

Nick v Schneider

2014 NY Slip Op 33903(U)

April 3, 2014

Supreme Court, Nassau County

Docket Number: 011894-13

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
NORMAN NICK, individually, and as President
of The Ashley Group, THE ASHLEY GROUP and
THE MAST GROUP INC.,

TRIAL/IAS PART: 15
NASSAU COUNTY

Plaintiffs,

-against-

Index No: 011894-13

IRWIN N. SCHNEIDER, JOEL C. SCHNEIDER,
ESQ., ESTATE OF HERBERT H. SOMMER, ESQ.,
Deceased, and SOMMER & SCHNEIDER, P.A.,

Defendants.

-----X

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support,
- Affidavit in Support and Exhibits.....X
- Memorandum of Law in Support.....X
- Affidavit in Opposition and Exhibits.....X
- Memorandum of Law in Opposition.....X
- Reply Affidavit in Support and Exhibits.....X
- Reply Memorandum of Law in Support.....X

This matter is before the Court for decision on the motion by Defendant Irwin N. Schneider ("Irwin" or "Moving Defendant") filed December 17, 2013 and submitted February 7, 2014 (motion sequence 1). For the reasons set forth below, the Court reserves decision on the motion and will permit discovery on the issue of personal jurisdiction so that the parties may submit supplemental papers in support of their respective positions on the motion.

BACKGROUND

A. Relief Sought

Moving Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(8), 301 and 302, dismissing the Verified Complaint (“Complaint”) against Moving Defendant on the grounds of lack of personal jurisdiction.

Plaintiffs Norman Nick, Individually, and as President of the Ashley Group, The Ashley Group and The Mast Group, Inc. (“Plaintiffs”) oppose the motion.

B. The Parties’ History

The Complaint (Ex. A to Farley Aff. in Supp.) contains the following summary:

This is an action for Fraud, Aiding and Abetting Fraud, Breach of Fiduciary Relationship, Conversion, Unjust Enrichment, Accounting, and Declaratory Judgment seeking to recover approximately [\$400,000] plus punitive damages and attorney fees. The Defendants induced Plaintiff Norman Nick to deposit monies in their attorney escrow account and made false and fraudulent representations that they would use the funds to make investments in legitimate business ventures. Plaintiff deposited the “investment” money in the Defendant Sommer & Schneider LLP escrow account and the proceeds of the investments were used by the Defendants for personal obligations. The defendants have refused to provide Plaintiffs with an accounting or to return any money to the Plaintiff, except that [\$22,000] was returned by the Defendant JOEL SCHNEIDER on or about March 14, 2012.

The Complaint alleges that Plaintiff Norman Nick (“Nick”) was and is a resident of the State of Florida, County of Palm Beach, and Plaintiff Ashley Investors Corp. (“Ashley”), of which Nick is president, is a Delaware company with its principal place of business in New York City. The Complaint does not contain allegations regarding where Plaintiff The Mast Group, Inc. was incorporated and/or does business. Irwin was, and continues to be, a resident of the State of Florida. The Complaint alleges that the Court has personal jurisdiction over Irwin, pursuant to CPLR §§ 301 and 302, on the grounds that “[Irwin] is a non-domiciliary who transacted [tortious]¹ and fraudulent securities business using the co-defendants as a cover and hiding his financial transactions in the Defendant Sommer & Schneider attorney escrow account” (Compl. at ¶ 1). The Complaint alleges that the tortious and fraudulent acts against Plaintiffs were committed within the County of Nassau (*id.*).

¹ “Tortuous” in original (Compl. at ¶ 1).

The Complaint alleges that Irwin was previously an attorney admitted to practice in New York and before the Securities and Exchange Commission, who was suspended from the practice of law in 1989 as a result of his conviction for a felony. The Complaint alleges that Irwin was convicted again in 1999 of conspiracy to violate securities laws. Defendants Joel Schneider (“Joel”) and Herbert F. Sommer (“Sommer”), now deceased, the son and son-in-law respectively of Irwin, were attorneys who engaged in the practice of securities law. Joel was and is, and Sommer was, a resident of New York. Defendant Sommer & Schneider LLP (“Sommer & Schneider”) is a New York partnership that maintains an office for the practice of law in Garden City, New York.

Plaintiffs allege that Irwin has continued his unlawful business activities through entities including Alaska Pacific Energy Corp. (“ASKE”), Hi Score Corp. (“HSCO”) and AvWorks Aviation Corp. (“SPLI”). Plaintiffs allege that Joel, Sommer and Sommer & Schneider permitted unlawful use of their attorney IOLA escrow account in an attempt to prevent disclosure of Irwin’s fraudulent activities, and to “provide him with a shield of credibility when engaging prospective investors” (Compl. at ¶ 25). The Complaint alleges that the transactions in which Plaintiffs were involved, which form the basis of the Complaint, took place between 2010 and 2012 (*see* Compl. at ¶¶ 26-62). Plaintiffs allege *inter alia* that Irwin represented that Pet Core, Inc. (“Pet Core”) needed funds to purchase shares of Cultural Exchange Network Corp. (“CXT”), and Plaintiffs agreed to provide \$90,000, with the understanding that Sommer & Schneider would prepare a promissory note for the \$90,000 loan. Plaintiffs also allege that Irwin sought funds from Plaintiffs to lend to IntoCell Distributors (“IntoCell”) which is also referred to in the Complaint as “DynaPep” (Compl. at ¶ 35).

In support of the motion, Irwin affirms that he is 81 years old and is a resident of Palm Beach County, Florida, where he and his wife have lived since 1993. They were initially wintertime-only residents of Florida and in November 1999 became full time, year-round residents of Florida. Prior to November 1999, Irwin and his wife resided in New York, where his wife owned real estate. Irwin affirms that he has never owned real property in New York.

Irwin denies the allegations against him in the Complaint. He also affirms that he has never heard of The Mast Group, a named Plaintiff, and affirms that this entity is not connected to the causes of action in the Complaint.

Irwin submits that 1) the Complaint does not contain allegations of any monies being tendered to Irwin; 2) there are no documents, attachments or exhibits attached to the Complaint, and Plaintiffs do not allege that Irwin is in privity of contract with any of the Plaintiffs; 3) the Complaint makes no reference to any documents connected to Irwin; and 4) all of the allegations relate to a Florida corporation and a California corporation, the former of which is located in Palm Beach County, Florida where Nick resided during the relevant time frame, specifically January 2010 and going forward, and where Nick continues to reside.

Irwin affirms that he was recently diagnosed, and underwent surgery for, melanoma that has metastasized. As a result, he is under constant medical observation by his physicians, who are located in Florida, and has been advised not to travel by airplane. When the doctors removed the melanoma, they also removed the lymph nodes under his right arm which has resulted in swelling of the arm which can cause clots. This swelling is exacerbated by changes in atmospheric pressures which make flying painful and dangerous. In May 2013, Irwin's wife underwent surgery to have a rare cancerous sarcoma tumor removed, and is subject to strict medical observation. Irwin affirms that he and his wife lack the financial means to pay for caregivers, should they be required to travel to New York to address this litigation.

Irwin affirms that he and Nick have been neighbors for years who share the same circle of friends. At all relevant times, the corporate Plaintiffs were controlled by Nick who is principally located at his personal residence in Palm Beach County, Florida. Should this matter proceed to trial, in light of the attacks on his character contained in the Complaint, Irwin will call character witnesses who are residents of Florida to testify on his behalf. In addition, the principal fact witnesses to the acts complained of are all residents of and/or domiciled in Florida, and Irwin provides a list of ten (10) of those individuals and entities (Irwin Aff. in Supp. at ¶ 21).

Irwin affirms that, at all relevant times, 1) he has not had any offices located within New York; 2) he has not operated, conducted, engaged in or carried on a business or business venture, or had an office or agency located in New York; 3) he has not had any employees in New York; 4) he has not traveled to New York to conduct business; 5) he has not traveled to New York to solicit business; 6) he has not solicited any business at all; 7) he has been a semi-retired businessman principally making his own private investments; 8) he has never attended a trade show in New York; 9) he has not employed or engaged anyone, in any capacity, to conduct

business in New York or elsewhere; 10) he has not owned, leased or shared property in New York; 11) he has not had any bank accounts or other tangible or real property in New York; and 12) he has not had a telephone listing in New York. Thus, Irving submits, there is no basis to subject him to personal jurisdiction in New York.

In opposition, Nick affirms that Plaintiff Ashley Group is a corporation doing business in New York which maintains its principal place of business in New York, citing to paragraph 4 of the Complaint. Nick provides no details regarding the state of incorporation of Plaintiff The Mast Group, Inc., or where that entity does business. Nick submits that Irwin's affidavit and memorandum of law ignore the fact that this is an action against Irwin, who resides in Florida, and his son and son-in-law who were residents of New York, and maintained their law practice in New York, at the time period referred to in the Complaint.

Nick makes reference to the allegations in the Complaint that Plaintiffs, at the direction of Irwin, provided money that was deposited in the Sommer & Schneider escrow account ("Escrow Account") in 2010 and 2011 (Compl. at ¶¶ 77-79). Nick affirms that Irwin directed Nick to make the first deposit of \$90,000 into the Escrow Account, and provides, in support, a typewritten document titled "Wire Transfer Instructions" pertaining to the Escrow Account (Ex. 1 to Nick Aff. in Opp.) that contains handwritten notes at the bottom reading, *inter alia*, "Ashley Investors Corp - or Beverly Marlowe \$90,000." Nick also affirms that on May 26, 2010, Irwin sent an email to Nick with an accounting for Ashley for the transaction involving Pet Core, and provides a copy of the email (Ex. 5 to Nick Aff. in Supp.) which reads as follows:

Re: Pet Core

Norman: the following is an accounting of your transaction with Pet Core:

1. Loaned-----\$90,000
2. Received at Sommer and Schneider in Payment of Note—\$125,000 plus default interest of \$888.50—Total \$125,888.50
3. Additional Consideration to Ashley—\$250,000 shares of Pet Core Common Stock. Those shares are held by me for the account of Ashley and will be sold as per instructions. Estimated gross return \$75,000. Proceeds of sales will be disbursed as per the instructions of Ashley.
4. As per instructions of the \$125,888.50, \$60,000 was loaned to DynaPep. A new Note and warrants [sic] will be delivered to Ashley next week,
5. Remaining on hand with Sommer and Schneider for the account of Ashley

is the sum of \$65,888.50

Pet Core is seeking some limited financing. If you have any interest call me.

Irwin

Nick affirms that he deposited his personal funds into the Escrow Account on August 2, 2011, and provides a March 15, 2012 letter from TD Ameritrade (Ex. 6 to Nick Aff. in Opp.) confirming that Nick withdrew \$80,000 by wire from his TD Ameritrade account and sent those funds to an account for the benefit of "Sommer Schneider Escrow." Nick affirms that, without Plaintiffs' knowledge or consent, Defendants disbursed approximately \$80,000 and deposited a series of escrow checks into the Sommer & Schneider business account at TD Bank. Nick provides a list of wire transfers for the period of April 8, 2010 to June 25, 2010 (Ex. 4 to Nick Aff. in Opp.) which reflects that Irwin received from the Escrow Account a \$5,000 wire transfer on April 9, 2010, a \$3,000 wire transfer on April 27, 2010 and a \$7,500 wire transfer on June 23, 2010.

Nick affirms that, pursuant to the terms of the promissory note, as soon as reasonably possible after receiving the CXT related payments, the escrow agent was to pay Ashley principal and interest and return the note to payor marked "paid in full." Irwin advised Nick that the funds were to be used for a gold mining venture and, if the venture did not materialize, the escrow funds would be returned. On or about August 24, 2011, Nick asked Joel to provide him with an escrow agreement, and Joel said that he would prepare one and give it to his father (Irwin). Nick and Irwin exchanged a string of emails dated January 31, 2012 and February 1, 2012 (Ex. 7 to Nick Aff. in Opp.) which read as follows:

From Nick to Irwin:

Irwin, I just want conf[i]rmation that you rec'd the instruction to wire out the money that your son is holding in his escrow a/c.

Would appreciate confirmation so it can be traced if need be.

Thanks.

From Irwin to Nick:

It is 10:15 PM and I just received your messages. I received the instructions which I accepted as confirmation of the cancellation [of] the Geo Subscription. I did not reach Joel today because he was, I believe, out of town. Tomorrow I will advise him of the cancellation and have Mike Mihelic confirm to Joel the acceptance of the

termination of the agreement and release [] the escrowed funds.

From Nick to Irwin:

What is the Geo Subscription? Never heard of this? What does it have to do [with] the the [sic] escrow \$'s?

Nick affirms that on or about February 1, 2012, Irwin confirmed to Plaintiff that the venture did not materialize and the money held in escrow would be returned. By email dated February 8, 2012 (Ex. 8 to Nick Aff. in Opp.), Irwin advised Nick that "we have an identity problem that is still causing problems. Joel has asked his bank to identify and verify the sending source. I am doing what I can to assist." Nick tried, unsuccessfully, to discuss the matter with Joel and subsequently received a February 9, 2012 email from Irwin (Ex. 9 to Nick Aff. in Opp.) which read as follows:

Norman: You are correct. Funds in the past were transferred to Sommer and Schneider for investments made by Ashley. In each instance the funds were transferred from a law firm you held out to be the law firm representing Ashley and all investments were duly made in the name of Ashley. In the present circumstance, I specifically asked you (as late as several days ago) where the \$80,000 came from and you, unhesitating advised me "from Ashley's account". I sent that info on to Joel and it was only after I advised you that he had elected to trace the source of the funds, did you, for the first time, fax me info that indicated that said funds came from "Norman Nick (Trust?). What is even more interesting is that you advised me that the funds were transferred from Fidelity (where I suspect Ashley maintains an account) but YOUR instructions are addressed to Ameritrade.

Norman, I will pass everything on to Joel and will speak with him this afternoon, but the call is his. I will advise you after I speak with him.

Irwin

Nick provides an email from Joel to Nick dated March 14, 2012 (Ex. 10 to Nick Aff. in Opp.) in which Joel advised Nick that his law partner Sommer had recently passed away, that Joel never handled the "accounting side" of his firm's business and was uncertain whom the funds in the Escrow Account belonged to, but Joel had requested that his accountant recreate the deposits and withdrawals in the Escrow Account. Joel advised Nick that he was wiring him \$20,000 "as a sign of good faith" and that the balance would be sent "once I received assurance from my accountant as to the owners of the funds in that account." Nick affirms that on March 22, 2012, Joel mailed a check in the amount of \$22,000 to Nick.

Nick affirms that, after he filed a grievance on April 8, 2012, Joel responded by letter dated July 24, 2012 (Ex. 11 to Nick Aff. in Opp.). In that letter, Joel advised the Grievance Committee that neither he, Sommer nor Sommer & Schneider ever represented Nick or had any communications with him prior to the deposit of \$80,000 into the Escrow Account. Joel also stated that, after the wire was received on or about August 11, 2011, there was no communication with Nick, and there was never a retainer agreement, escrow agreement or attorney-client relationship with Nick. Joel advised the Grievance Committee that the only discussions that he had regarding the \$80,000 were with Irwin, his father, who advised Joel that he was wiring the money into the Escrow Account for potential investments.

In reply, Irwin provides the following exhibits: 1) a New York State Department of State ("DOS") Division of Corporations printout for Ashley Group Inc. which reflects that it was dissolved on June 26, 1991 (Ex. C to Farley Reply Aff.), 2) a DOS printout for Ashley Investors Corp. which reflects that it was dissolved on June 26, 1991 (*id.* at Ex. D), 3) a DOS printout for The Ashley Group, LTD. reflecting that it was dissolved on April 2, 2008 (*id.* at Ex. E), and 4) a DOS printout for The Mast Group reflecting that no business entities were found for that entity.

C. The Parties' Positions

Irwin submits that he does not have the required presence in New York within the meaning of CPLR § 301 to warrant the exercise of jurisdiction over him in light of the fact that Irwin 1) does not live in New York; 2) does not work in New York; 3) does not maintain offices, record, bank accounts or telephone listings in New York; 4) does not own real estate in New York; 5) does not file taxes in New York; 6) does not solicit or advertise business in New York; and 7) does not transact business in New York.

Moreover, Irwin argues, 1) the exercise of jurisdiction over Irwin in New York, pursuant to CPLR § 302(a)(1), is not warranted because Irwin did not engage in purposeful activity in New York, and Plaintiffs' claims do not have the required relationship to New York; 2) Irwin is not subject to jurisdiction in New York, pursuant to CPLR § 302(a)(2) because the Complaint does not allege, and the Court cannot infer, that Irwin committed a tort against Nick while physically in New York; 3) Irwin is not subject to jurisdiction in New York, pursuant to CPLR § 302(a)(3) because, even assuming *arguendo* that Irwin engaged in tortious conduct, the injury from such conduct would have been caused in Florida, where Nick is domiciled and doing business; and 4) there is no basis for exercising jurisdiction over Irwin in New York, pursuant to CPLR § 302(a)(4), because the instant action does not concern real property in New York, and

Irwin does not own, use or possess real property in New York.

Irwin argues, further, that New York's exercise of jurisdiction over him would violate due process. Irwin submits that there would be a substantial burden on him if this matter were litigated in New York in light of his age, the fact that relevant evidence and documents are in Florida, and the fact that prospective witnesses reside in Florida. Irwin submits that New York has no interest in this dispute, in light of the fact that 1) it involves two Florida residents; 2) Nick is not organized under New York law or doing business here; 3) the people and businesses affected by this lawsuit are not in New York; and 4) the conduct complained of occurred, if at all, in Florida, which is the only jurisdiction with an interest in this dispute.

In opposition, Plaintiffs submit that 1) the Court has personal jurisdiction over Irwin, pursuant to CPLR § 302(a)(1), in light of the allegations in the Complaint that Irwin used the co-defendants, residents of New York, to conduct his investment business, using their office, bank accounts and escrow accounts, and in consideration of the fact that New York, not Florida, has the stronger interest in regulating the conduct of its attorneys, including Irwin who used the Escrow Account to commit tortious acts;² 2) the Court has personal jurisdiction of Irwin, pursuant to CPLR § 302(a)(2), in light of the Nick affidavit and supporting documentation which establish that Irwin "regularly conducted a substantial investment enterprise" (Ps' Memo. of Law at p. 14) through the co-defendants, who resided and worked in New York; 3) if the Court deems the basis for personal jurisdiction pursuant to CPLR § 301 or 302, is insufficient, the Court should provide Plaintiffs with the opportunity to conduct discovery pursuant to CPLR § 3211(d); 4) the exercise of jurisdiction over Irwin in New York does not offend due process as the facts alleged in the Complaint, coupled with the Nick affidavit and supporting exhibits, satisfies the "minimum contacts" requirement, and it would be reasonable to exercise jurisdiction over Irwin in New York in light of the fact that a) Irwin has provided no medical records or other documentation in support of his medical claims and lack of financial resources; b) five (5) of the witnesses to whom Nick refers are not relevant to the substantive allegations in the Complaint, as their names were mentioned in the Complaint solely in relation to their prior dealings with Irwin; c) for years, Irwin has used his New York contacts, knowing that conduct might subject him to jurisdiction in New York; d) New York is the center of the escrow transactions, as the bank institutions where the escrow accounts were maintained and disbursed were located in New

² Without conceding lack of jurisdiction pursuant to CPLR § 301, Plaintiffs' memorandum of law discusses CPLR §§ 302(a)(1) and (2) (Ps' Memo. of Law in Opp. at p. 5).

York; e) relevant evidence, including bank records and the co-defendants who controlled the escrow accounts, is in New York; and f) concluding that Irwin is subject to jurisdiction in New York will not erode any shared social policies of New York and Florida.

In reply, Irwin submits *inter alia* that 1) Plaintiff's opposition papers do not contain any argument supporting general jurisdiction pursuant to CPLR § 301 and, therefore, the Court should conclude that there exists no general jurisdiction over Irwin pursuant to CPLR § 301; 2) Plaintiffs have failed to allege facts demonstrating that Irwin is subject to jurisdiction in New York pursuant to CPLR § 302(a)(1) or 302(a)(2); Plaintiffs have not provided the requisite connection to New York simply by alleging that the defendants are co-conspirators, as the Complaint does not demonstrate, and Plaintiffs have not offered credible evidence demonstrating, that such a conspiracy existed; and 3) as Plaintiffs' opposition papers do not address Irwin's arguments with respect to CPLR § 302(a)(3) or 302(a)(4), the Court should conclude that Plaintiffs have conceded that jurisdiction under those sections does not exist.

RULING OF THE COURT

CPLR § 302 provides, in pertinent part:

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...who in person or through an agent: 1) transacts any business within the state...; or 2) commits a tortious act within the state...; or 3) commits a tortious act without the state causing injury to a person or property within the state...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.

Personal jurisdiction over a defendant that engages in purposeful activity is proper because the defendant has invoked the benefits and protections of our laws. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Thus, a defendant may transact business in New York and be subject to personal 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. *Fischberg v. Doucet*, 9 N.Y.3d 375, 380 (2007). Not all purposeful activity, however, constitutes a transaction of business within the meaning of CPLR § 302(a)(1). Although it is impossible to precisely fix those acts that constitute a transaction of

business, it is the quality of the defendant's New York contacts that is the primary consideration. *Fischbarg v. Doucet*, 9 N.Y.3d at 380.

Where jurisdiction is predicated upon the commission of a tortious act within the state, plaintiff must make a showing that at least part of the misconduct charged took place in New York. *Roddy v. Schmidt*, 57 N.Y.2d 979, 982 (1982). To commit a tortious act within New York, defendant must be "physically present" in the state either personally or through an agent. *Maranga v. Taj Maran Intn'l*, 386 F. Supp. 2d 299, 310 (S.D.N.Y. 2005).

Where jurisdiction is predicated upon the commission of a tortious act without the state causing injury within the state, plaintiff must make a showing that defendant had "sufficient economic contact" with the state. *McGowan v Smith*, 52 N.Y.2d 268, 273 (1981). The term "tortious act without the state" is broadly defined to encompass types of injury not recognized in New York, provided our public policy and notions of fairness are not offended. *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 85 (2006).

In *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 (1988), the Court of Appeals noted that, pursuant to CPLR § 302(a)(1), the court is authorized to exercise jurisdiction over a non-domiciliary of New York State for tort and contract claims arising from the defendant's transaction of business in this state. 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. *Id.* at 467. So 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, due process is not offended if that party is subjected to jurisdiction even if not present in the state. *Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 71 (2006), *cert. den.*, 549 U.S. 1095 (2006), quoting *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d at 466.

Whether a defendant has engaged in sufficient purposeful activity in New York to confer jurisdiction in this state requires an examination of the totality of the circumstances. *Farkas v. Farkas*, 36 A.D.3d 852, 853 (2d Dept. 2007); *Multi-Modal Intern., Inc. v. Anglia North America, Inc.*, 227 A.D.2d 600 (2d Dept. 1996). A non-domiciliary transacts business under CPLR § 302(a)(1) when he purposefully avails himself of the privilege of conducting activities within New York thus invoking the benefits and protections of its laws. No single event or contact

connecting defendant to the forum state need be demonstrated. Rather, the totality of all of defendant's contacts must indicate that the exercise of jurisdiction would be proper. *CutCo Industries, Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986).

The overriding criterion to establish a transaction of business is some act by which the defendant purposefully avails himself of the privilege of conducting activities within New York State. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007), citing *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382 (1967), quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), *reh. den.*, 358 U.S. 858 (1958). Although it is impossible to precisely fix those acts that constitute a transaction of business, the Court of Appeals' precedents establish that it is the quality of the defendant's New York contacts that is the primary consideration. *Grimaldi v. Guinn*, 72 A.D.3d 37, 44 (2d Dept. 2010), quoting *Fischbarg v. Doucet*, 9 N.Y.3d at 380.

If the court determines that a defendant has transacted business pursuant to CPLR § 302(a)(1), then it must further ascertain whether the exercise of that discretion comports with due process. *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000). Due process is not satisfied unless a non-domiciliary has minimum contacts with the forum state. The test has come to rest on whether a defendant's conduct and connection with the forum state are such that it should reasonably anticipate being haled into court there. *Id.*, quoting *World-Wide Volkswagen, Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

To satisfy the minimum contacts requirement, it is essential that there be some act by which defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of the law. *Hanson v. Denckla*, 357 U.S. at 253. The ultimate burden of proof on the issue of personal jurisdiction rests with the party asserting jurisdiction. *Shore Pharmaceutical Providers, Inc., v. Oakwood Care Center, Inc.*, 65 A.D.3d 623, 624 (2d Dept. 2009). That burden, however, does not entail making a *prima facie* showing of personal jurisdiction; rather, the plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant. *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 408 (2d Dept. 2005), citing *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 467 (1974). Moreover, the evidence presented by the parties must be viewed in the light most favorable to the plaintiff. *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 987 (2d Dept. 2007).

In opposing a motion to dismiss pursuant to CPLR § 3211(a)(8) on the ground that

discovery on the issue of personal jurisdiction is necessary, plaintiff need not make a *prima facie* showing of jurisdiction, but must instead only set forth a sufficient start, and show that its position is not frivolous. The plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant. *Castillo v. Star Leasing Co.*, 69 A.D.3d 551, 552 (2d Dept. 2010), citing *Shore Pharm. Providers, Inc. v. Oakwood Care Ctr.*, 65 A.D.3d 623, 624 (2d Dept. 2009) and *Ying Jun Chen v. Lei Shi*, 19 A.D.3d at 408, quoting *Peterson v. Spartan Indus.*, 33 N.Y.2d at 467.

If it appears from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot be stated, a court may, in the exercise of its discretion, postpone resolution of the issue of personal jurisdiction. *Goel v. Ramachandran*, 111 A.D.3d 783, 788 (2d Dept. 2013), quoting CPLR § 3211(d).

The Court reserves decision on the motion and will permit discovery on the issue of personal jurisdiction so that the parties may submit supplemental papers in support of their respective positions on the motion. The Court cannot conclude, based on the record before it, that there clearly exists a basis for the exercise of personal jurisdiction over Irwin in New York, in light of the issues raised by Irwin in his motion papers regarding whether, and the extent to which, Irwin was transacting business in New York and/or engaged in conduct that warrants the exercise of jurisdiction over him in New York. The Court also concludes, however, that Plaintiffs have established that discovery on the issue of personal jurisdiction over Irwin in New York is necessary, by setting forth a sufficient start, and showing that their position is not frivolous. Plaintiffs have alleged that Irwin, a disbarred attorney from New York whose son and son-in-law resided and practiced law in New York during the time period alleged in the Complaint, made use of the co-defendants' New York bank accounts to perpetrate the fraud alleged in the Complaint, and the evidence provided by Nick, including numerous emails between Irwin and Nick, arguably corroborates Plaintiffs' allegations in this regard. Moreover, on the issue of whether the exercise of jurisdiction over Irwin in New York comports with due process, the Court notes that Irwin has provided no documentation in support of his allegations regarding his medical and financial difficulties. Under these circumstances, the Court concludes that discovery on the issue of personal jurisdiction over Irwin in New York is necessary, reserves decision on the motion and will permit discovery on the issue of personal jurisdiction so

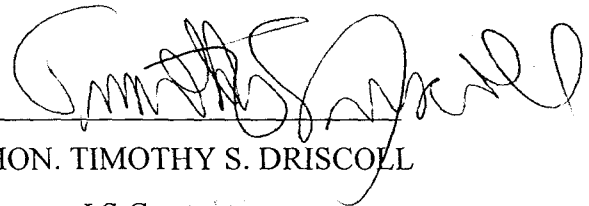
that the parties may submit supplemental papers in support of their respective positions on the motion.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on April 10, 2014 at 11:00 a.m.

ENTER

DATED: Mineola, NY

April 3, 2014



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 11 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE