

Personal Jurisdiction Based on Digital Presence

by George Bundy Smith, Thomas J. Hall

When a lawsuit involves an out-of-state defendant, an initial focus by New York courts frequently is whether the New York long-arm statute provides for personal jurisdiction over the foreign defendant. C.P.L.R. Section 302(a)(1) provides for such jurisdiction where the defendant “transacts any business within the state ... ” and the claim arises out of such transaction. As more companies look to digital media as a platform to conduct business, this analysis can prove to be complex. Many foreign entities now have a significant digital presence in New York despite never physically entering the state.

This column addresses recent Commercial Division decisions applying §302(a)(1) to transactions of business involving digital communications.

SECTION 302(A)(1)

New York courts have traditionally held that, under 302(a)(1), a non-domiciliary defendant must have “projected him or herself into New York by knowingly initiating and pursuing a substantial transaction ...” *Robinson v. Intuit*, No. 2010-101160, 2010 WL 9593841 at *3 (N.Y. Co. Sept. 29, 2010). Courts will “look at the totality of the defendant’s activities” to determine if it was “engaged in some purposeful activity in [the] State in connection” with the matter at issue. Courts have repeatedly held that one transaction within New York may be enough to establish such jurisdiction. Notwithstanding, “interstate communications by telephone, facsimile, e-mail or mail, standing alone,” have been

found not to constitute purposeful activity for purposes of 302(a)(1).” *Id.*

COURT OF APPEALS PRECEDENT

In a landmark decision, the Court of Appeals in *Deutsche Bank Sec. v. Montana Bd. of Investments*, 7 N.Y.3d 65 (2006), found digital communications between two parties sufficient to satisfy the transaction of business standard under 302(a)(1). There, an agent of Deutsche Bank, headquartered in New York, reached out through an online instant messaging service to the Montana Board of Investments (MBOI), located in Montana, inquiring about a potential swap of corporate bonds. The two entities had carried out similar transactions in the past, but this time MBOI rejected the offer and communications ceased. A short time later, MBOI sent an instant message to the Deutsche Bank agent asking whether the bank was interested in purchasing its corporate bonds outright for \$15 million. The Bank sent a reply expressing interest, and the parties reached an agreement without MBOI ever entering New York. Hours later, MBOI advised Deutsche Bank that it would not honor the agreement.

Deutsche Bank thereafter brought suit in New York, and MBOI moved to dismiss for lack of personal jurisdiction. Justice Richard Lowe III of the New York County Commercial Division granted the motion, concluding the digital communications at issue were not sufficient to be considered purposeful activity.

On appeal, however, the First Department reversed, and the Court of Appeals affirmed that reversal.

Specifically, the Court of Appeals noted that the instant messages were enough to establish personal jurisdiction under 302(a)(1) because MBOI “knowingly initiat[ed] and pursu[ed] a negotiation with a [Deutsche Bank] employee in New York that culminated in the sale of \$15 million in bonds.”

DIGITAL COMMUNICATIONS

Typically, a transaction of business within the meaning of 302(a)(1) occurs when the foreign defendant “knowingly initiates and pursues a substantial transaction,” as was the case in *Deutsche Bank*. In recent years, however, the Commercial Division has found personal jurisdiction to exist

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even in situations where the New York plaintiff initiated the digital communications with the non-domiciliary defendant.

In *Robinson v. Intuit*, No. 2010-101160, 2010 WL 9593841 (N.Y. Co. Sept. 29, 2010), Justice Shirley Kornreich of the New York County Commercial Division was faced with a claim originating from an online transaction between New York plaintiffs and a Florida defendant. There, New York plaintiffs used the Internet to purchase Intuit's turbo-tax software along with a membership to the Turbo Tax audit defense team. The membership entitled the plaintiffs to a New York C.P.A. should they be audited. Following Intuit's alleged failure to provide a proper C.P.A., plaintiffs brought suit in New York.

Even though it was the plaintiffs that had initiated the contact by purchasing the product online, the court concluded that Intuit had transacted business in New York. In finding the defendant subject to the court's jurisdiction, Justice Kornreich stated that "where an agreement is negotiated or executed by telephone, mail, or electronic communication, a defendant may be found to have transacted business due to additional substantive contacts with the state, such as where the agreement calls for complete or substantial performance in New York." The fact that Intuit agreed from Florida to provide the plaintiffs with a New York C.P.A. was deemed sufficient to establish personal jurisdiction under 302(a)(1).

The personal jurisdiction contacts were more remote in *Itochu v. Siderar, S.A.I.C.*, No. 650097/10, 2012 WL 5682002 (N.Y. Co. Nov. 8, 2012). The claim in *Itochu* arose after defendants Siderar and Exiros, Argentinian corporations, entered into a contract with *Itochu*, a Japanese company, for the sale of coal to be delivered to Alabama. Prior to the transaction, the defendants had no connection with New York. During negotiations, the plaintiff's New York subsidiary initiated discussions with the defendants concerning the sale. The defendants subsequently engaged in negotiations with the subsidiary through phone and email conversations, but never entered

New York. The New York subsidiary facilitated the deal by exchanging draft contracts and securing a supplier of coal, leading to an eventual agreement between the parties. Yet shortly after, the defendants allegedly breached the contract and the plaintiffs sued in New York. Despite not initiating the contact, Justice Barbara Kapnick found that the defendants' interaction with the New York subsidiary was enough to establish personal jurisdiction under 302(a)(1).

The Commercial Division has refused, however, to extend the reach of 302(a)(1) to cover instances where the transaction arises from a New York plaintiff's access to a foreign defendant's website. In *Cragnotti and Partners Capital Inv. - Brazil S.A. v. Quintal/a*, No. 650075/2015, 2017 WL 728754 (N.Y. Co. Feb. 23, 2017), the plaintiffs, a Brazilian investment company, purchased Argentinean bonds from the defendant Banco Investments Garantia S.A. (Garantia S.A.), a Brazilian bank. The plaintiffs purchased the bonds without taking possession of them and were allegedly told by the defendants that the transaction would be tax free. Months later, Garantia S.A. was acquired by Credit Suisse First Boston and its businesses were continued by both Credit Suisse First Boston and Credit Suisse Holdings (USA). Ultimately, the Brazilian government investigated the transaction and assessed tax penalties and sanctions against the plaintiffs. As a result, the plaintiffs brought suit in New York against Credit Suisse entities domiciled in Brazil, Switzerland and New York for fraud and to recover the bonds.

To establish that the Brazilian and Swiss defendants were amenable to personal jurisdiction under 302(a)(1), the plaintiffs pointed to Credit Suisse's interactive website which advertises generally to consumers, including New Yorkers. Justice Saliann Scarpulla of the New York County Commercial Division rejected this argument, explaining that the "publication of information on a globally-accessible website does not constitute the 'transaction of business' in New York unless the website specifically targets its activities at

New York." Passive websites meant merely to impart information without allowing for a business transaction are "generally insufficient to establish personal jurisdiction." Even the presence of an interactive website requires "something more" to establish personal jurisdiction.

The court explained that the meaning of "transacting business" would be "stretched too far if a defendant is subjected to personal jurisdiction in any state merely for operating a website, however commercial in nature, that is capable of reaching customers in that state, without some evidence or allegation that commercial activity in that state actually occurred or was actively sought."

"MANUFACTURING" JURISDICTION

In spite of these recent developments, courts may not permit a plaintiff to use a defendant's communications to "manufacture" jurisdiction by relocating to New York. Such a situation arises where conversations begin outside the state, and the plaintiff subsequently moves to New York, where conversations continue.

Justice Eileen Bransten of the New York County Commercial Division encountered this exact situation in *Ace Decade Holdings Ltd. v. UBS AG*, No. 653316/2015, 2016 WL 7158077 (N.Y. Co. Dec. 12, 2016). There, *Ace Decade*, a British Virgin Islands company, entered into an agreement in China with the defendant, the Hong Kong branch of UBS, a Swiss banking company, to purchase shares of a Chinese company. The plaintiffs then relocated to New York where UBS allegedly contacted them multiple times through email and phone calls that allegedly induced them to finalize and fund the investment. Contractual disputes eventually arose causing the plaintiffs to lose nearly the entire investment.

After bringing suit in New York, the plaintiffs cited the phone calls and emails directed towards them while in New York as evidence that UBS was transacting business within the state. Aware of the potential for gamesmanship, Justice Bransten rejected this argument based on the totality of the circumstances, holding that the plaintiffs

could not “manufacture” jurisdiction by moving its operations to New York.

CONCLUSION

Reacting to the rapid expansion of digital transactions, the Commercial Division

has creatively interpreted 302(a)(1) when considering a party’s digital presence in New York. While a defendant’s digital communications may now be a plaintiff’s ticket to access New York courts, the Commercial Division may not permit a plaintiff

to take advantage of this interpretation as a means to manufacture jurisdiction. Regardless, litigants on both sides should be mindful of their digital footprint when analyzing issues arising under §302(a)(1). ■