

Greenberg v Meyreles
2013 NY Slip Op 34180(U)
October 16, 2013
Supreme Court, Nassau County
Docket Number: 1485/13
Judge: Margaret C. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

NEIL H. GREENBERG,

Plaintiff,

-against-

**AL MEYRELES and
ADVANCED AIR AMBULANCE CORP.,**

Defendants.

**TRIAL/IAS PART 26
Index No.: 1485/13
Motion Seq.#'s 001 & 002
Submit Date: 5/23/13**

**DECISION AND
ORDER**

PRESENT: HON. MARGARET C. REILLY, J.S.C.

The following papers having been read on the parties' respective motions:

Defendants' Motion to Dismiss Plaintiff's Verified Complaint, & Exhibits	1
Defendants' Notice of Motion	2
Plaintiff's Cross Motion, Affirmation & Exhibits	3
Reply Affirmation to Plaintiff's Cross Motion & Exhibits	4

Upon the foregoing papers, it is ordered that the parties' respective motions are decided as follows:

The defendants, Advanced Air Ambulance Corp. (hereinafter referred to as "Ambulance Corp") and Al Meyreles move, pursuant to CPLR §3211, for an order dismissing the plaintiff's complaint, upon the grounds that (a) the Court does not have jurisdiction over the defendants; (b) plaintiff's failure to join a necessary party; and (c) plaintiff's failure to state a claim for which relief may be granted. The plaintiff cross moves, pursuant to CPLR §3215, for an order granting a default judgment against both defendants and granting an inquest to determine damages.

PLAINTIFF'S CROSS MOTION

Seq.# 002

The plaintiff asserts that the defendants' motion is untimely as the defendants were served with the summons and complaint on February 8, 2013, and the defendants were required to answer or file a motion to dismiss, by March 8, 2013. On March 15, 2013, the plaintiff's attorney claims that the instant motion was mailed. Plaintiff's counsel further argues that the motion did not contain a notice of motion. On March 27, 2013, after defendant's motion papers were served, the plaintiff received a notice of motion from the defendants.

In reply, the defendants' attorney posits that the instant motion was timely as the US postal tracking, certified, return receipt shows that the summons and complaint was in Mason, Ohio, on the 12th of February, 2013, and thus not received by the defendants until the 15th of February, 2013. As February has 28 days, the defendants' counsel asserts that instant motion was timely.

The Court finds the defendants' motion to be timely and thus the branch of the plaintiff's cross motion (seq.# 002) for an order granting a default judgment to the plaintiff is **DENIED**, in its entirety.

The remainder of the plaintiff's arguments were considered by this Court and **DENIED**, as without merit.

DEFENDANTS' MOTION

Seq.# 001

(a) The branch of the defendants' motion for an order dismissing the plaintiff's complaint upon the grounds of a lack of long arm jurisdiction is determined as follows:

CPLR §302, entitled "Personal Jurisdiction By Acts of Non-Domiciliaries" sets forth in relevant part as follows:

(a) As to a cause of action arising from any of the acts enumerated in this section, a Court may exercise personal jurisdiction over any non-domiciliary, or his executor or

administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortuous act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortuous act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

The defendants claim that the Ambulance Corp. does not conduct any business in New York and has no business contacts in New York. The defendants further assert that Ambulance Corp. is incorporated and conducts business exclusively in Miami-Dade County, Florida. Further, the defendants assert that the contract between the parties sets forth that the contract shall be governed by the law and jurisdiction of the county where Ambulance Corp. is located.

The plaintiff claims that defendant, Ambulance Corp. transacts business in New York because it (1) solicits clients outside the state of Florida; (2) lists testimonials on its website that have former clients, which thank the defendant's crew for transporting their Dad back to New York; (3) Ambulance Corp. website "touts" that it has multiple satellite bases strategically located throughout the U.S.; and (4) a Lexis Nexus business record search reveals that Ambulance Corp. has two New York addresses. The plaintiff further asserts that CPLR §302(a)(1) is a single act statute and thus proof of one transaction in New York is

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sufficient to invoke jurisdiction, even though the defendants never entered New York, so long as the defendants' activities here were purposeful and there is a substantial relationship between the transaction and the claim.

The defendants, in reply, claim that the plaintiff relies on hearsay and inaccurate information. The plaintiff, according to the defendants, has not established that the defendants have New York addresses. Furthermore, the defendants claim that their website only provides informational content and does not allow a person to purchase services or goods from the Ambulance Corp. The defendants further claim that, in this case, the aircraft that was used to transport was not their aircraft, as their aircraft was out of service for maintenance and therefore, Ambulance Corp. requested a third party, American Jets, to cover the transport, crew, medical staff and equipment. The defendants posit that no employees, equipment, aircraft owned, operated or leased by Ambulance Corp. entered the State of New York.

The Court finds that this Court has long-arm jurisdiction, over the defendants, pursuant to CPLR §302(a)(1). It is uncontroverted that the defendants contacted and arranged to provide a service to the plaintiff (*ie* transporting the plaintiff's brother) from Puerto Rico to New York (*see Torrioni v. Unisul, Inc.*, 176 AD2d 623 [1st Dept. 1991]).

In view of the foregoing, the branch of the defendants' motion for an order dismissing the plaintiff's action, pursuant to CPLR §3211(a)(8), is **DENIED**.

(b) The branch of the defendants' motion for an order dismissing the plaintiff's action upon the grounds that American Jets is an indispensable party to the action is **DENIED**.

CPLR §1001(a) asserts in relevant part as follows:

"Parties who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

In the instant case, American Jet is not a party who must be joined in order to allow

the parties complete relief or a party who might be inequitably affected by a judgment. The alleged contract was between the plaintiff and defendants. American Jet is not alleged to have contracted with the plaintiff.

(c) The branch of the defendants' motion to dismiss, based upon the ground that the plaintiff's complaint failed to state a cause of action, is **DENIED**.

On a motion to dismiss, pursuant to CPLR §3211(a)(7), the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiff the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; see *Polonetsky v Better Homes Depot*, 97 NY2d 46 [2001]; *Leon v Martinez*, 84 NY2d 83 [1994]). On a motion to dismiss, the plaintiff has no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint (see *Stuart Realty Co. v Rye Country Store, Inc.*, 296 AD2d 455 [2002]; *Paulsen v Paulsen*, 148 AD2d 685 [2d Dept 1989]; *Palmisano v Modernismo Pub.*, 98 AD2d 953 [4th Dept 1983]).

While it is true that allegations in a complaint are to be taken as true when considered on a motion to dismiss pursuant to CPLR §3211, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (see *Morris v Morris*, 306 AD2d 449 [2d Dept 2003]; *Maas v Cornell University*, 94 NY2d 87 [1999]).

In the instant case, the complaint sets forth viable allegations with regard to breach of contract and fraud cause of actions.

The remainder of the defendants' requested relief, not specifically addressed herein, is hereby **DENIED**.

All parties are directed to appear on **November 20, 2013 at 11:00 a.m.**, at the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, Part 26, for a Conference in this matter.

This constitutes the Decision and Order of this Court.

Dated: October 16, 2013
Mineola, New York

ENTER:


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ENTERED

OCT 29 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE