UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRY TUCKER, on behalf of himself and all others similarly situated,

Plaintiff,

v.

FIRSTLIGHT HOME CARE FRANCHISING, LLC,

Defendant.

REPORT AND RECOMMENDATION

18-CV-5012 (PAE)(KNF)

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE PAUL A. ENGELMAYER, UNITED STATES DISTRICT JUDGE

Plaintiff Henry Tucker ("Tucker") asserts violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 1201 et seq., New York State Human Rights Law, New York Executive Law Article 15 and New York City Human Rights Law, New York City Adminstrative Code § 8-101 et seq., by defendant Firstlight Home Care Franchising, LLC ("FirstLight"). Tucker contends that he is a visually-impaired and legally blind person and FirstLight is "a Delaware Limited Liability Company, with its principal office in Ohio, doing business in New York through its website and franchises." Tucker alleges that FirstLight owns and operates FirstLight's website and is a lessor or lessee, franchisor or franchisee of "Assisted Living Offices throughout the United States, including New York." Tucker contends that personal jurisdiction exists over FirstLight, pursuant to New York Civil Practice Law and Rules ("CPLR") § 302, "in that Defendant designed and maintains control over the subject Website, utilized by all franchise companies, and Defendant maintains a sufficient degree of control over daily franchise operations." In connection with FirstLight's website, Tucker asserts that it

> provides consumers with access to an array of information and services including Office locations and hours, access to details regarding its many programs and services, including information related to its Home Care Services, its Ask a Nurse feature, information pertaining to the various home care services, including Companion Care and Personal Care, promotional information, and other services available online and in Offices. . . . Defendant is a Home Care servicer that offers the commercial website, www.firstlighthomecare.com, to the public. The website offers features which should allow all consumers to access the facilities and services which Defendant offers in connection with their physical locations. Through the Website, consumers are, inter alia, able to: find information about Franchise opportunities, Office locations and hours, employment opportunities; access details regarding its many programs and services, including information related to its Home Care services, its Ask a Nurse feature, information pertaining to the various home care services, including Companion Care and Personal Care, and other services available online and in Offices.

According to Tucker, FirstLight's website "utilized by all Franchises, is a public accommodation within the definition of Title III of the ADA, 42 U.S.C. § 12181(7), as a service, privilege, or advantage of Defendant's franchise Assisted Living Offices." Moreover, FirstLight's "franchises Assisted Living Offices are public accommodations." Tucker alleges that he uses a screen-reading software to access, on the Internet, websites that have content capable of being rendered into text. According to Tucker, the international website standards organization, the World Wide Web Consortium, known as W3C, published version 2.0 of the Web Content Accessibility Guidelines ("WCAG 2.0"), to make websites accessible to blind and visually-impaired persons. Tucker maintains that WCAG 2.0 is followed universally by large business and government entities. Tucker asserts that FirstLight is a franchisor of in-home care businesses and has over 250 franchises in the United States. Tucker contends that FirstLight's website, designed and operated by Firstlight, offers to the public information and services related to its franchise Home Care Offices, including the office in New York, New York. However, Tucker asserts, the defendant's website has barriers for blind and visually impaired persons, which prevent the plaintiff from accessing the website fully to learn of the opportunities the

defendant offers that are made available to the general public. Before the Court is the defendant's motion to dismiss the amended complaint, for lack of personal jurisdiction, pursuant to Rule 12(b)(2), and for failure to make a claim upon which relief can be granted, pursuant to Rule 12(b)(6) the Federal Rules of Civil Procedure. The plaintiff opposes the motion.

DEFENDANT'S CONTENTIONS

FirstLight asserts that no personal jurisdiction exists under New York's long-arm jurisdiction statute, CPLR §§ 302(a)(2) or 302(a)(3), because: (1) "assuming FirstLight committed a tortious act in this case, it would have been in Ohio, where FirstLight created and maintains its website, not in New York"; (2) the plaintiff "does not even allege the extent of FirstLight's business in New York" and he "cannot establish the substantial business requirement, because FirstLight's New York business represents less than 5% of the company's revenue"; (3) the plaintiff "has not alleged, and cannot establish, it was reasonably foreseeable that the alleged barriers on FirstLight's website would cause injury in New York"; (4) FirstLight "does not operate or control the franchised operations"; and (5) "the website is merely informational; FirstLight does not conduct business, make sales, or derive revenue through the Website." In a footnote to its memorandum of law, FirstLight asserts:

> Although not alleged in Plaintiff's Complaint, jurisdiction also is not present under Section 302(a)(1), because Plaintiff's claims against FirstLight do not arise from FirstLight's business transactions in New York. Plaintiff's claims are all rooted in alleged accessibility barriers on the Website. . . . . But those barriers have nothing to do with FirstLight's business in New York, which is limited to a relationship with franchisees in New York. (Bevis Aff., ¶¶ 2, 3). . . . Moreover, the mere operation on an out-of-state website does not constitute transaction of business in New York.

FirstLight contends that the complaint fails to state a claim for relief for the following reasons: (a) the plaintiff's ADA claims, including for injunctive relief, are moot because "as of the date of this Motion, FirstLight has addressed the issues alleged in Plaintiff's Complaint"; (b)

the plaintiff "cannot allege facts sufficient to show FirstLight denied him access to a place of public accommodation owned, leased, or operated by FirstLight" because "the Website is not a place of public accommodation, nor does the Website have a connection to a place of public accommodation owned, leased, operated or controlled by FirstLight"; and (c) "application of unofficial standards of accessibility would violate FirstLight's due process rights" because "there are no such rules or regulations" requiring implementation of any standards. More specifically, FirstLight asserts that its website does not function "as a platform for the defendant to offer services to the public"; rather, it is merely a website that provides information to its visitors. Since: (i) FirstLight's clients or potential clients cannot order, purchase, pay for, or otherwise effect a revenue-producing transaction or obtain in-home care through the website; and (ii) "potential franchisees cannot complete the franchising process, through the Website," FirstLight's website "is no more than a conduit for background information on FirstLight's business." Moreover, no nexus exists between the website and any physical place of public accommodation that FirstLight owns, leases, operates or controls, and the franchise offices are owned or leased by franchisees, who are also responsible for operating the offices. FirstLight asserts that, even assuming that it owned, leased or operated the franchise offices, those offices are not places of public accommodation because they "are not intended for public use; they merely carry out administrative functions, such as recruiting service providers, and maintaining employee and client files" and no reason exists for the public to visit the offices, given that "the crux of the business at issue is *in-home* care." FirstLight contends that the plaintiff failed to allege valid claims under state or municipal law for the same reason, because the plaintiff "does not, and cannot, allege facts sufficient to show that FirstLight is a 'place of public accommodation.'" FirstLight maintains that imposing the WCAG 2.0 on it would be improper in

the absence of any regulations and guidelines requiring that standard, especially "in the context of non-physical places of public accommodation (such as websites)."

In support of its motion, FirstLight submitted a declaration, dated November 2, 2018, by Jeff Bevis ("Bevis"), FirstLight's president and CEO. Bevis states that FirstLight "is a franchisor of in-home care businesses" and its principal place of business is in Ohio. According to Bevis, FirstLight "derives the vast majority of its revenue from royalties and other fees collected from its franchisees who operate businesses under the FirstLight brand name, including the franchise in New York, New York." Bevis states:

> Under the franchise agreements between FirstLight and its franchisees, the franchisees are responsible for, among other things: (i) obtaining office space; (ii) recruiting, hiring and overseeing the day-to-day activities of the franchisees' employees; (iii) ensuring compliance with federal, state, and local laws, codes, and regulations, including the [ADA], with respect to the construction, design, and operation of the franchisees' offices. FirstLight does not own, lease, or operate the franchisees' offices. . . . In my role as President and CEO of FirstLight, I am aware of where the company derives its revenue, including the percentage of revenue the company generates from franchise operations in each state. Based on my review of the company's financial records, specifically the Profit and Loss by Customer Report, as maintained in the ordinary course and scope of business, I am aware that since the beginning of FirstLight's relationship with its first New York franchisees in May, 2012, FirstLight has derived far less than 5% of its total revenue from operations within New York. Also, FirstLight does not derive revenue from its website. The website has no transactional functionality; a FirstLight client or potential client cannot order, purchase, pay for or otherwise effect a revenue-producing transaction of any kind on the FirstLight website. . . . [FirstLight's website www.firstlighthomecare.com] is a website FirstLight created and maintains from its offices in Ohio. . . . [A]fter receiving the Plaintiff's complaint, I retained Zbra Studios to review FirstLight's website and, if necessary, implement changes to address the purported accessibility barriers raised in Mr. Tucker's Complaint. Zbra Studios completed its work in that regard on or about October 17, 2018, so as of the date of this affidavit, to the extent the accessibility issues with FirstLight's website alleged in Mr. Tucker's Complaint ever may have existed, they no longer do.

PLAINTIFF'S CONTENTIONS

Tucker asserts that personal jurisdiction exists over FirstLight under CPLR § 302(a)(1) because FirstLight transacts business in New York and Tucker's claims arise "from the transacting of business because [they are] based on [Tucker's] attempt to access the subject Website in order to ascertain the services offered to the disabled – the very sort of individuals Defendant begs to solicit." Tucker maintains that FirstLight's website is highly interactive, and the defendant mischaracterizes the nature of its website as passive. For example, the website offers not only information about "a wide variety of care for the elderly, disabled, veterans, busy moms, and in fact to any adult in need" but also: (i) advertises FirstLight's clinic in over 33 states; (ii) "contains an 'Ask a Nurse' prompt, which is a hyperlink (direct link) to its 'chat-on-line with a representative' feature from its home office in Ohio"; (iii) "offers the opportunity to gain employment"; (iv) "offers opportunities to open a franchise in the users[']' State of choice, including New York"; and (v) offers, via franchise links, "the user information as to the required Training Courses, Pre and Post-Training Module, including on-site, face to face encounters in the State of the franchisee several time[s] annually." Tucker contends that no due process principles are implicated because personal jurisdiction exists.

Tucker asserts that he alleged facts sufficient to sustain his claims, including for injunctive relief, and his claims are not moot because, at some unspecified time, FirstLight asserts it took unspecified measures to address access barriers alleged in the complaint. Furthermore, "a fact-intensive inquiry as to whether the subject website is now accessible, is premature." Tucker asserts that FirstLight's website is a place of public accommodation, as established by Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32-33 (2d Cir. 2000), which Tucker

asserts held "that Title III applies to a business engaging in the kind of activity that would make it a public accommodation, regardless of whether that business also has a brick-and-mortar location that patrons can frequent." According to Tucker, "*Pallozzi*'s reasoning applies fully to businesses that, like Defendant, operate substantially over the Internet." He maintains that FirstLight's website offers patrons access to a wide array of digital material that can be viewed on its website or through mobile applications and "allows the exchange of information between the server and user." Alternatively, Tucker contends, FirstLight conceded it is a franchisor doing business in New York. Tucker asserts that his state-law claims survive on the same ground as his federal-law claims, and under the New York City Human Rights Law, because FirstLight's website provides "accommodations, advantages, services, facilities or privileges offered to the general public." Tucker contends that the ADA and the regulations promulgated under the ADA cover commercial websites in their "general non-discriminatory provision," "reasonable modifications in policies, practices, or procedures provision" or "auxiliary aid provision."

DEFENDANT'S REPLY

FirstLight asserts that Tucker's opposition is based on "material that is neither alleged in the Amended Complaint nor made any part of the case record; i.e., material the Court must not consider on this motion." FirstLight contends that merely using its website to make information available does not constitute "purposeful availment" of the privilege of conducting activities in New York. According to FirstLight, Tucker's "own words work against his argument" that FirstLight's website is "highly interactive," and they "show that FirstLight's Website is, indeed, substantially passive." In arguing that his ADA claims, including claims for injunctive relief, are not moot, Tucker ignores Bevis's declaration, "detailing efforts taken by FirstLight to remedy its Website." FirstLight asserts that Tucker's "misguided reliance on *Pallozzi* is insufficient to

show the Website is a place of public accommodation under Title III" because the holding in Pallozzi "applies only to transactions that occur outside a brick-and-mortar location that patrons can frequent," and FirstLight does not conduct business, derive revenue or engage in sales over its website. FirstLight contends that Pallozzi does not address the issue in this case, namely, "whether a non-physical space that does not, itself, provide any service to the public, can nevertheless be a place of public accommodation under Title III." FirstLight asserts that no basis exists for liability under state or municipal law because it is not a provider of public accommodation. Moreover, application of random standards of accessibility would violate FirstLight's due process rights, and Tucker failed to address this argument with any specificity.

LEGAL STANDARD

"A party may assert [certain] defenses by motion," including "lack of personal jurisdiction" and "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(2) & (b)(6). "In diversity or federal question cases the court must look first to the long-arm statute of the forum state, in this instance, New York." Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997). "District courts resolving issues of personal jurisdiction must . . . engage in a two-part analysis" to determine whether: (1) "there is jurisdiction over the defendant under the relevant forum state's laws"; and (2) "an exercise of jurisdiction under [the applicable] laws is consistent with federal due process requirements." Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999). "On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant." Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 566 (2d Cir. 1996).

> In deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway. It may determine the motion on the basis

> of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion. If the court chooses not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials. Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial. But until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.
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> Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981) (internal citations omitted).

Pleadings and affidavits in support of the plaintiff's prima facie showing "are construed in the light most favorable to plaintiff and all doubts are resolved in its favor." Cutco Indus. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986) (citation omitted).

In New York, personal jurisdiction by acts of non-domiciliaries may be established as follows:

> (a) Acts which are the basis of jurisdiction. 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-domiciliary, or his executor or administrator, who in person or through an agent:
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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; or
> 4. owns, uses or possesses any real property situated within the state.
>
> CPLR § 302(a).

"Essential to the maintenance of a suit against a nondomiciliary under CPLR 302 (sub. [a], par.1) is the existence of some articulable nexus between the business transacted and the cause of action sued upon." McGowan v. Smith, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645 (1981).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
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> Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)).

"Conclusory allegations that the defendant violated the standards of law do not satisfy the need for plausible factual allegations." Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 191 (2d Cir. 2010) (citing Twombly, 550 U.S. at 555, 127 S. Ct. at 1965). On a motion pursuant to Rule 12(b)(6), all facts alleged in the complaint are assumed to be true and all reasonable inferences are drawn in the plaintiff's favor. See Interpharm, Inc. v. Wells Fargo Bank, Nat'l Ass'n, 655 F.3d 136, 141 (2d Cir. 2011).

APPLICATION OF LEGAL STANDARD

Motion to Dismiss for Lack of Personal Jurisdiction under Fed. R. Civ. P. 12(b)(2)

It has been long held in this circuit that, until an evidentiary hearing or trial is conducted, "the plaintiff need make only a prima facie showing of jurisdiction **through its own affidavits and supporting materials**." Marine Midland Bank N.A., 664 F.2d at 904 (emphasis added). FirstLight challenges personal jurisdiction in this action through its Rule 12(b)(2) motion, which is supported by Bevis's declaration, in which Bevis makes factual statements, under penalty of perjury, relevant to the issue of personal jurisdiction, including, inter alia, that: (a) "Firstlight does not derive revenue from its website"; (b) "[t]he website has no transactional functionality";

and (c) "a FirstLight client or potential client cannot order, purchase, pay for or otherwise effect a revenue-producing transaction of any kind on the FirstLight website." Tucker failed to submit any "affidavits and supporting materials" in response to FirstLight's Rule 12(b)(2) challenge of personal jurisdiction. Tucker made factual assertions in his memorandum of law, including some that are not contained in the complaint. However, a memorandum of law is not evidence. See Giannullo v. City of New York, 322 F.3d 139, 142 (2d Cir. 2003) (A "memorandum of law . . . is not evidence at all."). Having submitted no "affidavits and supporting materials" in response to FirstLight's Rule 12(b)(2) motion, Tucker failed to satisfy his burden of making "a prima facie showing of jurisdiction through its own affidavits and supporting materials." Marine Midland Bank N.A., 664 F.2d at 904. Accordingly, granting FirstLight's motion to dismiss, for lack of personal jurisdiction, is warranted.

RECOMMENDATION

For the foregoing reasons, I recommend that the defendant's motion to dismiss, for lack of personal jurisdiction, made pursuant to Fed. R. Civ. P. 12(b)(2), Docket Entry No. 31, be granted.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Paul A. Engelmayer, 40 Centre Street, Room 2201, New York, New York, 10007, and to the chambers of the undersigned, 40 Centre Street, Room 425, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Engelmayer.

Failure to file objections within fourteen (14) days will result in a waiver of objections and will preclude appellate review. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003).

Dated: New York, New York
June 10, 2019

Respectfully submitted,

Kevin Nathaniel Fox

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE