

**Net Com Data Corp. of N.Y. v Brunetti**

2010 NY Slip Op 30327(U)

February 4, 2010

Supreme Court, Nassau County

Docket Number: 004479-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**NET COM DATA CORP. OF NEW YORK,**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 004479-09  
Motion Seq. Nos: 2 & 3  
Submission Date: 12/4/09**

**-against-**

**DINO BRUNETTI,**

**Defendant.**

-----X

**Papers Read on these Motions:**

- Notice of Motion and Affidavit in Support.....X**
- Affirmation in Opposition and Exhibits.....X**
- Notice of Cross Motion, Affirmation in Support,  
Affidavit of R. Katz and Exhibits.....X**
- Affirmation in Opposition.....X**
- Reply Affidavit.....X**
- Reply Affirmation.....X**

This matter is before the court on 1) the motion by Defendant Dino Brunetti, filed on September 15, 2009, and 2) the cross motion filed by Plaintiff Net Com Data Corp. of New York on October 9, 2009, both of which were submitted December 4, 2009. For the reasons set forth below, the Court 1) grants Defendant’s motion and dismisses the verified complaint (“Complaint”); and 2) denies, as moot, Plaintiff’s cross motion to amend the Complaint.

**BACKGROUND**

**A. Relief Sought**

Defendant Dino Brunetti (“Brunetti” or “Defendant”) moves, pursuant to CPLR §§ 3211(a)(8) and (10), for an Order dismissing the Complaint on the grounds that 1) Plaintiff failed

to join a necessary party; and 2) the court does not have personal jurisdiction over the Defendant who is a resident of the State of North Carolina.

Plaintiff Net Com Data Corp. of New York (“Net Com” or “Plaintiff”) opposes Defendant’s motion.

Plaintiff moves for an Order, pursuant to CPLR § 3025(b) *et seq.*, granting Plaintiff leave to amend the Complaint to add two (2) defendants, Nitro Inc. and Anastasia Brunetti, to this action and to serve the proposed amended complaint upon all defendants.

#### B. The Parties’ History

Net Com alleges that Brunetti began working for Net Com on or about October 1, 2006. In connection with that employment, Brunetti signed a Non-Disclosure Agreement with Net Com concerning confidential information, non-solicitation and ownership of materials (“Agreement”). Brunetti terminated his employment with Net Com on or about October 17, 2008. Net Com alleges that Brunetti breached the Agreement by soliciting, and continuing to solicit, Net Com’s customers.

The Complaint alleges that Net Com is a New York corporation and Brunetti is a resident of North Carolina. Paragraph 7(a) of the Agreement, titled “Governing Law,” provides that the Agreement will be governed by the laws of the State of New York (“Choice of Law Provision”).

#### C. The Parties’ Positions

Brunetti, appearing *pro se*, moves to dismiss, submitting that the Court does not have personal jurisdiction over him and that he did not enter into the Agreement with Net Com. He avers that he was an agent for Nitro, Inc. (“Nitro”), a corporation located in North Carolina, and that he entered into the Agreement with Nitro.

In opposition, Net Com submits that Brunetti waived the defense of lack of personal jurisdiction by not raising it in a pre-answer motion or as a defense in his Answer, and by appearing for a preliminary conference without raising the objection at the conference.

Net Com also seeks leave to amend the Complaint to add, as defendants in this action, Nitro and Anastasia Brunetti (“Anastasia”), the President of Nitro. Plaintiff affirms that Anastasia signed the Agreement on behalf of Nitro, and provides a copy of the Agreement and its Appendix containing Anastasia’s signature.

## RULING OF THE COURT

### A. Defendant Timely Asserted his Objection to Personal Jurisdiction

While *pro se* litigants are held to less stringent drafting standards than attorneys, their pleadings must contain at least minimal legal drafting and are subject to the same critical judicial scrutiny in determining liability and the existence of a cause of action. *Gittens v. State*, 132 Misc.2d 399, 402, n.2 (Court of Claims 1986). The Second Department has held that a litigant appearing *pro se* acquires no greater right than any other litigant. *Roundtree v. Singh*, 143 A.D.2d 995, 996 (2d Dept. 1988).

Defendant Brunetti's Answer (Ex. 4 to Cross Motion) states, "by filing an answer, Defendant does not waive any right to challenge jurisdiction (ie. MOTION TO DISMISS per Rule 3211) at any point during this proceeding even upon final determination." A challenge to jurisdiction is waived if a party moves on any of the grounds set forth in CPLR § 3211(a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading. CPLR § 3211 (e). The Court finds that Brunetti's Answer, while not directly asserting a jurisdictional objection, clearly evinces an intent to raise one. Indeed, this imperfect assertion of lack of jurisdiction is precisely the sort of drafting leniency the law permits for a *pro se* litigant.

### B. Defendant did not Consent to Jurisdiction by Attending the Preliminary Conference

The Court also rejects Plaintiff's claim that Brunetti's appearance at a preliminary conference acted as a waiver of the jurisdiction defense. A waiver occurs when a defendant participates in a lawsuit on the merits. *Rose Ocko Foundation v. Lebovits*, 259 A.D.2d 685, 690 (2d Dept. 1999), *lv. app. den.* 93 N.Y.2d 997 (1999). By such participation the defendant indicates his intention to submit to the court's jurisdiction over the action. *Id.* A mandatory preliminary conference, which deals with disclosure schedules, *see* 22 NYCRR § 202.12(c), does not address the merits and cannot be deemed participation on the merits such that a jurisdictional defense raised in the Answer is waived.

### C. Plaintiff has Failed to Establish a Basis for Jurisdiction over Defendant

When a defendant moves to dismiss based on a lack of personal jurisdiction, the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381 (2007), quoting Vincent

C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C302:5. Plaintiff submits that, in light of the Choice of Law Provision, Defendant's motion based on a lack of personal jurisdiction must fail.

Plaintiff confuses a choice of law clause with a forum selection provision in which a party consents to jurisdiction. A forum selection provision was the subject of *Hunt Const. Group, Inc. v. Oneida Indian Nation*, 53 A.D.3d 1048, 1049 (4<sup>th</sup> Dept. 2008), *lv. app. den.*, 11 N.Y.3d 709 (2008). The provision in *Hunt* stated that the defendant "consents to submit to personal jurisdiction of those courts of the State of New York and of the United States with competent subject matter jurisdiction located in the City of Syracuse, New York . . ." *Id.* (emphasis in the original). There is no forum selection provision in the Agreement. And, while a choice of law provision in an agreement may be considered in support of a predicate for jurisdiction, it is insufficient by itself to confer personal jurisdiction over the defendant in New York under CPLR § 302(a)(1). *Executive Life Ltd. v. Silverman*, 68 A.D.3d 715, \*2 (2d Dept. 2009); *Goulds Pumps v. Mazander Engineered Equipment Co.*, 217 A.D.2d 960 (4<sup>th</sup> Dept 1995); *Peter Lisec Glastechnische Industrie GmbH v. Lenhardt Maschinenbau GmbH*, 173 A.D.2d 70, 72 (1<sup>st</sup> Dept 1991). Plaintiff has submitted no affidavits or other documents to support its claim of personal jurisdiction over the Defendant.

CPLR § 302(a)(1) provides for jurisdiction over a foreign entity that transacts any business within the state. To be subject to jurisdiction, a non-resident defendant must purposely avail himself of the privilege of conducting activities within the State, thus invoking the benefits and protections of its laws. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). Moreover, there must be a substantial relationship between the transaction and the claim asserted. *Id.* Plaintiff has failed to address any of these issues, relying solely on the Choice of Law Provision in the Agreement.

#### D. Conclusion

In light of the Court's conclusion that the Choice of Law Provision is insufficient to confer personal jurisdiction over Defendant, and the Court's rejection of Plaintiff's argument that Defendant has waived his claim of a lack of personal jurisdiction, the Court concludes that Plaintiff has failed to demonstrate that this Court has personal jurisdiction over Defendant. Accordingly, the Court dismisses the Complaint. As Plaintiff's proposed amended complaint

addresses Defendant's argument regarding necessary parties but does not provide any facts that might support a claim of personal jurisdiction over Defendant, the Court denies that cross motion as moot.

In light of the foregoing, the Complaint is dismissed.

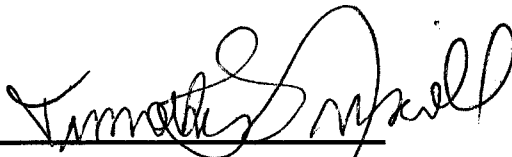
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

February 4, 2010

  
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HON. TIMOTHY S. DRISCOLL

J.S.C.

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**ENTERED**  
FEB 09 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE