SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON**, ***Justice*** — **PART** **IAS MOTION 37EFM**

---X

ALPHA 7 TRADING CORPORATION

Plaintiff,

- v -

CREATIVELY DISRUPTIVE LLC,

Defendant.

---X

INDEX NO. 655535/2018

MOTION DATE 11/18/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for DISMISSAL .

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion by defendant, pursuant to CPLR 3211(a)(8), to dismiss the complaint for lack of personal jurisdiction is granted, and the instant cross-motion by plaintiff, pursuant to CPLR 3124 and 3126, to, inter alia, strike defendant's answer is denied as moot.

Background

The facts, stated as simply as possible, are as follows. This action arises out of an agreement entered into between the parties wherein defendant agreed to provide plaintiff with certain research, marketing, and advertising services. Essentially, defendant was hired to build a "Facebook Funnel" that would advertise plaintiff-company to targeted audiences on Facebook and then drive those targeted people to plaintiff's website, using internet-based media marketing services. (NYSCEF Doc. 49, at ¶ 4; NYSCEF Doc. 50, at 10).

Plaintiff alleges that defendant's services were "insufficient, ineffective, deficient, negligent and unprofessional" as defendant's marketing and advertising services did not produce any positive results for plaintiff (i.e., no realization of customers). (NYSCEF Doc. 35, at ¶ 8). Plaintiff further alleges that it incurred damages "as a result of its reliance upon [d]efendant's recommendations and research, [d]efendant's failure to perform its duties under the [a]greement in a competent manner, and [d]efendant's representations as to the quality and level of its skill, including the representations made in its advertising and promotional materials." (Id., at ¶ 9). Plaintiff's unverified complaint alleges four causes of action, to wit, breach of contract (first cause of action); fraud (second cause of action); unjust enrichment (third cause of action); and violation of the General Business Law §§ 349, et seq. (fourth cause of action).

Defendant's answer generally denies the material allegations of the complaint and sets forth numerous affirmative defenses, including, inter alia, lack of personal jurisdiction.

Defendant now moves, pursuant to CPLR 3211(a)(8), to dismiss the complaint on the ground that this Court lacks personal jurisdiction. Plaintiff opposes the motion to dismiss and has cross-moved, pursuant to CPLR 3124 and 3126, to strike defendant's answer, with prejudice, and for entry of a default judgment against defendant, or alternatively, to compel defendant to comply with plaintiff's discovery demands.

Discussion

Motion to Dismiss

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." Leon v Martinez, 84 NY2d 83, 87 (1994) (internal citation omitted). "[T]he burden of proving jurisdiction is on the party asserting it, it [is] incumbent on the plaintiff … to come forward with evidence to support the existence of a basis upon which to predicate the exercise of personal jurisdiction over [defendant] or to at least show that such evidence may exist." Roldan v Dexter Folder Co., 178 AD2d 589, 590 (2nd Dep't 1991) (internal citations omitted); see also Stewart v Volkswagen of Am., Inc., 81 NY2d 203, (1993) ("once jurisdiction … [is] questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites.") (internal citation omitted).

Here, plaintiff asserts that, pursuant to CPLR 302(a), this Court has personal jurisdiction over defendant because "[d]efendant expected, or should have reasonably expected, its acts to have consequences in the State, i.e., injury to [plaintiff], and there is a substantial relationship between the subject transaction and that injury." (NYSCEF Doc. 58, at ¶ 18). In addition, plaintiff asserts that this Court has personal jurisdiction over defendant as the subject agreement states, "[plaintiff] may avail from [defendant] for consultation on the nature, timing and extent of these service via email, over the telephone, in person, or at **[plaintiff's office]**." (emphasis added) (NYSCEF Doc. 50, at 10). Plaintiff argues that this provision clearly anticipates defendant being present in this state, and thus, this purposeful availment creates a reasonable expectation that defendant would need to defend its actions in this state.

Defendant asserts that there is no jurisdiction, arguing, inter alia, that: (1) at the time the agreement was executed defendant was a California limited liability company with its principal place of business in California (apparently, defendant is now an Arizona limited liability company and currently operates its business exclusively out of its Arizona office, where all of its services are rendered remotely); (2) all of its business dealings with plaintiff and all of the contracted services were generated and provided from defendant's former office in California; (3) it never entered into New York State to do business, it does not solicit business from New York State residents, and it does not transact any business or contract to supply any goods in New York State or derive any substantial revenue therefrom; and (4) it does not maintain a physical presence in New York State as it is not licensed to do business in New York State and does not own any real property within the state.

In order to determine if this Court has personal jurisdiction over defendant the Court must follow a two-step analysis: (1) whether CPLR 301 or 302 provides a basis for personal jurisdiction; and (2) if they do, whether the exercise of personal jurisdiction over the defendant would offend due process. See 777388 Ont. v Lencore Acoustics Corp., 142 FSupp2d 309, 316 (EDNY 2001). Given that there are no allegations that CPLR 301 provides for jurisdiction in this situation, this

Court will focus its analysis on CPLR 302. New York's "long-arm" statute, CPLR 302(a), provides, as here relevant, as follows:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domicillary … who in person …

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

***

3. commits a tortious act without the state causing injury to a person or property within the state … if he

    (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

    (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

"So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in that State." Kreutter v McFadden Oil Corp., 71 NY2d 460, 466 (1988).

The only jurisdictional facts plead in plaintiff's complaint are as follows: (1) defendant, pursuant to the terms of the agreement, agreed to be available in New York for consultation purposes, and thus, defendant agreed, and should have anticipated, that the agreement would be effectuated in, and that defendant could be present in, New York; (2) plaintiff made payments to defendant from New York; and (3) defendant performed the contracted services and provided them to plaintiff in New York.

Plaintiff's alleged facts do not bring its claims against defendant within the ambit of CPLR 302(a). It does not appear that defendant had sufficient purposeful activities in New York, which bare a substantial relationship to the subject matter of this action, so as to avail itself of the benefits and protections of New York laws. This Court does not think that a California (now Arizona) company that contracted with plaintiff, a New York corporation, to provide marketing and advertising services on the internet has "avail[ed] itself of the benefits of" New York or that defendant had "sufficient minimum contacts with it," or "should reasonably expect to defend its actions" here.

Even if defendant should reasonably have expected "the act to have consequences" in New York by virtue of the terms of the agreement stating that defendant would consult with plaintiff at plaintiff's New York office, plaintiff has failed to allege any facts illustrating that defendant

regularly does or solicits business in New York, engages in any persistent course of conduct in New York, or derives substantial revenue from services rendered in New York or from interstate commerce. Arguing that defendant does not deny that it engages in *some* course of conduct in New York or that it derives *some* revenue from goods and services used or consumed in New York is not sufficient, as "some" is not the same as "substantial." Even assuming that defendant was present in New York or engaged in a course of conduct in New York, it would have to be related to the claims at issue or be a substantial presence to provide a basis for personal jurisdiction.

Cross-Motion to Strike and/or to Compel

Pursuant to 22 NYCRR § 202.7(a), "no motion shall be filed with the court unless there have been served and filed with the motion papers … with respect to a motion related to disclosure … , an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." "To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to reconcile with opposing counsel." 241 Fifth Ave. Hotel, LLC v GSY Corp., 110 AD3d 470, 471 (1st Dep't 2013) (citing 22 NYCRR § 202.7(c)).

Plaintiff's discovery motion is not accompanied by a separate good faith affirmation, and its attorney affirmation lacks any of the information 22 NYCRR § 202.7(c) requires. Thus, the cross-motion must be denied. Mironer v City of New York, 79 AD3d 1106, 1108 (2nd Dep't 2010) ("the affirmation of good faith submitted by the plaintiffs' counsel was insufficient, as it did not refer to any communications between the parties that would evince a diligent effort by the plaintiffs to resolve the discovery dispute.") (internal citation omitted).

In any event, it seems that the motion may be moot, as defendant, albeit late, appears to have complied with plaintiff's discovery demands. (NYSCEF Doc. 61). Whether defendant's discovery responses would have provided a basis for personal jurisdiction is purely speculative. The Court has considered plaintiff's other arguments in support of its cross-motion and in opposition to defendant's motion to dismiss and finds them to be unavailing and/or non-dispositive.

Conclusion

The motion to dismiss, pursuant to CPLR 3211(a)(8), is granted. The cross-motion to strike defendant's answer, pursuant to CPLR 3124 and 3126, is denied. The Clerk is hereby directed to enter judgment accordingly.

20210524163400AENGORONA97FB95CEE6D4190B719162858E6116C

5/24/2021	ARTHUR F. ENGORON, J.S.C.
DATE	

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE