

**Krobath v Tractor Barn**

2009 NY Slip Op 32263(U)

September 21, 2009

Supreme Court, Nassau County

Docket Number: 1409/09

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**MALCOM ERIC KROBATH,  
Plaintiff,**

**Motion Sequence #1, #2  
Submitted July 22, 2009**

**-against-**

**INDEX NO: 1409/09**

**THE TRACTOR BARN and ROBERT CASH  
MOLINE,  
Defendant.**

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**The following papers were read on these motions:**

<b>TRACTOR Notice of Motion.....</b>	<b>1</b>
<b>Plaintiff Notice of Cross-Motion.....</b>	<b>2</b>
<b>Response to Cross-Motion and in Support of Motion in Chief.....</b>	<b>3</b>

Counsel for defendant, ROBERT CASH MOLINE d/b/a THE TRACTOR BARN (hereinafter referred to collectively as "TRACTOR BARN") moves for an order, pursuant to CPLR §3211(a)(7) and (8), dismissing the complaint and alleges that long arm jurisdiction is lacking under CPLR §302(a) and that the tort based cause of action is duplicative of the contract causes of action. Counsel for plaintiff, MALCOM ERIC KROBATH, opposes the motion and cross-moves for an order, pursuant to CPLR §3025(a) and (b), granting him leave to serve an amended complaint. The motion and cross-motion are determined as follows:

This is an action to recover damages for breach of contract, fraud and breach of warranties. The record reflects that, in September 2008, plaintiff contracted with defendants for the purchase of a John Deere 450 Track Loader Crowell Tractor (“the tractor”) for the total sum of \$14,700.00—the actual price was \$13,500.00 plus a shipping cost of \$1,200.00.

Plaintiff is a New York resident. Defendant MOLINE, d/b/a as TRACTOR BARN, is a resident of Nashville, Tennessee. The tractor was shipped by truck from Texas, where the tractor was apparently located, to Deposit, New York. Defendant MOLINE made all the arrangements with the trucking company regarding the delivery of the tractor. Defendants move to dismiss the complaint pursuant to CPLR §3211(a)(8) and claim that long arm jurisdiction under CPLR §302(a)(1) is lacking.

In opposition to defendants’ assertion that they lacked the minimum contacts to provide long arm jurisdiction, plaintiff primarily relies upon *Zottola v AGI Group, Inc.*, 63 AD3d 1052, 882 NYS2d 445 (2<sup>nd</sup> Dept. 2009). In *Zottola*, the Second Department held that an out of state seller of a boat on the internet “transacted business” with the intended buyer in New York and had a substantial relationship with New York, so as to warrant the exercise of in personam jurisdiction over the seller under New York’s long-arm statute in compliance with due process; that the seller allegedly agreed to deliver the boat in New York, the money for the purchase of the boat was paid to seller by wire transfer to a New York bank branch, not a Florida branch, and the boat in question was transferred to the seller, and then later transferred by the seller to the buyer at his New York address.

In the case at bar, plaintiff specifically asserts that defendants made nineteen (19) contacts with plaintiff in New York via the e-Bay website, e-mail, and telephone and that

MOLINE arranged for the delivery of the tractor in New York and accepted a check drawn from a New York bank account. In addition, plaintiff alleges that “Moline purports in his e-Bay advertisements to be a major player in the sale of tractors and farm equipment in the United States, counting recent sales to purchasers in Missouri, Georgia, Tennessee, California, Illinois, Texas and even internationally to purchases in Canada.”

CPLR §302(a)(1) provides as follows:

A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent. . . transacts any business within the state or contracts anywhere to supply goods or services in the state.

By this “single act statute’ proof of one transaction in New York is sufficient to invoke 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 Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 818 NYS2d 164, 850 NE2d 1140 (C.A.2006), *cert den.* 549 US 1095 (USNY 2006); *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 527 NYS2d 195, 522 NE2d 40 (C.A. 1988). Hence, to avail itself of this statute, a plaintiff must not only establish that the defendant purposefully transacted business within the State of New York, but must also show a substantial relationship, which may pertain to a single act, between the transaction and the claim asserted. *Zottolo v AGI, Group, Inc.*, *supra*; *see Deutsche Bank Sec., Inc. v Montana Md. of Invs.*, *supra*; *Kreutter v McFadden Oil Corp.*, *supra*.

The totality of the nonresident defendant’s activities within the forum state are considered in order to determine whether its contacts satisfy the “transacting business” requirement (*see, Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 261

NYS2d 181, 209 NE2d 68 [C.A. 1965]). “Purposeful activities are those with which a defendant, through volitional acts, ‘avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” *Fischbarg v Doucet*, 9 NY3d 375, 849 NYS2d 501, 880 NE2d 22 (C.A.2007), quoting *McKee Elec. Co. v Rauland-Borg Co.*, 20 NY2d 377, 283 NYS2d 34, 229 NE2d 604 (C.A. 1967). Such acts may be contrasted with “random, fortuitous, or attenuated contacts, . . . [or] unilateral activity of another party or a third person.” *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 105 S. Ct, 2174, 85 L. Ed.2d 528 (1985) (internal quotations omitted).

The Courts have recognized CPLR §302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions. See e.g. *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, *supra*; *Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 308 NYS2d 337, 256 NE2d 506 (C.A.1970); *Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 427 NYS2d 601, 404 NE2d 726 (C.A. 1980). Cases that arise from a defendant’s internet activity often present perplexing questions of personal jurisdiction. However, it is “now established that one does not subject himself to the jurisdiction of the courts in another state simply because he maintains a web site which residents of that state visit” (*National Football League v Miller*, No. 99 Civ. 11846 [JSM], 2000 WL 335566 [US District Ct., SDNY 3/30/2000], citing *Bensusan Restaurant Corp. v King*, 126 F3d 25 [2<sup>nd</sup> Cir. N.Y. 1997]). In fashioning a functional test to determine when a non-domiciliary’s online activity constitutes the transaction of business in a particular forum, Courts often attempt to locate the internet activity at issue on a “sliding scale of interactivity” between “passive” websites that merely

make information available to interested visitors and “interactive” websites through which a defendant clearly “does business over the internet.” *Best Van Lines, Inc. v Walker*, 490 F3d 239 (2<sup>nd</sup> Cir. N.Y. 2007). Although this analytical framework “may be useful for analyzing personal jurisdiction under section 302(a)(1)” it “does not amount to a separate framework for analyzing internet-based jurisdiction.” *Id.* quoting *Best Van Lines v Walker*, 2004 WL 964009 (S.D.N.Y. May 4, 2004), *aff’d*. 490 F3d 239 (2<sup>nd</sup> Cir. N.Y. 2007). E-mail communications to New York may be of sufficient “quality” to establish a transaction of business in a suit based upon a professional services contract. *Fischbarg v Doucet, supra*; *JSO Associates, Inc. v Price*, NYLJ 4/15/08, p. 27, col. 3, (Supreme Nassau Co. , Bucaria, J).

In the case at bar, defendants should reasonably have expected to defend a suit based on their relationship with plaintiff in this jurisdiction. (*Fischbarg v Doucet, supra*). Defendants are sophisticated businessmen who “projected themselves” into New York by knowingly initiating and pursuing a negotiation with a resident and by delivering a good in New York. *See Deutsche Bank Sec., Inc. v Montana Bd. of Invs., supra*. Defendants dealt directly with plaintiff, a New York resident, by phone, e-mail, electronically and fax, and made arrangements for the delivery of the tractor in New York. This is sufficient to demonstrate that defendants “sufficiently availed itself of the benefits of doing business in this State, such that due process would not be offended by subjecting it to this State’s jurisdiction.” *Zottola v AGI, supra*; *see Pryor Personnel Agency, Inc. v Wage Law Firm*, NYLJ 3/28/08, p. 28, col. 3 (Supreme. Nassau Co., Winslow, J).

Accordingly, defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(8) is denied. The Court will now address the branch of defendants' motion which seeks to dismiss the complaint pursuant to CPLR §3211(a)(7), for failure to state a cause of action.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the Court must determine whether from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Salvatore v Kumar*, 45 AD3d 560, 845 NYS2d 384 (2<sup>nd</sup> Dept. 2007); *lv to app den.* 10 NY3d 703, 854 NYS2d 104, 883 NE2d 1011 (C.A. 2008). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference. *Nonnon v City of New York*, 9 NY3d 825, 842 NYS2d 756, 874 NE2d 720 (C.A. 2007); *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 729 NYS2d 425, 754 NE2d 184 (C.A.2001); *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972, 638 NE2d 51(1C.A.994). Notably, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 799 NYS2d 170, 832 NE2d 26 (C.A.2005); *Crepin v Fogarty*, 59 AD3d 837, 874 NYS2d 278 (3<sup>rd</sup> Dept. 2009); *Farber v Breslin*, 47 AD3d 873, 850 NYS2d 604 (2<sup>nd</sup> Dept. 2008).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform, and resulting damage. *Bellinson Law LLC v Iannucci*, 2009 WL 2416140 (Supreme NY Co.); *Furia v Furia*, 116 AD2d 694,498 NYS2d 694 (2<sup>nd</sup> Dept. 1986).

After a careful reading of the subject pleading, it is the judgment of the Court that the allegations set forth in the complaint sufficiently state a cause of action to recover damages for breach of contract. See *Sokoloff v Harriman Estates Development Corp.*, *supra*; *Kevin Spence & Sons, Inc. v Boar's Head Provisions Co., Inc.*, 5 AD3d 352, 774 NYS2d 56 (2<sup>nd</sup> Dept. 2004).

Turning to plaintiff's motion for leave to amend said complaint, such relief is denied. A motion for leave to amend the complaint pursuant to CPLR §3025(b) should be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or is patently devoid of merit. *Scofield v DeGroot*, 54 AD3d 1017, 864 NYS2d 174 (2<sup>nd</sup> Dept. 2008); *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 (2<sup>nd</sup> Dept. 2008); see, *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809, 862 NYS2d 513 (2<sup>nd</sup> Dept. 2008). Where the proposed amendment plainly lacks merit, "amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial," the motion should be denied. *Thomas Crimmins Contracting Co., Inc. v City of New York*, 74 NY2d 166, 544 NYS2d 580, 542 NE2d 1097 [C.A.1989].

In the proposed amended complaint, plaintiff alleges defendants' fraud with specificity. Generally, "a cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract." *Tiffany at Westbury Condominium By Its Bd. of Managers v Marelli Development Corp.*, 40 AD3d 1073, 840 NYS2d 74 (2<sup>nd</sup> Dept. 2007); *Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 817 NYS2d 230 (1<sup>st</sup> Dept. 2006); see, *Ross v DeLorenzo*, 28 AD3d 631, 813 NYS2d 756 (2<sup>nd</sup> Dept. 2006). Here, plaintiff's cause of action for fraud is a mere duplication of the breach of contract claims

and both seek identical damages. *Tiffany at Westbury Condominium By Its Bd. of Managers v Marelli Development Corp., supra*; *Reade v SL Green Operating Partnership, LP, supra*. Consequently, the Court finds that no basis exists for plaintiff to proceed on theories of fraud and the cross-motion to amend the complaint is denied. It is therefore

**ORDERED**, that defendants' motion to dismiss the action is denied, except as to the action alleging fraud; and it is further


**ORDERED**, that plaintiff's cross-motion to amend the complaint is denied; and it is further

**ORDERED**, that the parties shall appear for a Preliminary Conference on October 27, 2009, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 21, 2009

  
WILLIAM R. LaMARCA, J.S.C.

**ENTERED**

SEP 24 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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