

<b>Wednesday Night, Inc. v Sea Side Palm Beach, LLC</b>
2010 NY Slip Op 30808(U)
March 31, 2010
Supreme Court, Nassau County
Docket Number: 016561-09
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  
**WEDNESDAY NIGHT, INC., and  
ENSO MEDIA GROUP, INC.,  
d/b/a CORE COMPANY,**

**Plaintiffs,**

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

**Index No: 016561-09  
Motion Seq. Nos. 1  
Submission Date: 2/1/10**

**-against-**

**SEA SIDE PALM BEACH, LLC**

**Defendant.**

-----X

**The following papers have been read on this motion:**

- Notice of Motion, Affidavits in Support (2) and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Plaintiff's Memorandum of Law in Opposition.....X**

This matter is before the Court for decision on the motion by Defendant Sea Side Palm Beach, LLC ("Sea Side" or "Defendant") filed on October 21, 2009 and submitted on February 1, 2010. For the reasons set forth below, the Court denies Defendant's motion to dismiss the Complaint.

**BACKGROUND**

**A. Relief Sought**

Defendant moves for an Order, pursuant to CPLR § 3211(a)(8), dismissing the Complaint against Defendant on the ground that the court lacks personal jurisdiction over the Defendant.

Plaintiffs Wednesday Night, Inc. ("Wednesday Night") and Enso Media Group, Inc. ("Enso"), d/b/a Core Company ("Core") (collectively "Plaintiffs") oppose Defendant's motion.

B. The Parties' History

In the complaint ("Complaint") filed August 18, 2009 (Ex. A to Aff. in Support), Plaintiff alleges as follows with respect to all relevant times:

Wednesday Night is a domestic corporation with its principal place of business in Nassau County, New York. Enso is a domestic corporation with its principal place of business in Suffolk County, New York. Wednesday Night and Enso conducted business as a joint venture known as Core Company ("Core"). Sea Side is a Florida limited liability company ("LLC") that owned and operated a chemical dependency treatment center in Palm Beach County, Florida ("Facility"). Plaintiff claims that, pursuant to the agreement that is the subject of the action, Sea Side consented to the jurisdiction of the courts of the State of New York.

On or about July 1, 2009, Plaintiffs and Defendant entered into a consulting agreement ("Agreement") (Ex. 1 to Complaint). Pursuant to the Agreement, Defendant engaged Plaintiffs to provide consulting services with respect to the operation of the Facility and agreed to pay consulting fees ("Fees") to Plaintiffs in the sum of \$20,000 per month for a term of not less than six (6) months.

On or about July 15, 2009, Defendant notified Plaintiffs that it was repudiating the Agreement. At all relevant times, Plaintiffs performed, or were ready, willing and able to perform, their obligations pursuant to the Agreement. Plaintiffs allege that, as a result of Defendant's repudiation of the Agreement, Plaintiffs have suffered damages in the sum of \$120,000.

Paragraph ten (10) of the Agreement, titled "Controlling Law," provides as follows ("Choice of Law Provision"):

This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

Defendant provides an Affidavit in Support of Jack Coscia ("Coscia") dated October 15, 2009 in which Coscia affirms as follows:

Coscia is a Managing Member of Sea Side and is familiar with the facts and circumstances of this action. Sea Side was formed in December of 2008 as an LLC organized and existing under the laws of Florida. Sea Side 1) has never maintained an office or mailing address in New York; 2) does not own, use or possess real property in New York; 3) has no

employees in New York; 4) does not transact any business or supply and goods or services in New York; and 5) does not solicit business in New York.

Coscia affirms that, contrary to the allegations in the Complaint, Sea Side does not consent to the jurisdiction of New York courts. Coscia submits that, in light of the facts outlined in his Affidavit, New York courts do not have jurisdiction over Sea Side and the Court should dismiss the Complaint.

Plaintiffs provide an Affidavit in Opposition of Melissa Burton (“Burton”) dated November 27, 2009 in which Burton affirms as follows:

Burton is the shareholder and President of Enso. In her Affidavit, Burton outlines the facts supporting Plaintiffs’ allegations that they performed their obligations under the Agreement and suffered damages as a result of Defendant’s alleged breach of that Agreement.

With respect to the jurisdictional issue, Burton submits that Defendant transacted business in New York. In support thereof, Burton alleges that 1) on May 28, 2009, Burton and her business partner Joseph Shrank (“Shrank”) met with Blayre Farkas (“Farkas”), a representative of Defendant who previously advised Shrank that she was in charge of Defendant’s marketing campaign, at a location in Manhattan (“Meeting”); 2) at the Meeting, Burton, Shrank and Farkas discussed Defendant’s marketing efforts in New York which were designed to solicit affluent New Yorkers in need of chemical dependency treatment; 3) at the Meeting, Farkas provided Burton with a memorandum (“Memorandum”) detailing Defendant’s New York marketing strategy (Ex. 5 to Burton Aff. in Opp.); 4) the Memorandum describes a May 5, 2009 meeting between Farkas and Jason Binn (“Binn”), the founder and CEO of Niche Media, the publisher of several well-known lifestyle magazines geared towards affluent readers (“Binn Meeting”); and 5) the Memorandum notes that the Binn Meeting centered on Defendant’s upcoming summer marketing campaign in the Manhattan and Hamptons’ markets.

The Memorandum, which contains the Sea Side name and logo at the top, includes the following language:

To make our branding efforts in the Hamptons complete it is necessary to create awareness among the practitioners of our potential clients...

To accomplish this goal the proposal is to create an “event” in the Hamptons, during summer 2009 which would include a guest speaker discussing some aspect unique to the needs of treating affluent clients, and a chance for us to create “face presence” among

these practitioners. By holding the event in the Hamptons, we may entice Manhattan (and the surrounds) practitioners that may not otherwise attend such a seminar, to attend, as a result of the location and the combination of being able to earn [Continuing Education Units]...

The Memorandum also discusses Sea Side's decision to limit its marketing initiative to the northeast and to "subsequently target the same audience during the fall/winter season in their 'satellite' locations (Palm Beach, Miami, Aspen/Vail)."

Burton avers that, on June 1, 2009, Farkas contacted Shrank and Burton and asked them to travel to Florida to meet with Donald and Debbie Mullaney ("Mullaney's"), principals of Sea Side, regarding Defendant's future engagement of Plaintiffs to provide marketing services in New York to promote the Facility. On June 11, 2009, Burton received an e-mail from Farkas in which Farkas requested that Burton and Shrank meet with Sea Side's representatives in Florida (Ex. 6 to Burton Aff.). This e-mail makes reference to Shrank and Burton presenting the "proposal" to the Mullaney's son but does not provide details regarding that proposal.

Burton affirms that, over the weekend of June 11-13, 2009, Shrank and Burton met with representatives of Sea Side in Florida and discussed Sea Side's marketing efforts in New York. Sea Side's representatives allegedly stated that New York was their key target location. On June 23, 2009, Burton received an e-mail from Farkas that, she submits, was in furtherance of the parties' negotiations to retain Plaintiffs to provide further consulting services to Defendant. In that e-mail (Ex. 7 to Burton Aff.), Farkas again makes reference to the "proposal" and discusses different methods for promoting Sea Side, including the use of social media sites such as Facebook and Twitter. There are two (2) references to New York in this e-mail. The first is the following:

Corollary to this [Shrank's ability to network because of his established professional relationships] we would also like to explore the possibility of co-hosting targeted events in NY and FL (with potential for other locations etc.) over the next 12 months.

The second is Farkas' statement at the end of the June 23, 2009 e-mail that she is in New York during the week and would "love to get together and get started if you are available..." Burton affirms that she and Shrank again met with Farkas in New York during the week of June 23, 2009 at an event sponsored at Plaintiffs' New York office. Burton also avers that,

during that meeting, they “continued the negotiations for our consulting Agreement and Defendant’s marketing efforts in New York.”

Burton affirms that she and Shrank returned to Florida from June 30 to July 1, 2009 at which time they “had more intensive meetings with Defendant regarding the New York market.” Burton avers that Plaintiffs and Defendant executed the Agreement at that time and that Defendant subsequently “engaged in substantial advertising in New York publications including Hampton Magazine and Avenue Magazine” which appeared in those magazines during the summer of 2009. Burton provides a copy of a single page that, she affirms, appeared in Hampton Magazine (Ex. 8 to Burton Aff.). That page 1) contains the words “SeaSide Palm Beach;” 2) describes Seaside’s facility as “the East Cost’s premier luxury retreat;” 3) provides a toll free telephone number; and 4) provides a website address of [www.seasidepalmbeach.com](http://www.seasidepalmbeach.com).”

Burton submits that “the entire purpose of the Agreement was to solicit business in New York” (Burton Aff. at paragraph 31), and cites the Choice of Law provision in support of this assertion. Paragraph one of the Agreement reflects that Seaside retained Core to “consult on development of Sea Side.” Other than the Choice of Law Provision, there is no reference in the Agreement to any particular state.

### C. The Parties’ Positions

Defendant submits that the Complaint inaccurately alleges that, pursuant to the Agreement, Defendant consented to the jurisdiction of the New York courts. The Agreement does not contain any forum or venue selection provision, or any reference to Defendant’s consent to the jurisdiction of New York courts. Rather, the Agreement contains only the Choice of Law Provision which does not confer jurisdiction of the New York courts over Defendant. Defendant submits that the New York courts lack personal jurisdiction over Defendant in light of Coscia’s affirmations that Sea Side 1) has never maintained an office or mailing address in New York; 2) does not own, use or possess real property in New York; 3) has no employees in New York; 4) does not transact any business or supply and goods or services in New York; and 5) does not solicit business in New York. Defendant has not submitted a Reply to Burton’s Affidavit in Opposition.

Plaintiffs oppose Defendant’s motion submitting that, in light of Burton’s affirmations regarding meetings conducted in New York and efforts by Sea Side to solicit clients in New

York, the Court should conclude that Defendant transacted business in New York and is therefore subject to the jurisdiction of the New York courts. Plaintiff also submits that, in light of the Choice of Law Provision, Defendant's motion based on a lack of personal jurisdiction must fail.

### RULING OF THE COURT

#### A. Applicable Legal Principles

In general, 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. A plaintiff does not establish personal jurisdiction over a defendant merely by pointing to a contractual choice of law provision. Indeed, 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 a defendant in New York. *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). Rather, New York courts follow a time-honored test to determine whether personal jurisdiction is established. 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. *Grimaldi v. Guinn*, 2010 N.Y. App. Div. LEXIS 927, p.13 (2d Dept. 2010), citing *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71 (2006), *cert. den.*, 549 U.S. 1095 (2006), quoting *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 466 (1988).

Personal jurisdiction over a defendant that engages in purposeful activity in New York is proper because the defendant has invoked the benefits and protections of the state's laws. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Thus, a defendant may transact business in New York and be subject to personal 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. *Fischbarg v. Doucet*, 9 N.Y.3d 375,

380 (2007).

Not all purposeful activity, however, constitutes a transaction of business within the meaning of CPLR § 302(a)(1). *Grimaldi, supra*, at pp.13-14, quoting *Fischbarg*, 9 N.Y.3d at 380. Although it is impossible to fix precisely those acts that constitute a transaction of business, it is the quality of the defendant's New York contacts that is the primary consideration. *Id.* The purposeful creation of a continuing relationship has been a contributing factor in finding sufficient contacts to justify the exercise of long-arm jurisdiction. *Grimaldi* at p. 14.

The recent *Grimaldi* court's discussion of *Kimco Exch. Place Corp. v. Thomas Benz, Inc.*, 34 A.D.3d 433 (2d Dept. 2006), *app. den.*, 9 N.Y.3d 803 (2007) is instructive. In *Kimco*, the parties exchanged two executed exclusive marketing agreements by fax, pursuant to which the plaintiff was to market nationally several of the defendant's properties which were not in New York. *Grimaldi* at pp. 14-15, citing *Kimco*. While the plaintiff was conducting its marketing campaign, the defendants made a few follow-up telephone calls. *Id.* at p. 15, citing *Kimco*. The Second Department determined in *Kimco* that the defendants' acts of faxing the executed contracts to New York and making a few telephone calls did not qualify as purposeful acts constituting the transacting of business, or purposeful avilment of the New York forum, bur rather were merely attempts to contact the plaintiff. *Id.*

In contrast with *Kimco*, as the *Grimaldi* court noted, is the leading case of *Parke-Bernet Galleries v. Franklyn*, 26 N.Y.2d 13 (1970). There, the defendant, who was in California, received and transmitted bids over an open telephone line and actively participated in an auction held in New York. The Court of Appeals ultimately concluded that the defendant was subject to the jurisdiction of the New York courts in connection with an action arising out of the auction. *Grimaldi* at pp. 17-18, citing *Parke-Bernet*. The Court of Appeals also held that the defendant's participation in the auction, which resulted in the sale of certain paintings to him, constituted the sustained and substantial transaction of business in New York. *Grimaldi* at p. 18, citing *Parke-Bernet*.

#### B. Application of these Principles to the Instant Action

Preliminarily, the Court notes that Defendant did not submit a Reply refuting the allegations in Burton's Affidavit in Opposition. Moreover, in light of 1) the attendance at the Meeting by Defendant's representative, 2) Defendant's advertisement in a magazine distributed

in New York, and 3) Defendant's apparent intention to initiate an aggressive promotional campaign in New York, as demonstrated by the Memorandum, the Court concludes that Defendant transacted business in New York to a sufficient extent that the New York courts have personal jurisdiction over Defendant. Accordingly, the Court denies Defendant's motion to dismiss the Complaint.

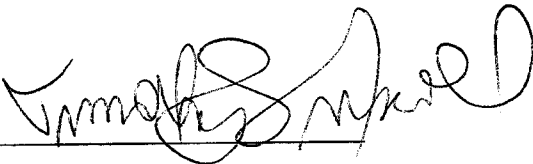
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on April 20, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY  
March 31, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
APR 05 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE