

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CAPITAL INVESTMENT AGENCY)
)
Plaintiff) C.A. No. N12C-11-063 CLS
)
)
v.)
)
CHRISTIAN A. KOSTAN)
)
)
)
Defendant.)

Date Submitted: December 17, 2013

Date Decided: March 31, 2014

On Defendant Christian Kostan's Motion to Dismiss. **GRANTED.**

ORDER

Sean T. O'Kelly, Esq. and Ryan M. Ernst, Esq., O'Kelly Ernst & Bielli, LLC.
Attorneys for Plaintiff.

C. Malcolm Cochran, IV, Esq. and Travis S. Hunter, Esq., Richards, Layton & Finger, P.A., Wilmington, Delaware 19801. Attorneys for Defendant.

Scott, J.

Introduction

Before the Court is Defendant Christian Kostan’s (“Kostan”) Motion to Dismiss for lack of personal jurisdiction or, in the alternative, forum *non conveniens*. The Court has reviewed the parties’ submissions, including the affidavits of Kostan and his counsel, and heard oral argument. For the reasons that follow, the Court finds that it lacks jurisdiction over Kostan and, thus, the motion is **GRANTED**.

Background

I. The Parties

Plaintiff Capital Investment Agency (“Capital”) is a citizen of Great Britain and a broker of commercial loans. Kostan resides in Germany and entered into a contract on behalf of Standard Energy, LLC. Standard Energy, LLC, at all relevant times, was and continues to be a nonexistent Delaware entity. Standard Energy Holding, LLC, a relevant nonparty, is an existing Delaware limited liability corporation with a registered agent located at 435 N. DuPont Highway, Dover, Delaware, 19901 (the “Dover, Delaware Address.”) Capital Funding Investment Trust Ltd. (the “Lender”) is also a relevant nonparty.

II. The Underlying Facts¹

In November 2009, Kostan and Capital engaged in discussions regarding Capital’s procurement of a loan for Standard Energy, LLC. The loan was to be used to fund Standard Energy, LLC’s construction of asbestos recycling plants in Germany, Austria and Romania. On November 13, 2009, Kostan executed an Application for Loan and a Mandate and Commission Agreement (the “Agreement”) on behalf of Standard Energy, LLC.² The Agreement was between Capital and Standard Energy, LLC and the address provided for Standard Energy, LLC was the Dover, Delaware Address. The Agreement provided that Capital would procure a lender to loan \$173,042,100 for the construction of the plants and required Standard Energy, LLC to pay a commission of three-percent of the construction loan balance for Capital’s procurement of a lender, which was to be paid if and when a formal offer of advance was made by the lender.

When Capital procured the Lender, the Lender made a written formal offer of advance to Standard Energy, LLC. On December 14, 2009, Kostan signed a letter agreement (the “Letter Agreement”) with the Lender on behalf of Standard Energy LLC.³ The Letter Agreement was addressed to Kostan at the Dover,

¹ The underlying facts are presented in a light most favorable to Capital.

² Instant Complaint, Ex. A. Counsel for Kostan has argued that, where the Mandate and Commission Agreement provided that it was for “Standard Energy, LLC,” the obvious inference is that it was a typographical error which should have stated that the entity was “Standard Energy Holding, LLC.” Kostan Reply Brief, at ¶ 9.

³ Instant Complaint, Ex. B.

Delaware Address and it contained a choice of law provision stating that the laws of England would apply.⁴ On April 12, 2010, Kostan terminated the agreements and demanded a return of the deposit. On April 19, 2010, Capital demanded payment of the commission. Due to its failure to receive payment, Capital filed two separate law suits, one on February 8, 2011 and this lawsuit on November 7, 2012 alleging Breach of Contract, Quantum Meruit/Quantum Valebant, Unjust Enrichment, and Detrimental Reliance.

III. The First Action⁵

A. The Original Complaint

On February 8, 2011, Capital filed its first four-count complaint (the “Original Complaint”) naming only Standard Energy, LLC, naming only Standard Energy, LLC as the defendant.⁶ Capital asserted that Standard Energy, LLC was a “limited liability company formed under the laws of the State of Delaware, having a principal place of business at [the Dover, Delaware Address].”⁷ Without mentioning Kostan, Capital alleged that Standard Energy, LLC failed to pay the commission that it was guaranteed under the Agreement. A writ was issued and

⁴ The Court also notes that the Letter Agreement’s choice of law provision stated that, should the provisions violate Delaware law, those provisions will be void.

⁵ *Capital Investment Agency v. Standard Energy LLC a/k/a Standard Energy Holding, LLC*, Del. Super., N11C-02-080 JRJ, Jurden, J.

⁶ Complaint (herein, “First Complaint”), Trans. ID. 35831126.

⁷ *Id.* at ¶ 2.

the sheriff served “Standard Energy LLC” by leaving a copy with Rose Wurzel⁸ on February 17, 2011 at [the Dover, Delaware Address].”⁹

B. The First Amended Complaint

On March 25, 2011, Capital amended its complaint (the “First Amended Complaint”) by amending the defendant’s name from “Standard Energy LLC” to “Standard Energy LLC a/k/a Standard Energy Holding, LLC.”¹⁰ Capital maintained that “Standard Energy LLC a/k/a Standard Energy Holding, LLC” was a “limited liability company formed under the laws of the State of Delaware, having a principal place of business at [the Dover, Delaware address].”¹¹ Another writ was issued and the sheriff served “Standard Energy LLC” by again leaving a copy with Rose Wurzel at the Dover, Delaware Address.¹²

On May 31, 2011, Kostan filed a *pro se* letter regarding the case on behalf of Standard Energy Holding, LLC, but the Court informed the parties that an artificial entity was required to be represented by Counsel. On June 24, 2011, Attorney Thomas I. Barrows wrote a letter to Capital’s counsel on behalf of the “principal” of the “defendant” informing the Court that he was not entering an appearance, but

⁸ The Court does not have information regarding Rose Wurzel’s relationship to the relevant parties.

⁹ Trans. ID. 36264706.

¹⁰ First Amended Compl., Trans. ID. 36693543.

¹¹ *Id.* at ¶ 2.

¹² Trans. ID. 37037147.

soley requesting an extension of time to file a responsive pleading to the complaint.¹³

C. The Default Judgment

On July 14, 2011, Capital filed a Motion for Default Judgment and the Court heard oral argument on August 17, 2011. The Court orally granted the motion and, on August 30, 2011, the Court signed the order which required “Defendant Standard Energy LLC a/k/a Standard Energy Holding, LLC” to pay the principal of \$5,141, 263 (i.e., the 3% commission), costs, pre- and post-judgment interest, and attorneys’ fees (the “Default Judgment”).¹⁴ The case was then transferred to judgments.

IV. The Instant Action

A. The Instant Complaint

On November 7, 2012, Capital filed a complaint against Kostan for the same four causes of action. Capital acknowledged that Kostan resided in Germany, but also asserted that “all, or substantially all, of [Kostan’s] conduct occurred in Delaware” and that he had “continuous and systematic” minimum contacts with Delaware.¹⁵ Capital identified Kostan as the “owner, sole shareholder, sole member, and/or sole partner of Standard Energy LLC” and stated that Standard

¹³ Letter to Plaintiff’s Counsel, Trans. ID. 38633860.

¹⁴ Order dated August 30, 2011.

¹⁵ Compl. (herein, “Instant Compl.”), at ¶¶ 2-4.

Energy, LLC was related to other Standard Energy entities, including Standard Energy Holdings LLC.¹⁶ Capital alleged, *inter alia*, that Kostan was personally liable because he “knowingly represented to Plaintiff that Standard Energy LLC was an existing company”¹⁷ and that he acted on behalf of that nonexistent entity. Capital did not address the Default Judgment or whether Kostan instructed Capital or the Lender to contact him with Delaware contact information.

B. This Motion to Dismiss

On August 1, 2013, Kostan filed this Motion to Dismiss pursuant to Superior Court Rule 12(b)(2) for lack of personal jurisdiction or, alternatively, *forum non conveniens*.¹⁸ On December 17, 2013, the Court held oral argument. When the Court inquired into the effect of the default judgment on this case, Capital explained that it was null and void because it was against a nonexistent entity. Capital stated that it did not discover that Standard Energy LLC did not exist until after the default judgment had been rendered.

Parties’ Contentions

Kostan moves to dismiss the complaint for lack of personal jurisdiction because Kostan resides in Germany and has no contacts with Delaware, other than

¹⁶ *Id.* at ¶ 6.

¹⁷ *Id.* at ¶¶ 31.

¹⁸ Kostan attached the Affidavit of Travis S. Hunter, Esq. in which counsel included the First Amended Complaint and Default Judgment from the first action. Counsel also attached Standard Energy Holding, LLC’s Certificate of Incorporation.

having participated in the formation of certain Delaware entities, such as Standard Energy Holding, LLC. Kostan argues that, under Delaware law, mere ownership or participation in the formation of those other entities does not subject him to jurisdiction. Kostan also argues that the Court cannot exercise jurisdiction over him because any actionable conduct, including conduct relating to the negotiations and execution of the Agreement, occurred in Europe. Kostan attached an affidavit in which he states that the negotiations occurred in Europe and that those negotiations included contact by phone, e-mail and facsimile.¹⁹ Kostan also stated in his affidavit that he has never been to Delaware.²⁰ Alternatively, Kostan argues that dismissal is proper under the doctrine of *forum non conveniens* because it is unnecessarily burdensome and expensive to compel him to litigate a case in Delaware when he lives in Europe and “necessary witnesses, documents, and other evidence are located in Europe, not Delaware.”²¹

Capital opposes Kostan’s motion, arguing that, while ownership of a Delaware entity does not alone constitute “transacting business” under 10 Del. C. § 3104(c)(1) of Delaware’s Long Arm Statute, Kostan subjected himself to the jurisdiction of this Court by purporting to act on behalf of a nonexistent Delaware entity and instructing Capital and the Lender to contact him by mail at the Dover, Delaware Address and by fax via a Delaware phone number. Capital argued that

¹⁹ Affidavit of Christian Kostan, at ¶ 3.

²⁰ *Id.* at ¶ 4.

²¹ Kostan Mot. to Dismiss, at ¶ 2.

Kostan would be liable as the “sole proprietor” of an entity having no proof of incorporation. In support of Capital’s assertion that Kostan directed Capital and the Lender to use a Delaware address and fax number to contact him, Capital pointed to the fact that the Lender’s letter agreement was addressed to Kostan at the Dover, Delaware address. In response to Kostan’s forum *non conveniens* argument, Kostan argued that Kostan would suffer no hardship.

Kostan rebuts Capital’s arguments, explaining that it was the Lender, not Capital who signed the Letter Agreement and addressed it to Kostan. In addition, there are no facts alleged in the complaint or any other support in the record showing that Kostan had a Delaware address or instructed Capital and the Lender to contact him by using Delaware contact information. Kostan also points out that Capital ignored the First Amended Complaint in the first action and that its assertions that it was Standard Energy, LLC that entered into the contract should be construed against it as judicial omissions.

Standard of Review

Upon a motion to dismiss for lack of personal jurisdiction, it is the plaintiff’s burden to show that the defendant may be subject to the jurisdiction of a Delaware court.²² “[T]he Court may consider the pleadings, affidavits, and any discovery of

²² *Wright v. Am. Home Products Corp.*, 768 A.2d 518, 526 (Del. Super. 2000); *Plummer & Co. v. Realtors v. Crisafi*, 533 A.2d 1242, 1244-45 (Del. Super. 1987).

record” in a light most favorable to the plaintiff.²³ If the Court considers the affidavits and documentary evidence prior to discovery, the Plaintiff need only make a *prima facie* showing of jurisdiction.²⁴

Delaware courts apply a two-part test to determine whether it may exercise its jurisdiction over a nonresident.²⁵ First, the Court must consider whether jurisdiction exists under the Long Arm Statute, 10 Del. C. § 3104.²⁶ Second, the Court must determine whether there are sufficient “minimum contacts” to exercise jurisdiction based on the 14th Amendment to the U.S. Constitution.²⁷

Section 3104(c) outlines six scenarios under in which a nonresident is considered to have submitted to the jurisdiction of a Delaware court. Section 3104(c)(1) is the only scenario addressed by Capital in response to this motion.²⁸ It provides that the Court may exercise personal jurisdiction if a nonresident “[t]ransacts any business or performs any character of work or service in the State.”²⁹ This is a specific jurisdiction provision which applies “when the

²³ *Florida R & D Fund Investors, LLC v. Florida BOCA/Deerfield R & D Investors, LLC*, 2013 WL 4734834 (Del. Ch. Aug. 30, 2013).

²⁴ *Tell v. Roman Catholic Bishops of Diocese of Allentown*, 2010 WL 1691199 (Del. Super. Apr. 26, 2010)(discussing *Greenly v. Davis*, 486 A.2d 669 (Del. 1983)).

²⁵ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 438 (Del. 2005).

²⁶ *Id.*

²⁷ *Id.*

²⁸ “It is well-settled Delaware law that a party waives an argument by not including it in its brief.” *Anguilla Re, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 1408857, at *3 (Del. Super. Mar. 28, 2012).

²⁹ § 3104(c)(1).

plaintiff's claims arise out of acts or omissions that take place in Delaware.”³⁰

Therefore, it is required that “some act on the part of the defendant must have occurred in Delaware and also that plaintiff’s claims arise out of that act.”³¹

“[E]ven a single transaction is sufficient if the claim has its origin in the asserted transaction.”³² “Thus, if the claim sought to be asserted arose from the performance of business or the discharge of the contract, no further inquiry is required concerning any other indicia of the defendant's activity in this state.”³³

Kostan did not transact business in Delaware under § 3104(c)(1). In other words, Kostan performed no act in Delaware from which Capital’s claim arises under. Capital’s claims against Kostan stem from Kostan’s failure to pay Capital the commission it was due under the Mandate and Commission Agreement. First, the negotiations for that agreement took place in Europe. Second, neither party disputes that the purpose of the Agreement was to obtain loans for the construction of plants in Europe. Third, the Letter Agreement’s choice of law provision provided that the Letter Agreement would be governed by the laws of England. Fourth, in his affidavit, Kostan stated that he has never been to Delaware and that the negotiations occurred in Europe by phone, e-mail, and facsimile. In response to this motion, Capital asserted that Kostan instructed the Lender and Capital to

³⁰ *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1155 (Del. Super. 1997) *aff'd sub nom. Oy Partek AB v. Boone*, 707 A.2d 765 (Del. 1998).

³¹ *Id.* at 1156.

³² *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768 (Del. 1986).

³³ *Id.*

contact him at a Delaware fax number and at the Dover, Delaware address. However, Capital submitted no support for this contention other than the Letter Agreement from the Lender addressed to the Dover, Delaware address. Based on these factors, the Court does not find that Kostan transacted business in this state.

Capital argues that Kostan transacted business in Delaware “by holding himself out as the sole member of a Delaware limited liability company, which was never formed.”³⁴ Generally, the mere ownership of a Delaware corporate entity, “does not, without more, amount to the transaction of business under Delaware's Long Arm Statute.”³⁵ This rule applies unless, “the underlying cause of action arises from the creation and operation of the Delaware [entity].”³⁶ The Court acknowledges that the issue raised by Capital differs in that it involves an individual who purports to act on behalf of a nonexistent Delaware entity. In light of the unusual procedural history of this case, the Court is disinclined to find that Kostan transacted business in Delaware on this basis.

The Court has struggled to frame the issues in this motion given Capital’s failure to address Kostan’s alleged conduct and Standard Energy LLC’s status as a nonexistent limited liability company prior to the filing of the instant complaint. In the original complaint in the first lawsuit, Capital asserted that Standard Energy,

³⁴ Capital Response, at ¶ 11.

³⁵ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 439 (Del. 2005).

³⁶ *Id.*

LLC was a Delaware entity, “having its principal place of business at [the Dover, Delaware Address].”³⁷ When Capital amended that complaint to name “Standard Energy LLC a/k/a Standard Holding, LLC,” Capital again stated that the defendant was a Delaware entity with its principal place of business at the same address. In neither the original nor the amended complaint, did Capital make any reference to Kostan. In August of 2011, Capital obtained the Default Judgment. During oral argument for this motion, Capital stated that it was not until after it obtained the default judgment that it discovered that the entity was nonexistent. Capital also argued that, since the entity was not existent, that judgment was void. Yet, as the Court noted, Capital took no action to notify the Court that that the default judgment was rendered against a nonexistent entity or that it should be vacated. In November 2012, over a year later, Capital filed this action against Kostan without mentioning the prior lawsuit or the default judgment. Capital still did not address them in its response to this motion until they were addressed by the Court during oral argument. Based on Capital’s actions, the Court is not persuaded that it should find that Kostan transacted business in Delaware on this ground alone.³⁸

³⁷ First Compl., ¶ 2.

³⁸ The procedural background in this case is more closely aligned with other cases in Delaware where a plaintiff sues an entity which it later discovers to be nonexistent. *E.g., Food Fair Stores Corp. v. Vari*, 191 A.2d 257 (Del. 1963); *Fletcher v. Roses Stores, Inc.*, 1989 WL 31578 (Del. Super. March 29, 1989); *Cf. Stoik v. Wanamaker*, 315 A.2d 606 (Del. Super. Jan. 9, 1974). In most cases, a plaintiff discovering the nonexistence of the entity alerts the court that it sued the wrong party due by a motion to amend or through other means. Here, Capital never alerted the Court that it sued a nonexistent entity once it was discovered and it did not inform the Court that

While this motion is not a motion to amend, the Court’s rationale in *Food Fair* reflects the Court’s concern with the effect of the procedural background in this case. Unlike the plaintiff in *Food Fair*, Capital did more than fail to amend a complaint to name a correct party when it sued the nonexistent entity. Capital asserted that the entity was a Delaware limited liability company in the original complaint, amended the original complaint, again asserted that the entity was a Delaware limited liability company, and obtained a default judgment against that entity. Moreover, when it discovered that the entity did not exist, Capital did not inform the Court or move to vacate the default judgment. Instead, it filed this action against Kostan over a year later stating that it had learned that the entity was never formed, but did not address the prior suit. In light of such “laxity” and “appeal to the court’s sense of fair play,” the Court does not find Capital’s argument that Kostan transacted business in Delaware by purporting to act on behalf of a Delaware limited liability corporation to be persuasive.

Conclusion

For the reasons stated above, the Court finds that Kostan did not transact business in Delaware pursuant to the Long Arm Statute. Because the Court finds that personal jurisdiction is lacking under the Statute, the Court does not reach the

Kostan acted on behalf of that nonexistent entity until over a year after it obtained the default judgment in the first action.

issues of due process³⁹ or forum *non conveniens*. Therefore, Kostan's motion to dismiss is **GRANTED**.

IT IS SO ORDERED.

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.

³⁹ See *Picard v. Wood*, 2012 WL 2865993, at *2 (Del. Ch. July 12, 2012).