART
☐ SUBMIT ORDER
☐ FIDUCIARY APPOINTMENT

☐ OTHER

☐ REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: