

**Paolucci v Kamas**

2009 NY Slip Op 31143(U)

May 5, 2009

Supreme Court, Richmond County

Docket Number: 104828/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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**DCM PART 3**

**BARBARA PAOLUCCI,**

**Index No. 104828/07  
Calendar No: 1961-002**

*Plaintiff,*

*-against-*

**DECISION AND ORDER  
HON. JOSEPH J. MALTESE**

**AL KAMAS, The Law Firm of Render,  
Kamas and all partners from 1995 to present,**

*Defendants.*

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The following papers numbered 1 to 5 were submitted on this motion the \_\_ day of \_\_\_\_, 2009:

	Papers Numbered
Notice of Motion to Dismiss by Defendants, with Supporting Papers, Exhibits and Memorandum of Law (dated June 18, 2008).....	1
Reply Affirmation of Dylan Braverman, with Supporting Papers and Exhibits (dated October 28, 2008).....	2
Opposition to Motion to Dismiss by Plaintiff, pro se, with Supporting Papers and Exhibits (dated December 9, 2008).....	3
Reply Affirmation and Reply Memorandum of Law in Further Support of Defendants’ Motion to Dismiss (dated December 17, 2008).....	4
Sur Reply in Opposition to Motion to Dismiss by Plaintiff, pro se, with Supporting Papers (dated January 14, 2009).....	5

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Upon the foregoing papers, defendants’ motion to dismiss is granted.

To the extent relevant, plaintiff, a New York resident, retained the individual defendant, a Kansas attorney, and his law firm (hereinafter, collectively, “defendants”) to represent her in connection with a matter under investigation by the Attorney General of that State involving

allegations of consumer fraud. It is alleged that while the Kansas Attorney General had commenced a class action against any number of individuals and institutions purportedly involved in the alleged fraud, it failed to pursue certain other parties who, defendants believed, had also participated in the fraudulent scheme (Affidavit of Albert Kamas, Esq., para 21). Although not divulged to the Court, it appears that defendants were able to obtain a list of potential fraud victims from the Federal Bureau of Investigation, and soon after sent letters to many if not all of those individuals asking for his or her assistance in the investigation and commencement thereof a possible class action lawsuit against the other alleged wrongdoers (*id.* at 21-23). In response to this correspondence, plaintiff entered into a retainer agreement with these defendants on or about April 25, 1997 to pursue her legal claims against these remaining malefactors in Kansas (Affidavit of Albert Kamas, Esq. at 23; Defendants' Exhibit "O"). In pertinent part, said retainer agreement provided that it would be governed by the Laws of Kansas (Defendants' Exhibit "O"). It is undisputed that thereafter a course of communication ensued between the parties regarding the case via email, telephone, and the post, and it was in one of these communiques that plaintiff was apprised that although class action certification had been denied, an action was commenced on her behalf by defendants on or about October 26, 1999 in the District Court of Johnson County, Kansas. Apparently dissatisfied with defendants' services, plaintiff commenced this action for legal malpractice against them in New York. Defendants thereupon moved to dismiss the complaint on the ground, among others, that they are not subject to personal jurisdiction in this State.

In their motion to dismiss, defendants claim that they practice primarily in Kansas, and that they lack any significant contacts with the State of New York. More particularly, defendants claim that they never rendered any legal services to plaintiff within the State, and disavow conducting any business in New York or deriving any substantial income here (Affidavit of Albert Kamas, Esq. para 4- 19). In this regard, defendants note that they are not licenced to practice law in New York; own no property within the State; and have never appeared in any legal proceedings in New York. (*id.* at para 2,3,6,15,18).

In opposition, plaintiff asserts that defendants "solicited [her] by mail and by telephone... in New York, to provide [her with] legal representation", and acted in like fashion to pursue "other New Yorkers similarly situated" (Plaintiff's Amended Complaint, para 8, 10; Plaintiff's Pro Se Memorandum of Law, pp 6, 13, 14). Plaintiff also alleges that the firm advised her to "abandon her New York Civil Court lawsuit" against the defendants in the Kansas litigation (Amended Complaint at 12[b]; Plaintiff's Pro Se Memorandum of Law, p 12).

As is pertinent to this case, it is provided by statute that the courts in New York may exercise personal jurisdiction over any party who “transacts any business within the state... even where that defendant has never physically entered the state so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transactions and the claim asserted” (CPLR 302 [a][1]; *see Bogal v. Finger*, 59 AD3d 653,654 [2<sup>nd</sup> Dept 2009]). Thus, the application of this standard requires that each case be considered based on the totality of circumstances concerning that particular matter, including, e.g., the quality of the nonresidents’ interaction with New Yorkers and their activities, if any, within the State (*see Scheuer v. Schwartz*, 42 AD3d 314, 316 [1<sup>st</sup> Dept 2007]).

While the ultimate burden of proof rests with the party asserting jurisdiction, it has been held that a plaintiff opposing a motion to dismiss under CPLR 3211(a)(8) need only make a prima facie showing that their adversaries are subject to the jurisdiction of the Court in order to shift the burden of going forward with contrary proof to the defendants (*see Alden Personnel, Inc. v. David*, 38 AD3d 697 [2<sup>nd</sup> Dept 2007]).

Here, plaintiff has satisfied her initial burden by showing that defendants solicited her in New York as a client. According to plaintiff, defendants sent a “form letter... to hundreds of persons who were believed to have been involved [with the Kansas defendants]”, and entreated them to assist in its investigation of potential claims against the alleged defrauders (*see* Affidavit of Albert Kamas, Esq., para 21-23; Defendants’ Reply Memorandum of Law, p 18). In the opinion of this Court, defendants’ solicitation of plaintiff in New York as a potential client, the subsequent establishment of an attorney-client relationship, and the ensuing record of their mutual correspondence is sufficient to satisfy plaintiff’s initial burden of demonstrating personal jurisdiction under CPLR 302(a)(1) (*see Liberatore v. Calvino*, 293 AD2d 217, 221 [1<sup>st</sup> Dept 2002]; *Tilyou II v. Carroll*, 1993 US Dist LEXIS 3217 at 12 [ED NY March 15,1993]).

While it is undisputed that defendants successfully solicited plaintiff in New York with the intention of securing her as a client<sup>1</sup>, it has been held repeatedly that the mere solicitation of business within the State does not constitute the transaction of business for purposes of CPLR 302(a)(1) in

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<sup>1</sup>While it is unclear whether the retainer agreement was finally executed in Kansas or New York, it is not without significance that it provided that the parties’ rights and obligations were to be determined under the Laws of Kansas.

the absence of other activities within the State bearing a substantial relationship to the claim asserted (*see Bogal v. Finger*, 59 AD3d at 654; *O'Brien v. Hackensack Univ Med Ctr.*, 305 AD2d 199 [1<sup>st</sup> Dept 2003]; *cf. Kaczorowski v. Black & Adams*, 293 AD2d 358 [1<sup>st</sup> Dept 2002]). Essentially, therefore, it is the quality of this nexus that renders the lack of a physical presence in New York unnecessary for purposes of exercising jurisdiction (*see Fischbarg v. Doucet*, 9 NY3d 375, 381-382 [2007]; *Mayes v. Leipziger*, 674 F2d 178, 185 [2d Cir 1982]).

In this case, although the retainer agreement clearly gave rise to a substantial and ongoing attorney-client relationship which lasted for approximately ten years, defendants have demonstrated to the satisfaction of this Court that the extent of their purposeful activity within the State is, on the whole, insufficient to subject them to personal jurisdiction under CPLR 302(a)(1). Although defendants undoubtedly entered New York for the purpose of acquiring plaintiff (and perhaps others) as claimants in a potential class action, it is undisputed that the solicitation was not targeted to New York residents alone, but was part of a nation-wide search. Moreover, it would appear that the retainer agreement was itself the product of interstate communication (whether by telephone, email or the post), and that the subject of the representation as well as the alleged malpractice occurred solely in Kansas, *i.e.*, the state designated in the choice of forum provision of the retainer agreement. In fact, despite the subsequent stream of interstate communication between the plaintiff in New York and the defendants in Kansas, there has been no claim of any other contact between the parties.

Under these circumstances, it would be unjust to conclude that defendants purposefully availed themselves of the benefits and protections of New York law, or sought “to take advantage of a field particular to New York” in their course of representing this plaintiff (*see Farkas v. Farkas*, 36 AD3d 852 [2<sup>nd</sup> Dept 2007]; *Kimco Exch Place Corp v. Thomas Benz, Inc.*, 34 AD3d 433, 434 [2<sup>nd</sup> Dept 2006]; *J.E.T. Adv. Assoc v. Lawn King*, 84 AD2d 744, 745 [2<sup>nd</sup> Dept 1981]; *cf. Fischbarg v. Doucet*, 9 NY3d 375, 385 [2007]; *Opticare Acquisitions Corp v. Castillo*, 25 AD3d 238, 247 [2<sup>nd</sup> Dept 2005]). Viewed in this context, it is the opinion of this Court that the exercise of personal jurisdiction over these defendants would be inconsistent with traditional notions of due process, fair play and substantial justice (*cf. Bogal v. Finger*, 59 AD3d at 654-655). As a result, defendants’ motion to dismiss based on the absence of personal jurisdiction is granted.

In light of this determination, the balance of defendants' motion need not be considered.

Accordingly, it is hereby:

ORDERED that defendants' motion to dismiss is granted; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

DATED: May 5, 2009

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Joseph J. Maltese  
Justice of the Supreme Court