SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 54
Justice

BRIAN ROBINSON,

-v-

INTUIT, INC

INDEX NO. 101160/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/27/10

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BRIAN ROBINSON and MONICA MILLER,

Plaintiffs,

-against-

INTUIT, INC., TURBOTAX, TAX RESOURCES, INC., and MARTIN SOLOMON,

Defendants.

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Index No.: 101160/10

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

This action arises from an agreement by defendant Tax Resources, Inc. (TRI) to provide Brian Robinson and Monica Miller (plaintiffs) with financial and legal services in the event that they should be subject to an audit by the Internal Revenue Service (IRS). Plaintiffs claim breach of fiduciary duty and negligence against TRI. TRI brings this motion to dismiss on the grounds of lack of personal jurisdiction [CPLR 3211(a)(8)], lack of proper service [CPLR 3211(a)(9)], and forum non conveniens [CPLR 327]. Plaintiffs oppose.

I. Background

A. The Complaint

The complaint alleges the following facts: Plaintiffs, both New York residents, used the computer software program known as TurboTax to prepare their federal income taxes for the 2003 and 2004 tax years. While purchasing the software on TurboTax's website, plaintiffs also purchased a membership with the TurboTax Audit Defense program. This membership entitled them to receive legal and accounting services provided by TRI in the event that they should be audited by the IRS. TRI is a Florida corporation with its principal place of business in California.

In 2006, plaintiffs received notice that the IRS would be conducting an audit of their 2003 tax return. TRI notified them that it was assigning them a certified public account (CPA) named Martin Solomon, a New York resident, to handle their case. The letter from TRI stated that Solomon should be their "only point of contact with the IRS or state agency" and that they should not provide any information to the IRS. It further stated that TRI, not plaintiffs, would be responsible for paying Solomon's fees. TRI did not mention that Solomon's CPA license had been revoked in 1998 after he was found guilty of professional misconduct for embezzling client funds.

In keeping with the agreement, plaintiffs promptly provided Solomon with the paper work he would need to defend them. However, he did not forward it to the IRS or take any other action necessary to aid them in the auditing process. In January, 2007, TRI notified plaintiffs that it would terminate their audit service claiming that plaintiffs had failed to provide TRI with the required documentation.

B. The Motion to Dismiss

TRI submits the affidavit of Mark D. Olander, the Executive Vice President of TRI. He attests that "TRI maintains no office in New York, has no employees in New York, does not conduct any business from New York, has no bank accounts in New York, and maintains no New York phone lines." He further avers that Solomon "was an independent contractor and who [sic] was neither [sic] employee nor [sic] agent of TRI."

As evidence of this, Exhibit E consists of Solomon's 1099 tax form indicating that the money he received from TRI for his services was listed under "Nonemployee compensation." Finally, Olander attests that "[n]one of the witnesses or records TRI would need to offer are located in New York."

In opposition, plaintiffs submit: (1) a cover letter on TRI's letterhead and a document referred to in TRI's cover letter as their "Tax Year 2004 Membership Certificate and Contract," and described as entitling plaintiffs to a "professional tax representative" should they be audited by the IRS; (2) a letter to plaintiffs from TRI assigning Solomon to work with them , stating that he should be their only point of contact with the IRS, directing them to provide Solomon with all relevant documentation and indicating that TRI, not the plaintiffs, would be responsible for paying his fees; (3) letters from an IRS agent to plaintiffs indicating that she had not received any of the necessary documentation from Solomon; and (4) the letter plaintiffs received from TRI stating that they had "not provided the documentation in a timely manner that is needed to support the information that [they] reported on [their] 2003 and 2004 income tax returns" and that their failure to do so "requires that [TRI] cease providing audit representation services for these tax years."

II. Discussion

In deciding a motion to dismiss, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. *EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 (2005). When the motion is based on an alleged lack of personal jurisdiction, it is the plaintiff's burden to establish that the court has jurisdiction over the defendant. *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 (2d Dept 2005). However, when opposing a motion to dismiss, the plaintiff need only make a prima facie showing of personal jurisdiction. *Id.*.

A. CPLR 302

In addition to the requirements of the CPLR, a finding of personal jurisdiction must also satisfy constitutional safeguards of due process. Under the Fourteenth Amendment, personal

jurisdiction may be extended over a non-domiciliary only where "minimum contacts [exist between the defendant and the forum state." *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291 (1980). These minimum contacts must not be so tenuous as to offend "traditional notions of fair play and substantial justice." *International Shoe Co. v Washington*, 326 US 310, 316 (1945). Instead, "the defendant's conduct and connection with the forum state [must be] such that he should reasonably anticipate being haled into court there." *Burger King Corp. v Rudzewicz*, 471 US 462, 474 (1985). For this to be the case, there must be "some act by which the defendant purposefully availed itself of the privilege of conducting activities with the forum State, thus invoking the benefits of the protections of its laws." *Hanson v Denckla*, 357 US 235, 253 (1958).

Plaintiffs assert that this court has limited personal jurisdiction over TRI under CPLR 302, New York's long-arm statute. CPLR 302(a)(1) is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even where the defendant never enters New York. *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). CPLR 302(a)(1) allows the exercise of personal jurisdiction over a non-domiciliary "who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state." Moreover, a formal agency relationship is not required to establish long-arm jurisdiction through the acts of an agent in New York. *Id.* The plaintiff need only convince the court that the agent engaged in purposeful activities in New York in relation to the transaction for the benefit of, and with the knowledge and consent of the non-domiciliary, who exercised some control over the agent in the matter. *Id.* CPLR 302(a)(1) allows the exercise of personal jurisdiction over a non-domiciliary "who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state."

However, jurisdiction is only established if the cause of action "arises out of" the transaction at issue. *PDK Labs, Inc. v Friedlander*, 103 F3d 1105, 1109 (2d Cir 1997).

In construing the words "transacts business," courts look at the totality of the defendant's activities to determine if it was "engaged in some purposeful activity in this State in connection with the matter in suit." *Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 457 & n 5, *cert denied su nom. Estwing Mfg. Co. v Singer*, 382 US 905 (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.'" [citations omitted] *Fischbarg v Doucet*, 9 NY2d 375, 380 (2007); *Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 158 (1st Dept 1992). Interstate communications by telephone, facsimile, e-mail or mail, standing alone, do not constitute purposeful activity. *Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351, 352 (1st Dept 2004); *accord Edelman v Taittinger, S.A.*, 298 AD2d 301 (1st Dept 2002). There must be a showing of conduct demonstrating the non-domiciliary projected him or herself into New York by knowingly initiating and pursuing a substantial transaction and, thereby, reasonably should have expected to defend himself in New York. *Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71-72 (2006); *see Fischbarg*, 9 NY3d at 380 (purposeful establishment of attorney client relationship and direct participation in relationship through emails, faxes and phone calls provided jurisdiction).

A cause of action "arises out of" a transaction where there is "a substantial relationship or nexus between the business transacted by the defendant in this state and the plaintiff's cause of action. *Lancaster*, 177 AD2d at 158. "[J]urisdiction is not justified where the relationship between the claim and the transaction is too attenuated" or "merely coincidental." *Johnson v*

Ward, 4 NY3d 516, 520 (2005).

In addition, CPLR 302(a)(1) provides that jurisdiction may be found where the defendant "contracts anywhere to supply goods or services in the state." It is irrelevant where the contract was negotiated or signed. What matters is whether the contract contemplates the supply of goods and services to New York. Mere "knowledge that a product may be destined for a particular forum is insufficient." *Paradise Products Corp. v Allmark Equipment Co.*, 138 AD2d 470, 471 (2d Dept 1988). But, where a contract explicitly calls for the supply of goods or services to New York [*Island Wholesale Wood Supplies, Inc. v Blanchard Industries, Inc.*, 101 AD2d 878 (2d Dept 1984) (goods and services supplied to New York)], or the defendant plays an active role in the supply of the goods or services to New York [*Seaman v Fichet-Bauche North America, Inc.*, 176 AD2d 793 (2d Dept 1991) (supply of goods to New York), jurisdiction will exist if the cause of action arises from the contract. *See Anderson Development Corp. v Isoreg Corp.*, 154 AD2d 859, 860 (3d Dept 1989); *Torrioni v. UNISUL, Inc.*, 176 AD2d 623, 624 (1st Dept 1991).

Plaintiffs have alleged sufficient facts to make a prima facie showing of personal jurisdiction under both prongs of CPLR 302(a)(1). In regard to the first prong, the contract was executed when Robinson, while in New York, purchased the service on TurboTax's website. Where an agreement is negotiated or executed by telephone, mail, or electronic communication, a defendant may be found to have "transact[ed] business" due to "additional substantive contacts" with the state, such as where the agreement calls for complete or substantial performance in New York. *Courtroom Television Network v Focus Media, Inc.*, 264 AD2d 351, 353 (1st Dept 1999) (defendant contracted with plaintiff to provide services in New York). That the contract was not negotiated or executed in New York is immaterial. "Even when physical presence is lacking, jurisdiction may still be proper if the defendant 'on his [or her] own

initiative ... projects himself [or herself]' into this state to engage in a 'sustained and substantial transaction of business.'" *Fischbarg*, 9 NY3d at 382. Here, TRI projected itself into New York through the formation of a relationship with New York residents whereby it would provide them legal and accounting services.

While the contract was silent as to where TRI would provide the promised "tax professional" to plaintiffs, on a motion to dismiss the court will provide plaintiff with the benefit of every possible inference. Given that it would be logical for TRI to provide an accountant licensed in the jurisdiction in which plaintiffs lived and would be subject to investigation and possible legal action and since TRI, in fact, did provide them with an accountant located in New York, it can be inferred that the contract called for the provision of legal and accounting services to a New York resident. The fact that TRI so provided a New York accountant (albeit an unlicensed one) further supports this conclusion. This constituted substantial performance of TRI's obligation and a purposeful activity by which TRI availed itself of the privilege of carrying on activities within New York and invoked the benefits and protections of its laws. The court finds that TRI transacted business in New York when it signed the contract with Robinson.

This court may also exercise jurisdiction over TRI on the basis of the second prong of CPLR 302(a)(1)—contracting anywhere to supply goods or services in New York. In its motion, TRI asserts that there never was a contract between it and plaintiffs. Plaintiffs rebut this assertion with a letter dated March 18, 2005 (on TRI stationery) from TRI to plaintiffs and a document which the letter refers to as his "Tax Year 2004 Membership Certificate and *Contract*" ("Certificate") (emphasis added). Exh. A, Giordano Affirm. Both the letter and the Certificate assert that TRI (not TurboTax or Intuit) would provide plaintiffs with legal and accounting services should they later be subject to an audit and, crucially, these services would be provided

"until the time this membership expires as agreed upon by the payment amount." Based on these facts, which the court must accept as true, the court finds that there was a contract between TRI and plaintiffs and that the contract contemplated the provision of services by TRI to plaintiffs in return for the payment they made on TurboTax's website.

TRI nonetheless asserts that it did not contract to supply services because the legal and accounting services supplied were supplied solely by Solomon, who was an independent contractor instead of an employee or agent of TRI. This argument is unavailing. First, the Certificate clearly states that TRI would provide a "professional tax representative" who would render a number of services to plaintiffs, and TRI's records show that Solomon was paid by TRI to perform these services. However TRI chooses to define Solomon's position, it seems clear that he was merely a conduit through which TRI was to perform services it had promised to plaintiffs. Particularly telling is the final letter plaintiffs received from TRI in January, 2007. It stated that "*we*" would "*cease providing* audit representation services" and that the "letter is official notification of *our* complete *withdrawal* of audit representation services." Exh. F, Giordano Affirm (emphasis added).

Finally, there is no question that plaintiffs' causes of action against TRI arose out of the transaction of business and the contract to supply services. Plaintiffs allege that TRI acted negligently and breached its fiduciary duty to them through its hiring and supervision of Solomon. Since hiring a "professional tax representative" on their behalf was precisely the performance contemplated by the contract, these causes of action clearly have a "substantial relationship or nexus" to the relevant transaction of business and the contract. *Lancaster*, 177 AD2d at 158.

Subjecting TRI to jurisdiction under CPLR 302(a)(1) does not offend "traditional notions

of fair play and substantial justice." Having contracted with a New York state resident for the provision of services and having provided those services via a paid representative in New York, albeit in an allegedly negligent manner, it should have been reasonably foreseeable to TRI that it would be haled into a New York court. Consequently, TRI's motion to dismiss on the grounds of personal jurisdiction is denied.

B. CPLR 301

TRI's additional argument, that the court lacks general personal jurisdiction over it under CPLR 301, although persuasive [*See Haber v Studium, Inc.*, 2009 WL 565185, *3 (NYSup 2009) citing *Spencer Trask Ventures, Inc. v Archos S.A.*, 2002 WL 417192, *6 (SDNY 2002) (mere operation of an interactive website is insufficient to meet the requirements of CPLR 301)], is superfluous. The court need not reach this issue having found jurisdiction under CPLR 302.

C. Lack of Proper Service

Defendant claims that service under BCL 307 was improper because this court lacks jurisdiction over TRI. For the reasons stated above, the motion to dismiss on the basis of lack of proper service is denied.

D. Forum non conveniens

New York courts "need not entertain causes of action lacking a substantial nexus with New York." *Martin v Mieth*, 35 NY2d 414, 418 (1974). The doctrine of forum non conveniens, codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 (1984), *cert denied* 469 US 1108 (1985). New York courts consider the availability of an adequate alternative forum and certain other private and public interest factors when deciding whether to dismiss an action on the ground of

forum non conveniens. *Id.* The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation. *Id.*; *Highgate Pictures, Inc. v De Paul*, 153 AD2d 126 (1st Dept 1990).

Although not every factor is articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: the existence of an adequate alternative forum, situs of the underlying transaction, residency of the parties, potential hardship to the defendant, location of documents, location of a majority of the witnesses and burden on New York courts. *Islamic Republic of Iran v Pahlavi, supra*; *World Point Trading PTE v Credito Italiano*, 225 AD2d 153 (1st Dept 1997). Finally, a motion to dismiss on the grounds of forum non conveniens is subject to the discretion of the trial court, and no single factor is controlling. *Islamic Republic of Iran v Pahlavi, supra*; *Matter of New York City Asbestos Litig. v Rapid American Corp.*, 239 AD2d 303 (1st Dept 1997).

In terms of personal jurisdiction, for the reasons given above, New York is an available forum. TRI does not propose an alternative forum for this action. Although California, where it maintains its principal place of business, may be an available forum, it is not the exclusive one. TRI alleges no facts to suggest that New York lacks jurisdiction over this matter.

As to the residency of the parties and the relative inconvenience to them, a defendant does not meet its burden where the parties are equally inconvenienced by trial in the other party's home state. *Temple v Temple*, 97 AD2d 757 (2d Dept 1983). Here, TRI is a Florida corporation with its principal place of business in California. It has no place of business in New York. Plaintiffs are New York residents with no alleged ties to California. This is significant because New York courts impose an even higher burden on the defendant when the plaintiff is a New

York resident. *Highgate Pictures, Inc. v De Paul*, 153 AD2d 126, 129 (1st Dept 1990). Further, Solomon is a co-defendant in this dispute and is likely to be a crucial witness. He is also a New York resident with no alleged ties to California.

As to the situs of the transaction, because the contract between plaintiffs and TRI was made via TurboTax's website with no negotiation taking place, there is no one jurisdiction in which the contract can be said to have been negotiated or executed. However, all of Solomon's actions relating to his status as a licensed CPA and his interactions with plaintiffs—the supervision of which (or lack thereof) forms the basis for plaintiffs' suit against TRI—occurred in New York. It is true that evidence relating to TRI's decision to hire Solomon and its subsequent supervision of his actions may be located in California. Yet, TRI does not explain why it would be more inconvenient for it to produce such evidence in New York than it would be for plaintiffs and Solomon to produce evidence of their actions in California. TRI has failed to meet its burden to demonstrate that this action should be dismissed on the basis of forum non conveniens. Accordingly, it is

ORDERED that defendant Tax Resources, Inc's motion to dismiss the complaint is denied; and it is further

ORDERED that defendant Tax Resources, Inc. file and serve an Answer to the Complaint no later than 20 days after entry of this Order.

Dated: September 27, 2010

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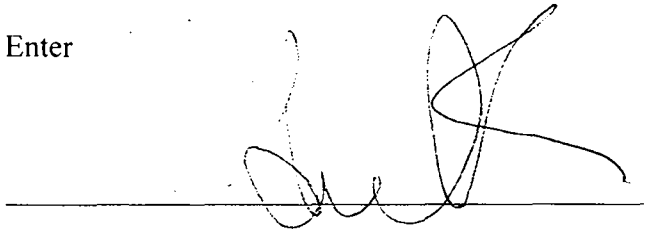

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