

**Manhattan Telecommunications, Corp. v Upnorth  
Ltd., Inc.**

2011 NY Slip Op 33077(U)

November 18, 2011

Supreme Court, New York County

Docket Number: 112175/09

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
*Justice*

PART 11

Manhattan Telecommunications,  
Corp. d/b/c METTEL

Plaintiff,

- v -

Upwork, et al.

Defendant.

INDEX NO.: 112175/09

MOTION DATE: 10/27/11

MOTION SEQ. NO.: 002

MOTION CAL. NO.:

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion: [ ] Yes  No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the attached Memorandum Decision & Order.

Dated: November 18, 2011

J  
J.S.C.

**FILED**

NOV 28 2011

NEW YORK  
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Check one:  FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
MANHATTAN TELECOMMUNICATIONS,  
CORPORATION d/b/a METTEL,

Index No. 09-112175

Plaintiff,

-against-

UPNORTH LIMITED, INC., d/b/a  
U-SAVE AUTO RENTAL and  
DANIEL J. COGAN

Defendant(s)

**FILED**

**NOV 28 2011**

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COUNTY CLERK'S OFFICE

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JOAN MADDEN, J.:

Plaintiff Manhattan Telecommunications Corporation ("MetTel") moves, pursuant to CPLR 2221(e), for an order granting it leave to renew the court's decision and order dated January 7, 2011 ("the original decision"), to the extent it denied MetTel's motion for a default judgment against defendant Upnorth Limited, Inc. d/b/a U-Save Auto Rental ("Upnorth") and granted Upnorth's cross motion to dismiss for lack of personal jurisdiction. Upnorth opposes the motion which, for the reasons set forth below, is denied.

In this action, MetTel seeks to recover unpaid telephone service fees allegedly due and owing from Upnorth and Upnorth's President, defendant Daniel J. Cogan ("Cogan"). On July 20, 2010, MetTel moved for a default judgment against defendants for failure to answer, move or otherwise respond to the complaint. Defendants opposed the motion and cross moved to dismiss the complaint for lack of personal jurisdiction and for sanctions, and MetTel opposed the cross motion.

In the original decision, the court denied the motion for a default judgment and granted the cross motion to dismiss the complaint as against Cogan for failure to properly

serve him with process. With respect to Upnorth, during oral argument on January 6, 2011, the court indicated that the issue of whether this court had personal jurisdiction over Upnorth would be referred to a referee, and Upnorth did not object. However, upon closer review of the file, this court found that MetTel provided no basis for a finding of personal jurisdiction over Upnorth, a New Hampshire corporation, headquartered in Massachusetts, and therefore granted the cross motion to dismiss, without prejudice to bringing an action in a court with jurisdiction.

MetTel now moves, pursuant to CPLR 2221(e), for leave to renew the original decision, asserting that jurisdiction over Upnorth exists under Upnorth's contract with MetTel, which provided that MetTel, which does business in New York, was to act as an agent of Upnorth. In support of its position, MetTel submits the affidavit of Douglas Parobeck, a former Director of Provisioning for MetTel. According to Parobeck, based on his review of documents entitled "Authorizations to Disconnect Telephone Service," "Upnorth made MetTel its agent to contact its existing telephone providers and terminate the listed telephone numbers and service, for the purposes of replacing same with MetTel's lines and service." (Parobeck Aff. ¶ 3). Thus, concludes Parobeck, "it appears that MetTel carried out its agency to Upnorth and terminated Upnorth's old lines and service on Upnorth's behalf." (Id., ¶ 4).

MetTel argues that renewal should be granted as it was prevented from presenting evidence of the agency relationship between MetTel and Upnorth during oral argument on January 6, 2011 when the court stated on the record that the matter of jurisdiction would be referred by a referee.

In opposition, Upnorth submits Cogan's affidavit in which he states that Upnorth has no contacts with New York and that MetTel solicited its business for the purpose of taking over Upnorth's telephone transmissions lines in New Hampshire and Massachusetts.

In reply, MetTel submits an affidavit of an employee who states that Upnorth sent it authorizations to disconnected certain telephone lines in Massachusetts and New Hampshire and states that the disconnections were performed by MetTel in New York City.

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1<sup>st</sup> Dept 2001)(citations omitted). A motion for leave to renew should be denied when the movant fails to show that it exercised due diligence in obtaining the evidence before the submission of the original application (Taub v. Art Students League of New York, 63 AD3d 630 [1<sup>st</sup> Dept 2009]), or in the absence of a valid excuse for not submitting the additional facts previously. Elson v. Defren, 283 AD2d 109, 113 (1<sup>st</sup> Dept 2001)(holding that renewal should be denied in absence of a valid excuse for not submitting additional facts at the time of the original motion).

Here, MetTel offers no valid excuse for failing to submit evidence supporting a basis of personal jurisdiction in New York over Upnorth, and the court's statement during oral argument regarding referring the matter to a referee does not excuse MetTel's failure to assert its agency theory for jurisdiction in its prior submission.

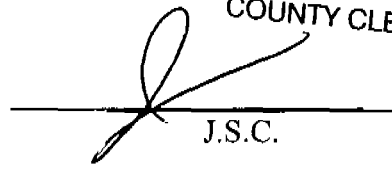
In any event, even if the court were to grant renewal, it would adhere to its original decision as the MetTel's agency theory does not establish a prima facie basis for finding jurisdiction over Upnorth in New York. Specifically, Upnorth's authorization for MetTel to act as Upnorth's agent for the limited purpose of contacting its existing telephone providers in Massachusetts and terminating listed telephone numbers in Massachusetts and New Hampshire for service in order to replace them with MetTel lines is insufficient to establish that Upnorth was transacting business in New York such that personal jurisdiction can be obtained here. Notably, while MetTel does business in New York, the duties it was authorized to perform on Upnorth's behalf were not in New York, but in Massachusetts and New Hampshire.

Under these circumstances, it cannot be said that Upnorth purposefully availed itself of the privilege of doing business in New York such that it should be amenable to jurisdiction in the State. See generally, Ehrenfeld v. Bin Mahfouz, 9 NY3d 501, 508 (2007); McKee Elec. Co. v Rauland-Borg Corp., 20 NY2d 377, 382 (1967), CPLR 302 (a)(1). Moreover, MetTel points to no contractual provisions under which Upnorth consented to personal jurisdiction in New York. Accordingly, the new evidence submitted by MetTel does not provide a basis for finding jurisdiction over Upnorth in this court.

In view of the above, it is

ORDERED that the motion to renew is denied.

DATED: November 18, 2011

**FILED**  
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 J.S.C.