

Monahan v Finlandia Univ.

2010 NY Slip Op 30644(U)

March 16, 2010

Supreme Court, Nassau County

Docket Number: 2159/09

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

DR. JOSEPH M. MONAHAN,
Plaintiff,

Motion Sequence #3
Submitted January 8, 2010
XXX

-against-

INDEX NO: 2159/09

FINLANDIA UNIVERSITY and PHILIP JOHNSON,
Defendants.

The following papers were read on this motion to dismiss:

Notice of Motion and Affs.....	1-4
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Upon the foregoing papers, it is ordered that this motion by defendants, Finlandia University and Philip Johnson, for an order pursuant to CPLR 3211(a)(8) and CPLR 302 dismissing the plaintiff's complaint on the grounds that the court lacks *in personam* jurisdiction over them, is granted.

This is an action by the plaintiff, Dr. Joseph M. Monahan ("Monahan") to recover money damages for an alleged breach of contract. Plaintiff alleges that defendants have sought to evade their contractual obligations to employ and pay him as the Dean of the School of Business, Executive Vice President for External Relations, and as a tenured professor in the Finlandia University School of Business.

Defendant Philip Johnson (“Johnson”) is employed as the president of Finlandia University (“Finlandia”). Finlandia, a private university and non-profit corporation with a registered office in Hancock, Michigan.

Plaintiff, Monahan, is a resident of the State of New York. He began his employment with Finlandia in the Fall of 2006. Defendants maintain that Monahan did not have a continuous employment contract with Finlandia; rather, in his affidavit in support of the within motion, defendant Johnson states that Monahan was employed pursuant to yearly written Letters of Appointment, each of which was effective only during the referenced academic year. Defendants maintain that in order to be employed by Finlandia, Finlandia had to offer a Letter of Appointment each academic year to Monahan and Monahan had to accept the Letter of Appointment each academic year.

On January 14, 2007, plaintiff was granted “tenure” status at the University.

On July 1, 2008, defendants sent an annual Letter of Appointment to Monahan. In this letter, Johnson requested Monahan to return the enclosed Letter of Appointment on or before July 15, 2008. Johnson also informed Monahan that if the signed Letter of Appointment was not received by July 15, 2008 the position would not be held. Neither Finlandia nor Johnson received Monahan’s signed Letter of Appointment by July 15, 2008, as requested. Apparently, however, on July 14, 2008 the plaintiff, in an attempt to meet the deadline, sent a signed copy of the Appointment Letter via Express Mail. Defendants did not receive the signed copy of the Appointment Letter until July 16, 2008. As such, on July 21, 2008, defendants sent a letter informing plaintiff that due to

his failure to comply with the noted deadline, defendants took plaintiff's failure to timely respond as a voluntary resignation.

In January 2009, Monahan commenced this action to recover fees allegedly due and owing from the defendants based on their alleged breach of the Letter of Appointment. In pertinent part, the complaint alleges that the defendants terminated Monahan, a tenured faculty member, in violation of the properly executed and returned Appointment Letter; that defendants did not possess cause to rescind the Appointment letter; and, that during the 2007-2008 academic year, in addition to being a tenured faculty member, Monahan's duties in the position of Executive Vice President for External Relations with Finlandia University included interstate and international travel with the objective and purpose of business development for Finlandia, for which the travel expenses were advanced by Monahan with the promise of reimbursement by Finlandia and which remain outstanding.

Plaintiff's action against the defendants alleges jurisdiction under New York's Long-Arm statute, to wit, CPLR 302. Specifically, plaintiff relies on the "transacts business" provision of CPLR 302(a)(1), as well as the "tortious act without the state causing injury to [a] person ... within the state" provision of CPLR 302(a)(3) as grounds for New York's long arm jurisdiction.

By prior motion dated March 12, 2009, defendants Finlandia and Johnson, sought to dismiss plaintiff's verified complaint for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) and CPLR 302. Plaintiff, in turn, cross moved for an order pursuant to CPLR 3211(d) granting him leave to conduct predetermination discovery. Finding that the plaintiff had made a sufficient showing to allow for leave to conduct further

disclosure, this court, in an Order dated July 7, 2009, granted plaintiff's cross motion and denied defendants' motion to dismiss with leave to renew after completion of predetermination discovery regarding whether jurisdiction exists over the defendants.

The Order also directed the counsel for the parties to appear before this Court to discuss and schedule the necessary predetermination discovery. Counsel appeared before this Court on August 3, 2009 at which time they entered into a "So-Ordered" stipulation which limited predetermination jurisdictional discovery "for period academic years 2006-2009". By defendants' own admission herein, their otherwise unavailing argument that the relevant time period for determining personal jurisdiction is one year prior to the filing of the Verified Complaint, is moot, as defendants produced documentation and information in their possession as far back as 2005.

Upon the instant application, defendants, Finlandia and Johnson, again move pursuant to CPLR 3211(a)(8) and CPLR 302, to dismiss plaintiff's complaint for want of personal jurisdiction. In support of this motion, defendants submit the sworn affidavit of defendant Johnson who states that he is the president of Finlandia University, which is a non-profit corporation registered in Michigan. Johnson states that the aforesaid contract was drafted in Michigan for services to be performed within Michigan. Furthermore, defendants contend that they had no purposeful relationships with nor directly solicited business from the State of New York.

In opposition, plaintiff argues that he is a resident of the State of New York and a tenured professor whose property rights, i.e., his "tenure-ship" - were violated and usurped by the Michigan defendants, in direct violation of the defendants' own

prescribed process and procedures. Plaintiff submits that he was granted "tenure" at Finlandia University on January 14, 2007. Plaintiff claims that by terminating his employment, the defendants willfully, improperly and unjustly appropriated his tenure status property rights in addition to his employment. With respect to personal jurisdiction over the defendants, plaintiff, Monahan contends that long arm jurisdiction exists over the defendants since they "have purposefully availed themselves of the benefits of the forum" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466).

The Court of Appeals in *Kreutter v McFadden Oil Corp.*, *supra*, explained, long arm jurisdiction, as follows:

Constitutional due process requires that a court have a jurisdictional basis to exercise its powers over a party. Customarily this basis is supplied by the party's presence within the court's geographical jurisdiction. With the growth of national markets for commercial trade and technological advances in communication and travel systems, however, an enormous volume of business may be transacted within a State without a party ever entering it. Recognizing this, the Supreme Court has expanded the permissible powers of States to obtain personal jurisdiction over nondomiciliaries. So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not "present" in that State*** (*Kreutter v. McFadden Oil Corp.*, *supra* at 466).

New York's long-arm statute, CPLR 302, provides as follows:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) 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, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

While generally, defendant, Philip Johnson's admitted status as the president of the non-profit corporate defendant, Finlandia University, without more, would not provide a sufficient basis to identify him as an agent of the corporate defendant for jurisdictional purposes (*American Barrick Resources Corp. v Canarim Inv. Corp. Ltd.*, 153 AD2d 546; *Low v Bayerische Motoren Werke, AG*, 88 AD2d 504, 506), in light of this Court's determination that there is no basis for personal jurisdiction over the corporation in New York, *infra*, this Court, for the purposes of analysis will deem both defendants as one and the same. For the sake of clarity, this Court will address the jurisdiction issue under CPLR 302(a)(1) and CPLR 302(a)(3) separately, and in turn.

CPLR 302(a)(1) authorizes the court to exercise jurisdiction over nondomiciliaries for tort and contract claims arising from a defendant's transaction of business in this State. It is a "single act statute" and 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 are purposeful and there is a substantial relationship between the transaction and the claim asserted (*Kreutter v McFadden Oil Corp.*, *supra*

at 467; *Reiner & Co v Schwartz*, 41 NY2d 648, 651-652; *Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 16-17). “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, 380, quoting *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382). Thus, the court's determination of whether defendants have engaged in sufficiently purposeful activity to confer long-arm jurisdiction is based on an examination of the totality of the circumstances (*Multi-Modal v Anglia North America, Inc.*, 227 AD2d 600; *Catauro v Goldome Bank*, 189 AD2d 747). With respect to “substantial relationship,” the Court of Appeals declared in *McGowan v Smith*, 52 NY2d 268, that even if the defendant has engaged in purposeful acts in New York, there must be a “substantial relationship” between those acts and the transaction upon which the plaintiff's cause of action is based (*Id.*). In other words, an “articulable nexus” must exist between the New York transaction and the cause of action (*Id.*). “Although it is impossible to precisely fix those acts that constitute a transaction of business, our precedents establish that it is the quality of the defendants' New York contacts that is the primary consideration” (*Fischbarg v Doucet, supra* at 380).

In this case, plaintiff asserts three basis for long arm jurisdiction under CPLR 302(a)(1). First, that in 2006, defendant Finlandia University entered New York through a classified advertisement in a national-international publication for the purposes of recruiting employee services in Michigan. Second, that at all times during the two-plus year relationship (and at the present time) the plaintiff remained a New York resident and all written correspondence between defendants and the plaintiff was to plaintiff's

New York postal address. And lastly, that throughout the course of the employment relationship, the defendant, Finlandia, made bi-monthly salary payments and expense reimbursements for travel and marketing on behalf of the defendant university only to the plaintiff's account at Citibank in Manhasset, New York. Plaintiff submits that the totality of defendant's contact with the forum indicates that the exercise of jurisdiction is proper herein.

Plaintiff claims that in 2006, defendant Finlandia University entered New York through a classified advertisement in a national-international publication for the purposes of recruiting employee services in Michigan. He alleges that, as a New York resident, and in response to the advertisement, he entered into a contract with the defendant for the provision of such services. Specifically, Monahan states in his affidavit in opposition to defendants' instant motion that, in the Spring of 2006, he responded to an advertisement in the Chronicle of Higher Education for the position of Dean of International School of Business, Finlandia University, Hancock, Michigan. He states that he was contacted by telephone by the search committee and underwent an interview. He subsequently visited the campus "for more intensive discussions." Monahan states that at the end of this visit, he and the defendants "verbally reached agreement for my hire." Monahan states that "upon [his] return to New York, [he] received a formal contract by mail, which [he] signed and returned by mail." He states that in the Fall of 2006, he began his career with Finlandia.

Plaintiff submits that the issuance of the advertisement in the Chronicle of Higher Education constitutes “transaction of business” by the defendants within the meaning of CPLR 302(a)(1). This Court disagrees.

As stated above, an essential criterion for long-arm jurisdiction under CPLR 302(a)(1) is that the cause of action “arise” out of the business transacted in New York (*Apicella v Valley Forge Military Academy & Jr. Coll.*, 103 AD2d 151, 154; *Nemetsky v Banque de Development de la Republique Du Niger*, 65 AD2d 748, *affd.* 48 NY2d 962. In this case, the plaintiff’s causes of action for breach of contract and reimbursement of expenses did not “arise out of” the defendants’ advertisement in the Chronicle of Higher Education (*Frummer v Hilton Hotels Int.*, 19 NY2d 533; *Apicella v Valley Forge Military Academy & Jr. Coll.*, *supra*; *Greenberg v R.S.P. Realty Corp.*, 22 AD2d 690). Plaintiff has failed to demonstrate, or even allege, that the advertisement has any bearing on his contract with the defendants or the defendants’ alleged duties to the plaintiff. In fact, while defendant issued the advertisement in New York, it is obvious and undisputed that the defendants never intended the performance of the solicitation occur in New York. Where the services contracted for are to be performed outside of New York, the mere fact that a party to the contract is a New York domiciliary does not suffice to invoke the court’s jurisdiction pursuant to CPLR 302(a)(1) (*Finesurgic v Davis*, 148 AD2d 414, 415, *lv dismissed in part, denied in part* 74 NY2d 781. Accordingly, the issuance of the advertisement does not amount to doing business in New York.

Further, plaintiff alleges that the advertisement was issued in a magazine with a national (and international) circulation. New York law is clear that advertisements in national publications are not sufficient to provide personal jurisdiction under CPLR

302(a)(1) (see e.g., *Davidson Extrusions, Inc. v Touche Ross & Co.*, 131 AD2d 421, 424; *Naples v Janesville Apparel Co.*, 29 AD2d 971). The defendants were not able to control who viewed the advertisement or responded to it; thus, they cannot be found to have targeted New York citizens any more than the citizens of any other state. Plaintiff has also failed to show what benefit or privilege from New York has occurred to the defendant through the posting of this employment advertisement (see e.g., *Best Van Lines, Inc. v Walker*, 2004 U.S. Dist. Lexis 7830 [SDNY 2004], aff 2007 U.S. App. Lexis 15152 [2nd Cir, NY, June 26, 2007]).

In fact, even assuming that the defendants specifically aimed the advertisement at the New York market, plaintiff has not alleged (nor is there any evidence) that the defendants sought the protection of New York law specifically as the advertisement clearly involved business that would take place elsewhere (*Carte v Parkoff*, 152 AD2d 615, 616; *Ziperman v Frontier Hotel of Las Vegas*, 50 AD2d 581, 582-83).

Plaintiff claims that all written correspondence between defendants and the plaintiff was to plaintiff's New York address. Further, plaintiff contends that all telephonic communication from the defendants were to the New York telephone number of the plaintiff. Plaintiff explains in his affidavit that it was his understanding that his "primary mission" in his employment with Finlandia "was to develop relationships with Finish corporate and educational institutions" and as such, he maintained his New York residency "based upon the international component of the job scope and advantage of New York as my hub, both for my home and travel". Accordingly, his New York mailing address was used by the university for all correspondence. With respect to

communications via telephone, plaintiff states in his affidavit that “[a]ll telephonic communications outside of the university campus were directed to me at my New York telephone number”. Plaintiff submits that by communicating with the plaintiff in New York, both by written correspondence and via telephone, defendants have subjected themselves to the jurisdiction of this state. This Court disagrees.

Generally, unless they are used by defendant to actively participate in business transactions in New York, telephone or written communications do not provide a basis for personal jurisdiction, on a transacting-business theory under New York’s long-arm statute (*Levisohn, Lerner, Berger & Langsam v Medical Taping Systems, Inc.*, 10 F.Supp.2d 334 [SDNY 1998]). In other words, communications into New York are only sufficient to establish personal jurisdiction under transacting business portion of long-arm statute if they are related to some transaction that has its “center of gravity” inside New York, into which a defendant projects himself (*Maranga v Vira*, 386 F.Supp.2d 299 [SDNY 2005]).

Assuming the truth of plaintiff’s allegations, in this case, it is clear that the defendants only contact with New York (the mailing of correspondence and telephone calls made to plaintiff at his residence) was not a voluntarily chosen benefit; rather, given that the plaintiff *chose* to maintain his New York residence, it was akin to a *requirement* for the defendants to send all his mail and otherwise communicate with the plaintiff to New York. Insofar as the plaintiff admits that “[a]ll telephone communications *outside of the university campus*, were directed to me at my New York telephone number” it is clear that the defendants never *chose* to enter New York. Plaintiff has offered no evidence to this Court that the university *required* that the plaintiff maintain

his New York residency as a condition of his employment such that the defendants could arguably be found to have projected themselves into New York. Rather, plaintiff states in his affidavit that “[i]n my original discussions of employment with the university, I delineated the rationale for maintaining my New York residency...”. The fact that Monahan had to “delineate [his] rationale” for his New York residency makes it clear to this Court that the university never required any such residency; it was the plaintiff’s choice to maintain his New York residence. Accordingly, defendants were compelled to mail their correspondence to the plaintiff in New York. Thus, the defendants never voluntarily chose to benefit from New York, nor did they ever choose to enter into the state. This Court is not persuaded that the defendants ever intended to derive business or profits from New York as a result of corresponding to the plaintiff in New York (*Taurus Intern. Inc. v Titan Wheel Intern. Inc.*, 892 F.Supp. 79 [SDNY 1995]; see also *Falow v. Cucci*, 2003 U.S. Dist. Lexis 23019, [SDNY 2003]). Accordingly, it would not be just to require them to conduct a defense in this forum (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Barnum*, 162 Misc.2d 245 [Sup. Ct. New York 1994]).

Insofar as the plaintiff claims that following his visit to the university for “more intensive discussions” about his employment, he returned to New York, and received a formal contract by mail which he signed (in New York) and returned by mail, such argument also falls short of constituting “transacting business” in New York. An exercise of jurisdiction under CPLR 302(a)(1) turns on an assessment of the purposeful activities of the defendant within New York in relation to the transaction (*Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443). Here, there was

no purposeful activity undertaken in New York by Finlandia and/or Johnson which is connected with the matter in suit. The contract was negotiated in Michigan. In fact, the plaintiff states that "at the end of [his] visit [to Finlandia in Michigan], [the search committee and he] verbally reached agreement for my hire". The employment agreement, including the terms and conditions, were reached verbally in Michigan. No meetings were held in New York. All of the New York activities relating to the contract - i.e., signing the formal contract which he received via mail and sent via mail - were performed by the plaintiff and cannot be attributed to the defendant particularly where the signing of the contract was just a "formality" and the terms and conditions relating to the employment contract were all negotiated in Michigan (see e.g., *Professional Personnel Management Corp. v Southwest Medical Associates*, 216 AD2d 958; *J.E.T. Advertising Assocs., Inc v Lawn King*, 84 AD2d 744, 745, *lv dismissed* 56 NY2d 648).

Plaintiff claims that over the course of his multi-year relationship with Finlandia, Finlandia made bi-monthly salary payments and expense reimbursements for travel and marketing to the plaintiff's account at Citibank in Port Washington, New York. Plaintiff maintains that this persistent initiation of 50 or more individual payments for services into the New York banking system to a New York bank account held by the plaintiff, throughout the course of this multi-year relationship establishes a "pattern of commercial dealings with plaintiff centered in New York" and is persuasive of the depth and complexity of the defendants purposeful activity and transaction of business in this state with the plaintiff. Again, this Court disagrees.

First, where the defendant's only contact with New York is the sending of payments at the other party's request to a bank account in New York, personal

jurisdiction under the “transaction of business” provision of New York’s long arm statute is not acquired (*Continental Field Service Corp. v ITEC Intern., Inc.*, 894 F.Supp. 151 [SDNY 1995]). Second, there is an insufficient nexus between the banking done in New York and the circumstances giving rise to plaintiff’s claim for breach of contract against the defendants (*Walsh v Maryland Bank, N.A.*, 806 F.Supp. 437 [SDNY 1992]). Therefore, an agreement to send payments to New York, without more, does not constitute “transacting business” under CPLR 302(a)(1) (see e.g., *ESI, Inc. v Coastal Corp.*, 61 F.Supp.2d 35, 60 [SDNY1999]; *Roper Starch Worldwide, Inc. v Reymer & Assocs., Inc.*, 2 F.Supp.2d 470 [SDNY1998]).

Pursuant to CPLR 302(a), a court is permitted to exercise personal jurisdiction over any non-domiciliary “who in person or through an agent” performs any of the acts specified in subsections (1) - (4) and the plaintiff’s cause of action arises from any of said acts (CPLR 302[a]).

Plaintiff claims that the two day visit of former Finlandia University president, Robert Ubbelohde, to New York on June 12-14, 2008, confers personal jurisdiction over the defendants. Plaintiff alleges that at the time of this visit, Dr. Ubbelohde, “continued a pattern of travel to New York on fund raising missions” following his retirement as President of the defendant university. Plaintiff alleges that at the end of his term as university President, Dr. Ubbelohde signed an employment contract with the defendant university for an additional one year period as a “fund raiser.” Plaintiff maintains that when he traveled to New York for this visit, Dr. Ubbelohde was doing so as an employee of the defendants and was acting on their behalf in his fund raising activities.

Plaintiff also alleges that defendants also transacted business through three of their Board of Trustee members who, like the plaintiff, were also full time residents of New York. Plaintiff claims that it is from New York that these members conducted business on behalf of, and fulfilled their responsibilities to the defendant university and its president, as trustees. Plaintiff alleges that management decisions and actions taken in New York by the New York resident trustees had a direct impact on the administration, faculty and staff of the defendant university including the fact that they were responsible for a large portion of the outstanding funds borrowed by the university.

Finally, plaintiff alleges that as an employee of the defendant university and in his capacity as the Dean of the International School of Business, he also acted as an agent of the defendant and therefore his activities involving soliciting, establishing and coordinating corporate internships for students of the university, meet the statutory requirement for New York jurisdiction to attach to the defendants.

This Court disagrees on all three grounds.

To establish transaction of business in New York, sufficient to support exercise of personal jurisdiction, based on a meeting in New York, the meeting must be essential to formulation of business relationship (*United Computer Capital Corp. v Secure Products, L.P.*, 218 F.Supp.2d 273 [NDNY 2002]). Meetings that are exploratory, unproductive, or insubstantial are insufficient to establish transaction of business in the state necessary to support personal jurisdiction (*Id*). A single meeting in New York rarely provides the basis for jurisdiction under New York's long arm statute (*Cooper, Robertson & Partners, LLP v Vail*, 143 F.Supp.2d 367 [SDNY 2001]). Moreover, when the meeting is unrelated to the issues in the plaintiff's lawsuit, such visit is insufficient to confer jurisdiction over

the out of state defendant (*First Nat. Bank & Trust Co. v Wilson*, 171 AD2d 616; *Pacamor Bearings, Inc. v Molon Motors & Coil, Inc.*, 102 AD2d 355).

Although former president Dr. Ubbelohde visited New York from June 12 to 14, 2008, at a time when he was no longer acting as the President of the defendant university, his visit is insufficient to confer jurisdiction over the defendants. This visit was unrelated to the plaintiff and plaintiff's employment with Finlandia. Further, there is no evidence that Dr. Ubbelohde visited New York consistently or even on multiple occasions; therefore, Ubbelohde's single, two-day visit to New York in June 2008 does not meet the statutory requirements of CPLR 302(a)(1).

Further, like Dr. Ubbelohde, the Board of Trustee members in New York, even assuming that they were agents of the defendants in the first place, did not engage in any purposeful activity in New York in connection with the matter at hand. Therefore they cannot be found to have "transacted business" on behalf of Finlandia within the meaning of CPLR 302(a)(1).

Finally, even assuming that plaintiff was an agent of the defendant university, it is well settled that a local agent cannot sue his or her non-resident principal using the agent's own activities in New York as a jurisdictional predicate under New York's long arm statute (*Marble Tile Imports v Mihelich & Assocs.*, 1993 U.S. Dist. Lexis 6574 [SDNY 1993]; *Metropolitan Air Serv., Inc. v Penberthy Aircraft Leasing Co.*, 648 F. Supp. 1153, 1157 [SDNY 1986]).

In determining whether defendant foreign corporation "transacted business" in New York, for jurisdiction purposes, the court must look at the totality of the

circumstances to determine whether plaintiff's claim has a nexus and relationship to defendant's transaction in this forum (CPLR 302[a][1]).

In applying the totality of the circumstances analysis to the facts of this case, the Court finds the defendants' activities, which fail to provide any service in New York and which have nothing to do with New York, were not purposeful. Thus, based on the totality of the circumstances, this Court finds that the defendants have not purposefully availed themselves of the privileges of conducting activities within New York, such that they would be afforded the benefits and protections of its laws (*McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377).

CPLR 302(a)(3) permits a court to exercise personal jurisdiction over a nondomiciliary who:

3. commits a tortious act without the state causing injury to person or property within the state * * * if he

(i) 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, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce " (CPLR 302[a][3]).

Under CPLR 302(a)(3), the plaintiff must show both that an injury occurred within the state, and that the elements of either clause (i) or (ii) have been satisfied (*Ingraham v Carroll*, 90 NY2d 592). The Court of Appeals in *Ingraham v Carroll*, *supra*, further explained as follows:

Subdivision (a)(3)(i) requires the party seeking to obtain jurisdiction to demonstrate that the tortfeasor "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"***. By this provision,

the Legislature limited CPLR 302(a)(3)(I) jurisdiction to extend only to those “who have sufficient contacts with this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere”***Thus, CPLR 302(a)(3)(I) necessitates some ongoing activity within New York State***. Although clause (I) does not require the quantity of New York contacts that is necessary to obtain general jurisdiction under the “doing business” test of CPLR 301***, it does require something more than the “one shot” single business transaction described in CPLR 302(a)(1)***.

A much closer question is presented under clause (ii) of CPLR 302(a)(3). This provision requires the satisfaction of two prongs. To establish jurisdiction, a plaintiff must demonstrate that the nonresident tortfeasor: (1) “expects or should reasonably expect the act to have consequences in the state”; and (2) “derives substantial revenue from interstate or international commerce” (CPLR 302[a][3][ii]). The first prong is intended to ensure some link between a defendant and New York State to make it reasonable to require a defendant to come to New York to answer for tortious conduct committed elsewhere. The nonresident tortfeasor must expect, or have reason to expect, that his or her tortious activity in another State will have direct consequences in New York.

...[P]ersonal jurisdiction over respondent ultimately turns on whether he “derives substantial revenue from interstate or international commerce,” the indispensable second prong of subdivision (a) (3) (ii). Unlike clause (I), the “interstate commerce” prong of clause (ii) requires no direct contact with New York State***. It is the first prong of clause (ii) (the expectation of New York consequences) that ensures that the defendant has some direct contact with New York State. The substantial interstate commerce revenue component, on the other hand, narrows the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but “whose business operations are of a local character”***(*Ingraham v. Carroll*, supra [citations omitted]).

Plaintiff claims in this case that the defendants, Finlandia and Johnson committed a tortious act in Michigan “when they arbitrarily, improperly and unjustly deprived the plaintiff within the state of his property,” i.e., tenure status. Plaintiff relies upon the same acts as those alleged under CPLR 302(a)(1) for the argument that the defendants persisted through the relevant period in transacting business in New York, including the services of their agents and employees in fund-raising on behalf of the

university. Plaintiff claims that the defendants derived both monetary and non-monetary benefits from these New York activities including donations from New York residents and managerial and oversight services from the New York resident trustees. Specifically, he states, in his affidavit that, “[i]n the Spring of 2007, the university was put “on notice” by their academic accreditation body due to their deteriorating financial position” and “[i]n response, [he] was approached by the former president and several members of the board of trustees to join the executive management team as [Executive Vice President]-External Relations”. He explains that “commencing in 2006, the defendants embarked on a plan to widen their source of revenue streams by expanding into both the interstate and international markets”. With respect to “substantial revenues” plaintiff points to an unsworn “Report to the Board of Trustees” dated September 6, 2007 from Kathleen Lakanen, Vice President for Advancement, to President Johnson, wherein it is reported that the university received \$20,000,000 or more from interstate and international benefactors between 2000 and 2007. Plaintiff states that this is an average of \$2,500,000 per year and that this equates to “substantial revenue” for the purposes of CPLR 302(a)(3)(ii). Counsel for plaintiff argues that “[a]lthough the defendants are located in Michigan, through their actions and activities, both in New York, interstate and internationally, they have purposefully availed themselves of the laws of this forum, met the criteria for personal jurisdiction, and should reasonably expect to appear in its Courts”. This Court disagrees.

The court has no jurisdiction over the defendants pursuant to CPLR 302 (a) (3), since the injury to the plaintiff, which was allegedly caused by the defendant's tortious conduct, occurred in Michigan rather than in New York. For the purpose of determining

the applicability of CPLR 302 (a) (3), “[t]he situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff” (*Hermann v Sharon Hosp.*, 135 AD2d 682, 683, citing *McGowan v Smith*, *supra* at 273-274; *Kramer v Hotel Los Monteros*, 57 AD2d 756). Simply put, an injury does not occur within New York simply because the plaintiff is a resident.

In this case, any damages allegedly sustained by the plaintiff resulting from his loss of employment with Finlandia occurred in Michigan. Any decision making by Finlandia and Johnson concerning plaintiff’s employment occurred in Michigan; thus, the location of the original event allegedly causing plaintiff’s injury is clearly Michigan. Any resulting financial loss sustained by the plaintiff in New York, allegedly caused by his loss of employment in Michigan, is insufficient to confer jurisdiction over the defendants pursuant to CPLR 302(a)(3) (*Mareno v Rowe*, 910 F.2d 1043 [2nd Cir. 1990]).

Moreover, plaintiff has failed to provide any factual support for his conclusory allegation that the defendants “regularly do or solicit business in the State.” Rather, as stated above, defendants’ only contact with New York involved their few communications with plaintiff, the former President’s single, two-day visit to New York that was unrelated to matters concerning plaintiff, and the nominal donations received from New York residents. Such incidental contacts do not constitute a persistent course of conduct sufficient to demonstrate solicitation of business, and thus, are insufficient to subject the defendants to personal jurisdiction in New York (*Murdock v Arenson Intern. USA, Inc.*, 157 AD2d 110).

Similarly, plaintiff's verified complaint is devoid of any factual support for his conclusory allegation that the defendants expected or reasonably should have expected their alleged tortious acts to have consequences in New York (*Murdock v Arenson Intern. USA, Inc.*, *supra* at 114). Plaintiff has also failed factually to show any purposeful affiliation by defendants in New York (*Id.*).

For these reasons, this Court finds that plaintiff has failed to satisfy the elements required to support jurisdiction under CPLR 302. Therefore, this Court need not reach the question of whether subjecting the defendants to personal jurisdiction in New York comports with the due process clause of the Fourteenth Amendment of the U.S. Constitution (*LaMarca v Pak-Mor Mfg.*, *supra* at 216-19).

Accordingly, this Court grants defendants' motion for an Order, pursuant to CPLR 3211(a)(8), dismissing plaintiff's complaint.

This shall constitute the decision and order of this Court.

Settle Judgment on Notice.

Dated: March 16, 2010


UTE WOLFF LALLY, J.S.C.

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ENTERED

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