UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

LÉONE MEYER,

Plaintiff,

-against-

13 Civ. 3128 (CM)

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, et al.,

Defendants.

x

MEMORANDUM DECISION AND ORDER DISMISSING ACTION AS AGAINST THE OKLAHOMA DEFENDANTS FOR LACK OF PERSONAL JURISDICTION

McMahon, J.:

In this action, plaintiff Léone Meyer seeks to recover a painting by Camille Pissarro entitled "Shepherdess Bringing in Sheep," which was purportedly donated to the University of Oklahoma Foundation, Inc. and presently hangs in the Fred Jones Jr. Museum of Art on the campus of the University of Oklahoma in Norman, Oklahoma. Plaintiff, a descendant of the owners of Galeries Lafayette (Paris's high end department store) alleges that the painting was stolen from her family by the Nazis during World War II, and found its way to the United States, where it was acquired by Aaron and Clara Weitzenhoffer in January 1957. The Weitzenhoffers, who purchased the painting from E.J. van Wisselingh & Co., left the painting to the University in 2000.

There are three groups of defendants in this action, whom I will refer to as the "Findlay Defendants," the "Oklahoma Defendants," and the "Art Museum Association Defendants."

The Findlay Defendants consist principally of a group of entities associated with the noted (and long deceased) New York City art dealer David Findlay and his brother, the equally

noted (and equally dead) art dealer Walstein (Wally) Findlay, or their descendants: Wally Findlay Galleries (New York), Inc., Wally Findlay Galleries International Development Corp., DFG Art Corp., Findlay Art Consignments, Inc., and Findlay Galleries, Inc.[1] It is my understanding that David Findlay brokered the sale of the painting to the Weitzenhoffers after exhibiting it in the David Findlay Gallery in New York City in the late fall of 1956. There is no allegation that any of the Findlay Defendants had anything to do with the painting after arranging the sale of the painting some 57 years ago.

The Court is reliably advised that some or all of the Findlay Defendants are defunct. They are certainly all in default. The Court long ago concluded that the Findlay Defendants were sued as window dressing, in order to try to site the case in New York rather than in Oklahoma.

The Art Museum Association Defendants were added to this action only recently and returned waivers of service just last week. They allegedly owed Plaintiff some sort of duty to punish the Fred Jones Jr. Museum of Art when the Oklahoma Defendants did not immediately accede to Meyer's demand that the painting be returned to her possession.

The Oklahoma Defendants—The Board of Regents of the University of Oklahoma, David Boren, individually and as President of the University of Oklahoma,[2] and the University of Oklahoma Foundation, Inc.—have moved to dismiss the complaint as against them on a variety of grounds. Only one ground need be discussed: this Court lacks personal jurisdiction over all of them. Therefore, the motion to dismiss as against them is granted.

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[1] The two brothers engaged in a notorious lawsuit when Wally—who had been operating galleries in Chicago and Palm Beach since the brothers went their separate ways in 1938—opened a gallery under his name (Wally Findlay) right next door to his brother David's gallery on East 57th Street here in Manhattan. *See David B. Findlay, Inc. v. Walstein G. Findlay, Jr.*, 47 Misc. 649 (Sup Ct. N.Y. Co. 1965).

[2] The Complaint may or may not have been withdrawn as against President Boren personally.

The causes of action against the Oklahoma Defendants all arise under state law. No federal claims are asserted.

No allegations in the First Amended Complaint would render the Oklahoma Defendants amenable to specific (long-arm) jurisdiction in New York pursuant to N.Y. Civ. P. Law & Rules § 302. The Oklahoma Defendants allegedly came into the possession of the Pissarro painting in 2000, when it was gifted to the University by the Weitzenhoffer family—who, according to publicly available materials, lived in Oklahoma City. Since then, the painting has been housed on the campus of the University. The First Amended Complaint pleads not a single New York-based activity by the Oklahoma Defendants in connection with either the University's acquisition or its subsequent maintenance of the painting—all of which allegedly took place in Oklahoma. FAC ¶¶ 87-88, 101.[3]

Plaintiff asserts jurisdiction over the Oklahoma Defendants pursuant to N.Y. Civil Practice Law and Rules 301—New York's "general jurisdiction" statute, which provides that a court may assert general jurisdiction over a defendant (personal jurisdiction involving any and all matters, whether connected with activity in the forum state or not) when that defendant "has engaged in such a continuous and systematic course of 'doing business' [in New York] that a finding of its 'presence' [in New York] is warranted." *Landoil Res. Corp. v. Alexander & Alexander Servs.*, 77 N.Y. 2d 28, 33 (1990).

The constitutional limit of general jurisdiction was settled three quarters of a century ago, in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), where the Supreme Court announced that general jurisdiction exists in a state only when an entity's contacts with that state

[3] The painting is in Oklahoma even as I write this, which means that this Court could not take cognizance of an action under the Federal Declaratory Judgment Act for a declaration as to the ownership of the painting. *See* 28 U.S.C. §§ 2201-02.

are "so 'continuous and systematic' as to render [it] essentially at home in the forum State." Only a few months ago, in *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), the Supreme Court reminded us all of the limitations of *International Shoe*, when it held that "only a limited set a affiliations with a forum will render a defendant amendable to all-purpose jurisdiction there." *Daimler* made it clear that, as a rule, it is not constitutionally permissible to sue an individual or corporation in a state where that individual is not "at home" unless the defendant's activities in the forum state are the basis for the lawsuit—that is, it is not appropriate for a state where a defendant is not "at home" to exercise general (as opposed to specific) jurisdiction over that defendant. An individual is "at home" in the state of his domicile; a corporation is "at home" where it is incorporated and where it has its principal place of business. *Id.*

The phrase "as a rule" obviously admits of exceptions, and in *Daimler* the Supreme Court was careful to note that domicile (for individuals) and place of incorporation and principal place of business (for corporations) would not always be the only fora in which general jurisdiction could appropriately be asserted. But the Court rejected the *Daimler* plaintiffs' assertion that general jurisdiction exists in any state in which an individual or corporation "engaged in a substantial, continuous, and systematic course of business"—a phrase from *International Shoe* that referred to the assertion of specific, rather than general, jurisdiction. *Id.* at 761. More important, the Court noted that a defendant's operations in a state other than its "home" state(s) would have to be "so substantial and of such a nature as to render the corporation at home in that State" before general jurisdiction could be exercised; such a case, it went on to say, would be "exceptional." *Id.* at 761 n.19.

So the question is whether the Oklahoma Defendants are amenable to general jurisdiction in the State of New York.

The question answers itself.

The University (sued through its trustees) is located in Oklahoma (indeed, it is an arm of the State of Oklahoma, which raises issues of sovereign immunity); its Trustees govern it in Oklahoma; President (former Senator) Boren resides on the campus in Oklahoma and his office is in Oklahoma. The University, its Board and its President are quintessentially "at home" in Oklahoma—not New York.

Jurisdictional discovery, in which the parties have engaged, reveals that the University maintains no bank accounts in New York; owns no real estate in New York; has no offices in New York; has no employees in New York; has no telephone or other similar contact in New York; and does not routinely conduct or solicit business in New York. The University obviously recruits students from New York and solicits and receives contributions nationwide, including from New York residents; it also has an exchange program that allows its students to spend a semester at New York University (and, I assume, vice versa). But long before *Daimler* such activities were insufficient to subject a nationally prominent university to general jurisdiction in this state. *See, e.g.*, *Farahmand v. Dalhousie University*, No. 117787/2009, 2011 WL 103539, at *3 (Sup. Ct. N.Y. Co. 2011); *Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 209-211 (W.D.N.Y. 1997); *Gehling v. St. George's School of Medicine, Ltd.*, 773 F.2d 539, 541-43 (3d Cir. 1985). To the extent that plaintiff relies on *Kingsepp v. Wesleyan University*, 763 F. Supp. 22 (S.D.N.Y. 1991), that case is likely not good law, especially in light of the Supreme Court's strong statement in *Daimler*.

Plaintiff contends that the fact that the University has issued bonds with the assistance of Wall Street (*i.e.*, New York-based) underwriters is sufficient to subject the Oklahoma Defendants to general jurisdiction here. That argument has been repeatedly rejected for years;

the use of New York-based financial services firms does not subject a defendant to CPLR 301 jurisdiction—or, to use *Daimler*'s formulation, does not render the defendant "at home" in New York. *See Daniel*, 988 F. Supp. at 223; *Nelson v. Massachusetts General Hospital*, No. 04-cv-5382 (CM), 2007 WL 2781241, at *21 (S.D.N.Y. Sept. 20, 2007), *aff'd*, 299 F. App'x 78 (2d Cir. 2008). If New York courts did not routinely reject the notion that accessing the financial markets constitutes "doing business" in New York, literally millions of individuals and entities who have no other connection to this state would be subject to general jurisdiction here. *Schenker v. Assicurazioni Genereali S.p.A., Consol.*, No. 98-cv-9186 (MBM), 2002 WL 1560788, at *5 (S.D.N.Y. July 15, 2002), *abrogated on other grounds by Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81 (2d Cir. 2013).

In fact, the proposition is so well settled that it ought to violate Fed. R. Civ. P. 11 to make the argument!

Finally, Plaintiff argues that the Foundation is amenable to general jurisdiction in New York because it has a bank account in New York—a proposition rejected decades ago, see *Grove Valve & Regulator Co., Inc. v. Iranian Oil Services, Ltd.* 87 F.R.D. 93, 95 (S.D.N.Y. 1980)—and because it solicits and receives donations and contributions from New York residents, which (as discussed in the preceding paragraphs) does not constitute "doing business" in New York.

Indeed, the "at home in" formulation of *Daimler* calls into the question the notion that "doing business in" New York—the traditional formulation of the CPLR 301 test—is constitutionally compliant. Fortunately, I need not tackle that issue. The Oklahoma Defendants are not "at home" in New York in any sense of the word, and so are not subject to suit in this Court, in this state, on the allegations of the First Amended Complaint.

I decide the pending motion on the ground of personal jurisdiction to emphasize that this matter had no business being brought before this Court in the first place. Plaintiff may wish to bring her lawsuit against the Oklahoma Defendants in Oklahoma. It is there that issues about the doctrine of sovereign immunity in relation to the University, its Trustees and its President ought to be litigated, as well as issues relating to the statute of limitations and various torts, which may well be governed by Oklahoma law.

The Oklahoma Defendants' motion to dismiss this action as against them is granted without prejudice. Unfortunately, this action cannot be closed altogether because there are other defendants in the caption.

As previously noted, the Findlay Defendants have defaulted, but this Court refuses to turn a blind eye to its belief that they were sued for no other reason than to site this action in New York rather than in Oklahoma. Neither will I turn a blind eye to the fact that any claims that might be asserted against them appear on their face to be time-barred.

Although the default means that the well-pleaded factual allegations of the complaint are deemed admitted, *see Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 108 (2d Cir. 1997), it does not mean that the plaintiff is automatically entitled to any relief against the defaulting defendant. If the well-pleaded allegations do not make out a cause of action, a court cannot order relief against a defaulting defendant. *Gill v. Pact Org.*, No. 95-cv-4510 (LAP), 1997 WL 539948, at *13 (S.D.N.Y. Aug. 28, 1997). If plaintiff wishes to maintain her lawsuit against the New York Defendant, she has 14 days (no more and no extensions) to show cause why her claims against them state a timely and facially meritorious causes of action—assuming the well-pleaded allegations of fact (but not allegations of law or purely conclusory allegations) to be true. Otherwise, this Court will dismiss

the claims against the New York Defendants. Needless to say, Fed. R. Civ. P. 11 will be invoked if this Court's time is wasted with frivolous arguments.

Finally, as noted at the top of this opinion, the American Alliance of Museums and the Association of Art Museum Directors were added as defendants when the First Amended Complaint was filed and have recently acknowledged receipt of process. Having read the First Amended Complaint, I assume that a motion to dismiss is forthcoming. Again, I remind counsel for Meyer of *their* obligations under Rule 11 as signatories of pleadings.

CONCLUSION

For the foregoing reasons, the Oklahoma Defendants' motion to dismiss the First Amended Complaint as against them is granted without prejudice. The Oklahoma Defendants' motion for judicial notice is denied as moot. The motions at Docket Nos. 23 and 27 are also denied as moot, having preceded the First Amended Complaint. The Clerk of the Court is directed to remove Docket Nos. 23, 27, 36, and 40 from the Court's list of pending motions.

Dated: May 14, 2014

U.S.D.J.

BY ECF TO ALL COUNSEL