

**Gauchet v Prins**

2011 NY Slip Op 34053(U)

May 31, 2011

Sup Ct, Erie County

Docket Number: 2010/11046

Judge: John F. O'Donnell

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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**MARIA CAMMILLERI GAUCHET**  
Plaintiff

**INDEX NO.: 2010/11046**

vs.

**BRIAN PRINS**  
Defendant

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**MEMORANDUM**

APPEARANCES:

FRANK T. GAGLIONE, P.C.  
FRANK T. GAGLIONE, ESQUIRE, of counsel  
Attorney for Plaintiff, **Maria Cammilleri Gauchet**

**Brian Prins**, Defendant  
Pro se

O'DONNELL, J., Supreme Court Justice

The defendant has moved to dismiss this action for lack of personal jurisdiction and for summary judgment claiming that the action is barred by the statute of frauds since the agreement was never reduced to writing.

The defendant also requests, in what will be considered a cross-claim, the return of a necklace that he states is worth \$32,000. According to him, the necklace was purchased jointly by the parties, at an auction, as an investment. Once the relationship ended, the plaintiff kept the necklace despite repeated requests for its return.

The underlying action alleges a breach of contract. The plaintiff claims she loaned the defendant \$18,000 to buy a race car and that he agreed to pay her back within three months. The defendant has not paid.

The defendant claims that the money was a short term investment for a business venture, paid to an entity called "BP Ventures Inc". The business failed and there was never an obligation on his part or an agreement for him to pay the funds back. The defendant, in his answer, claims that he is not the proper party to this action and that New York does not have personal jurisdiction over him.

The plaintiff has brought a cross motion for summary judgment stating that the defendant has no defense for not paying the money now due and owing to her. The plaintiff claims that the necklace at issue was an unconditional gift to her in September 2009 and is only worth \$7,000.

The parties were involved in an intimate relationship for a period of years, during which time the plaintiff resided in Williamsville, New York and the defendant resided in Berlin, New Jersey. The parties traveled back and forth between their homes during the courtship. There is no dispute that after having discussions over the phone, on February 9, 2010, the plaintiff wired \$18,000 from her bank account in New York to an account controlled by the defendant in New Jersey. There was never any written agreement or terms for the money transfer.

The defendant's claim that the alleged oral agreement is barred under the statute of frauds has been rebutted by the plaintiff. (See General Obligations Law § 5-701 [a] [1]) The statute of frauds is not a bar to enforcement of the alleged oral agreement because by its terms it could have been performed within one year of its making. (See, Hubbell v. T.J. Madden Constr. Co., Inc., 32 A.D.3d 1306)

The defendant has also moved to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Under New York's long arm statute, CPLR 302 (a) (1), a court may exercise personal jurisdiction over a non-domiciliary defendant who transacts any business within the state. Proof of one transaction in New York is sufficient to invoke jurisdiction, even if 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. It is also well settled that long-arm jurisdiction exercises over parties using electronic and telephonic means to project themselves into New York. (See, Grimaldi v. Guinn, 72 A.D.3d 37)

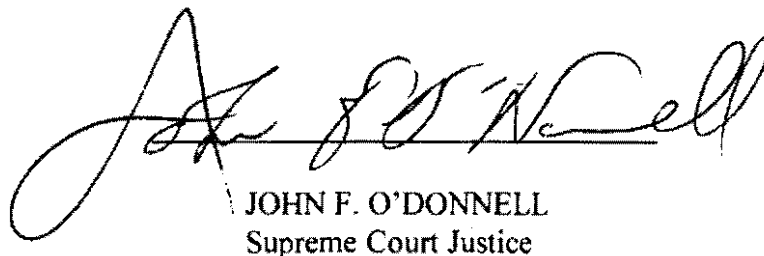
Whether a defendant has transacted business within New York is determined under the totality of the circumstances, and rests on whether the defendant, by some act or acts, has purposefully availed itself of the privilege of conducting activities within New York. Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its laws. (See, Fischbarg v Doucet, 9 NY3d 375).

Here, in opposition to the defendant's motion, the plaintiff made a prima facie showing that the defendant, a New Jersey residence, transacted business in the State of New York and had numerous instances of contact in connection with the gravamen of the complaint. Specifically, in the pleadings, both parties allege an agreement, whether for a loan or investment, purposefully entered into by the defendant and the plaintiff in Williamsville, New York culminating in funds being transferred out of New York. A New York resident was allegedly harmed as a result. The defendant has also availed himself of the protection of New York by making a claim for the return of the necklace.

Viewing the evidence in the light most favorable to the plaintiff, her allegations demonstrate that the defendant transacted business in New York in connection with the plaintiff's causes of action and is subject to the long-arm jurisdiction. Accordingly, the defendant's motion to dismiss the complaint for lack of personal jurisdiction is denied.

The remainder of the motions must be denied. The conflicting and distinct recollections as to the purpose and intent of the exchanges raise questions of fact that cannot be resolved by motion.

Submit order in accordance with this memorandum.



JOHN F. O'DONNELL  
Supreme Court Justice

DATED: May 31, 2011