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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**
**TRIAL/IAS, PART 9**
**NASSAU COUNTY**

**PRYOR PERSONNEL AGENCY, INC. d/b/a PRYOR ASSOCIATES,**

**Plaintiff,**

**INTERIM ORDER**

**- against -**

**MOTION SEQ. NO.: 001**
**INDEX NO.: 14148/06**

**WAAGE LAW FIRM,**

**Defendant.**

**The following papers read on this motion (numbered 1-4):**

**Notice of Motion..... 1**
**Notice of Cross Motion..... 2**
**Affirmation in Opposition to Cross Motion..... 3**
**Reply Affirmation..... 4**

Plaintiff PRYOR PERSONNEL AGENCY, INC. d/b/a PRYOR ASSOCIATES ("PRYOR") moves to strike the affirmative defenses asserted by defendant WAAGE LAW FIRM (the "WAAGE firm" or "WAAGE") in WAAGE's answer and for summary judgment. Defendant WAAGE firm cross moves for summary judgment dismissing the complaint. The motions are determined as follows.

This is an action based on contract and quantum meruit by PRYOR to recover its referral fee in the amount of $36,000 incurred in connection with the placement of a candidate in the WAAGE firm. PRYOR, a NY corporation, is an employer fee paid employment agency performing executive search and placement services primarily within the insurance and pension industries. The WAAGE firm is a California and Washington State corporation with offices only in those states.

PRYOR alleges that on August 27, 2003, June Waage of the WAAGE firm telephoned PRYOR in NY to retain PRYOR's services to find a suitable candidate for the position of enrolled actuary. The affidavit of Pauline Reimer ("Reimer"), an actuarial recruiter with PRYOR, sworn to on April 23, 2007, asserts that during said telephone conversation, she and June Waage had a lengthy discussion regarding the WAAGE firm,

the open position, the qualifications of the candidate the WAAGE firm was seeking and the salary being offered. Reimer also states that June Waage provided her with contact information "in order for me to forward Pryor's fee schedule for this service." PRYOR submits an email, dated August 28, 2003, from Reimer to June Waage thanking Waage for her call and attaching "a formal letter of introduction to my company and its actuarial services." The attached letter describes PRYOR and the services it offers and sets forth PRYOR's schedule of fees charged to employers. The letter states that PRYOR charges 1% per $1,000 of gross annual first year compensation up to a maximum of 30% and that PRYOR provides a 30 day guarantee period, with no charge if an applicant's employment is terminated.

Reimer claims that subsequent to the telephone conversation with June Waage, Reimer researched potential candidates and that same day identified an actuary named Gary Mevorah ("Mevorah") who worked in Georgia. By email, dated August 28, 2003, addressed to "jwaage", Reimer attached Mevorah's resume. Reimer contends that subsequent to emailing Mevorah's resume, she had a series of telephone conversations with June Waage which culminated in a telephone interview between Mevorah and Scott Waage, a principal of the WAAGE firm. Reimer claims that thereafter she telephoned June Waage to inform her that Mevorah was available for an interview in San Diego.

In early October 2003, Reimer states that she had several telephone conversations with June Waage and with Mevorah. Reimer claims that June Waage advised Reimer that she would consider making an offer to Mevorah but that she wanted to negotiate with Mevorah directly. Thereafter, Mevorah contacted Reimer to inform her that an offer was made. Reimer contends that in a subsequent telephone conversation with June Waage, although Reimer requested a copy of the offer letter, it was sent by WAAGE only to Mevorah. Reimer submits copies of emails exchanged between Mevorah and June Waage concerning terms of Mevorah's employment, which were forwarded to Reimer by Mevorah after Mevorah had consulted Reimer for advice. Reimer contends that in response to Mevorah's inquiry to her, she left a message with June Waage on October 29, 2003 and then spoke with her on October 31, 2003, about whether the WAAGE firm would cover Mevorah's relocation expenses.

Mevorah accepted WAAGE's offer of employment and began employment on January 6, 2004. PRYOR submits an invoice, dated February 5, 2004, sent to the WAAGE firm indicating a fee in the amount of $36,000 owed to PRYOR for placing Mevorah. By letter, dated March 1, 2004, from Scott A. Waage of the WAAGE firm to PRYOR, WAAGE informed PRYOR that "as stated in the telephone conversation with you the other day, our firm had never retained your firm or agreed to pay your firm any compensation. Our firm does not have a contractual relationship with Pryor & Associates

for any services. On his own free will, Mr. Mevorah contacted our firm and flew to San Diego. Salary and benefit negotiations were between our firm and Mr. Mevorah. These negotiations did not factor in any compensation to your firm."

PRYOR makes this motion to strike WAAGE's affirmative defenses asserted in WAAGE's answer which make allegations based on (1) lack of personal jurisdiction; (2) statute of limitations; (3) statute of frauds; (4) failure of consideration; (5) waiver and estoppel; (6) lack of privity; (7) lack of capacity to sue; and (8) violations of **General Obligations Law** provisions. With respect to WAAGE's allegation that the Court lacks jurisdiction over WAAGE, a California and Washington State corporation, PRYOR argues that WAAGE'S conduct in NY was sufficient to subject WAAGE to the jurisdiction of the NY courts. PRYOR contends that WAAGE, a sophisticated law firm, telephoned PRYOR in NY for the purpose of securing an employee for the position of enrolled actuary, that there were subsequent extensive emails and telephone conversations to and from NY all relating to the matter for which WAAGE sought PRYOR's assistance and that PRYOR's services on behalf of WAAGE were performed in NY.

In opposition, by affidavit of June Waage, sworn to on May 3, 2007, June Waage claims that WAAGE never initiated contact with PRYOR, and although she "had a few exceedingly short conversations with plaintiff about hiring an actuary, [she] never agreed to retain, hire or compensate [PRYOR]." WAAGE asserts that it did not sign or otherwise accept PRYOR's fee schedule and there was no signed contract. WAAGE claims that Mevorah negotiated directly with the WAAGE firm from his location in Georgia and was ultimately hired by WAAGE in California.

Pursuant to **CPLR §302(a)(1)**, a nondomiciliary defendant is subject to the jurisdiction of New York State courts if the defendant "transacts any business within the state or contracts anywhere to supply goods or services in the state." A single act in NY is sufficient to confer jurisdiction "even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." **Deutsche Bank Securities, Inc. v. Montana Board of Investments**, 7 NY3d 65, 71 *quoting* **Kreutter v. McFadden Oil Corp.**, 71 NY2d 460, 467. A transaction conducted by electronic or telegraphic means is sufficient to confer jurisdiction if defendants "projected" themselves into New York. *See,* **Deutsche Bank Securities, Inc. v. Montana Board of Investments**, *Id.* at 71; **Parke-Bernet Galleries, Inc. v. Franklyn**, 26 NY2d 13; **Fischbarg v. Doucet**, 38 AD3d 270; **Liberatore v. Calvino**, 293 AD2d 217. The key inquiry is whether defendant purposefully availed itself of the benefits of New York's laws. *See,* **Parke-Bernet Galleries, Inc. v. Franklyn**, *supra*, at 18. The activities conducted in NY must be directed by the defendant and not by the plaintiff. *See,* **Kimco Exchange Place Corp. v.**

**Thomas Benz, Inc.**, 34 AD3d 433; **Professional Personnel Management Corp. v. Southwest Medical Associates, Inc.**, 216 AD2d 958; **Success Marketing Electronics, Inc. v. Titan Security, Inc.**, 204 AD2d 711.

In this case, the record is insufficient to allow the Court to determine whether WAAGE's contacts in NY in connection with this transaction are sufficient to constitute purposeful activity in NY in order for the Court to exercise long-arm jurisdiction under **CPLR §302(a)(1)**. "To determine whether a party has 'transacted business' in New York, courts must look to the totality of circumstances concerning the party's interactions with, and activities within, the state." **Scheuer v. Schwartz**, 42 AD3d 314 *quoting* **Bank of Brussels Lambert v. Fiddler Gonzalez & Rodriguez**, 171 F3d 779, 787. *See* **Farkas v. Farkas**, 36 AD3d 852; **Olympus America, Inc. v. Fujinon, Inc.**, 8 AD3d 76; **Liberatore v. Calvino**, *supra*; **Catauro v. Goldome Bank for Savings**, 189 AD2d 747. In view of the conflicting proof submitted by the parties, it is necessary to hold a traverse hearing "where jurisdictional facts may be established." **Cliffstar Corp. v. California Foods Corp.**, 254 AD2d 760, 761. Only if the Court concludes that it acquired jurisdiction over the WAAGE firm, will the Court be permitted to consider the other claims raised herein.

Accordingly, it is

ORDERED, that counsel for both parties are directed to appear in Supreme Court, 100 Supreme Court Drive, Part 9, at 10:00 a.m. on October 15, 2007 for a conference and traverse hearing. Further, the motion by PRYOR PERSONNEL AGENCY, INC., d/b/a PRYOR ASSOCIATES to strike the affirmative defenses of defendant WAAGE LAW FIRM and for summary judgment and the cross motion by WAAGE LAW FIRM for summary judgment is adjourned to October 15, 2007 or any adjourn date designated for the conference and traverse hearing.

This constitutes the order of the Court.

ENTER:

Dated: 9/28, 2007

J.S.C.

ENTERED

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NASSAU COUNTY

COUNTY CLERKS OFFICE