

**Gelwan v Bartlett**

2022 NY Slip Op 32572(U)

July 29, 2022

Supreme Court, New York County

Docket Number: Index No. 650005/2021

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 28M

Justice

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LLOYD GELWAN

Plaintiff,

- v -

HENRY E. BARTLETT, III D/B/A BARTLETT
CONSTRUCTION,

Defendant.

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INDEX NO. 650005/2021

MOTION DATE 05/05/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISSAL.

Before the Court is defendant's motion, pursuant to CPLR §3211 (a)(8), for an Order granting the defendant summary judgment, and dismissing the complaint on the grounds that this Court lacks jurisdiction. Plaintiff filed opposition. Defendant filed a reply.

The plaintiff filed this action seeking compensation for damages to his property located in Monterrey, Massachusetts. Plaintiff alleges that the defendant performed faulty work on the premises, and thus plaintiff is entitled to damages.

In support of the motion, the defendant argues that this Court lacks jurisdiction as defendant is a citizen of the Commonwealth of Massachusetts, and has no connection to New York State. The defendant contends that he is licensed as a general contractor by the Commonwealth of Massachusetts, and conducts all of his work in Massachusetts. Defendant also states that he resides in Massachusetts, he does not own any property within the State of New York, and he is not licensed in any capacity by the State of New York. Additionally, defendant argues that there is no basis for the exercise of personal jurisdiction over defendant's company because his company maintains a principal place of business in the Commonwealth of Massachusetts, and has never been located in New York. Lastly, the defendant argues that the plaintiff failed to demonstrate that any of the alleged tortious acts occurred in New York, or that the defendant's alleged business activities in New York were purposeful or substantial enough to warrant defendant being subjected to the jurisdiction of a New York court.

In opposition, the plaintiff argues that this Court does have personal jurisdiction over defendant since the defendant has performed work for the plaintiff and in the plaintiff's mother-in-law's home in Queens, New York from 2005 to 2013. Plaintiff alleges that on several occasions, the defendant traveled to Queens to work on the plaintiff's property, and even stayed in their house

for more than one week to perform the repairs. Plaintiff contends that the defendant called on plaintiff in New York to prosecute an unfair competition and harassment action in Massachusetts for defendant from 2011 to 2012. Plaintiff also contends that the defendant sought plaintiff's services from 2012 to 2015 to supervise and work with Massachusetts counsel in multiple court actions. Plaintiff contends that he retained a New York-based attorney for defendant, and plaintiff was called upon in New York to assist defendant in supervising a Massachusetts counsel for a personal injury action from 2013 to 2017. Plaintiff asserts that he was called upon in New York to lend funds to defendant in 2013, and communicated with defendant hundreds of times while plaintiff was in New York to discuss potential business.

Lastly, plaintiff argues that the underlying breach of contract and negligence claim derives from misrepresentations defendant conveyed to plaintiff in both New York and Massachusetts. Plaintiff argues in the underlying claim that defendant failed to properly secure the pipes and disabled the water pump, causing plaintiff to suffer economic injury and depriving his family of the use of the Massachusetts property for an extended period. Plaintiff states that the damage caused to the Massachusetts property directly impacts plaintiff's finances only in New York, and this Court has jurisdiction over defendant as he has conducted and solicited business in New York for sixteen years. Lastly, plaintiff cites to the Supreme Court decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, that allows long-arm jurisdiction over a foreign domiciliary based upon the degree of relation between a defendant's contacts with the forum state and the cause of action, and states that defendant has enough contacts in New York State to warrant this Court to have jurisdiction over him. *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S.Ct. 1017, 2021 WL 1132515 (2021)).

Defendant replies by citing to the Supreme Court's holding in *Bristol Myers Squibb Co v. Superior Court of California, San Francisco County*, where the Supreme Court found jurisdiction improper because the defendant's activities lacked any connection whatsoever to the defendant's claim, to reconcile that defendant in this case has no connection to New York State and this Court lacks jurisdiction as a result. *Bristol Myers Squibb Co., v. Superior Court of California, Francisco County*, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017). Additionally, the defendant argues that he has not "purposefully availed" himself of the New York general contractor marketplace by making *continuous* and *deliberate* exploitations that warrant subjecting him to a New York court for alleged acts that occurred exclusively in Massachusetts.

### DISCUSSION

Pursuant to *CPLR 302(a)(1)*, the "court 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" (*Santiago v Highway Frgt. Carriers, Inc.*, 153 A.D. 3d 750, 778 [2d Dep't 2017]). "In order to determine whether personal jurisdiction exists under *CPLR 302(a)(1)*, a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction." *Id.* Additionally, under *CPLR §302*, personal jurisdiction by acts of non-domiciliaries can exist if a person "commits a tortious act within the state; 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 expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or owns, uses or possesses any real property situated within the state.” *CPLR §302*. “As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden on this issue.” *Doe v. McCormack*, 100 A.D. 3d 684 (2d Dep’t 2012). Additionally, “in order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts ‘may exist’ to exercise personal jurisdiction over the defendant.” *Tucker v. Sanders*, 75 A.D. 3d 1096 (4th Dep’t 2010). “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 (2014).

This Court finds that the plaintiff failed to demonstrate that this Court has personal jurisdiction over defendant. While plaintiff need only demonstrate that facts “may exist” to exercise personal jurisdiction over the defendant, plaintiff does not set forth any evidence to establish that defendant has sufficient connection to New York State to warrant defendant being subjected to a New York court.

The plaintiff failed to demonstrate that the defendant transacted business in New York, and that the cause of action arose from the defendant conducting business in New York. Plaintiff’s argument that the defendant worked on his mother-in-law’s home several times from 2005 to 2013 is insufficient to establish *substantial and continuous* business in New York. Defendant contends that his work in the mother-in-law’s home in New York was infrequent, and has no connection whatsoever to the current action at bar. Further, the defendant has demonstrated that his infrequent repair work is not sufficient contact to warrant jurisdiction over defendant.

Furthermore, this Court finds that the underlying claim arose in Massachusetts *only* because the subject property was located in Massachusetts. The plaintiff alleges that the construction work performed by defendant was done solely in Massachusetts. Defendant contends that he is not licensed as a general contractor in New York, nor does he reside in New York. Therefore, this Court finds that defendant does not perform substantial or continuous business in New York, nor does defendant purposefully avail himself of the benefits and protections of New York State law. This underlying claim does not arise from defendant’s limited work performed years ago in New York; it arises solely from defendant’s extensive work performed on plaintiff’s property in Massachusetts.

Lastly, the plaintiff has not set forth any evidence showing that any tortious acts in complaint occurred in New York to warrant personal jurisdiction under *CPLR §302 (a)(2)*. Plaintiff’s arguments, *inter alia*, that defendant called upon plaintiff many times for various favors while plaintiff was in New York, such as asking plaintiff to assist defendant’s counsel in Massachusetts for an unrelated claim is unavailing. The plaintiff’s contention that he provided defendant with legal services in Massachusetts has no relation to claims asserted for breach of contract. The plaintiff has failed to demonstrate that defendant had sufficient contacts with New York State to justify subjecting defendant to New York law. It is abundantly clear that the plaintiff

has not set forth enough evidence to meet its burden to prove that this Court has personal jurisdiction over defendant. As such, the defendant’s motion to dismiss the action for lack of personal jurisdiction is granted.

Accordingly, it is

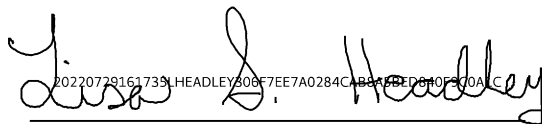
**ORDERED** that defendant’s motion to dismiss is **GRANTED**, in its entirety, on the basis that this Court finds plaintiff failed to establish that this Court has personal jurisdiction over defendant; and it is further

**ORDERED** that the complaint is **DISMISSED** in its entirety; and it is further

**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, defendant shall serve a copy of this decision/order upon the plaintiff with notice of entry.

7/29/2022  
DATE

  
LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: