SCAN

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,

MOTION SEQ. NO.: 001
MOTION DATE: 11/7/07

- against -

INDEX NO.: 14148/06

WAAGE LAW FIRM,

Defendant.

The following papers read on this motion (numbered 1-5):

Notice of Motion [Plaintiff].....1
Affirmation [Plaintiff].....2
Plaintiff's Memorandum of Law in Support of Motion to Strike Affirmative Defenses and For Summary Judgment.....2A
Notice of Cross-Motion [Defendant].....3
Affirmation in Opposition to Cross-Motion [Plaintiff].....4
Reply Affirmation [Defendant].....5

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 pursuant to **CPLR §3212**. Defendant WAAGE cross-moves for summary judgment dismissing the complaint. The motions are determined as follows.

Facts and Procedural History

PRYOR, a New York corporation, is an employer fee paid employment agency providing executive search and placement services primarily within the insurance and pension industries. The WAAGE firm is a California and Washington State professional corporation with offices in those states. PRYOR brings this action, based on contract and

quantum meruit, to collect a referral fee in the amount of $36,000 for its placement of a candidate in the WAAGE firm.

By affidavit of Pauline Reimer ("Reimer"), an actuarial recruiter with PRYOR, sworn to on April 23, 2007 (the "Reimer Affidavit"), PRYOR proffers the following account of the events underlying this action: On August 27, 2003, June Waage of the WAAGE firm telephoned PRYOR in New York to retain PRYOR's services to find a suitable candidate for the position of enrolled actuary. During said telephone conversation, Reimer and June Waage had a lengthy discussion regarding the WAAGE firm, the open position, the qualifications of the candidate that the WAAGE firm was seeking and the salary being offered. Based upon such discussion, Reimer filled out a Job Order Sheet [Motion Exhibit A]. June Waage provided Reimer with her contact information "in order for [Reimer] to forward Pryor's fee schedule for this service." [Reimer Affidavit, ¶2]. On August 28, 2003, Reimer sent an e-mail to June Waage thanking Waage for her call and attaching a formal letter of introduction, which described PRYOR and its services and set forth PRYOR's fee schedule. The letter stated that PRYOR charges employers 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.

According to the Reimer Affidavit, following the initial 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 e-mail, dated August 28, 2003, addressed to "jwaage," Reimer forwarded Mevorah's resume to WAAGE [Motion Exhibit C]. Reimer thereafter had a series of telephone conversations with June Waage which culminated in a telephone interview on September 13, 2003 between Mevorah and Scott A.Waage, a principal of the WAAGE firm. After further discussions with Mevorah by e-mail and telephone, Reimer telephoned June Waage to inform her that Mevorah was available for an interview in San Diego.

Reimer states that in early October 2003, several telephone conversations took place between Reimer and June Waage, Reimer and Mevorah, and June Waage and Mevorah regarding Mevorah's employment. 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 requested a copy of the formal offer letter from June Waage, but the letter was sent only to Mevorah. Mevorah forwarded to Reimer copies of the correspondence between Mevorah and June Waage concerning Mevorah's employment, as well as the written offer of employment. [Motion Exhibits E, F and G.] Mevorah sought Reimer's

advice regarding the offer, and at Mevorah's request, Reimer spoke with June Waage to inquire if the WAAGE firm would cover Mevorah's relocation expenses.

WAAGE generally denies the above version of the underlying events. In support of its cross-motion, WAAGE submits the Affidavit of June Waage, sworn to on May 3, 2007 (the "June Waage Affidavit"), which states: "Plaintiff's allegations are not accurate. Defendant never entered into an agreement with plaintiff and I did not initiate contact with plaintiff. I had a few exceedingly short conversations with plaintiff about hiring an actuary, but I never agreed to retain, hire or compensate plaintiff."

It is undisputed that Mevorah accepted WAAGE's offer and began employment on January 6, 2004. On or about February 5, 2004, PRYOR submitted an invoice to the WAAGE firm in the amount of $36,000, representing the fee charged by PRYOR for placing Mevorah, calculated pursuant to the fee schedule forwarded to WAAGE. By letter from Scott A. Waage, dated March 1, 2004, 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 commenced the instant action on or about August 29, 2006, and issue was joined on or about November 2, 2006. Among several affirmative defenses, WAAGE asserts that the New York court lacks jurisdiction to hear this matter, insofar as WAAGE is a California and Washington corporation with no New York office and insufficient contacts with New York to render it subject to personal jurisdiction here. PRYOR asserts that WAAGE's conduct falls within the ambit of **CPLR §302(a)(1)**, which authorizes jurisdiction on the basis of transacting business in New York. By Interim Order dated September 28, 2007, the Court adjourned the instant motion and cross-motion to hear oral argument and testimony on the question of personal jurisdiction. The parties appeared through counsel on November 7, 2007, and Reimer testified under oath regarding the circumstances of PRYOR's relationship with WAAGE and the events leading to Mevorah's employment by WAAGE, essentially reiterating the facts stated in the Reimer Affidavit. Before addressing the merits of the contractual claim, the Court turns to the threshold question of jurisdiction.

Personal Jurisdiction

Under New York law, a court must follow a two-step procedure to determine whether there is personal jurisdiction over a non-resident defendant. First, the Court must determine whether the "long arm" provisions of the Civil Practice Law and Rules provide a basis for jurisdiction. If they do, then the Court must conduct a constitutional inquiry to determine whether the exercise of personal jurisdiction would offend due process pursuant to **International Shoe Company v. Washington**, 326 U.S. 310 and its progeny. **777388 Ontario Ltd. v. Lencore Acoustics Corp.**, 142 F.Supp.2d 309; **Opticare Acquisition Corp. v. Castillo**, 25 AD3d 238. The burden of establishing jurisdiction rests on the party asserting it. **Id.**

In pertinent part, **CPLR §302(a)(1)** permits the New York courts to exercise personal jurisdiction over a non-domiciliary who "transacts any business within the state," if the cause of action arises out of such transaction. **CPLR §302(a)(1)**; **Opticare**, 25 AD3d 238. "To determine whether a party has 'transacted business' for purposes of "long-arm" jurisdiction, 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**, 293 AD2d 217; **Catauro v. Goldome Bank for Savings**, 189 AD2d 747.

Although what constitutes a "transaction" is not precisely defined, it is clear that a single act within New York may be sufficient to invoke jurisdiction, "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." **Opticare**, 25 AD3d at 243; **Deutsche Bank Securities, Inc. v. Montana Board of Investments**, 7 NY3d 65, 71 *quoting* **Kreutter v. McFadden Oil Corp.**, 71 NY2d 460, 467. The relevant activities within New York are those of the defendant or its agent, and not those of the plaintiff or a third party. *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. Physical presence in New York, however, is not essential. A transaction conducted by electronic or telephonic means may be sufficient if, by such means, defendants "knowingly entered" or deliberately "projected" themselves into New York. *See,* **Deutsche Bank Securities, Inc. v. Montana Board of Investments**, 7 NY3d at 71; **Parke-Bernet Galleries, Inc. v. Franklyn**, 26 NY2d 13; **Fischbarg v. Doucet**, 38 AD3d 270; **Liberatore**, 293 AD2d 217. The inquiry centers, not on the number, but on the purposeful nature, of defendant's contacts with New York. **Deutsche Bank**, 7 NY3d at 71; **George Reiner & Co., Inc. v.**

Schwartz, 41 NY2d 648; **Parke-Bernet Galleries,** 26 NY2d 13; **Fischbarg,** 38 AD3d 270; **Liberatore,** 293 AD2d 217; **Otterbourg, Steindler, Houston & Rosen, P.C. v. Shreve City Apartments Ltd.,** 147 AD2d 327.

The concept of "purposeful" has not been clearly defined, and case law instructs primarily by illustration. For example, the Court found insufficient purposeful activity in New York in the case of: (i) a single order of goods placed by telephone or facsimile to New York [**Stengel v. Black,** 28 AD3d 401; **Success Marketing Electronics,** 204 AD2d 711]; and (ii) stock purchase orders placed through a series of five telephone calls to New York over three days [**Barington Capital Group, L.P. v. Arsenault,** 281 AD2d 166]. Purposeful activity was found, however, in the case of: (i) a single, substantial bond transaction initiated, negotiated and consummated electronically by a "sophisticated institutional investor" [**Deutsche Bank,** 7 NY3d at 71-72]; and (ii) participation in a New York auction by telephone [**Parke-Bernet Galleries,** 26 NY2d 13]. If any definition emerges, it is a definition of what is *not* purposeful. Activities consisting of "random," "fortuitous," "attenuated," or "casual" contacts with New York have been distinguished from the kind of purposeful activity necessary for an assertion of jurisdiction. **Burger King Corp. v. Rudzewicz,** 471 U.S. 462, 475; **SAS Group, Inc. v. Worldwide Inventions, Inc.,** 245 F.Supp.2d 543; **George Reiner & Co.,** 41 NY2d at 654.

In this case, PRYOR contends that WAAGE, a sophisticated law firm, telephoned PRYOR in New York for the purpose of availing itself of PRYOR's placement services, that there were subsequent extensive e-mails and telephone conversations to and from New York all relating to the matter for which WAAGE sought PRYOR's assistance and that PRYOR's services on behalf of WAAGE were performed in New York. *See* **Fischbarg,** 38 AD3d 270; **Kaczorowski v. Black and Adams,** 293 AD2d 358. WAAGE denies that it initiated contact with PRYOR in New York or entered into any contractual relationship or agreement with PRYOR. WAAGE claims that Mevorah negotiated directly with the WAAGE firm from his location in Georgia and was ultimately hired by WAAGE in California. WAAGE asserts that the matter is governed by the holding in **Professional Personnel Management Corp.** [216 AD2d 958], where the Court found that interstate negotiations by telephone, facsimile and mail between the out-of-state defendant and a New York personnel recruiting company constituted insufficient purposeful activity in New York, notwithstanding that the parties entered into a signed written contract that was the subject of the dispute. In WAAGE's view, the jurisdictional ties in the instant case are even weaker than in **Professional Personnel Management,** insofar as there was no signed contract between WAAGE and PRYOR.

The Court finds that the preponderance of the evidence supports PRYOR's version of the facts leading up to Mevorah's employment with WAAGE; that is, that June Waage

made the initial telephone call seeking PRYOR's services, and participated in ongoing discussions with Reimer from August through October of 2003 related to the transaction at issue. At the evidentiary hearing, WAAGE relied upon the general denials contained in the June Waage Affidavit, and offered no further statement or documentation to refute PRYOR's testimony. Although June Waage denies, in a conclusory manner, that she made the first telephone call, she offers no other explanation regarding how the initial contact was made. She does not claim, for example, that she was the recipient of a "cold" call, or that PRYOR contacted her in response to some general advertisement placed by WAAGE. June Waage's admission that she participated in "a few exceedingly short" telephone conversations with Reimer does not contradict the facts stated by Reimer, but, at best, only challenges their characterization.

On the foregoing facts and evidence to be discussed below, the Court determines that a contract was formed between PRYOR and WAAGE. For jurisdictional purposes, the Court further finds that WAAGE purposefully "projected" itself into New York in order to avail itself of PRYOR's services. WAAGE initiated direct telephone contact with PRYOR in New York, for purposes of finding a suitable candidate for the position of enrolled actuary. The inquiry was neither general nor casual. June Waage spoke with sufficient specificity and intent, and gave sufficient information regarding the job, the firm and its requirements to prompt the completion of a job order, the commencement of a search, the delivery of follow-up information, and the conclusion of the referral which was the subject of the inquiry. The focus here is not on PRYOR's actions in filling the job order, but on WAAGE's actions, in directing and enabling PRYOR to do so. WAAGE accepted Mevorah's resume from PRYOR for consideration. WAAGE admits to at least a few conversations with PRYOR, which resulted, directly or indirectly, in two separate interviews with Mevorah. WAAGE's deliberate decision to exclude PRYOR from the salary and benefit negotiations and to negotiate with Mevorah directly cannot be raised as a barrier to jurisdiction. On the whole, WAAGE's activities directed toward New York both substantially advanced, and were essential to, the formation of the contract out of which the instant cause of action arises. Accordingly, the Court determines as a matter of law that WAAGE engaged in sufficient purposeful interactions with PRYOR in New York to satisfy **CPLR §302(a)(1)** with respect to the instant breach of contract claim. *See* **SAS Group, Inc. v. Worldwide Inventions, Inc.,** 245 F.Supp.2d 543.

The Fourth Department's holding in **Professional Personnel Management** [216 AD2d 958] is not controlling here, notwithstanding the factual coincidence that both cases involve the services of a professional recruiter. First, the rationale of that 1995 decision is no longer applied by the Courts in an automatic, formulaic manner. Interstate negotiations by telephone, e-mail and facsimile may be found sufficient to support

jurisdiction if the out-of-state party's activities are of a purposeful nature. **Deutsche Bank**, 7 NY3d 65. Further, although the case holds that plaintiff's own activities in New York cannot be relied upon to establish the presence of the defendant in the State, recent cases suggest that this rule is not rigidly applied when a defendant directs or sets in motion plaintiff's activities in New York. *See* **Fischbarg,** 38 AD3d 270; **Kaczorowski,** 293 AD2d 358.

Second, the **Professional Personnel Management** case is distinguishable with respect to one significant fact. In **Professional Personnel Management**, the out-of-state defendant did not initiate contact with the New York plaintiff. Where, as here, the defendant solicited plaintiff's services or otherwise initiated contact with the New York plaintiff, that fact has been consistently cited as evidence of purposeful activity in New York. *See* **Deutsche Bank**, 7 NY3d 65; **Fischbarg,** 38 AD3d 270; **Kaczorowski,** 293 AD2d 358. *Compare* **Dero Enterprises, Inc., v. Georgia Girl Fashions, Inc.** 598 F.Supp. 318, 322. The significance of who solicited whom is often highlighted in federal due process analysis, in terms of a defendant's reasonable expectation of being "haled into" a particular forum, or a State's interest in protecting its residents from the activities of those who enter the state to avail themselves of its benefits.

Turning to the issue of federal due process, the Court shall not belabor the discussion, insofar as the New York "long arm" standard is generally held to satisfy, if not exceed, the minimum Constitutional requirements. The Court finds that WAAGE's conduct and connection with New York were such that WAAGE could "reasonably anticipate being haled into court there" with respect to a dispute arising from such conduct. **World-Wide Volkswagen Corp. V. Woodson,** 444 U.S. 286, 287. "[T]his 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." **Burger King,** 471 U.S. 462, 472 (internal citations omitted).

The Court further finds that the assertion of jurisdiction would "comport with 'fair play and substantial justice.'" **Burger King,** 471 U.S. at 476, quoting **International Shoe,** 326 U.S. at 320. Due process requires consideration of defendant's contacts in light of other factors, including "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies." **Burger King,** 471 U.S. at 477, quoting **World-Wide Volkswagen,** 444 U.S. at 292 (internal quotations omitted). "These considerations

sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." **Id.**

The interests of judicial economy and efficiency, and New York's interest in providing its residents with convenient and effective redress for injuries arising from the New York activities of out-of-state actors, argue in favor of this Court's exercise of jurisdiction, and outweigh any burden that the defendant may claim. Moreover, in this Court's view, the burden of litigating in a distant forum is rapidly becoming an anachronistic consideration. Over twenty-five years ago, Justice Brennan, writing for the dissent in **World-Wide Volkswagen** [444 U.S. 286, 308], observed that "[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures... [T]he structure of our society has changed in many significant ways since *International Shoe* was decided in 1945. Mr. Justice Black, writing for the Court in *McKee v. International Life Ins. Co.* (1957) [citation omitted], recognized that 'a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.' He explained the trend as follows: 'In part this is attributed to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.' As the Court acknowledges [citation omitted], both the nationalization of commerce and the ease of transportation and communication have accelerated in the generation since 1957. The model of society on which the *International Shoe* Court based its opinion is no longer accurate." With the advent of the internet and other recent advances in communication and transportation, including telecommunications devices that permit "virtual" courtroom appearances by parties in distant locations, Justice Brennan's words resound even louder today.

The Court determines that the exercise of personal jurisdiction over WAAGE satisfies the requirements of New York long arm jurisdiction and federal due process. WAAGE's affirmative defense in that regard is stricken, and the Court shall proceed to address plaintiff's substantive claim.

Breach of Contract

In support of its contract claim, PRYOR submits the Reimer affidavit, together with a copy of its letter of introduction and fee schedule sent August 28, 2003, and

documentary evidence that Mevorah was employed by WAAGE at an annual salary of $120,000. PRYOR also relies upon Reimer's testimony at the November 7, 2007 hearing.

In opposition, WAAGE argues that there was no "meeting of the minds" as to the essential terms of the agreement, and therefore, a contract was never formed between the parties. The only evidence submitted on behalf of WAAGE is the June Waage Affidavit, consisting of a non-specific denial of the contract. WAAGE does not deny receipt of PRYOR's letter of introduction and schedule of fees. WAAGE also does not deny receipt of Mevorah's resume from PRYOR, or that WAAGE hired Mevorah and employed him past the 30-day guarantee period contained in the letter of introduction. Although Scott A. Waage's letter to PRYOR denies the referral, the absence of any sworn statement to that effect is significant. There is no evidence in the record to suggest that WAAGE was introduced to Mevorah in any manner other than through PRYOR's referral.

The Court finds that PRYOR has established, *prima facie,* its entitlement to judgment as a matter of law. WAAGE's conduct in hiring the job candidate referred by PRYOR, together with its demonstrated knowledge that a specified fee structure would become operative upon such hiring, constituted acceptance of the terms on which the referral was offered. **John William Costello Assoc. v. Standard Metals Corp.,** 99 AD2d 227; **Fashion Careers Recruiting Corp. v. Alex Apparel Group, Inc.,** 180 Misc.2d 95. WAAGE's conclusory denials fail to raise a triable issue of fact. **Id.**

* * *

The Court has considered the remaining affirmative defenses and contentions of the parties, and finds them to be without merit. Based upon the foregoing, it is

ORDERED, that PRYOR's motion to strike WAAGE's affirmative defenses and for summary judgment in its favor is **granted.** Settle judgment on notice.

ENTER:

Dated: 2/28/08

J.S.C.