

Interactive Web Sites And New York Jurisdiction

In today's global economy based on electronic communications, Web sites present invaluable opportunities for sales and marketing. As technology continues to evolve and Web sites become more sophisticated in their reach and design, plaintiffs will seek to establish jurisdiction in New York over out-of-state defendants under CPLR §§301 and 302(a)(1) on the grounds that a site's existence and content are sufficient to demonstrate doing business or transacting business in New York.

Under certain circumstances, communications with a Web site may be enough to confer jurisdiction on an out-of-state defendant. Recent cases have examined this issue, with emerging themes being the degree of interaction with a site, as well as an analysis of whether a site specifically targets a New York audience in a systematic and continuous way. The conclusion being reached is that the more deliberate the New York interaction, the more likely it is that an out-of-state defendant will find itself being compelled to litigate in New York.

Although the New York Court of Appeals has not yet fully examined Web site advertising and solicitation, it briefly addressed the issue of whether certain Internet activity suffices to establish jurisdiction. In *Ehrenfeld v. Mahfouz*,¹ the Court examined whether, among other things, a defendant's "monitoring of [plaintiff's] activities in New York," by reviewing a paperback edition of her book published in the United States, and surveying a site maintained by a New York-based organization in which plaintiff served as director, constituted doing business in New York.

Holding that it does not, the Court stated that "[i]n an age where information about many New Yorkers can be accessed by those outside our state through a simple 'Google' search, we decline to find that such 'monitoring,' without more, constitutes the transaction of business in New York under CPLR 302(a)(1)."²

Interactive Sites

The plaintiff in *Bossey v. Camelback Ski Corp.*,³ a New York resident, sought to establish jurisdiction

By
**Mark A.
Berman**



under CPLR §301 predicated on a Pennsylvania defendant's interactive Web site, and that defendant placed advertising fliers in New York ski shops. The Suffolk County Supreme Court instructed:

Engagement in occasional or casual business in New York does not suffice under CPLR 301, nor does mere solicitation of New York customers...[i]nstead, a finding of 'doing business' under CPLR 301 is dependent upon the traditional indicia from which the court may conclude that the foreign defendant has sufficient contacts in New York to warrant a finding that it is present here. Such indicia include whether the corporation has employees, agents, offices or property within the state; whether it is authorized to do business here and the volume of business it conducts with New York residents.

The *Camelback* defendant had no New York employees, and its principal traveled to New York only occasionally to attend trade shows. The court examined the "solicitation-plus" rule, which provides for a finding of jurisdiction where foreign defendants solicit business that is substantial, continuous and representative of an undertaking of other activities in New York. The court held that jurisdiction did not lie where a claim rests on allegations of solicitation and marketing by a non-New York agent through a Web-based reservation system "not located" in New York. Specifically,

The record adduced...reveals only that the defendant solicits business through its interactive Web site which allows customers, including those in New York, to book reservations for accommodations and to purchase tickets to ski lifts and other recreational events at the defendant's ski resort in Pennsylvania. Even if this court were to conclude that the constant availability of the defendant's interactive web-site constitutes substantial solicitation so as to

trigger application of the 'solicitation-plus' rule, there has been no showing of other factors such as, its engagement in financial or commercial dealings or other activities of substance here in New York.

Similarly, in *New World Sourcing Group v. SGS SA*,⁴ where one foreign defendant was listed as an affiliate/subsidiary on another foreign defendant's Web site, the court held that the existence of such listing did not specifically target New York and was not interactive, which mitigated against finding jurisdiction under CPLR §301.

Applying CPLR §302, no jurisdiction was found where the only evidence offered to establish jurisdiction consisted of three inspection reports e-mailed from China from the foreign defendant, which "were not sent on a consistent basis over a period of one year and no telephone calls or other modes of communication were used."

In *Klein v. Education Loan Servicing, LLC*,⁵ the court found that a loan servicing company's Web site was not sufficiently interactive upon which to base jurisdiction, despite students' ability to make payments through it. The court noted that there was insufficient evidence to establish that defendants had New York customers from whom they derived substantial revenue or that their business with New York customers was of a continuous nature.

None of the defendants, including the graduate loan service companies and their employees; the Web site itself, through which students could make payments; and the university and its dean and its loan service officers, were located in New York, nor did they have employees in New York.

The court in *Calvert v. Cove*⁶ held that "courts must look to the nature and quality of commercial activity that an entity conducts over the internet."

Calvert was a landlord-tenant matter in which plaintiffs, New York residents, negotiated a lease over the phone to rent an apartment in Tennessee with a Tennessee-based defendant.

Finding no jurisdiction, the court held that defendant's Web sites were passive in nature, where the on-screen printouts offered by plaintiffs revealed that defendant simply posted information about the properties available and provided a phone number for potential customers' inquiries, and there was no indication that the defendant directed his advertising to New York. The fact that the site, "ForRent.Com," was hosted in New York state did not satisfy due process requirements.

MARK A. BERMAN, a partner at the commercial litigation firm *Ganfer & Shore*, is secretary of the e-discovery committee of the Commercial and Federal Litigation Section of the New York State Bar Association.

The issue of passive sites also was examined in *Schoolman Transportation System Inc. v. Molly Corp.*⁷

Schoolman involved a New York plaintiff who purchased a trolley from a Maine-based defendant, which was not authorized to do business in New York, did not employ personnel in New York, did not have a New York phone number, and did not have property in New York.

The trolley was assembled in Maine, plaintiff contacted defendant in Maine with respect to the purchase, and the contract was negotiated and entered into in Maine. The trolley was delivered to plaintiff in New York, after which plaintiff experienced mechanical difficulties and sued for breach of contract.

Reiterating the necessity for there to be "minimum contacts," as well as precedent requiring there to be purposeful activity within the state that must be substantially related to the cause of action to establish jurisdiction, the court held that jurisdiction did not lie when a Web site advertised a product and provided contact information for a Maine company.

The court noted that a passive site, which merely made information available to potential customers, was not a basis for jurisdiction under CPLR §302(a)(1), and "[t]o find otherwise would result in subjecting every entity worldwide which maintains a Web site providing contact information, to New York's long-arm jurisdiction. Such proposition would be unduly burdensome upon the calendars of the New York court system, and in contravention of the minimum contacts requirement of [*International Shoe*]."

Bases for Jurisdiction

In *Bankrate Inc. v. Mainline Tavistock Inc.*,⁸ the court directed "limited discovery to allow for a jurisdictional determination on a more complete record."

Bankrate was a breach of contract action between a New York plaintiff and out-of-state defendants who signed contracts outside of New York involving publications in states other than New York. The court noted that:

Soliciting New York business through an interactive Web site, together with other factors, constitutes a basis for jurisdiction under CPLR 301, even where defendant is not physically present within the state... To determine whether soliciting business over a Web site conferred jurisdiction in New York, Courts have looked to additional factors such as the extent of the Web site's 'interactive nature,' whether the company has 'substantially solicited' New York business through its Web site, and whether defendant's servicing of New York customers has been 'systematic and continuous.'⁹

The court observed that the record was silent as to whether defendants' Web site was sufficiently interactive to confer jurisdiction, whether defendants obtained substantial revenue from sales to New York customers or whether their business with New York customers was of a continuous nature.

In a factual scenario where a jurisdictional argument predicated upon electronic contacts is not typically raised, a defendant sought dismissal of an action on the grounds that plaintiff's site clips established doing business in New York, but

it was not authorized to do business in New York in contravention of BCL §1312(a).

In *Port O'Call Productions Inc. v. Staten Island Yacht Sales*,¹⁰ plaintiff was to send a production crew to a client's place of business, film for several days, and then place the finished product on television and the Internet to solicit future business.

Plaintiff had sent an e-mail regarding expansion of business into New York, and its Web site provided movie clips of three New York projects, which defendant argued was enough to prove continuous and systematic business in New York and attempts to advertise in New York.

Adding to the basis for New York jurisdiction were videos of plaintiff's projects posted on YouTube.com.

Looking for "regular and continuous course of conduct in the state," resulting in "large volume of sales, both in number and dollar amount," the court found plaintiff to be doing business in New York without proper authorization, based on both its attempt to solicit clients through e-mail, as well as its video posting of multiple New York projects on its Web site.

In *Société des Bains de Mer et du Cercle des Étrangers*

Companies should be mindful that the more interactive and directed their Web sites are in their specific pursuit of business in New York, the more likely it is that they will find themselves subject to jurisdiction in New York.

à *Monaco v. MGM Mirage*,¹¹ the U.S. District Court for the Southern District of New York recently upheld jurisdiction over defendants applying CPLR §302(a)(1).

Plaintiff was a foreign business entity organized under the laws of Monaco with a principal place of business in Monaco, and defendants were Delaware corporations with principal places of business in Nevada, and which owned the Monte Carlo Resort and Casino in Las Vegas.

Alleging that defendants' Web sites improperly suggested an association between plaintiff's Casino de Monte-Carlo and defendants' casino, plaintiff argued that defendants utilized interactive sites to sell vacation packages, and, through the use of drop down menus, customers were able to choose from a finite list of departure airports, including LaGuardia, John F. Kennedy International and Newark Liberty International.

Rejecting a standard that would call for "express targeting" of New York residents on a passive site, the court analyzed whether the defendants transacted business through their online activities. It noted that defendants used the site to sell vacation packages to New York residents who departed from New York airports, and observed that plaintiff's representative who lived in New York booked a vacation package and received offers, a confirmatory e-mail, and from New York spoke with hotel representatives on a phone number listed on the site.

Thus, the court held that the defendants' activity was significant and commercial in nature with an "articulable nexus" between the interactive site and plaintiff's claims of trademark infringement.

Current precedent requires that a Web site must have some degree of interactive capacity for a court to be able to find jurisdiction on the basis of electronic communications with it, but mere interactive ability may not be enough for jurisdiction to lie.

Courts will analyze, in addition, whether there is substantial solicitation, advertising directed to New York, systematic and continuous servicing of New York customers, and revenue derived therefrom.

Companies should therefore be mindful that the more interactive and directed their Web sites are in their specific pursuit of business in New York, the more likely it is that they will find themselves subject to jurisdiction in New York.

1. 9 N.Y.3d 501, 851 N.Y.S.2d. 381 (2007).
2. Id. at 509, 851 N.Y.S.2d at 386.
3. 2008 WL 4615680, 21 Misc.3d 1166(A) (Sup. Ct. Suffolk Co. Oct. 20, 2008).
4. Index No. 602173/2005 (Sup. Ct. New York Co. June 24, 2008).
5. Index No. 021496/2007 (Sup. Ct. Nassau Co. July 1, 2008).
6. Index No. 109957/2007 (Sup. Ct. New York Co. June 30, 2008).
7. Index No. 027024/2006 (Sup. Ct. Suffolk Co. Oct. 23, 2008).
8. Index No. 16673/2007 (Sup. Ct. Kings Co. Jan. 14, 2008).
9. Id. at 9; see also *Chestnut Ridge Air, Ltd.*, 13 Misc. 3d 807, 810, 827 N.Y.S.2d 461 (Sup. Ct. N.Y. Co. July 31, 2006) (jurisdiction found under CPLR §301; defendant's site was a virtual community with a forum for customers to post questions and items for sale/rent and a private site for their own projects, and the site represented that defendant would e-mail or send drawings to customers for proposed projects; defendant obtained 4 percent of yearly revenue from customers with New York mailing addresses and spent 14 weeks per year servicing projects from these customers); cf., *Atlantic Veal & Lamb Inc. v. Silliker Inc.*, 11 Misc. 3d 1072(A), 816 N.Y.S.2d 693 (Sup. Ct. Kings Co. Mar. 29, 2006) (although defendant's site indicated ability to conduct audits around the world, this was mere solicitation not directly targeted to potential New York clients, and there was no showing that the aggregate of defendant's New York activities were systematic or continuous enough for application of CPLR §301).
10. Index No. 18844/2007 (Sup. Ct. Nassau Co. Aug. 20, 2008).
11. 2008 WL 4974800 (S.D.N.Y. Nov. 24, 2008).

Reprinted with permission from the January 27, 2008 edition of the NEW YORK LAW JOURNAL © 2009 Incisive US Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@customerservice@incisivemedia.com. # 070-01-09-48

Ganfer
& Shore, LLP

360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com