

Arroyo v Mountain School

2009 NY Slip Op 30875(U)

April 13, 2009

Supreme Court, New York County

Docket Number: 112599/08

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Arroyo, Quemel

INDEX NO. 11 2599/08

MOTION DATE 11/21/09

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

Mountain School

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED
APR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is granted.

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants to dismiss the complaint pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, and pursuant to CPLR § 327(a) on the ground of *forum non conveniens* is denied; and it is further

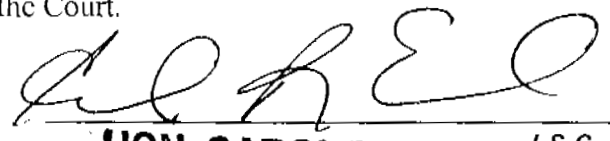
ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that defendants shall serve their answer within 30 days of the date of this order; and it is further

ORDERED that the parties appear for a preliminary conference in Part 35 on May 26, 2009, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 4/13/09



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
QUEMUEL ARROYO,

Plaintiff,

Index No. 112599/08

- against-

THE MOUNTAIN SCHOOL, THE MOUNTAIN SCHOOL, INC., THE MOUNTAIN SCHOOL OF MILTON ACADEMY, THE MOUNTAIN SCHOOL OF MILTON ACADEMY, INC., THE BOARD OF TRUSTEES OF THE MOUNTAIN SCHOOL, THE MOUNTAIN SCHOOL PROGRAM OF MILTON ACADEMY, THE MILTON ACADEMY, THE MILTON ACADEMY, INC., THE BOARD OF TRUSTEES OF THE MILTON ACADEMY,

Defendants.

-----X
HON. CAROL EDMEAD, J.S.C.

FILED
APR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this negligence and premises liability action, plaintiff Quemuel Arroyo ("plaintiff") seeks damages for injuries he sustained in a bicycle accident while a student at The Mountain School, located in Vermont. The Mountain School is a college preparatory program, which according to defendants,¹ is owned and operated by the Milton Academy, a Massachusetts nonprofit corporation.

Defendant Milton Academy and all parties designated as defendants herein (collectively,

¹ According to the affidavit of Steven Moore, the Director of Administration and Academy Counsel of Milton Academy, of the defendants The Mountain School, The Mountain School, Inc., The Mountain School of Milton Academy, The Mountain School of Milton Academy, Inc., The Board of Trustees of the Mountain School, The Mountain School Program of Milton Academy, The Milton Academy, The Milton Academy, Inc., and The Board of Trustees of the Milton Academy, none except for The Milton Academy and the Board of Trustees of Milton Academy are separate existing entities.

"defendants"), now move to dismiss the complaint pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, and pursuant to CPLR § 327(a) on the ground of *forum non conveniens*.

Motion

Defendants argue that there is no general jurisdiction over defendants pursuant to CPLR § 301. They are not "doing business" in New York or conducting activities within New York that are so systematic and continuous to be considered "present" in New York, such that they may be sued here on any claim unrelated to its activities in the state.

All of The Mountain School's staff is employed by Milton Academy, and none of them resided in New York during the period of their employment. While some members of the Board of Trustees of Milton Academy reside in New York, such residence is in their personal capacity and not for purposes of fulfilling their board membership duties. Milton Academy's principal place of business is located at Milton, Massachusetts. None of the defendants are licensed or authorized to do business in the New York, or leases, owns, or occupies any real property or office space in New York. None of the defendants maintain any facilities, place of business, a telephone listing or an address in New York, and plaintiff's conclusory allegations to the contrary are unsupported by any facts and are untrue. Jurisdiction would thus be based on *de minimis* contacts with New York, none of which are sufficient to establish personal jurisdiction.

Defendants also argue that although Milton Academy promotes itself to students in New York, such efforts involve occasional trips to New York, and only a small number of New York residents are enrolled. Such solicitation of business in New York does not establish jurisdiction as it is not "accompanied by a substantial continuity of presence in the state." Further, there is no property, office, media advertising, or other contact that would establish a continuity of presence

in New York.

Defendants also have no fundraising office located in New York, and Milton Academy's primary business is college preparation, not fundraising. And, defendants' fundraising efforts geared toward New York are nothing more than "ancillary" undertakings separate and apart from the overall purpose of the organization itself.

Further, for purposes of conducting its day-to-day business, Milton Academy occasionally enters into commercial contracts with vendors located in New York, but the number and dollar volume of such contracts are relatively minimal in relation to the overall operations of Milton Academy. Also, some of the investment companies Milton Academy engages to manage its endowment are located in New York. However, these investments involve a relatively small portion of the endowment, and none of these business relationships are significant enough to require Milton Academy to file New York State tax returns. Such contractual relationships do not show extensive conduct directed toward or occurring in New York.

Nor are defendants subject to long-arm jurisdiction. First, plaintiff cannot establish personal jurisdiction over defendants under CPLR § 302(a)(1), since his claim does not arise from any transaction of business in New York by defendants. Plaintiff's claim is based on one isolated incident that occurred in Vermont - an incident that has no nexus to New York. Second, defendants are also not subject to long-arm jurisdiction under CPLR § 302(a)(2), because the tort plaintiff alleges did not take place in New York. Third, there is no jurisdiction under CPLR § 302(a)(3) since the alleged tortious act committed outside the state did not give rise to an injury occurring within the state. The mere residence or domicile in New York of an injured plaintiff does not constitute injury within the state for the purpose of establishing jurisdiction under CPLR

§ 302(a)(3) where the injury occurred elsewhere. Thus, plaintiff cannot claim that his injury affected him in his home state in order to avail himself of the New York Court system in this action. Further, CPLR § 302(a)(4) is inapplicable, as defendants do not own, use or possess any real property situated within New York. Nor would plaintiff's alleged injury outside of the state have any nexus to defendants' ownership of any property located in New York.

Even if the Court were to find that defendants are subject to personal jurisdiction in New York, dismissal of the complaint is warranted on the ground of *forum non conveniens*. First, all defendants, potential witnesses, and potential evidence would be located in Vermont and Massachusetts, not New York. Second, it would be tremendously difficult and costly for defendants to participate in discovery and a trial in New York and meet/correspond with their attorneys in New York. Third, the Vermont courts are available to plaintiff as an alternate forum. Fourth, the alleged incident occurred outside of New York. Finally, acceptance of jurisdiction of this suit, which has no significant connection with New York, would only increase the Court's already heavy caseload.

Opposition

Plaintiff argues that defendants are subject to jurisdiction under CPLR §301 since they are "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction." Milton Academy performs educational services in New York through a program entitled "City Term." City Term is an experience-based interdisciplinary study of New York for high school juniors, who live at the "Masters School" in Dobbs Ferry and travel into New York City to study commerce and culture in New York City's urban life. City Term is marketed on Milton Academy's website to attract students to the school.

Milton Academy also derives significant revenue from its large population of students from New York, actively recruits students in New York and provides a large amount of financial aid to New York residents. Milton Academy receives approximately 12.7% of its revenue from New York residents or approximately \$3,980,600.

In addition, Milton Academy engages in substantial commercial activity in New York. It has had investment relationships with Blackstone Group and Kellner Dilco & Co., since 2004. In 2006, Milton Academy invested approximately \$14 million with these entities. Moreover, Milton Academy's website indicates that alumni donations are to be made by wire transfers directly to its Citibank account in New York.

Milton Academy also regularly conducts numerous school events in New York City, such as a Career Networking Night, Reunion Kick-Off Celebration, Young Alumni Event, and Wine Tasting Event. Accordingly, Milton Academy has sufficient traditional contacts with New York to establish that it engages in a continuous and systematic course of "doing business" sufficient to warrant a finding of its presence in New York.

Plaintiff also argues that Milton Academy is subject to personal jurisdiction under CPLR § 301 based upon the alternative "solicitation plus" test. Milton Academy's solicitation in New York, *i.e.*, deriving approximately 12.7% of its tuition revenue from New York students, combined with (1) financial investments in excess of \$14,000,000 in New York, (2) a New York Citibank bank account, (3) facilities in New York from which to conduct fundraising activities and meetings in New York, and (4) its off-campus City Term program in Dobbs Ferry, New York, meet this alternative standard.

Plaintiff also maintains that based upon the facts, long arm jurisdiction over Milton

Academy exists under CPLR §302(a)(1) which confers jurisdiction over an entity that “transacts business” within New York, and under CPLR §302(a)(3), which confers jurisdiction over an entity that commits a tortious act outside New York.

As to section 302(a)(1), a Milton Academy agent actively recruited plaintiff in person while he was attending school in New York, and recruited plaintiff by telephone on multiple occasions. Plaintiff ultimately accepted Milton Academy's offer to attend The Mountain School, which he would not have done but for the fact that the Milton Academy had arranged for the educational credits he received from Milton Academy to be applied as credits toward his New York high school diploma. Plaintiff was the direct target of Milton Academy's recruiting efforts in New York for a specific purpose of promoting the overall diversity of its student body, which the Milton Academy considers an important educational objective. Thus, the contacts in this case concerning the transaction of business by Milton Academy relate directly to plaintiff.

As to section 302(a)(3), Milton Academy committed a tortious act in Vermont that resulted in plaintiff's injuries. New York's jurisprudence appears to find jurisdiction where an ongoing injury takes place in New York, rather than requiring that the initial injury take place in New York. Plaintiff argues that but for the initial few days, all of his ongoing injuries and their consequences have taken place in New York. And, once there is injury in New York from the out-of-state tort, a plaintiff need only show that a defendant (1) “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” (302(a)(3)(i)), or (2) “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce” (302(a)(3)(ii)). Given Milton Academy's

extensive contacts with New York, jurisdiction is appropriate under Section 302(a)(3)(i). Further, Milton Academy should reasonably expect that its tortious acts would have consequences in New York: plaintiff was a New York resident attending classes to obtain New York credits toward his graduation from high school in New York; it was clear that plaintiff intended to return to New York at the conclusion of the program; Milton Academy reports that it has students enrolled from more than 30 states and 18 countries; and almost 13% of revenue is derived from New York alone.

Furthermore, the exercise of personal jurisdiction under a state long-arm statute comports with federal due process, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. There is no greater burden upon Milton Academy in defending this suit in New York than involved in those activities that it already chooses to conduct in New York. Plaintiff's interest in obtaining relief is furthered because the doctors responsible for almost all of his care are subject to subpoena in New York but not elsewhere. New York has an interest in its resident obtaining proper relief for his injuries as well as minimizing any impact upon state resources in providing for his care. Finally, there is no "shared interest of the several states" in furthering social policies and achieving the efficient resolution of controversies that contraindicates that jurisdiction in New York is appropriate.

In the event additional facts are required to establish jurisdiction, plaintiff seeks leave to conduct discovery pursuant to CPLR § 3211(d). Any additional information rests within the exclusive knowledge of the defendants.

Furthermore, defendants failed to establish entitlement to dismissal based on *forum non conveniens*. The affidavit of its Director of Administration and Academy Counsel contains

unexplained and unfounded conclusory assertions about inconvenience or prejudice. The residence of the plaintiff in this state militates against transfer of this case and other factors weigh in favor of retaining this action in New York. Any claim by defendants of inconvenience herein is belied by the fact that Milton Academy actively recruits in New York, fundraises in New York, and routinely conducts alumnae events in New York. Indeed, these very activities were performed by many of the individuals who will be deposed and appear at trial. Milton Academy can easily compel its witness to come to New York. Conversely, plaintiff cannot compel its experts to travel to Vermont to trial. Similarly, given plaintiff's significant and permanent paraplegic injuries, his ability to travel to Vermont to pursue his claim would present enormous difficulties.

Reply

In reply, defendants add that City Term is established, organized and administered by the Masters School in New York, not The Milton Academy. Although an occasional student may receive academic credit through their participation in City Term, City Term is not a Milton Academy program in any sense, and is not a business activity of Milton Academy in New York. Nor does Milton Academy receive any financial benefits from this program. Therefore, Milton Academy's relationship with City Term is insufficient to confer jurisdiction over defendants.

Milton Academy only has two outstanding bonds (neither of which are issued out of New York). And, the portion of Milton Academy's endowment that is invested in New York is only a portion of its investment portfolio. The management of Milton's endowment, like fundraising, is an ancillary function that is separate from the Milton Academy's overall purpose.

Further, Milton Academy's limited contact with plaintiff is insufficient. Plaintiff cannot

expect to have jurisdiction conferred over defendants by an unsubstantiated "in person" meeting with Milton Academy's agent, and a few alleged telephone calls with others, and further discovery is unwarranted on this issue. Milton Academy generally conducts interviews of prospective students on the Milton Academy campus in Massachusetts. Only occasional exceptions are made for off-site interviews when a prospective student does not have the financial means to travel to Milton Academy for such interview. The general practice of the Mountain School of Milton Academy is not to conduct interviews at all.

Nor is there any nexus between plaintiff's accident and defendants' *de minimis* New York contacts to support long-arm jurisdiction. The cases on which plaintiff relies involved New York contracts that were breached, from which an injury directly resulted. The only two alleged New York agreements between plaintiff and defendants were as to his financial aid package and his applicable academic credits, and the alleged torts committed by Milton Academy in no way involve alleged breaches of those two agreements. And, the medical malpractice case on which plaintiff relies to establish jurisdiction under CPLR §302(a)(3), is distinguishable.

Finally, the residence of a plaintiff is not dispositive on a motion to dismiss on ground on *forum non conveniens*. Although plaintiff's residence and his current medical condition support retaining this action in New York, the remaining factors weigh heavily in removal of this action.

Analysis

Personal Jurisdiction

A. CPLR 301 general jurisdiction

A foreign corporation is amenable to suit in New York courts under CPLR §301 if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its

“presence” in this jurisdiction is warranted. . . . The test for “doing business” is a “simple [and] pragmatic one,” which varies in its application depending on the particular facts of each case. . . . The court must be able to say from the facts that the corporation is “present” in the State “not occasionally or casually, but with a fair measure of permanence and continuity” (*Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33-34, 563 NYS2d 739, 741 [1990]). In order to establish that this standard is met, a plaintiff must show that a defendant engaged in “continuous, permanent, and substantial activity in New York” (*Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 918 F2d at 95). A finding of “doing business” under CPLR §301 is dependent upon the existence of traditional *indicia* from which the court may conclude that the foreign defendant has sufficient contacts with New York to warrant a finding that it is present here (*Bossey ex rel. Bossey v Camelback Ski Corp.*, 21 Misc 3d 1116, 873 NYS2d 509 [Sup Ct New York County 2008]). 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 which it conducts with New York residents (*id.*, citing *Laufer v Ostrow*, 55 NY2d 305 [1982]; *Frummer v Hilton Hotels Intl., Inc.*, 19 NY2d 533, 281 NYS2d 41 [1967]). At the pretrial stage, plaintiff may meet his burden by pleading in good faith sufficient allegations of jurisdiction (*In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 FSupp2d 376 [SDNY 2002] citing *Jazini v Nissan Motor Co.*, 148 F3d 181, 184 [2d Cir 1998] and *Koehler v Bank of Bermuda, Ltd.*, 101 F3d 863, 865 [2d Cir 1996]).

It is undisputed that defendants do not have any employees, agents, offices or telephone listings in New York, that they are not authorized to do business in New York, and do own or lease any real property in New York. Thus, plaintiff failed to make a *prima facie* showing of

personal jurisdiction over defendants under the traditional indicia of “presence.”

However, under the “solicitation plus” doctrine, the solicitation of business from New York is sufficient to confer jurisdiction if (1) the solicitation is substantial and continuous, and (2) the defendant engages in other activities of substance in New York (*Landoil*, 918 F2d at 1043). Defendants’ “solicitation” in New York must first rise to the level of “substantial solicitation” in order to trigger the “solicitation-plus” rule in the first instance (*Overseas Media, Inc. v Skvortsov*, 407 F Supp2d 563, 569 [SDNY 2006] citing *Stark Carpet Corp. v M-Geough Robinson, Inc.*, 481 F Supp 499, 505 [DCNY 1980]). Further, the additional activities sufficient to confer jurisdiction under the solicitation plus doctrine must involve “either some financial or commercial dealings in New York . . . or the defendant holding himself out as operating in New York, either personally or through an agent” (*Grill v Walt Disney Co.*, 683 F Supp 66, 69 [SDNY 1988]).

In order to find that the solicitation of business is sufficient to trigger the solicitation-plus doctrine, courts “frequently look to the percentage of a company’s revenue attributable to New York business” (*Id.* at 569).

It is undisputed that representatives from Milton Academy make occasional trips to New York to promote its college preparatory program to students in this state, and that a number of New York residents attend the Mountain School as a result of these efforts. Indeed, the record appears to indicate that in 2007, 25% of Milton Academy students receive financial aid and that of that amount, 32 students from New York receive financial aid. Based on the number of students as a whole, it appears that there are approximately 128 students from New York attending Milton Academy. The tuition charged for the 2007 school year is \$38,275 and the

2007 average financial aid award covers 75% of tuition. The 32 financial aid students from New York are projected to pay Milton Academy 25% of the tuition for a total of \$306,200. The remaining 96 students from New York that did not receive financial aid are projected to pay Milton Academy a total of \$3,674,400. As such, revenues from New York students are projected to be \$3,980,600. Based on the most recent available information, Milton Academy reported receiving \$31,276,948 in tuition, denoted as "program service revenue." Therefore, New Yorkers account for approximately 12.7% of such revenue. In addition, New Yorkers also received approximately \$918,600 in direct financial aid awards from Milton Academy.

Additionally, the record indicates that Milton Academy charters round-trip bus service for its students from Milton to New York City five times a year during school vacations occurring on Columbus Day, Thanksgiving, Winter Vacation, Presidents' Weekend, and Spring Vacation. This service to New York City is the only bus service of its kind offered by Milton Academy (*see Laufer v Ostrow*, 55 NY2d 305, 310,449 NYS2d 456,458 [1982] [New Jersey defendant's sales representatives assigned to New York accounts, solicited sales in New York, ran clinics for the customers, followed up on complaints, and delivered sales materials; calls were also made on New York accounts, including eight to 10 such calls in a year with plaintiff; the volume of defendant's New York sales of \$2,000,000 a year was relevant in finding that there was no unfairness or unreasonableness in allowing the action to be brought against it in New York]). Therefore, the solicitation of New York students to attend Milton Academy is substantial for purposes of triggering the solicitation plus doctrine (*see Thompson Med. Co. v Nat'l Ctr. Of Nutrition, Inc.*, 718 F Supp 252 [SDNY 1989][where defendant derives 8.5 % of revenue from New York, "solicitation of this degree" is sufficient to constitute the doing of business by

defendant within New York State under CPLR § 301]; *Kingsepp v Wesleyan Univ.*, 763 F Supp 22, 27 [SDNY 1991][although Dartmouth was not licensed to do business in New York, and did not maintain an office or have a phone number in New York, it was engaged in a “continuous and systematic course of conduct; the solicitation prong was met because Dartmouth “actively solicits students” by having representatives visit secondary schools and having alumni interview prospective students]).

This is not an instance where the defendant’s revenues from New York can be classified as *de minimus* (see *Overseas Media, Inc. v Skvortsov*, *supra*, citing *Aqua Products, Inc. v Smartpool, Inc.*, 2005 WL 1994013, at *4 [SDNY 2005][“sales in the forum state, which comprise only two percent of a company's total income,” do not satisfy the substantial solicitation test]; *Gross v Bare Escentuals, Inc.*, 2005 WL 823889, at *5 [SDNY 2005][3-4% of total product sales “insufficient to constitute substantial solicitation”]; *Stemcor v Sharon Tube Co.*, 2001 WL 492427, at *2 [SDNY 2001][where New York orders under 1% of total invoices insufficient]; *Hennigan v Taser International, Inc.*, 2001 WL 185122, at *2 [SDNY 2001][3% of total nationwide sales insufficient]; *Pieczenik v Dyax Corp.*, 2000 WL 959753, at *3 [SDNY 2000][insufficient showing where New York sales were 1.3% of world-wide sales, 1.9% of domestic sales]; *Walbro Automotive Corp. v Apple Rubber Products, Inc.*, 1992 WL 251449, at *4 [SDNY 1992][where revenue only 0.9% of total annual sales, plaintiff failed to proffer “evidence that defendant's solicitation” in subject forum is substantial or continuous]; *Bush v Stern Bros. & Co.*, 524 F Supp 12, 15 [SDNY 1981][less than 1% of its total business over five years insufficient]).

Apicella v Valley Forge Military Academy and Junior College (103 AD2d 151,478

NYS2d 663 [1984]) cited by defendants is not controlling. In *Apicella*, plaintiff alleged that defendant, a Pennsylvania boarding school, improperly refused to supply him with his medication. Defendant's out-of-State visits to conduct interviews of prospective students were "[v]ery rarely" made, New York State students made up only 10% of the school's total enrollment, the school's football coach visited New York on a personal basis five times over a period of ten years, and recruited five players of which only three attended the school, and that the defendant advertised in the Sunday magazine section of the New York Times. The Second Department held that the rare visits by defendant's registrar into New York State to interview prospective students, and the defendant's advertisements in the Sunday magazine section of the New York Times do not constitute the doing of business. Thus, the Court lacked jurisdiction under section 301. Here, however, substantial revenue is derived from students from New York, based upon defendants' continuous, systematic, and purposeful solicitations in New York.

Sedig v Okemo Mountain (204 AD2d 709, 710, 612 NYS2d 643, 644 [2d Dept 1994]) is also not controlling [no jurisdiction found over a Vermont corporation which solicited business in New York, sent its employees into New York to attend ski shows, sold ski lift tickets to attendants at ski club meetings in New York once a year, and offered complimentary lift tickets to New York ski shop employees]).

Notably, the case *Kane v Stockbridge School*, 33 Misc 2d 103, 228 NYS2d 904 [Sup Ct 1962]), to which defendants cite for the proposition that jurisdiction does not exist under section 301, stated that it did "not appear that the defendant offers or conducts any educational curriculum or program other than at its school in Massachusetts." Here, however, it is undisputed that Milton Academy's students are given the opportunity to participate in a program

held in Dobbs Ferry, New York, as a supplement to its studies at Milton Academy.

Therefore, the record supports the conclusion that Milton Academy's solicitation of New York students is continuous and substantial.

Furthermore, the additional activities conducted by defendants in New York are sufficient to support personal jurisdiction under section 301. In *Cinemotion NV v Lorimar-Telepictures Corp.* (1989 WL 120083, at *5 [SDNY 1989]), in addition to the fact that defendant's personnel traveled on a regular basis to New York to conduct large volumes of business with various companies, defendant also effectuated payments in New York. Further, although defendant no longer maintained an office in New York, defendant's personnel routinely used a related company's office facilities in New York. "Consistent with the spirit of *Laufer v Ostrow*," the court found that defendant's business conduct in New York constituted a purposeful, systematic and continuous presence and that it is fair to assert personal jurisdiction under section 301.

Similarly in *Kingsepp v Wesleyan Univ.* (763 F Supp 22, *supra*) the Court found that jurisdiction under section 301 was established where defendant had adequate financial or commercial dealings in New York on the basis of, *inter alia*,: (1) having two bank accounts at Chase Manhattan Bank; and (2) issuing bonds through Goldman Sachs.

In addition to solicitations of New York students, the Milton Academy has a relationship with the Masters School located in New York that permits Milton Academy students to study in New York. That City Term is administered by the Masters School and not The Milton Academy is inconsequential, where Milton Academy advertises its ability to offer its students a program in New York. According to Milton Academy's own documents, juniors in the City Term program earn Milton Academy graduation credits for participating in this program, even though it is

conducted in New York. And, to state that Milton Academy does not receive any financial benefits ignores the fact that Milton Academy seeks to use the City Term program to attract students to its school, who in turn, provide a financial benefit to the school in form of tuition.

The record also indicates that Milton Academy regularly conducts numerous school events in New York. In 2007, Milton Academy conducted three events in New York City: Career Networking Night, a Reunion Kick-Off Celebration, and a Young Alumni Event, and in 2008, held the three following events: Career Networking Night, a Wine Tasting Event, and another Young Alumni Event.

It is uncontested that Milton Academy enters into commercial contracts with New York vendors and manages its endowment through New York-based investment companies. The record indicates that Milton Academy has at least \$14,000,000 invested with New York firms over the last several years, including \$13,792,182 invested with the Blackstone Group as of June 2004; \$7,120,052 invested with Kellner Dilco & Co. as of June 2004; \$10,734,742 invested with the Blackstone Group as of June 2005; \$2,026,362 invested with Kellner Dileo & Co. as of June 2005; \$11,857,659 invested with the Blackstone Group as of June 2006; and \$2,159,184 invested with Kellner Dilco & Co. as of June 2006.

The record also indicates that Milton Academy maintains a bank account in New York (*Landoil Resources Corp. v Alexander & Alexander Servs, Inc.*, 918 F2d 1039 [1990] [the presence of bank accounts or other property in New York is one of the factors establishing jurisdiction]). According to the Instructions for Making Wire Transfers, Milton Academy directs that its alumni donations be made by wire transfer and are to be paid to Citibank in New York City. Although the mere existence of a bank account in New York is not enough to constitute

doing business (*see Nemetsky v Banque De Developpement De La Republique Du Niger*, 48 NY2d 962, 425 NYS2d 277 [1979]; *Fremay, Inc. v Modern Plastic Machinery Corp.*, 15 AD2d 235, 241, 222 NYS2d 694, 700 [1st Dept 1961]), here, the defendants' New York Citibank account is used for the receipt of substantially all of defendants' alumni donations. Further, the New York bank account is not defendants' sole contact with New York.

The present record of three fundraising events in 2001 are insufficient to support a finding of presence in New York.

However, when coupled with its solicitation of students in New York, Milton Academy's relationship with City Term, a New York-based program, the events Milton Academy holds on a regular basis in New York, its sizable New York investment accounts, and its use of its New York bank account, are additional factors of substantial substance to constitute presence in New York.

Long-Arm Jurisdiction

Personal jurisdiction under CPLR §302(a)(1) may be obtained over a non-domiciliary "who in person or through an agent ... transacts any business within the state or contacts anywhere to supply goods or services in the state." In order to obtain jurisdiction under this statute, the following conditions must be met: (1) the defendant must transact business in the state; and (2) the cause of action must be directly related to, and arise from, the business so transacted (*Storch v Vigneau*, 162 A.2d 241, 556 NYS2d 342 [1st Dept 1990]). Although the statute "is typically invoked in cases involving contractual liability, it also has application in tort actions" (*Lebel v Tello*, 272 AD2d 103, 707 NYS2d 426 [1st Dept 2000]). The transaction of business under CPLR §302(a)(1) confers jurisdiction only if the cause of action arises from or has an

“articulable nexus” to the transaction of business within the state (*McGowan v Smith*, 52 NY2d 268, 437 NYS2d 643 [1981]). Here, plaintiff’s personal injury claim is substantially related to defendants’ transaction of business in New York.

In *Battista v American Institute for Mental Studies* (183 AD2d 416, 583 NYS2d 374 [1st Dept 1992]), plaintiffs sued for personal injuries suffered by the infant plaintiff who had been placed into foster care with the Commissioner of Social Services of the City of New York (the “City”). The City placed the child with the defendant American Institute for Mental Studies (“AIMS”), at its Vineland, New Jersey facility. The plaintiffs alleged that due to the City’s failure to supervise the placement of the child and because of their failure to provide proper medical treatment, the infant plaintiff suffered physical injuries.

In deciding whether AIMS was subject to New York jurisdiction, the Court noted that AIMS entered into a contract with the City to care for the infant plaintiff and other children. The City paid AIMS approximately \$45,000 a year for each child housed at its facility. Pursuant to the contract, AIMS submitted bills for payment, vouchers for expenditures and reports to the City regarding the care provided each child. AIMS agreed to follow City guidelines for the care of the children and further agreed to report all accidents and injuries suffered by a child to the City. AIMS also employed a New York insurance broker to obtain the insurance required by the contract.

Citing to CPLR §302(a)(1), the Court held that “AIMS’ contacts with New York were purposeful and that there was a substantial relationship between its transactions in New York and the claim asserted. The Court also held that since “AIMS availed itself of the benefits of this jurisdiction, had sufficient minimum contacts here and should have reasonably expected to

defend its actions in New York, due process is not offended by subjecting it to the jurisdiction of the New York courts.

Likewise, in *McLenithan v Bennington Community Health Plan* (223 AD2d 777, 635 NYS2d 812 [3d Dept 1996], *lv. dismissed*, 88 NY2d 1017, 649 NYS2d 383 [1996]), a Vermont physician rendered treatment to a New York patient in Vermont. The patient received health benefits from Capital Area Community Health Plan, Inc. (CHP), a New York-based HMO (health maintenance organization). The physician had "contracted" with CHP to provide medical care and treatment to CHP's subscribers, who were mostly New York residents. Given that the physician rendered treatment to the patient in accordance with the CHP contract, "and because [the physician's] entry into New York's service economy via the CHP contract was purposeful and significant," the Court found that the physician was subject to jurisdiction under CPLR 302(a)(1). Continuing, the Court held that "Requiring him to defend himself in New York will not offend due process because, by actively seeking New York residents as patients, he should have reasonably expected that he would be required to defend his actions here.

Here, defendants solicited the plaintiff to attend its facility in Massachusetts to participate in their college preparatory program. Defendants' college preparatory program takes place at defendants' premises. Inherent in providing an on-campus educational program at their facilities is the duty to maintain their premises in a reasonably safe condition. It is alleged that plaintiff's severe injuries are the result of defendants' failure to satisfy such a duty. Therefore, defendants' contention that there is no substantial relationship between its transactions in New York and the

claim asserted by plaintiff, lack merit, and dismissal on this ground is denied.²

Based on the forgoing, dismissal of the action pursuant to CPLR § 3211(a)(8) based on the lack of personal jurisdiction is denied.

B. *Forum Non Conveniens*

The common law doctrine of *forum non conveniens*, now codified in CPLR 327(a), permits a court to dismiss an action where the movant challenging the forum demonstrates that the action, “although jurisdictionally sound, would be better adjudicated elsewhere” (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479, 478 NYS2d 597 [1984]; *Grizzle v Hertz Corp.*, 305 AD2d 311, 761 NYS2d 163 [1st Dept 2003]). Among the factor’s courts consider when deciding a motion to dismiss on the ground of *forum non conveniens* is: (1) the burden on New York courts; (2) the lack of an alternate forum; (3) the fact that the transaction giving rise to the action occurred in a foreign jurisdiction; (4) the residency of the parties; (5) the location of a majority of the witnesses; and (6) the potential hardship to the defendant in litigating in New York (*Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479). No one factor is controlling (*Id.*).

As to the burden on New York courts, acceptance of jurisdiction of this suit would increase the Court's caseload. However, New York has an interest in its resident obtaining

² However, jurisdiction does appear to exist under CPLR §302(a)(3). CPLR § 302(a)(3) permits personal jurisdiction based on a tortious act committed outside the state, where the injury giving rise to the plaintiff's claim occurs within the state (*Ross v Colorado Outward Bound School*, 603 F Supp 306, 308 [WDNY 1985]). The “mere residence or domicile in New York of an injured plaintiff does not constitute injury within the state for the purpose of establishing jurisdiction under NY CPLR § 302(a)(3) where the injury occurred elsewhere (*Domond v Great American Recreation, Inc.*, 116 F Supp 2d 368, 373-74 [EDNY 2000]). Plaintiff was allegedly seriously injured in a bicycle accident upon defendants’ premises in Vermont, and this is the location of plaintiff’s injury. That he underwent continued treatment for his injuries in New York does not establish that his injury occurred in New York. The case on which plaintiff relies to support jurisdiction under this section is wholly distinguishable, in that such case involved a medical malpractice case where the injury arising from the malpractice manifested itself after the plaintiff returned home to New York. As defendants point out, plaintiff’s case is not one in which his injury was hidden until after he returned to his New York domicile.

proper relief for his injuries.

As to the availability of another forum, it cannot be contested that the Massachusetts or Vermont courts are available to plaintiff as an alternate forum in which plaintiff may seek redress. However, the doctors responsible for almost all of his care are subject to subpoena in New York but not in Massachusetts or Vermont. Milton Academy can readily compel its witnesses to come to New York. However, plaintiff cannot compel its experts to travel to Vermont to trial.

Since plaintiff's accident occurred out of state, this factor weighs in favor of removal of this action.

As to the residency of the parties, plaintiff's New York residence should generally be "the most significant factor in the equation" (*Sweeney v Hertz Corp.*, 250 AD2d 385, 672 NYS2d 342 [1st Dept 1998] *citing Sweeney v Hertz Corp.*, 250 AD2d 385, 672 NYS2d 342 [1st Dept 1998]). A plaintiff's choice of forum should not be disturbed absent a balance of factors strongly favoring the defendants (*Sweeney v Hertz Corp.*, *supra*). Thus, given that the plaintiff resides in New York, and the main defendants reside out of state, this factor weighs in favor of plaintiff (*see Amlon Metals, Inc. v Liu*, 292 AD2d 163, 738 NYS2d 198 [1st Dept 2002] [stating "that defendant's alleged conversion and other torts were committed in China, that some of defendant's prospective witnesses reside there and that Chinese law may govern do not present a balance of factors which so strongly favor defendant that they warrant disturbing plaintiff's choice of a forum in New York where plaintiff has its principal place of business and defendant owns real estate and maintains a bank account"])).

As to the location of a majority of the witnesses, obviously, the testimony of plaintiff,

who resides in New York, on the issue of liability, is essential to this action. As to plaintiff's damages claim, it is noted that after the accident, plaintiff was immediately transported to and treated at the Dartmouth Hitchcock Hospital in Dartmouth, New Hampshire, for three days. Plaintiff was then flown to the Rusk Institute of Rehabilitation Medicine, a part of New York University Hospital, located in New York City, where he remained as a full-time patient from September 29, 2007 until June 2008. Plaintiff continues to receive physical therapy at the Rusk Institute on an out-patient basis through the present. Thus, the vast majority of plaintiff's medical care and the greatest part of his medical expenses were incurred in New York. Based on the above, the testimony of the plaintiff coupled with the testimony of plaintiff's New York doctors will be of far greater significance to the prosecution of plaintiff's claims than the defense of this action as to the condition of the premises on the issue of defendants' negligence. Further, defendants did not offer any evidence indicating that any material witnesses would be burdened by proceedings in New York (*see Estate of Katz v Lazaroff*, 236 AD2d 257, 653 NYS2d 348 [1st Dept 1997] [defendants did not offer any evidence to demonstrate that any material witnesses would be burdened by proceedings in New York; the action, involving a simple one-vehicle accident, which occurred in Pennsylvania, "had a substantial nexus to New York and placed little burden on our courts"])).

As to the potential hardship to the defendants in litigating in New York, as plaintiff points out, there is no greater burden upon Milton Academy in defending this suit in New York than involved in the activities it already conducts in New York. Thus, defendants' claim that it would be difficult and costly for Milton Academy's representatives and witnesses to participate in discovery and trial in New York and meet with their attorneys in New York is unpersuasive.

Defendants have not articulated which of their representatives are essential to the defense of this action, and there is no evidence of any hardship upon such representatives to appear in New York to testify either before or at the trial of this action.

Based on a weighing of the above factors, the Court denies defendants' motion to dismiss this action based on the ground of *forum non conveniens*.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants to dismiss the complaint pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, and pursuant to CPLR § 327(a) on the ground of *forum non conveniens* is denied; and it is further

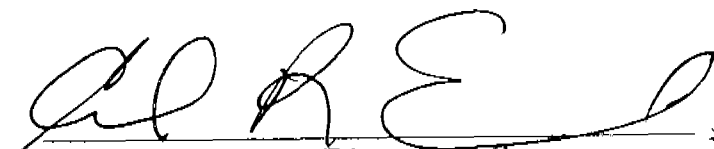
ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that defendants shall serve their answer within 30 days of the date of this order; and it is further

ORDERED that the parties appear for a preliminary conference in Part 35 on May 26, 2009, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: April 13, 2009


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

FILED
APR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK