SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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U.S. IMMIGRATION FUND LLC, et al.,

Petitioners,

Index # 159222/2018

-against-

DOUGLAS LITOWITZ, ESQ, et al.,

Respondents.

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FOR FEES AND COSTS

Respondent Douglas Litowitz ("Litowitz") appears solely for the purposes of contesting personal jurisdiction, and hereby moves this honorable court to dismiss this action under CPLR 3211(a)(8) for lack of personal jurisdiction, and for an award of attorney fees and costs.

MEMORANDUM OF LAW

Petitioners bear the burden of establishing personal jurisdiction by showing that the Respondent engaged in purposeful activity within the State of New York. *Brandt v. Toraby*, 273 A.D.2d 429, 430, 710 N.Y.S.2d 115 (2nd Dept. 2000).

Yet the Complaint does not have a single allegation addressing the issues of jurisdiction or venue. It concedes that Litowitz is domiciled in Illinois, and doesn't contain any allegation placing him in New York State at any time, nor does it assert that Litowitz has any business interests, contracts, ownership, or any other

connection of any kind to the State of New York. That is because Litowitz truly doesn't have any connection to New York State. This Complaint should never have been filed in this Court.

No Element of the Long-Arm Statute is Satisfied

The Complaint fails to allege that Litowitz took any action set forth in CPLR 302(a) which would give rise to personal jurisdiction in New York State. The question is not even close. To wit:

Litowitz has not been to New York State for many years.

Litowitz does not transact business within New York State.

Litowitz does not buy nor supply goods or services within New York State.

Litowitz has not committed a tortious act within New York State.

Litowitz has not injured anyone in New York State.

Litowitz does not do business or have an office or phone in New York State.

Litowitz does not own, use, rent, or deal with property in New York State.

Litowitz does not own any business or investment within New York State.

Litowitz does not solicit business within New York State.

Litowitz does not derive any revenue from New York State.

Litowitz – a lawyer – does not practice in New York and has no clients there.

Litowitz has no agreement or contract that is tied to New York State.

Litowitz has no license, abode, certificate, or government ID from New York.

Litowitz is from Illinois. If he is going to be sued, it must be in Illinois. He cannot be sued in New York City just because that is where the Plaintiffs find it comfortable to sue someone.

Counts I, II, IV, and V are for torts (fraud, defamation, tortious interference, and prima facie tort) but New York law is clear that the long-arm statute only applies to torts committed on New York soil: "New York law precludes an assertion of jurisdiction under § 302(a)(2) unless the defendant is physically present within the state when the tortious act is committed." *Heinfling v. Colapinto*, 946 F. Supp. 260, 264 (S.D.N.Y. 1996). Personal jurisdiction cannot arise 'remotely,' as it were, by virtue of telephone calls or letters that originate from out of New York State. And 'injury in New York' must be *direct* to invoke personal jurisdiction. As for Count III, it alleges breach of the contracts signed by Litowitz's clients (not Litowitz himself), on the incredibly bizarre and unprecedented theory that since Litowitz is a lawyer, he is bound by the contracts signed by his clients. See paragraph 76. This is so unbelievable that Litowitz will repeat it for the Court: *Count III alleges that Litowitz breached a contract to which he is not a party.*

The fact pattern here is nearly identical to *Shatara v. Ephraim*, 137 A.D.3d 1248, 29 N.Y.S.3d 406 (2nd Dept. 2016). In *Shatara*, the defendant was a New Jersey lawyer sued for fraud, conversion, and breach of contract in the Supreme Court of Nassau County. The Appellate Division found that the attorney did not conduct any business in New York, had no clients in a New York court proceeding, and did not avail herself of the privileges of conducting activities in New York. Accordingly, the case was dismissed for lack of personal jurisdiction. The Court held that the mere

allegation of committing a tort or an injury in New York State in not enough to create personal jurisdiction unless the respondent also does business in the State or has significant ties to the State:

> Accepting as true the plaintiff's allegations that [Respondent] committed tortious acts without New York State causing injury to the plaintiff within the State, the plaintiff failed to present any evidence that [Respondent] regularly did or solicited business, or engaged in any persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in this State, or derived substantial revenue from interstate or international commerce.

Id. at 408. The facts here are analogous. Indeed, Litowitz is much farther away than the defendant in *Shatara*: he is 800 miles from this Court.

The only possible connection between Litowitz and the State of New York is that – as the Complaint states – he wrote a letter to a judge in New York in a case where USIF was sued by ninety-four (94) of their own Chinese investors. See *Ang et al. v. USIF LLC*, No. 156339/2018)(Scarpulla, J.). Litowitz merely inquired whether his eight (8) Chinese clients were automatically part of the impending settlement of the case, or whether he should move to intervene and/or hire a New York lawyer to file a motion or complaint to determine their fate. That's it. We have already seen that personal jurisdiction cannot arise from an alleged tort unless the person is physically in New York. Here, Litowitz never went to New York, never had a New York client, never filed any document in a New York court, never filed any appearance in any New York court, and never did any business in New York. Litowitz never left Chicago and never received any benefit from New York State. A letter or a phone call to New York City are too slender a reed on which to base

personal jurisdiction, or else this Court would have personal jurisdiction over half the people in America.

The Plaintiffs have a simple remedy if they want to sue Litowitz: they can come to Chicago and sue him in federal court. But they cannot sue in New York City just because it happens to be convenient for them.

Tellingly, the Complaint Has No "Jurisdiction and Venue" Section

The lack of a section on "Jurisdiction and Venue" in the Complaint is an obvious sign that there is no basis for jurisdiction in this case, and therefore no way to determine venue. Since Litowitz was never in the State of New York and has no ties to New York, Plaintiff's counsel obviously drew a blank on jurisdiction and venue. After all, if Litowitz was never in New York State and never did anything there, then there is no way to determine the appropriate venue.

A Complaint cannot simply ignore jurisdiction and venue. These have *constitutional* implications on a defendant's due process rights, as the United States Supreme Court has held all the way back to the line of cases coming from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). It is constitutionally impermissible for a court to require a respondent to appear in a state court where he does not reside, does not do business, and has no connections. Here, Litowitz does not even have minimal contacts with New York State. So by suing Litowitz in New York, the Plaintiffs are actually putting this Court in the very dangerous position of infringing on Litowitz's constitutional rights. There is no excuse for such recklessness by Plaintiffs' counsel.

Attorney Fees and Costs are Assessable

A defendant can recover fees and costs when sued in a frivolous action, and that includes an action which is filed when the court obviously lacks personal jurisdiction. *Kyowa Seni, Co., Ltd. v ANA Aircraft Technics, Co., Ltd*., 60 Misc. 3d 898, 2018 WL 3321410 (July 5, 2018). In *Kyowa*, one Japanese company sued another in New York, even though they had already litigated in Japan. The Court reiterated the fundamental rule that a person or entity cannot be named as a defendant in New York unless he transacts business in the state and such business is substantially related to the claim: in other words, there must be an "articulable nexus" and "substantial relationship" with the defendant's transaction of business. *Id*. at 905. The Court found that the lack of jurisdiction was so obvious that the lawsuit should never have been filed in the first place, and that Plaintiff should pay fees and costs under 22 NYCCR 130-1.1, which provides sanctions for frivolous actions that are completely without merit and cannot be justified as an extension, modification, or reversal of existing law.

In this case, not a single paragraph of the Complaint puts Litowitz anywhere near New York or having any involvement with New York that could conceivably place him within the purview of the long-arm statute. There was no basis to file this case in New York state court.

This 'mistake' was intentional. No attorney could miss, forget, or accidentally skip over the issues of jurisdiction and venue. This is purposeful, contemptuous behavior, designed solely to harass and annoy.

WHEREFORE, Respondent Litowitz asks that the Complaint be dismissed with prejudice for lack of personal jurisdiction, and that attorney fees and costs be assessed against Plaintiffs and/or their counsel.

Dated: October 7, 2018

Respectfully Submitted,

/s/ Douglas Litowitz