

<b>Celli v Arrow Power Boats, LLC</b>
2018 NY Slip Op 33890(U)
February 27, 2018
Supreme Court, Albany County
Docket Number: 900417-2016
Judge: L. Michael Mackey
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

ANDREA E. CELLI, STANDING CHAPTER 13  
TRUSTEE FOR CHARLES R. ALLEN,

**DECISION AND ORDER**

Plaintiff,

Index # 900417-2016

-against-

ARROW POWER BOATS, LLC, ANTHONY  
FRISINA (aka ANTHONY FRISINI),

Defendants.

(Albany County Supreme Court, Motion Term)

(Justice L. Michael Mackey, Presiding)

APPEARANCES:

LEMERY-GREISLER, LLC  
Attorneys for Plaintiff  
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Mackey, J.:

Plaintiff Andrea E. Celli, as Chapter 13 bankruptcy trustee for Charles R. Allen ("Allen"), commenced this action for money damages by filing a summons and complaint on or about March 14, 2016. Plaintiff claims, in essence, that defendants breached two agreements, one of which required delivery of a custom built boat and the other of which required defendants to

compensate Allen for services provided under an employment agreement. Defendants joined issue by an answer with counter-claims and affirmative defenses including, as relevant here, that the Court lacks jurisdiction and that defendants' lack of sufficient contact with New York precludes "long arm jurisdiction" pursuant to CPLR 302. Plaintiff moves pursuant to CPLR 3211 (b) to dismiss defendants' affirmative defense that the Court lacks personal jurisdiction, claiming defendants are subject to the jurisdiction of New York courts under CPLR 302(a)(1). Defendants cross-move pursuant to CPLR 3211 (a) (8) for an order dismissing plaintiff's complaint on the grounds that the Court lacks personal jurisdiction over the defendants based upon the provisions of the "long arm" statute found at CPLR 302. No depositions have been conducted. Because plaintiff has made the requisite showing based on "preliminary affidavits" to warrant further discovery on the issue of jurisdiction, both plaintiff's motion to dismiss defendants' jurisdictional defense and defendants' motion to dismiss the complaint on jurisdictional grounds are denied without prejudice. *See, Gottlieb v. Merrigan*, 119 AD3d 1054 (3d Dep't 2014).

New York courts "may exercise personal jurisdiction over any non-domiciliary ... 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). This jurisdictional predicate is a "single act statute" under which "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 [in New York] were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 NY3d 65, 71 (2006) quoting *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). In order to

satisfy the “substantial relationship” prong, “the existence of some articulable nexus between the business transacted and the cause of action sued upon is essential to the maintenance of a suit against a non-domiciliary under CPLR 302 (a) (1).” *Gottlieb v. Merrigan*, 119 AD3d at 1056 quoting *McGowan v. Smith*, 52 NY2d 268 (1981) (other citations omitted). The Court must analyze (1) whether the defendant transacts any business in New York and, if so, (2) whether the cause of action arises from such a transaction. *Licci v. Lebanese Canadian Bank*, 20 NY3d 327 (2012). Even absent a defendant’s physical presence in New York, jurisdiction under the “transacts business” provision of 302(a)(1) may still be proper if the defendant, on his initiative, projects himself into the state to engage in a sustained and substantial transaction of business. *Fischbarg v. Doucet*, 9 NY3d 375 (2007). “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 Institute*, 24 NY3d 370 (2014) (citation omitted). Through the conduct of individual actors or by technological means that permit business transactions and communications without physically entering New York, a non-domiciliary transacts business when he, on his own initiative, seeks out and initiates contact in New York, solicits business here, and establishes a continuing relationship. *Id. citing Fischbarg v. Doucet*, 9 NY3d at 382; *Parke-Burnet Galleries*, 26 NY2d 13 (1970). When long arm jurisdiction is asserted based upon telephone calls and email communications, the Court must examine the quality rather than the quantity of these contacts. *Paterno v. Laser Spine Institute*, 24 NY3d at 378 (citations omitted).

“A plaintiff may not ‘rely on his own activities within the State, rather than on defendant’s *independent* activities’ to invoke long-arm jurisdiction.” *Fischbarg v. Doucet*, 9 NY3d at 382, *citing Parke-Bernet Galleries v. Franklyn*, 26 NY2d at 19. To comport with due

process, the assertion of personal jurisdiction must be premised upon a defendant's "minimal contacts" with New York. *See, George Reiner & Co. v. Swartz*, 41 NY2d 648, 650 (1977). The defendant's "minimum contacts" with New York must be sufficient such that (1) the defendant should reasonably anticipate suit in New York and (2) the prospect of defending such a suit in New York must comport with traditional notions of fair play and substantial justice. *LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d 210 (2000).

Here, plaintiff asserts that defendants are subject to long arm jurisdiction arising from two distinct transactions, one of which involved an alleged agreement to employ Allen to perform services in New York and elsewhere and the second of which involved defendants' alleged contractual obligation to provide Allen with a custom-made boat. In support of plaintiff's motion to dismiss defendants' affirmative defense of lack of jurisdiction, Allen submitted an affidavit detailing his assertions concerning defendants' contacts in New York. Defendants opposed plaintiff's motion and supported their cross-motion to dismiss the complaint for lack of jurisdiction by submitting the affidavit of defendant Anthony Frisina denying some of the material allegations in Allen's affidavit. Then, in reply to defendants' opposition, plaintiff submitted (1) various emails (which Allen alleges were exchanged with defendant Frisina); (2) an executed settlement agreement among Allen, defendant, and the non-party with whom Allen initially contracted to supply the boat; and (3) excerpts of the original agreement between Allen and non-party OCM relative to the purchase of the boat. Although plaintiff bears the burden of proof as the party seeking to assert jurisdiction under the long arm statute, that burden does not entail making a *prima facie* showing of personal jurisdiction but instead requires plaintiff only to demonstrate a "sufficient start" to warrant

further discovery. *Gottlieb v. Merrigan*, 119 AD3d 1054 (3d Dep't 2014) citing *Peterson v. Spartan Indus.*, 33 NY2d 463, 467 (1974) (other citations omitted); see also *Bunkoff Gen. Contr. Inc. v. State Auto. Mutual Ins. Co.*, 296 AD2d 699 (3d Dep't 2002). Here, plaintiff has submitted enough evidentiary facts to demonstrate a "sufficient start" to warrant further discovery. For instance, while the parties disagree about whether Allen was engaged as an employee or alternatively an independent contractor, the parties seemingly agree that Allen was briefly engaged as a representative of defendant. At the same time, the affidavit of defendant Frisina raises questions about whether his own independent activities (as compared to Allen's conduct) were sufficient to meet the criteria for long-arm jurisdiction relative to the engagement of Allen for compensation.

Similarly, the Court is confronted with conflicting proof about the extent to which defendants sought customers in New York for their products and the extent to which defendants agreed to guarantee performance of the non-party with whom Allen initially contracted for the purchase of the boat. The settlement agreement submitted by plaintiff contains defendant Arrow's promise to assume the rights and obligations of OCM. On this record, the Court cannot determine the extent to which Allen's agreement with OCM itself would be sufficient to confer long arm jurisdiction because only excerpts of the partially executed purchase agreement have been submitted. Assuming *arguendo* that the contract terms and course of dealings between Allen and OCM contemplated activities sufficient to satisfy CPLR 302 (a) (1), then defendants' promise to assume those obligations may indeed suffice to establish jurisdiction. See, *Rielly Co. v. Lisa B. Inc.*, 181 AD2d 269 (3d Dep't 1992); *Key Bank of New York, N.A. v. Patel*, 796 F.Supp 674 (NDNY 1992) (CPLR 302 (a) (1) contemplates

jurisdiction over a non-domiciliary who guaranties performance owed to a New York creditor); *Skrabalak v. Rock*, 208 AD2d 1100 (3d Dep't 1994).

"[T]he issue of whether long-arm jurisdiction exists often presents complex questions; discovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits." *Gottlieb v. Merrigan, supra*, 119 AD3d at 1056 quoting *Peterson v. Spartan Industries*, 33 NY2d at 467. The Court finds that while the parties have submitted conflicting "preliminary affidavits," plaintiff's documentary evidence is sufficient to make the "sufficient start" warranting further discovery contemplated by the above-cited precedent. Assuming that plaintiff can establish both the claimed employment relationship and defendants' activities to consummate the sale of the boat in New York as alleged in Allen's affidavit, then jurisdiction under CPLR 302 (a) (1) will be proven. Accordingly, both plaintiff's motion to dismiss defendants' jurisdictional affirmative defense and defendants' motion to dismiss the complaint for lack of jurisdiction are denied without prejudice to further application following discovery.

Defendants seek alternative relief dismissing the complaint against defendant Frisina individually, arguing that he is not individually subject to long arm jurisdiction based upon the conduct of the corporate defendant (which he essentially controls). While further discovery may provide the parties with facts to support their substantive jurisdictional claims, the Court observes that New York does not recognize the "fiduciary shield doctrine" such that Frisina's alternative application to dismiss the complaint as against him individually is denied. *Williams v. Preeminent Protective Services, Inc.*, 81 F.Supp3d 265 (EDNY 2015) citing *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460 (1988). If plaintiff can establish that long arm jurisdiction against the

corporate defendant Arrow Power Boats LLC is proper, then Frisina is subject to the jurisdiction of New York courts, too.

Finally, plaintiff seeks dismissal of defendants' affirmative defense to the extent defendants assert improper service of process. As plaintiff correctly states, a party objecting to improper service must move on such defense within 60 days after joining issue, unless the time to move is extended by the Court upon the ground of undue hardship. CPLR 3211 (e). Defendants have not moved to dismiss under CPLR 3211 (e) and do not specifically oppose that part of plaintiff's motion addressing improper service. Accordingly, that part of plaintiff's motion to dismiss defendants' jurisdictional defense arising from alleged improper service only is granted.

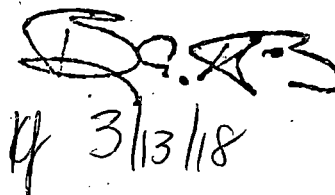
Accordingly, plaintiff's motion for an order dismissing defendants' jurisdictional defense is granted, in part, only to the extent that defendants claimed improper service of an initiatory paper. Otherwise, plaintiff's motion pursuant to CPLR 3211 (b) to dismiss defendants' affirmative defense of lack of jurisdiction, and defendants' cross-motion to dismiss plaintiff's complaint due to want of jurisdiction, are both denied without prejudice.

**SO ORDERED.**

**ENTER.**

Dated: February 27, 2018  
Albany, New York

  
**L. MICHAEL MACKEY**  
Supreme Court Justice

  
3/13/18

Papers Considered:

1. Plaintiff's notice of motion to dismiss affirmative defense filed October 24, 2017; affidavit of Charles R. Allen in support of plaintiff's motion to dismiss affirmative defense with exhibits 1-4 filed October 24, 2017; affirmation of Paul A. Levine Esq. with exhibits A-C filed October 24, 2017; Plaintiff's memorandum of law in support filed October 24, 2017; Plaintiff's amended notice of motion filed November 6, 2017;
2. Defendant's notice of cross-motion to dismiss plaintiff's complaint filed November 28, 2017; affirmation of Michael C. Conway, Esq. in opposition to plaintiff's motion and in support of defendant's cross-motion to dismiss with Exhibits A-B filed November 28, 2017; affidavit of Anthony Frisina filed November 28, 2017;
3. Reply affirmation of Paul A. Levine, Esq. filed December 11, 2017; reply affidavit of Charles R. Allen with exhibits A-B filed December 11, 2017.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for plaintiff. A copy of this Decision and Order is being forwarded to the County Clerk for filing. The signing of the Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry and notice of the original Decision and Order.