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STATE E-DISCOVERY

Long-Arm Jurisdiction, E-Mail and Web Sites

New York's highest court has stated that technological advances in communication "enable a party to transact enormous volumes of business within a state without physically entering it."¹ Accordingly, recent trial court decisions addressing electronic communications have had to determine whether such communications, along with other contacts, suffice to establish long-arm jurisdiction in New York.

Courts look to the substance and quality of the electronic communications to determine whether there is a sufficient connection to New York. Thus, electronic contacts, when coupled with a sufficient nexus between the transaction, defendant's actions and New York state, will sustain long-arm jurisdiction.²

To make a case for jurisdiction, the cases discussed here illustrate that a court's decision on a motion to dismiss for lack of jurisdiction will hinge on the facts contained in affidavits asserting the jurisdictional predicates. And while the burden is on a plaintiff to demonstrate jurisdiction, the "plaintiff need only demonstrate that facts may exist to exercise jurisdiction over the defendant" and courts are required to view the evidence presented by the

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parties "in the light most favorable to the plaintiff."³

Thus, it is imperative that counsel provide the court with as much factual jurisdictional detail as possible to ensure that jurisdiction is upheld.

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E-Mail

Using a test of "articulable nexus," a trial court recently upheld personal jurisdiction over the defendant in *CPI NA Parnassus*.⁴ The plaintiff was a Netherlands limited liability company with a principal place of business in Amsterdam that had loaned money to a foreign non-party.

The defendant, also a foreign citizen and resident, guaranteed the loan. The defendant and his agents had sent e-mails and initiated numerous calls to the New York business team of an affiliate of the borrower with respect to the negotiation of the loan, and attended meetings in New York. The loan was found to have been negotiated and prepared in New York.⁵

The court upheld jurisdiction, reiterating the principle that "a transaction of business in New York, standing alone, is not enough to sustain personal jurisdiction under CPLR 302(a)(1),"⁶ and that "the cause of action sued upon must arise out of the transaction,"⁷ with an "articulable nexus between the business transacted and the cause of action sued upon" forming a "substantial relationship" between the parties.⁸

In *John E. Osborn, P.C. v. Jasper Int'l Business Inc.*,⁹ the court upheld jurisdiction on a claim for legal fees, notwithstanding that neither defendant had signed a retainer agreement with plaintiff New York counsel and the corporate defendant's offices were registered in the British Virgin Islands, and that such defendant did no business in New York, and did not maintain offices, employ personnel or have a corporate bank account in New York.

The individual defendant, a New York resident and a principal of the

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corporate defendant, was alleged to have bought an entity that would have been otherwise liable to pay the legal fees, and the individual defendant argued that the purchaser was actually his British Virgin Islands company over which the court had no jurisdiction.

Plaintiff had communicated with the individual defendant through his personal hotmail.com account, and by mail to what plaintiff claimed was defendant's New York apartment.

The court upheld jurisdiction when presented with a motion to dismiss, relying upon the doctrine of veil-piercing and noted that, since the matter was at the "pleading stage and not the proof stage," plaintiff sufficiently set forth its allegations evidencing jurisdiction.¹⁰

On the other hand, in *Shahidsaless v. Ebadi*,¹¹ a trial court recently found that electronic communications and a single meeting in New York were too minimal for defendant to have reasonably anticipated being hauled into court in New York, where the subject agreement was not negotiated or to be performed in New York, and the parties conferred by e-mail, express mail and telephone from their respective foreign residences. The court found that the one meeting that took place in New York¹² failed to establish that it "furthered the parties' relationship."¹³

In *Hospitality Int'l Inc. v. Hotels Unlimited Inc.*,¹⁴ the court dismissed the action for lack of long-arm jurisdiction, even though plaintiff's "screening activities" of employees were conducted in New York, where the subject contract was not negotiated in New York, but rather was negotiated over the phone and e-mail¹⁵ between plaintiff in New York and defendant in New Jersey, and the employee interviews conducted by defendant took place in defendant's offices in New Jersey.

As such, the court held that the "quality of the contacts" was not substantial enough to satisfy jurisdiction over a defendant who had no physical presence in New York.¹⁶

Web Sites

The court in *Goodwin v. Themestar, Ltd.*¹⁷ found that where Web sites evidence a "regular course of activity" in New York during a period before a litigation had been commenced, and while such allegations were "sketchy," limited discovery would be permitted to determine whether defendant or "through related, affiliated or partnered parties," was doing business in New York at the time of the commencement of the action.

The court noted that a court may assert jurisdiction over a foreign defendant vicariously doing business through another company that is directly doing business in New York resulting from "a parent/subsidiary relationship" or under agency theory.

The plaintiff was a New York resident but a United Kingdom citizen, while defendant was organized under the laws of the British Virgin Islands, domiciled in Hong Kong with offices in states other than in New York, and the subject injury occurred in China.

Conclusion

Courts look to see if the electronic communications upon which New York jurisdiction is predicated concern a transaction that is germane and related to the relationship between the parties and also sufficiently connected to the state.

The more tangential a transaction to the state or to the defendant, the more likely jurisdiction in New York will not lie, and electronic communications connected to the state alone will generally not suffice to cause a defendant to be subject to the jurisdiction of New York.

Thus, a plaintiff should be mindful that when entering into an agreement, whether oral or written, if New York is to be the forum of choice in the event of future litigation, the magnitude and quality of the electronic communications as they relate to New York business will be a significant factor when a court is asked whether to extend long-arm jurisdiction to the subject dispute.

1. *Deutsche Bank Sec. Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71, 818 N.Y.S.2d 164, 167 (2006).

2. *NA Pamassus B.V. v. Salvador Francisco Ornelas-Hernandez*, Index No. 600997/08, at 4 (Sup. Ct. New York Co., Jan. 27, 2009), citing *Opticare Acquisition Corp. v. Castillo*, 25 A.D.3d 238, 246, 806 N.Y.S.2d 84 (2nd Dept. 2005).

3. *Id.* at 4, quoting *Chen v. Sui*, 19 A.D.3d 407, 408, 796 N.Y.S.2d 126, 127 (2nd Dept. 2005) and citing *Brandt v. Toraby*, 273 A.D.2d 429, 430, 710 N.Y.S.2d 115 (1st Dept. 2001).

4. Index No. 600997/08 (Sup. Ct. New York Co., Jan. 27, 2009).

5. See *Atlantic Veal & Lamb Inc. v. Silliker Inc.*, 11 Misc. 3d 1072(A), 816 N.Y.S.2d 693 (Sup. Ct. Kings Co., March 29, 2006) (a breach of contract action involving a defendant's audit of New York plaintiff's business, where defendant was incorporated in Delaware and had a principal place of business in Illinois; communications between the parties relative to the audit took place through telephone, e-mail and facsimile and, under the "totality of the circumstances," defendant's actions demonstrated purposeful activities in this state to invoke the benefits and protections of the laws of New York).

6. *Id.* at 5, citing *Opticare* at 91.

7. *Id.*, citing *Deutsche Bank* at 164.

8. *Id.*, citing *Opticare* at 91.

9. Index No. 601190/08 (Sup. Ct. New York Co., Jan. 12, 2009).

10. *Id.* at 6.

11. Index No. 115835/07 (Sup. Ct. New York Co. Jan. 12, 2009).

12. See e.g., *KDDI America Inc. v. Electronic and Unit Recorder Data Center Inc.*, Index No. 116005/2006 (Sup. Ct. New York Co., Aug. 15, 2007) (jurisdiction not found where the Pennsylvania defendant had contacts with plaintiff in New York via e-mail and telephone, and there had been one meeting in New York to discuss performance of a contract that had already been entered into months earlier, and which was not the basis for the subject relationship between the parties).

13. *Id.* at 6.

14. Index No. 109609/08 (Sup. Ct. New York Co., Feb. 25, 2009).

15. See *Rivoir & Fetzer, LLC v. Daticon Inc.*, Index No. 26075/04, at 2 (Sup. Ct. Suffolk Co., May 2, 2005) ("[T]he telephone and email communications defendant had with plaintiff's principals from outside the state do not constitute sufficient contacts with New York to confer personal jurisdiction over a non-resident under the statute.")

16. *Id.* at 2.

17. Index No. 601197/08 (Sup. Ct. New York Co., Jan. 23, 2009).

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