

**Sahn v Garden State Home Care Servs., LLC**

2018 NY Slip Op 30347(U)

February 23, 2018

Supreme Court, New York County

Docket Number: 159335/2017

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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Emilya Sahn, Guardian to the Person and Property of  
Rita Gurevich, an incapacitated person,

Plaintiff,

Index No.  
159335/2017

**DECISION and  
ORDER**

- against -

Mot. Seq. #001

Garden State Home Care Services, LLC,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for medical malpractice and breach of contract. It was commenced by the filing of the Summons and Complaint on October 20, 2017. As alleged in the Complaint, Rita Gurevich (“Gurevich”) is an incapacitated individual. Gurevich previously resided at 211 Pond Terrace, Washington, New Jersey, and currently resides in 334 East 92<sup>nd</sup> Street, Apartment 5C, New York, New York. Plaintiff Emilya Sahn (“Sahn”) is Gurevich’s daughter and was appointed Gurevich’s guardian on October 3, 2017. Sahn resides at 2 East Avenue, Apartment 3B, New York, New York 10075. Defendant Garden State Home Care Services, LLC (“GSHC”) is a New Jersey licensed health care service provider regulated by the State of New Jersey. In July 2016, Sahn entered into an agreement with GSHC for GSHC to provide full time home care services to Gurevich at Gurevich’s NJ residence, from August 2016 through October 2016. Sahn asserts that GSHC was negligent in its performance of its services and failed to detect and address bed sores on Gurevich. Sahan alleges that as a result, Gurevich received medical treatment, was hospitalized, and suffers from a permanent condition.

GSHC moves for an Order, pursuant to CPLR § 3211(a)(8), dismissing the complaint for lack of personal jurisdiction. GSHC submits: the attorney affirmation of Jeffrey T. Wolber; Summons and Complaint; Affidavit of Service; and the affidavit of David Feygin (“Feygin”), the Administrator of GSHC. Sahn opposes and

submits the attorney affirmation of Michael A. Santo; emails between Sahn and Feygin of GSHC; and checks made payable to GSHC.

### CPLR 3211 Standard

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction over the person of the defendant;

Personal jurisdiction must be authorized under the CPLR and consistent with the Due Process Clause of the United States Constitution. In order to defeat a motion to dismiss for lack of personal jurisdiction, “the opposing party need only demonstrate that facts ‘may exist’ whereby to defeat the motion.” (*Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 466 [1974]; *American BankNote Corp. v. Daniele*, 45 A.D.3d 338, 340 [1st Dep’t 2007]; CPLR § 3211[d]). A prima facie showing of jurisdiction “simply is not required.” (*Peterson*, 33 N.Y.2d at 467). Where a plaintiff seeks disclosure on the issue of personal jurisdiction pursuant to CPLR § 3211(d), the plaintiff need only set forth a “sufficient start” to warrant the discovery and show that its position is “not frivolous.” (*Id.*).

### CPLR § 302(a)(1)

CPLR § 302(a)(1) permits a court to exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, transacts any business within the State, provided that the cause of action arises out of the transaction of business. (CPLR § 302 [a][1]; *Lebel v. Tello*, 272 A.D.2d 103, 103-04 [1st Dep’t 2000]). 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, as long as the requisite purposeful activities and the connection between the activities and the transaction are shown.” (*Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 21 A.D.3d 90, 93-94 [1st Dep’t 2005]). For purposes of CPLR § 302(a)(1) jurisdiction, “[p]urposeful activities are those with which a defendant, through volitional acts, ‘avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” (*Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 [2007]). Alternatively, cumulative minor activities may provide sufficient grounds for “transaction of business” jurisdiction pursuant to

CPLR §302(a)(1), so long as the cumulative effect creates a “significant presence” in the State. (*O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 200 [1st Dep’t 2003]; CPLR § 302 [a][1]). In either event, “it is the quality of the defendant[’s] New York contacts that is the primary consideration.” (*Fischburg*, 9 N.Y.3d at 380). The “test is whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy.” (*Otterbourg, Steindler, Houston & Rosen, P.C. v Shreve City Apartments*, 147 A.D.2d 327, 331 [1st Dept 1989]). “More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York.” (*Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 376, 23 N.E.3d 988 [1st Dept 2014]).

In order “[t]o determine whether a party in a contract action has ‘transacted business’ within the meaning of Section 302(a)(1),” courts will consider the following factors:

- (i) whether the defendant has an on-going contractual relationship with a New York corporation;
- (ii) whether the contract was negotiated or executed in New York and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship;
- (iii) what the choice-of-law clause is in any such contract; and
- (iv) whether the contract requires [the defendant] to send notices and payments into the forum state or subjects them to supervision by [a] corporation in the forum state.

(*Skrodzki v. Marcello*, 810 F. Supp. 2d 501, 509 [E.D.N.Y. 2011]).

“Another important factor is whether the contract is to be performed in New York.” (*Skrodzki*, 810 F. Supp. 2d at 509). No single factor is determinative; instead, the court will examine the totality of the circumstances to determine whether there is personal jurisdiction over a party. (*Id.*).

Generally speaking, “interstate negotiations by telephone, facsimile, or mail are insufficient to impose personal jurisdiction in New York on a non-resident defendant.” (*Professional Personnel Mgmt. Corp. v. Southwest Medical Assocs.*, 216 A.D.2d 958, 958 [4th Dep’t 1995]; *Glassman v. Hyder*, 23 N.Y.2d 354, 363 [1968]). “[C]ourts seem generally loath to uphold jurisdiction under the ‘transaction in New York’ prong of CPLR 302 if the contract at issue was negotiated solely by mail, telephone and fax without any New York presence by the defendant.” (*Worldwide*

*Futgol Associates, Inc. v. Event Entm't, Inc.*, 983 F. Supp. 173, 177 [E.D.N.Y. 1997]). “[N]o court has extended §302(a)(1) to reach a nondomiciliary who never entered New York, who was solicited outside of New York, who performed outside of New York such services as were performed, and who is alleged to have neglected to perform other services outside of New York.” (*Mayes v. Leipzieer*, 674 F.2d 178, 185 [2d Cir.1982] cited by *Skrodzki*, 810 F. Supp. 2d at 512). On the other hand, a non-resident’s “solicitation of [a New York resident] in New York and their frequent communications . . . in this state” may be sufficient to form the basis of personal jurisdiction in New York. (*Fischbarg*, 9 N.Y.3d at 383).

Here, GSHC asserts that the Court lacks personal jurisdiction over GSHC and therefore the action should be dismissed. In his affidavit, Feykin, GSHC’s Administrator, avers that GSHC is a New Jersey limited liability company and is not “incorporated, licensed, registered to do business, or authorized to do business in New York at the time of the conduct alleged in complaint or of the purported service of process.” (Feykin’s affidavit at ¶3). Feykin further avers that GSHC maintains a principal place of business in New Jersey and does not maintain any place of business in New York and does not own any real property in New York. (Feykin’s affidavit at ¶4). He further avers that GSHC is a company that offers home health care services to individuals only in New Jersey. (*Id.* at ¶5). Feykin further avers GSHC does not do business in New York, and does not derive any substantial revenue from New York or any state other than New Jersey. (*Id.* at ¶5-6). Feykin avers that all services provided by GSHC were rendered to Gurevich in New Jersey. *Id.* at ¶8).

In opposition, Sahn contends that GSHC has “sufficient ties” to New York to warrant jurisdiction over GHSC including the following: the “initial contact”; contract as to services; emails between Sahn and Feykin regarding invoices and payment; acceptance of checks; Gurevich’s subsequent care at a hospital and with doctors in New York County; and Gurevich’s incapacity status and Sahn’s appointment as guardian over Gurevich in October 2017 after GSHC’s services terminated.

In her affidavit, Sahn avers that although GSHC provided services to her mother Gurevich in Gurevich’s home in New Jersey, GSHC’s “actions, communications with [her], requests for payment by [her] and the ultimate medical results and treatment of/for my mother all in New York County [are] all collectively sufficient to cause this Honorable Court to have jurisdiction over this particular action.” Specifically, Sahn avers that in July 2016, she contracted with GSHC to provide home care services to her Gurevich from August 2016 through October

2016. (Sahn's affidavit at ¶ 5). Sahn states, "To the best of my knowledge, there was a written agreement. I have searched for the agreement and can no [sic] locate it; however, it was noted in my communications with David Feygin, the defendant's Administrator, as noted in my emails." (*Id.* at ¶ 6). Sahn avers:

Upon information and believe, my counsel has requested a copy of the "agreement" from the defendant and the defendant has failed to provide same." It is my understanding that all [sic] times, the agreement and payments concerning my mother's care by the defendants were contracted and paid through me since my mother did not have the capacity to sign and/or understand same; this was the ultimate basis of my application and the granting of an Order appointment me as the Guardian over the property and person of my mother.

(*Id.* at ¶ 10-11).

Sahn further avers that GHSC accepted payments through checks that were drawn either on her mother's New Jersey bank account with Sahn's Power of Attorney or on Sahn's own New York personal account. (Sahn's affidavit at ¶7).

In reply, GHSC reiterates its position that dismissal is warranted based on a lack of personal jurisdiction. Furthermore, GSHC states that Sahn has failed to demonstrate the need for jurisdictional discovery. GSHC argues that that to foreclose any argument that the contract is relevant to the question of jurisdiction, GSHC submits a copy of the blank Client Services Agreement that was sent in the email referenced by Sahn. The agreement has no exclusive forum provision.

Here, accepting Sahn's allegations as true, Sahn asserts that GSHC engaged in activities in New York, namely, through its interactions with her, a resident of New York. Sahn asserts that her "initial contact" with GHSC is one such interaction. However, Sahn does not specify the "initial contact" between her and GSHC. From the emails attached to Sahn's affidavit, it appears that the initial contact was a phone call. (See email from Feykin on August 29, 2016: "Dear Mila, It was a pleasure speaking to you today ...") However, no additional details are provided by Sahn regarding this "initial contact" – namely, whether she initially contacted GSHC or a representative of GHSC contacted her. "[A] non-domiciliary transacts [i.e., GSHC] business when on his [or her] own initiative ... [the non-domiciliary] project[s] himself [or herself] into this state to engage in a sustained and substantial transaction

of business. (*Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 376–77 [NY 2014] [citations omitted]). “Thus, where the non-domiciliary [GSHC] seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1).” (*Paterno*, 24 N.Y.3d at 377). Here, there is no allegation that GSHC sought and initiated the contact with Sahn, who resides in New York. Even assuming *arguendo* that GSHC contacted Sahn and solicited Sahn’s business in New York, “mere solicitation of business within the state does not constitute the transaction of business within the state, unless the solicitation in New York is supplemented by business transactions occurring in the state or the solicitation is accompanied by a fair measure of the defendant’s permanence and continuity in New York which establishes a New York presence.” (*O’Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 201 [1st Dept 2003]).

Sahn further argues that the parties’ contract is a basis for personal jurisdiction because she believes “[to] the best of [her] knowledge there was a written agreement” that she signed. Sahn provides no additional details regarding the contract negotiations or execution of the possible written agreement.

Here, Sahn believes that there is a written contract between the parties that she signed. However, based on this record, any agreement would have been negotiated through remote electronic communications. Sahn makes no allegation that GSHC entered New York at any time. Further there is no proof that GSHC knew it was engaging with a New York resident; Sahn at all times was acting on behalf for Gurevich, a New Jersey resident. Moreover, it is undisputed that the agreed upon services were to be rendered exclusively in New Jersey by a GSHC, to Gurevich, a New Jersey resident. Accordingly, even if there was a contract between the parties that Sahn signed, the totality of the circumstances disfavor personal jurisdiction over GSHC based on all other facts.

Sahn further argues that GSHC’s email exchanges with her, a resident of New York, regarding billing constitute “continued contacts” between GSHC and New York sufficient for jurisdictional purposes. These email exchanges, annexed to Sahn’s affidavit as Exhibit A, are as follows: 8/19/2016 email from Feygin to Sahn attaching a “client agreement” for signature and confirming that he may email Sahn with weekly invoices going forward; 8/29/2016 email from Feygin to Sahn attaching an invoice for the first week of service for Gurevich; and email exchanges between Feykin and Sahn from 9/20/2016 through 11/30/2016 regarding invoices and payment for services rendered. “It is not the quantity but the quality of the contacts that matters under our long-arm jurisdiction analysis.” (*Paterno v. Laser Spine Inst.*,

24 N.Y.3d 370, 378 [2014]. In *Paterno*, the court held that the telephone calls and email communications between the plaintiff, a resident of New York, with defendant Laser Spine Institute, which was located in Florida, concerning the treatment that plaintiff was to receive in Florida “were responsive in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction over these out-of state defendants.” (*Id.* at 378). Here, the email exchanges between Feykin and Sahn are limited to the issue of payment for the services being rendered to Gurevich in New Jersey by GHSC, a New Jersey licensed home health care provider. There is further no evidence that GHSC was aware that Sahn resided in New York at the time these emails were exchanged or any other relevant time.

Sahn further argues that GSHC’s acceptance of checks as payment confers personal jurisdiction by this Courts over GHSC. These checks issued to GHSC are as follows: check dated October 2, 2016 in the amount of \$925.00; October 2, 2016 in the amount of \$1,295.00; October 10, 2016 in the amount of \$1,295.00; November 12, 2016 in the amount of \$1,295.00, and January 6, 2017 in the amount of \$1,295.00, and April 7, 2017 in the amount of \$200.00. These checks were issued to GHSC by Sahn, as Power of Attorney of Gurevich. The October 2, 2016 and November 12, 2016 checks were drawn from Rita and Valentin Gurevich’s New Jersey Citibank bank accounts and identify a New Jersey address. The rest of the checks are drawn from Rita Gurevich’s Citibank New Jersey account but identify the address of 334 East 92<sup>nd</sup> Street, 5C, NY, NY 10128. All checks were deposited into GSHC’s New Jersey Bank of America bank account. While Sahn may have signed the checks in New York, this does not change that they were drawn from New Jersey bank accounts, deposited into a New Jersey bank account, and were for payment for services rendered exclusively in New Jersey and outside New York.

Lastly, Sahn argues that Gurevich’s subsequent medical care in New York County, Gurevich’s incapacity and Sahn’s appointment as guardian over Gurevich are sufficient factors to confer personal jurisdiction over GSHC. However, Gurevich’s alleged subsequent “care and treatment at a hospital and doctors in New York County” is not relevant to whether GSHC transacted business with New York before that date. Similarly, based on the complaint, Sahn was appointed Gurevich’s guardian on October 3, 2017, while the services at issue were rendered between August 2006 and October 2015. New York’s “long-arm statute requires that the cause of action arise from the non-domiciliary’s actions that constitute transaction of business.” (*Paterno*, 24 N.Y. 3d at 379). “[T]here [must be] a substantial relationship between the transaction and the claim asserted” (*Id.*) (citations omitted). Here, Sahn’s claim is based on the services rendered by GSHC to Gurevich from August

2016 through October 2016. “Contacts after this date cannot be the basis to establish defendant’s relationship with New York because they do not serve as the basis for the underlying medical malpractice claim.” (*Id.*).

Here, for the reasons set forth above, Sahn has failed to show the kind of purposeful activity by GHSC in New York that is required by the courts of New York for the invocation of § 302(a)(1). In addition, Sahn fails to make a sufficient start warranting jurisdictional disclosure. While Sahn seeks a copy of a written agreement between the parties that she may have signed, she does not specify why it is needed to determine if personal jurisdiction existed. Even if Sahn signed the contract, the totality of circumstances would still weight against asserting jurisdiction over GSHC. Furthermore, to the extent that any agreement may have a forum selection clause, GSHC submits a copy of the blank Client Services Agreement that was sent in the email referenced by Sahn as part of its reply. The agreement does not contain a forum selection clause. The Court further notes, however, that Sahn does not even allege that the parties agreed to resolve any disputes under the contract in New York.

CPLR § 302(a)(3)

Under CPLR §302(a)(3)(ii), a court in New York may exercise jurisdiction over a non-domiciliary when the defendant commits a tortious act outside New York that causes injury to a person or property within New York State, the defendant “(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.” *See* CPLR §302(a)(3). “Under this provision, the appellant must show both that an injury occurred “within the state,” and that the elements of either clause (i) or (ii) have been satisfied.” (*Ingraham v. Carroll*, 90 N.Y.2d 592, 596 [NY 1997]). Here, the alleged injury was in New Jersey where GHSC rendered its services to Gurevich. Furthermore, Sahn has made no showing that GHSC “regularly does or solicits business ... in the state” or “engages in any other persistent conduct in the state” or “derives substantial revenue from goods used or services rendered in the state.” It is undisputed that GSHC renders services only in New Jersey.

Wherefore it is hereby,

ORDERED that the motion by defendant Garden State Home Care Services, LLC to dismiss for lack of personal jurisdiction is granted; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendant Garden State Home Care Services, LLC shall serve a copy of this order with notice of entry upon Plaintiff within 20 days of entry,

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: FEBRUARY 23, 2018



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Eileen A. Rakower, J.S.C.