

State of New York v Vayu, Inc.

2020 NY Slip Op 35368(U)

January 6, 2020

Supreme Court, Albany County

Docket Number: Index No. L-00058-18

Judge: Margaret Walsh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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STATE OF NEW YORK,

Plaintiff,

DECISION AND ORDER

-against-

Index No. L-00058-18

VAYU, INC.,

Assigned Justice:
Hon. Margaret Walsh

Defendant.

Appearances:

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WALSH, J.:

In this action, the Plaintiff, on behalf of the State University of New York–Stony Brook (“SUNY-Stony Brook”), seeks damages from the Defendant, Vayu, Inc. (“Vayu”), in a dispute arising from the purchase of two unmanned aerial vehicles (“UAVs”). The Defendant moves pursuant to CPLR 3211(a)(8) for an order dismissing this proceeding for lack of personal jurisdiction. The Plaintiff opposes.

On a motion pursuant to CPLR 3211(a)(8), a court may dismiss an action for want of personal jurisdiction. “A plaintiff bears the ultimate burden of proof as the party seeking to assert personal jurisdiction” (*Gottlieb v. Merrigan*, 170 AD3d 1316, 1317 [3d Dept. 2019], *lv denied*, 33 NY3d 908 [2019]). The “burden, however, does not entail making a prima facie showing of jurisdiction; rather, plaintiff need only demonstrate that it made a ‘sufficient start’ to warrant further discovery” (*Bunkoff Gen. Contractors Inc. v. State Auto. Mut. Ins. Co.*, 296 AD2d 699, 700 [3d Dept. 2002], quoting *Peterson v. Spartan Indus.*, 33 NY2d 463, 467).

The motion record establishes the following. Vayu is a designer and manufacturer of UAVs, or drones, for the purpose of delivering medical aid and supplies to inaccessible areas (*Notice of Motion, Pepper Aff.*, ¶3). Vayu, incorporated under the laws of Delaware, is based out of the state of Michigan (*Pepper Aff.*, ¶12). Daniel Pepper is Vayu’s founder and chief executive officer (*Pepper Aff.*, ¶1). From 2015 to August of 2018, Dr. Peter Small was Professor of Medicine at SUNY–Stony Brook in New York and the founding director of SUNY–Stony Brook’s Global Health Institute (“GHI”) (*Pepper Aff.*, ¶4; *Small Aff.*, ¶¶1-3). SUNY–Stony Brook and GHI sought to develop the use of UAVs to deliver needed medical supplies to remote areas of Madagascar and other developing areas (*Small Aff.*, ¶6). It appears that SUNY–Stony Brook’s GHI, in turn, was around that time working with a not-for-profit entity in Madagascar known as MICET¹ (*Pepper Aff.*, ¶4).

In approximately 2015, Small contacted Pepper about establishing a business relationship to develop and use UAVs for the delivery of medical supplies to remote areas in underdeveloped countries (*Pepper Aff.*, ¶4; *Small Aff.*, ¶8). From that point, the parties and their respective employees engaged in discussions over the telephone and by emails regarding the development of such UAVs for the purpose of sale to SUNY–Stony Brook as well as a larger goal of developing a partnership

¹MICET is the acronym for Madagascar Institute for the Conservation of Tropical Environments, founded by Mr. Benjamin Andriamihaja (<https://mg.usembassy.gov/island-lemurs-madagascar/>)

for future opportunities (*Small Aff.*, ¶¶10-11).

In furtherance of the development of UAVs, the parties traveled to Madagascar in July, 2016 to undertake test flights of two UAVs belonging to Vayu (*Small Aff.*, ¶¶14). During these tests, one UAV reportedly crashed, and the other was, as described by Small, not fit for its intended purpose (*Small Aff.*, ¶15). After the test flights in Madagascar, the parties nevertheless continued their discussions about improvements to the UAVs so that they could be utilized for the delivery of medical supplies (*Small Aff.*, ¶16). In or about September, 2016, SUNY–Stony Brook placed an order from Vayu for two UAVs for a total purchase price of \$50,000 (*Small Aff.*, ¶18, Exh. 2; *Pepper Aff.*, ¶5, Exh. A). The invoices submitted by both parties show that the UAVs were to be shipped from the Defendant directly to Mr. Benjamin Andriamihaja of MICET in Madagascar (*id.*). The UAVs were, in fact, shipped to Madagascar in November 2016 (*Small Aff.*, ¶¶12, 18, 28; *Pepper Aff.*, ¶¶4-6).

The UAVs were to be utilized by Small and his team in Madagascar for an ABC News story about the use of drones to deliver healthcare and medical supplies to remote geographical areas (*Pepper Aff.*, ¶5; *Small Aff.*, Exh. ¶8). Small claims that the UAVs were not flight-worthy upon arrival and that Vayu breached their agreement (*Small Aff.*, ¶29; Exh. 8) Following the UAVs' delivery, Vayu sent a team, including Pepper, to Madagascar to help receive, assemble and handle or fly the UAVs (*Pepper Aff.*, ¶7; *Small Aff.*, Exh. 8). It appears that, following the ABC News shoot, the UAVs remained in a storage facility in Madagascar (*Pepper Aff.*, ¶¶8-9).

Small reached out to Pepper by emails during the first half of 2017 without response (*Small Aff.*, Exh. ¶9). In September, 2017, Pepper traveled to meet Small in Port Jefferson, New York, to discuss the UAVs and Madagascar project (*Small Aff.*, ¶¶35-36). During this meeting, Small agreed to arrange for SUNY–Stony Brook to ship the UAVs at its expense to Vayu in Michigan, while Vayu agreed to provide replacement UAVs conforming with SUNY–Stony Brook's specifications (*Small*

Aff., ¶36, Exhs. 10, 11). The defective UAVs were shipped from Madagascar to Vayu’s offices in Michigan in January, 2018 (*Small Aff.*, ¶40). Small avers that Vayu failed to deliver the replacement UAVs as promised and never refunded the purchase money to SUNY–Stony Brook (*Small Aff.*, ¶¶41-42).

Discussion

Personal jurisdiction over a non-resident or non-domiciliary may fall under one of two categories: general or all-purpose jurisdiction, or jurisdiction linked to or arising from specific conduct (*Daimler AG v. Bauman*, 571 US 117, 122 [2014]; see also *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773, 1779-1780 [2017]). For the reasons explained below, the Court cannot exercise personal jurisdiction over the Defendant under either CPLR 301 or 302.

A. General Jurisdiction under CPLR 301

In New York, CPLR 301 provides for the exercise of general or all-purpose jurisdiction by New York courts “over persons, property or status as might have been exercised heretofore” (see generally, *Aybar v. Aybar*, 169 AD3d 137, 143 [2d Dept. 2019], *lv granted*, 2019 NY LEXIS 3521 [December 17, 2019]). For a corporation the paradigm forum for general jurisdiction is the place where the corporation is at home, i.e., the place of incorporation and the principal place of business (*Daimler AG*, 571 US at 137). Inasmuch as the Defendant is a Michigan-based company incorporated under the laws of Delaware, New York is not the “paradigm forum for general jurisdiction.”

The Court, however, may assert general jurisdiction over the Defendant only where its “affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State” (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915, 919 [2011]). In this respect, the Plaintiff offers no facts demonstrating that the Defendant’s contacts with New York were so extensive and pervasive as to support general jurisdiction; for example,

no offer of proof was made as to any advertising for sale of its UAVs to customers in New York or that the Defendant derives substantial revenue from New York customers in order to warrant further discovery (see *Best v. Guthrie Med. Group, P.C.*, 175 AD3d 1048, 1050-1051 [4th Dept. 2019]).

B. Specific or Long-Arm Jurisdiction under CPLR 302

“Specific jurisdiction. . . depends on an ‘affiliatio[n] between the forum and the underlying controversy,’ principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation” (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US at 919, quoting von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 [1966]). Specific jurisdiction “is confined to adjudication of ‘issues deriving from, or connected with, the very controversy that establishes jurisdiction’” (*id.*, quoting von Mehren & Trautman at 1136).

CPLR 302—New York’s long-arm statute—provides for specific jurisdiction over a non-resident or non-domiciliary based upon one of four grounds, including where a non-resident defendant “transacts any business within the state or contracts anywhere to supply goods or services in the state” (CPLR 302[a][1]). “When the defense is timely asserted, a New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute (CPLR §302) and the exercise of jurisdiction comports with due process” (*Williams v. Beemiller, Inc.*, 33 NY3d 523, 528 [2019], citing *LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). If either of these requirements is not met, “the action may not proceed” (*id.*). To satisfy due process, a non-domiciliary must have “‘certain minimum contacts’ with the forum and ‘that the maintenance of the suit does not offend traditional notions of fair play and substantial justice’” (*id.*, quoting *International Shoe Co. v. Washington*, 326 US 310, 316 [1945][internal quotations and citations omitted]). If neither

“minimum contacts” nor “fair play and substantial justice” are demonstrated, due process fails and the exercise of personal jurisdiction is improper (*id.*).

The initial question to be addressed is whether the Defendant conducted business in New York. A court may exercise personal jurisdiction over a non-domiciliary when in person or through an agent the non-domiciliary “transacts any business within the state or contracts anywhere to supply goods or services in the state” (CPLR 302[a][1]). The statute sets forth “two distinct grounds for long-arm jurisdiction: where a defendant ‘transacts any business’ in the state and where a defendant ‘contracts anywhere to supply goods or services’ in the state” (*D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 297 [2017], citing *Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]; CPLR 302[a][1]).

CPLR 302(a)(1) has been touted as “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 460, 467 [1988], citing *Reiner & Co. v. Schwartz*, 41 NY2d 648, 651-652; see also *Rushaid v. Pictet & Cie*, 28 NY3d 316, 323 [2016]). “Whether a non-domiciliary is transacting business within the meaning of CPLR 302(a)(1) is a fact based determination, and requires a finding that the non-domiciliary’s activities were purposeful and established ‘a substantial relationship between the transaction and the claim asserted’” (*Paterno v. Laser Spine Inst.*, 24 NY3d at 376, quoting *Fischbarg v. Doucet*, 9 NY3d 375, 380 [2007][case citations omitted]; *Gottlieb v. Merrigan*, 170 AD3d 1316, 1317 [3d Dept. 2019], *lv denied*, 33 NY3d 908 [2019]).

Activities are considered “purposeful” whereby the non-domiciliary willingly “avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws” (*id.* at 376, quoting *Fischbarg*, 9 NY3d at 380 [internal quotations

and citations omitted]). “More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York” (*id.*). The absence of any physical presence within the State is not dispositive of the question; rather, the analysis involves evaluating whether the non-domiciliary, “on his [or her] own initiative. . . project[s] himself [or herself] into this state to engage in a “sustained and substantial transaction of business”” (*id.* at 377, quoting *Fischbarg*, 9 NY3d at 382 [quoting *Parke-Bernet Galleries v. Franklyn*, 26 NY2d 13, 18]). If it is established that the non-domiciliary is seeking out and initiating contact with New York, soliciting business in New York, and establishing a continuing relationship with the party in New York, a finding that the non-domiciliary is transacting business in New York is proper (*id.*). “Whether the activities are purposeful is an objective inquiry that ‘requires a court to closely examine the defendant’s contacts for their quality’” (*Gottlieb v. Merrigan*, 170 AD3d at 1317, quoting *Licci v. Lebanese Can. Bank, SAL*, 20 NY3d 327, 338 [2012]).

On this record the Court finds that an insufficient showing has been made that the Defendant, through its CEO Pepper, sought out and initiated contact with Small in New York for the purpose of transacting or conducting business in New York. “A non-domiciliary defendant transacts business in New York when ‘on his or her own initiative[,] the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business’” (*D&R Global Selections, S.L.*, 29 NY3d at 297-298, quoting *Paterno v. Laser Spine Inst.*, 24 NY3d 370, 376 [2014]). It appears that, in 2013, Pepper reached out to Small about the concept of using UAVs to transport laboratory samples (*Small Aff.*, ¶7); however, the record fails to disclose that Small was in New York or was affiliated with SUNY-Stony Brook at that time. After beginning his tenure as professor at SUNY-Stony Brook in 2015, it was Small who contacted Pepper for “the purpose of creating a business relationship” between the Defendant and

SUNY-Stony Brook (*Small Aff.*, ¶8). The business relationship began not in 2013, but instead much later in 2015, when Small was employed by SUNY-Stony Brook, and only upon Small's initiation (see *Paterno v. Laser Spine Institute*, 24 NY3d at 377 [New York lacked personal jurisdiction over Florida surgical facility and professionals where, *inter alia*, plaintiff conceded that he was the party who sought out and initiated contact]). In contrast, the record is devoid of proof that the Defendant, through Pepper or any other representative, on its own volition projected itself into the State to solicit or engage in a substantial transaction of business.

The contacts between Pepper and Small show that they were predominantly responsive in nature. After Small contacted Pepper about forming a business relationship, the phone and email contacts by Pepper and other representatives of the Defendant to Small concerned the development and use of the UAVs for the delivery of medical supplies (*Small Aff.*, ¶¶9-10). The nature or quality of these contacts ostensibly involved the Defendant carrying out SUNY-Stony Brook's specifications in the drone design and function, given "the complex technology of the UAVs" (*Small Aff.*, ¶¶9-10,12). Following tests of demo UAVs in the summer of 2016 in Madagascar, SUNY-Stony Brook placed an order for two drones from the Defendant. The UAVs were built in Michigan by the Defendant and shipped from Michigan to Madagascar in the fall of 2016, as requested by Small. The contacts between Small and Pepper from the end of November 2016 and into the ensuing months after the UAVs were delivered to Madagascar concerned their performance, or lack thereof, and trying to salvage the relationship. In September, 2017, Pepper did travel to New York to meet with Small about this issue. According to Small, from this meeting Pepper agreed to provide replacement UAVs and flight training in Michigan to a SUNY-Stony Brook employee (*Small Aff.*, ¶¶36-37; Exh. 11). This single, in-person meeting did not culminate in additional business activities, but instead focused on addressing the existing dispute between the parties regarding the UAVs in Madagascar (compare, *D&R Global*

Selections, S.L., 29 NY3d at 298 [defendant subject to personal jurisdiction where it traveled to New York several times with plaintiff to attend events, promoted its product in New York, and entered into exclusive agreement with a New York distributor whom the plaintiff had introduced it]). The Court finds that the foregoing types of interactions are “not the type ... that demonstrate the purposeful availment necessary to confer personal jurisdiction” upon the Defendant (*Gottlieb v. Merrigan*, 170 AD3d at 1318, quoting *Paterno v. Laser Spine Inst.*, 24 NY3d at 378).

That the parties partnered in the submission of a grant proposal in approximately August 2016 to the U.S. Agency for International Development (“USAID”)—the proceeds from which SUNY—Stony Brook anticipated or hoped would cover the costs of the subject UAVs as well as additional UAVs—does not affect the analysis. The objective of the grant was not to facilitate the sustained conduct of business in New York, but rather to develop and employ UAVs to bypass existing poor infrastructure in Madagascar and Malawi to deliver needed healthcare to affected populations in those countries (*Small Aff.*, Exh. ¶5).

In summary, the Plaintiff has failed in its opposition to make a showing of a “sufficient start” to warrant denial of the Defendant’s motion to dismiss. The Court determines that “[t]here is no basis to allow discovery to be conducted on the issue of personal jurisdiction since the [plaintiff] did not allege any facts which, if proven, would establish that [the defendant] may be subject to personal jurisdiction in New York” (*Grandelli v. Hope St. Holdings, LLC*, 176 AD3d 922 [2d Dept. 2019][case citation omitted]).

It is therefore

ORDERED, that the *Notice of Motion* to dismiss filed on behalf of the Defendant on May 17, 2019 is granted. The complaint is dismissed for lack of personal jurisdiction over the Defendant for the reasons herein stated.

This constitutes the *Decision and Order* of the Court. The original *Decision and Order* is being returned to the attorney for the Defendant. A copy of this *Decision and Order* together with all other original papers are being forwarded to the Albany County Clerk for filing. The signing of this *Decision and Order* and delivery of the copy of the same to the Albany 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 entry of the original *Decision and Order*.

SO ORDERED.

ENTER.

Dated: January 6, 2020
Albany, New York



Margaret Walsh
Supreme Court Justice

ENTER:

Papers considered on motion:

- (1) *Notice of Motion* dated May 10, 2019 with *Affidavit* of Daniel Pepper, sworn to on May 9, 2019 with exhibits A and B annexed; *Memorandum of Law*;
- (2) *Affirmation in Opposition* of Jorge A. Rodriguez, Esq., Assistant Attorney General, dated July 12, 2019; *Affidavit* of Peter Small, M.D., sworn to on July 9, 2019, with exhibits 1 through 12 annexed; *Memorandum of Law in Opposition*;
- (3) *Affidavit in Further Support* by Daniel Pepper, dated August 19, 2019, with exhibit A annexed; *Memorandum of Law* in Further Support.