Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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DATA CURE EVOLUTION INC.
KASHMIR AHUJA

Plaintiff, **Index No. : 12040/11**

-against-

Mot. Seq. 2

ALLIED WALLET, INC.
NICK QUALMAN

Defendants.

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The following papers numbered 1 to 15 read on the motion by defendant for an order pursuant to CPLR 3211(a)(8) dismissing the action as against it and the cross-motion by plaintiff for an order pursuant 305(c) to amend to file an amended summons to amend the caption and for an order granting it a default judgment.

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Upon the forgoing papers and after a Conference scheduled by Order of this Court, dated September 28, 2012, and held on January 24, 2013, the motion and cross-motion are both denied.

As an initial matter, the Court notes that all the papers submitted have different captions as the Summons and the Verified Complaint have different captions. However, after the conference with the parties, the caption on this Order reflects that of the Verified Complaint.

The defendant previously submitted a motion to dismiss on the same grounds, which was denied by order of Justice Marguerite A. Grays, dated December 23, 2011. Only one such motion is permitted (CPLR 3211[e]; Reilly v Prentice, 141 AD2d 520 [2d Dept. 1988]). Moreover, the defendant did not renew or reargue that decision. Instead, a new motion for identical relief was submitted to this Court. This Court cannot overrule a court of coordinate jurisdiction. The Court also notes that the factual averments submitted with the defendant's motion are not in admissible form. The affidavits of California attorney Rudy Dekermenjian purports to affirm his factual averments pursuant to CPLR 2106. However, that statute only permits an attorney licensed in New York State to make such affirmances. The affirmation of former Allied Wallet employee Dominic Volpe, a resident of Arizona, which is labeled "declaration" contains no notarization or associated Certificate of Conformity. The purported "certification" of California attorney David B. Felsenthal as to the laws of California regarding the use of declarations does not conform with CPLR strictures. In addition, the Court notes that the "declaration" of Arizona resident Dominic Volpe was purportedly executed in Chicago, Illinois, thus rendering any certification as to California procedures superfluous. Hence, the defendant's motion could be denied as procedurally defective and unsupported by admissible evidence. However, in the interest of justice, and resolving matters on their merits, rather than the above procedural infirmities alone, the Court will address the jurisdictional issues raised by the defendant's motion.

Due process requires that to exercise jurisdiction over a nonresident defendant, the nonresident defendant must have "minimum contacts" such that maintenance of the action does not offend traditional notions of fair play and substantial justice (*see e.g.* International Shoe Co. v Washington, 326 US 310, 316 [1945]). Due process is not offended "[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there . . . even if not 'present' in that State. . . . New York's long-arm statute, CPLR 302, was

enacted in response to [inter alia that decision]" (Kreutter v McFadden Oil Corp., 71 NY2d 460, 466-467 [1988] [citations omitted]).

Under CPLR 302 (a) (1), the provision at issue here, "a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" CPLR 302 (a) (1) "is a single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though 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" (Kreutter v McFadden Oil Corp., 71 NY2d at 467; *see* Deutsche Bank Sec., Inc. v Montana Bd. of Invs., 7 NY3d 65, 71[2006], *cert denied* 549 US 1095, 127 S Ct 832, 166 L Ed 2d 665 [2006]). Thus, to avail itself of this statute, a plaintiff must not only establish that the defendant purposefully transacted business within the State of New York, but must also show a substantial relationship, which may pertain to a single act, between the transaction and the claim asserted (*see* Deutsche Bank Sec., Inc. v Montana Bd. of Invs., 7 NY3d at 71, Kreutter v McFadden Oil Corp., 71 NY2d at 467).

To satisfy the "transacting business" requirement under CPLR 302 (a)(1), a nonresident defendant must purposefully avail itself of the privilege of conducting activities in New York, thus invoking the benefits and protections of New York law (*see* McGowan v Smith, 52 NY2d 268, 271 [1981]). The totality of the nonresident defendant's activities within the forum state is considered in order to determine whether its contacts satisfy the "transacting business" requirement (*see* Longines-Wittnauer Watch Co. v Barnes & Reinecke, 15 NY2d 443, 457-458 [1965]; Zottola v. AGI Group, Inc., 63 AD3d 1052, 1053-1055 [2d Dept. 2009]).

The extent to which an Internet Web site confers personal jurisdiction in the forum in which the consumer's computer is located has been addressed by several courts (*see generally* In re Ski Train Fire in Kaprun, Austria, 230 F Supp 2d 392 [2002]; Brown v

Grand Hotel Eden, 214 F Supp 2d 335 [2002]; Rodriguez v Circus Circus Casinos, Inc., 2001 US Dist. LEXIS 61, 2001 WL 21244 [SD NY 2001]; Citigroup, Inc. v City Holding Co., 97 F Supp 2d 549 [2000]; Grimaldi v Guinn, 72 Ad3d 37 [2d Dept. 2010]; Vandermark v Jotomo Corp., 42 AD3d 931 [2007]; Kaloyeva v Apple Vacations, 21 Misc 3d 840;[2008]; Sayeedi v Walser, 15 Misc 3d 621, 835 NYS2d 840 [2007]; Boris v Bock Water Heaters, 3 Misc 3d 835 [2004]; Jones v Munroe, 2 Misc. 3d 24, 773 NYS2d 498 [2003]; LB International Inc. v Rainmaker Liquidators Inc., 2010 NY Misc LEXIS 6746 [Sup Ct. Suffolk Co 2010]; Krobath v The Tractor Barn, 2009 NY Misc LEXIS 6185 [Sup Ct. Nassau Co. 2009]; Cushley v Wealth Masters Int'l, 29 Misc3d 144A [App. Term 2d Dept. 2010]).

A useful jurisdictional analysis pertaining to online presence was delineated in Zippo Mfg. Co. v Zippo Dot Com, Inc. (952 F Supp 1119 [1997]), a trademark infringement action brought by the manufacturer of "Zippo" lighters against a computer news service using the Internet domain name of "zippo.com.." The defendant was a California-based news service with an interactive Web site "through which it exchanged information with Pennsylvania residents in hopes of using that information for commercial gain later" (*id.* at 1125) The defendant had entered into news-service contracts with 3,000 Pennsylvania residents and seven "contracts with Internet access providers to furnish services to their customers in Pennsylvania" (*id.* at 1126). Observing that it was the defendant's "conscious choice to conduct business" in Pennsylvania, the court asserted personal jurisdiction based upon the following analysis: "At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper … At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to

those who are interested in it is not grounds for the exercise [of] personal jurisdiction … The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site" (*id*. at 1124).

If the foreign company maintains an informational Web site accessible to the general public but which cannot be used for purchasing services or goods on the site, many courts have found it unreasonable to assert personal jurisdiction over that company (see generally American Homecare Fedn., Inc. v Paragon Scientific Corp., 27 F Supp 2d 109 [1998]; Edberg v Neogen Corp., 17 F Supp 2d 104 [1998]; Boris v Bock Water Heaters, 3 Misc 3d 835 [2004] [*absence of direct solicitation of sales of product rendered Internet presence insufficient to confer personal jurisdiction on the record before the court*]).

However, even passive Web sites, when combined with other business activity, may provide a reasonable basis for the assertion of personal jurisdiction (*see* Grimaldi v Guinn, *supra* at 50; CompuServe, Inc. v Patterson, 89 F3d 1257 [1996]).

If a Web site provides information, permits access to e-mail communication, describes the goods or services offered, downloads a printed order form, or allows online sales with the use of a credit card, and sales are, in fact, made, then the assertion of personal jurisdiction may be reasonable. This seems to be the trend for the sale of goods and services that are delivered after they are ordered by the consumer on his or her home computer.

In the case at bar, it is clear that Allied Wallet's web site is not thoroughly passive in nature. Even if it were, the web site along with the associated business activity, which is not inconsiderable, would provide a basis for the assertion of personal jurisdiction over it.

The “declaration” of Mr. Volpe, were it in admissible form, acknowledges in

paragraph 7 that defendant Allied Wallet "derives less than 5 percent of its revenue from persons and entities in New York." The actual dollar amount of sales representing that 5 percent figure is conspicuously absent. In addition, the affidavit of plaintiff Kashmir Ahuja states that he submitted 6,710 transactions via the defendant's website, and that the defendant's processed 3,210 transactions on behalf of the plaintiffs and received the payments (*see* affidavit of Kashmir Ahuja, page 3, paragraph 12, Exhibit "K" to plaintiff's cross-motion.) The plaintiff contends that the difference between the amounts paid to it by the defendant and the amounts it collected totaled $465,904.69 . It is apparent, therefore, that this is not an isolated transaction over the Internet, but the purposeful creation of a continuing relationship evidenced by numerous emails and other contacts between the parties (*see* Grimaldi v Guinn, 72 AD3d 37 [2d Dept. 2010]). As the Second Department stated in Grimaldi,

> Notwithstanding the foregoing, based on the totality of the circumstances (see Farkas v Farkas, 36 AD3d at 853), in light of the number, nature, and timing of all of the contacts involved, including the numerous telephone, fax, e-mail, and other written communications with the plaintiff in New York that Guinn initiated subsequent to his initial involvement in the project, as well as the manner in which Guinn employed his decidedly passive Web site for commercial access, Guinn must be deemed to have sufficient contacts with this state. Despite the fact that Guinn was not physically present in New York, the exercise of jurisdiction over him by the courts of this state does not offend due process . . .

(Grimaldi v Guinn, 72 A.D.3d 37 at 51)

Accordingly, the defendant's motion is denied in all respects. The defendant is **ORDERED** to interpose an Answer to the plaintiff's complaint within twenty (20) days of the date of service of a copy of this Order with Notice of Entry.

The branch of the cross-motion to include individual defendant Nick Qualman is denied in all respects. Mr. Qualman was included in the original Verified Complaint but his name was left off the Summons, and he never served. In addition, since the plaintiff's redress would be against the corporation of which Mr. Qualman was an employee acting

in the course of his employment, he would have no individual liability.

This constitutes the opinion, judgment, and decision and order of the Court.

Dated: January 24, 2013

TIMOTHY J. DUFFICY, J.S.C.