

Hebberd v Brown

2025 NY Slip Op 35394(U)

February 13, 2025

Supreme Court, Queens County

Docket Number: Index No. 707301/2022

Judge: Maurice E. Muir

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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

KERRI L. HEBBERD and DIANE WEDELL,

Plaintiff,

-against-

OMAR E. BROWN, PENSKE TRUCK LEASING CORPORATION and GIG INVEST, INC.,

Defendants.

IAS Part - 42

Index No.: 707301/2022

Motion Date: 7/18/24

Motion Cal. No. 27

Motion Seq. No. 1

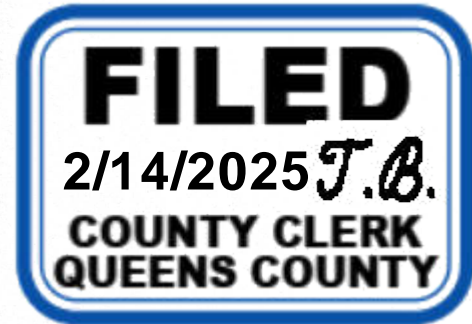
OMAR E. BROWN, PENSKE TRUCK LEASING CORPORATION and GIG INVEST, INC.,

Third- Party Plaintiffs,

-against-

BOLINGBROOK TRUCK AND TRAILER REPAIR, INC.,

Third- Party Defendants.



The following electronically filed (“EF”) documents read on this motion by Bolingbrook Truck and Trailer Repair, Inc. (“Bolingbrook” or “Third-Party Defendant”) for an order pursuant to CPLR §§ 3211(a)(1) and (8), and the exhibits attached thereto, the Memorandum of Law in Support of Third Party Defendant’s Motion to Dismiss the Third Party Complaint, and upon all the proceedings in this case to date; and b) granting such other, further, and different relief as to this Court may deem just, proper, and equitable.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Memorandum of Law.....	EF 097 - 104
Affirmation in Opposition-Exhibits.....	EF 113 - 117

Reply Affirmation..... EF 118

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Kerri L. Heberd (“Ms. Kerri”) and Diane Wedell (“Ms. Wedell”) (collectively, the “plaintiffs”) allegedly sustained in a motor vehicle collision. In particular, the plaintiffs alleged that on November 9, 2021, a tire from the truck and/or trailer of the motor vehicle owned by Penske Truck Leasing Corporation (“Penske”), and operated by Omar E. Brown (“Mr. Brown”), came into contact with the motor vehicle operated by Diane Wedell (“Ms. Wedell”), wherein Ms. Heberd was a passenger. As a result, on April 4, 2022, the plaintiffs commenced the instant action; and on July 11, 2022, issue was joined. Thereafter, on October 11, 2023, Mr. Brown, Penske, and GIG Invest, Inc (“GIG”) (collectively, the “Third-Party Plaintiffs”) commenced a third-party action against Bolingbrook, wherein they allege “[t]hat Third-Party Defendant, BOLINGBROOK TRUCK AND TRAILER REPAIR INC., committed a tortious act outside the State of New York resulting in injury to the plaintiffs, who are domiciled in the State of New York.” Now, Bolingbrook seeks the above-described relief, pursuant to CPLR §§ 3211(a)(1) and (8).

In support of the instant motion, Bolingbrook argues that on August 8, 2019, it incorporated in the State of Illinois; and its principal and sole place of business is located at 2000 W 135th Street, Bolingbrook, Illinois 60490. Moreover, its sole business is to repair and maintain trucks and trailers that are brought to its sole place of business. Moreover, Bolingbrook argues that it does not control where the trucks go after they are repaired in Illinois; and it neither conducts any business in New York nor has any contracts with any New York entities. Lastly, Bolingbrook contends that it does not advertise in New York. In opposition, the Third-Party Plaintiffs argue that “Bolingbrook’s motion to dismiss, pursuant to CPLR §§3211(a)(1) and (8), should be denied as Bolingbrook’s tortious acts clearly subject it to jurisdiction under New York’s long-arm statute.” In particular, “[t]he third-party action against Bolingbrook is based, in part, on a repair invoice dated November 3, 2021, reflecting that Bolingbrook performed work on the wheels of the subject trailer . . . just six (6) days prior to the alleged incident. . . . Additionally, Defendant Omar E. Brown, the driver pulling the trailer on the day in question, testified it appeared to him, after the incident, that the main nut holding together the brake drum and wheel assembly either failed or was missing.”

It is well settled that “[t]he party seeking to assert personal jurisdiction bears the ultimate

burden of proof to establish a basis for such jurisdiction” (*Sacco v. Reel-O-Matic, Inc.*, 183 AD3d 567, 568 [2d Dept 2020]). Yet where, as here, a defendant moves to dismiss a complaint pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, the plaintiff, in opposing the motion, bears the burden of coming forward with sufficient evidence to prove jurisdiction (*see Aybar v. Aybar*, 169 AD3d 137, 142 [2d Dept 2019], *affd* 37 NY3d 274 [2021]). In the seminal case, *International Shoe Co. v. Washington*, 326 US 310 [1945], it crystallized the two categories of personal jurisdiction that we now recognize: general or all-purpose jurisdiction and specific or case-linked jurisdiction (*Aybar v. Aybar*, 37 NY3d 274, 288 [2021]; *see Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 US 915, 919 [2011]). General jurisdiction permits the court’s exercise of jurisdiction over a defendant based on claims which arise from events occurring anywhere in the world (*see Aybar*, 37 NY3d at 288). “A state court may exercise general jurisdiction only when a defendant is ‘essentially at home’ in the State” (*Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 592 US 351, 358 [2021], quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915, 919 [2011]). “General jurisdiction extends to any claim against the defendant, and ‘[t]hose claims need not relate to the forum State or the defendant’s activity there’ ” (*WCVAWCK-Doe v. Boys & Girls Club of Greenwich, Inc.*, 216 AD3d 1, 5 [2d Dept 2023], quoting *Ford Motor Co.*, 592 US at 358). Conversely, specific jurisdiction permits a court to exercise jurisdiction only where the suit arises out of or relates to the defendant’s contacts with the forum (*see Aybar*, 37 NY3d at 288-289). “The law of specific jurisdiction thus seeks to ensure that States with ‘little legitimate interest’ in a suit do not encroach on States more affected by the controversy” (*Ford Motor Co.*, 592 US at 360, citing *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 US 255, 262 [2017]).

Under the first subdivision of New York’s long-arm statute, “a 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” (CPLR 302 [a] [1]). “The CPLR § 302(a)(1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions” (*Rushaid v. Pictet & Cie*, 28 NY3d 316, 323 [2016]). To this end, “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” (*Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). “Purposeful 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 NY3d 375, 380 [2007], quoting *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967]). Although a definition of acts that constitute a transaction of business cannot be fixed with precision, the primary consideration is the quality of the defendant’s contacts in New York (*see Fischbarg*, 9 NY3d at 380). “To satisfy the second prong, the statute requires an ‘articulable nexus’ or ‘substantial relationship’ between the cause of action sued upon, or an element thereof, and the defendant’s business transactions in New York” (*Aybar v. US Tires & Wheels of Queens, LLC*, 211 AD3d 40, 48 [2d Dept 2022] [internal quotation marks omitted]).

Furthermore, a court may also exercise personal jurisdiction over any non-domiciliary who commits a tortious act within the state (*see* CPLR § 302 [a] [2]) or “commits a tortious act without the state causing injury to person or property within the state” if he or she “(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” (CPLR § 302 [a] [3]).

Here, the Third-Party Defendant’s submissions are insufficient to establish that it is not subject to personal jurisdiction under CPLR § 302(a)(1) (*see Jacobs v. 201 Stephenson Corp.*, 138 AD3d 693, 694 [2d Dept 2016]; *Shatara v. Ephraim*, 137 AD3d 1248, 1249 [2d Dept 2016]). It is well settled that pursuant to CPLR § 3211(d), it states, in relevant part, that “[s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.” Thus, the burden on the opposing party is to convince the court in the opposing affidavits that facts “may exist” that would defeat the motion; mere hope that discovery will yield helpful information will not forestall a determination of the CPLR § 3211 motion. (*Trump Village Section 4, Inc. v. Bezvoleva*, 161 AD3d 916 [2d Dept 2018]; *Karpovich v. City of New York*, 162 AD3d 996 [2d Dept 2018]; *Bordan v. North Shore University Hosp.*, 275 AD2d 335 [2d Dept 2000]; *Cantor v. Levine*, 115 AD2d 453 [2d Dept 1985]; *Cracolici v. Shah*, 127 AD3d 413 [1st Dept 2015]). Here the court finds that the Third-

Party Defendant prematurely filed the instant motion to dismiss, pursuant to CPLR § 3211, especially in view of the fact that the parties have not had an opportunity to conduct discovery.

Accordingly, it is hereby

ORDERED, that Third-Party Defendant's motion is denied with leave to renew upon completion of all discovery in the third-party action; and it is further,

ORDERED, that Third-Party Plaintiff shall serve a copy of this decision and order with notice of entry upon all parties on or before February 28, 2025.

The foregoing constitutes the Decision and Order of the court.

Dated: February 13, 2025
Long Island City, New York


MAURICE E. MUIR, J.S.C.

