

**Wohl v Landmark Capital II, LLC**

2012 NY Slip Op 33542(U)

September 24, 2012

Supreme Court, Westchester County

Docket Number: 50376/12

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

FILED & ENTERED

9/24/12

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH Supreme Court Justice

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STEVEN J. WOHL, GENOVEVA F. HOWLAND, RICHARD F. HOWLAND, ANDREW W. HOWLAND as Trustees of the GENOVEVA HOWLAND RESTATED MARITAL TRUST, a New York Inter Vivos Trust,

Plaintiffs,

MOTION DATE: 9/7/12 INDEX NO.: 50376/12

-against-

LANDMARK CAPITAL II, LLC and THOMAS KORNFELD,

Defendants.

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The following papers numbered 1 to 10 were read on this motion by defendants for an Order pursuant to CPLR 3211, subdivision (a), paragraph 8 and CPLR 3212 dismissing this action based upon lack of jurisdiction, etc.

Papers Numbered

Notice of Motion - Affidavit (Kornfeld) - Exhs. (A-G) -	
Affirmation (Brodsky) - Exhs. (A-B) .....	1-5
Answering Affidavit (S. Wohl) - Affirmation (Kebbe) - Exhs. (1-21) - Memorandum of Law .....	6-9
Replying Memorandum of Law .....	10

Upon the foregoing papers, it is Ordered and adjudged that

this motion by defendants for an Order pursuant to CPLR 3211, subdivision (a), paragraph 8 and CPLR 3212 dismissing this action based upon lack of jurisdiction is granted. This action is hereby dismissed.

This action arises out of an alleged breach of a purported contract for defendant Landmark Capital II, LLC ("Capital") to purchase from plaintiff Genoveva Howland Restated Marital Trust ("Genoveva") 74.67 percent of Genoveva's limited partner interest in non-party Alpha II Limited Partnership ("Alpha")<sup>1</sup>. Plaintiff had commenced this action on January 11, 2012, alleging that defendant Landmark is a Colorado limited liability company with its principal place of business being located in Colorado, that defendant Kornfeld is a resident of Colorado and that non-party Alpha is a New York limited liability partnership with its principal place of business in Georgia. Plaintiffs further allege that New York has jurisdiction over defendants because both "transact business within New York and contract to supply goods and services in New York," and further that, "upon information and belief," they both "conduct business on a regular and systematic basis in New York." Defendants thereafter each had been served in Denver, Colorado.

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<sup>1</sup>Alpha owns real property leased out to a CVS store in Falls River, Massachusetts and to a Wlagraens in Duluth, Georgia.

Presently defendants are moving to dismiss the complaint predicated upon several reasons.

Firstly defendants argue, correctly in this Court's view, that jurisdiction over them has not been conferred pursuant to CPLR 301 or 302, subdivision (a), because they have no presence in New York, do not regularly engage in purposeful New York business and they have not invoked the privileges of conducting New York business. In support of their argument that jurisdiction over them pursuant to CPLR 301 does not exist, defendants have submitted an unrefuted affidavit from defendant Kornfeld wherein he states that Landmark is a limited liability company in Colorado, that it is not licensed to do business in New York, that it presently does not and never previously did maintain any office in New York, that it has never had a bank account in New York, that it has no New York telephone and keeps no business records in New York, that it has no employees or agents in New York and that it sells no product or service in New York.

Defendants' further contention that long arm jurisdiction pursuant to CPLR 302, subdivision (a), paragraph 1, also does not apply likewise has merit in the circumstances presenting. While under CPLR 302, subdivision (a), proof of a single transaction without physical entry into New York may be sufficient to establish New York jurisdiction, said long arm statute requires that the non-

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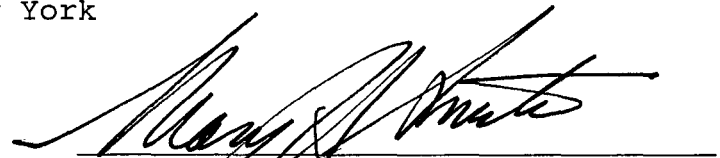
domiciliary defendant have transacted business in New York and that the cause of action arose from that transaction. See Johnson v. Ward, 4 N.Y.2d 516, 519 (2005); Grimaldi v. Guinn, 72 A.D.3d 37, 44 (2<sup>nd</sup> Dept. 2010). However, where a defendant has not engaged in "purposeful activity" in New York, i.e., engaging in volitional acts through which it has availed itself of the privilege of conducting activities in New York and thereby invoking the benefits and protections of its laws, jurisdiction over that defendant does not exist. See Fischbarg v. Doucet, 9 N.Y.3d 375, 380 (2007).

Here, the Court agrees with defendants that no purposeful activity by defendants had occurred in New York by which they had availed themselves of the protections and benefits of New York law. While telephone calls and emails had been exchanged, the law is settled that "communications into New York will only be sufficient to establish personal jurisdiction if they were related to some transaction that had its center of gravity inside New York, into which a defendant projected himself." Three Five Compounds, Inc. v. Scram Technologies, Inc., 2011 WL 5838697 (SDNY 2011); see, also CRT Investments, Ltd. v. BDO Seidman LLP, 85 A.D.3d 470 (1<sup>st</sup> Dept. 2011); Magwitch, L.L.C. v. Pusser's, Inc., 84 A.D.3d 529, 531 (1<sup>st</sup> Dept. 2011); Kimko Exchange Place Corp. v. Thomas Benz, 34 A.D.3d 433, 434-435 (2<sup>nd</sup> Dept. 2006). That there may have even been a large number of telephone calls or communications regarding the

subject contract is simply not persuasive to find otherwise since it is the quality - not quantity - of the communications which is the primary consideration. See Fischbarg v. Doucet, supra, 9 N.Y.3d at 380. The totality of the presenting circumstances surrounding these parties dealing unequivocally establishes that New York was not only not central to the subject business transaction to purchase an interest in Alpha, but it had absolutely nothing to do with New York, and there is no evidence supporting any finding that the parties, post this agreement, had intended to continue any type of business relationship. Accordingly, the Court necessarily finds that defendants have not engaged in purposeful activity.

Having found that personal jurisdiction over these defendants does not exist, the Court need not and will address the remaining additional defense arguments in support of their dispositive motion, including that the subject contract is void for lack of mutuality and that personal jurisdiction over defendant Kornfeld for the alleged corporate breach of contract does not properly lie. But see Murtha v. Yonkers Child Care Association, Inc., 45 N.Y.2d 913 (1978).

Dated: September 24, 2012  
White Plains, New York



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