

**Besler v Spermon**

2011 NY Slip Op 34132(U)

January 26, 2011

Supreme Court, Bronx County

Docket Number: 308112/09

Judge: Mark Friedlander

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This opinion is uncorrected and not selected for official publication.

PART 25

Case Disposed   
Settle Order   
Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

BESLER, DARTON D.

Index No. 0308112/2009

-against-

Hon. MARK FRIEDLANDER

SPERMON, HENRY M.

Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **DISMISSAL**  
Noticed on **December 23 2010** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 1/18/11

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTIONS (3) AND CROSS-MOTION, CONSOLIDATED FOR  
DISPOSITION, ARE DECIDED IN ACCORDANCE WITH  
DECISION FILED HEREWITH.

RECEIVED  
BRONX COUNTY CLERK'S OFFICE

FEB - 2 2011

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 1/26/11

Hon.   
MARK FRIEDLANDER, J.S.C.

**NEW YORK SUPREME COURT-COUNTY OF BRONX  
PART IA-25**

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DARTON D. BESLER,

Plaintiff,

Action No. 1

-against-

Index No. 308112/09

HENRY M. SPERMON AND CINELLI IRON AND  
METAL CO. INC.,

Defendants.

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JOSE I. PALOS-GONZALEZ and ANNA JIMENEZ,

Plaintiffs,

Action No. 2

-against-

Index No. 302456/10

CINELLI IRON AND METAL CO. INC., HENRY M.  
SPERMON AND DARTON BESLER,

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HON. MARK FRIEDLANDER

Plaintiffs in Action No. 2 move for an Order consolidating their action with Action No. 1 and to strike the affirmative defense of personal jurisdiction asserted by defendants Cinelli Iron and Metal Co. Inc. and Henry M. Spermon (hereinafter "Cinelli and Spermon"). Defendants Cinelli and Spermon, in two separate motions, move to dismiss the respective complaints of plaintiff in Action No. 1 and plaintiffs in Action No. 2, on the grounds of lack of jurisdiction. Plaintiff in Action No. 1 cross-moves to dismiss the affirmative defenses of lack of jurisdiction over their person interposed by Cinelli and Spermon. By order dated July 7, 2010, Justice Laura G. Douglas ordered a joint trial of these actions. By further order of Justice Douglas, dated December 15, 2010, the branch of the motion by defendants Cinellia and Spermon for consolidation was permitted to be withdrawn and the motion to strike the affirmative defenses of

personal jurisdiction was referred to the undersigned. The aforementioned motions and cross-motion are consolidated for disposition.

The motion by defendants Cinelli and Spermon to dismiss plaintiff's complaint in Action No. 1 is denied and plaintiff's cross-motion in Action No. 1 to dismiss the affirmative defenses of lack of jurisdiction (the eighth, ninth, tenth and eleventh affirmative defenses contained in Cinelli's and Spermon's answer to the amended complaint) is granted and these affirmative defenses are stricken.

By order dated January 26, 2010 this Court, *inter alia*, denied the motion of defendants Cinelli and Spermon to dismiss plaintiff's complaint in Action No. 1. These defendants, New Jersey domiciliaries, are the corporate owner, and the operator, of a vehicle which was involved in an accident in New Jersey. Defendants claimed that this Court had no jurisdiction over their persons by reason of their insufficient contacts with New York State. Defendants' answer, however, did not contain an objection to jurisdiction, but only asserted improper service of process. Such affirmative defense does not suffice to preserve an objection to jurisdiction based on purported insufficient contacts and constitutes a waiver of any objection to jurisdiction..

*Weisener v. Avis*, 182 A.D.2d 372.

In October, 2010, plaintiff in Action No. 1, served an amended complaint, adding a cause of action on behalf of Liliana Besler, his wife, for loss of services. Defendants Cinelli and Spermon, in their answer to the amended complaint, now assert affirmative defenses of lack of jurisdiction over their person. Having waived the affirmative defense of lack of personal jurisdiction by failing to assert it in their first responsive pleading, said waiver cannot be nullified by adding the missing affirmative defense to a subsequent amendment of the pleading.

*McGowan v. Hoffmeister*, 15 A.D.3d 297 (1<sup>st</sup> Dept. 2005).

Defendants' motion to dismiss the plaintiffs' complaint in Action No. 2 for lack of jurisdiction is granted with respect to defendant Spermon and denied with respect to defendant Cinelli. Plaintiffs' motion in Action No. 2 seeking to strike the affirmative defenses of defendants Cinelli and Spermon (the Eleventh and Twelfth Affirmative Defenses) of lack of long arm jurisdiction and jurisdiction over the defendants is denied with respect to defendant Spermon and granted with respect to defendant Cinelli.

CPLR§301 has been construed to authorize New York courts to exercise jurisdiction over a foreign corporation if it is "engaged in a continuous and systematic course of doing business" in New York to warrant a finding of its presence in this jurisdiction. *Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 N.Y.2d 246, 430-431 (1972). The test for "doing business" requires that "[t]he court ... be able to say from the facts that the corporation is present in the State not occasionally or casually, but with a fair measure of permanence and continuity. *Landoil v. Resources Corp. V. Alexander & Alexander Services, Inc.*, 77 N.Y.2d 28 33-34 (1990). In addition to the traditional indicia of "doing business" in New York, such as the existence of an office, bank account or other property in New York, jurisdiction over a foreign corporation exists where it solicits business in New York and engages in some other continuous activity (*Allojet PLC v. Vantage Assoc.*, 2005 WL 612848 [S.D.N.Y. 2005] [once solicitation is shown "very little more is necessary to a conclusion of doing business" (internal quotation marks omitted)]).

Personal jurisdiction over a non resident individual may also be acquired under CPLR§301 if he or she can be deemed to have a sufficient presence for jurisdictional purposes by

virtue of “doing business” in New York, even as to causes of action unrelated to the business done within the State. *Lancaster v. Colonial Motor Freight Line, Inc.* 177 A.D.2d 152, 159 (1<sup>st</sup> Dept. 1992); *ABKCO Industries, Inc. v. Lennon*, 52 A.D.2d 295 (1<sup>st</sup> Dept. 1975); but see *Nilsa BB v. Blackwell*, 84 A.D.2d 295 (2<sup>nd</sup> Dept. 1981). However, a non-resident individual cannot be subject to such jurisdiction unless he or she is doing business individually, rather than on behalf of a corporation. *Laufer v. Ostrow, supra*; *Lancaster v. Colonial Motor Freight Line, Inc., supra*.

Here, there are no allegations that Spermon, as an individual, ever engaged in any activity whatsoever in New York. Nor is personal or long arm jurisdiction available under the provisions of CPLR§302. *Lancaster v. Colonial Motor Freight Line, Inc., supra*.

The Court notes that the plaintiffs in Action No. 2 do not state the basis for jurisdiction over defendants Cinelli and Spermon. However, plaintiffs’s motion papers cite CPLR§301 as the basis for jurisdiction. Plaintiffs assert that defendant Cinelli has admitted it “does business in New York, has New York customers and pays Highway Use Taxes. More specifically: (1) defendant Cinelli’s website states that it “... offers diversified tri-state services that include *Long Island*, eastern Pennsylvania, and *upstate New York*. This continued expansion of our client base, beyond our New Jersey foundation, can be attributed to our extensive inventory of processing equipment and our dedicated, courteous, and hard working employees.” (*Italics added*); (2) a sales representative for defendant Cinelli provided their investigator with current New York customers, to wit, M & M Hunts Point Bronx, New York, Lukes, Long Island City, New York, and Ferraras, Bronx, New York; and (3) defendant Cinelli pays Highway Use Taxes (HUT) pursuant to Article 21 of the New York State Tax Law, as evidenced by photographs of a

permit issued to a commercial vehicle owned by them.

The affidavit of Steve Pikowski, Chief Operating Officer of defendant Cinelli, submitted in support of its motion to dismiss plaintiffs' complaint, states that Defendant Cinelli does not have and has never had a office or a telephone number located in the State of New York, does not have a permanent and continuous presence in the State of New York, and any work performed by it in the State of New York was performed on a pick-up or delivery basis and not on any sort of a permanent basis. The Court notes that Mr. Pilowski's affidavit, is sworn to on December 2, 2010, almost five weeks after the service of plaintiffs' motion in Action No. 2 to strike defendants' affirmative defenses, is conclusory, fails to provide specifics as to its operations and revenue in the State of New York, and does not address the plaintiffs' submissions as to its "doing business" within the State of New York.

In fact, Cinelli's submissions as to the facts seem more designed to divert attention from the issue of Cinelli's contacts with New York, by detailing instead Cinelli's many contacts with New Jersey. Neither the Court, nor, apparently, plaintiffs, retains any doubts as to Cinelli's very real contacts with New Jersey. This, however, cannot excuse Cinelli's failure to deal with plaintiffs' proofs as to its contacts with New York.

Plaintiffs in Action No. 2 have presented sufficient evidence that defendant Cinelli is "doing business" within the State of New York under CPLR§301.

The foregoing constitutes the Decision and Order of the Court.

Dated: \_\_\_\_\_

1/24/11

  
\_\_\_\_\_  
MARK FRIEDLANDER, J.S.C.