
Commercial division update

Personal jurisdiction based on electronic and telephonic communication

Thomas J. Hall and Judith A. Archer,* *New York Law Journal* – June 20, 2019

Foreign companies that do business with New York entities or persons may face in litigation the issue of whether their New York connections with the transactions in dispute are sufficient for a New York court to exercise personal jurisdiction over them. With continued advances in technology, the personal jurisdiction analysis has continued to evolve, and courts are increasingly examining fact patterns with more remote physical contacts with New York. As a result, the personal jurisdiction analysis is becoming increasingly complicated and unpredictable.

Personal Jurisdiction

CPLR § 302(a)(1) provides that “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.” That statute requires that (i) the non-New York defendant transacted some business in New York, and (ii) some articulable nexus exists between the business transacted and the cause of action. *D & R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 298-99 (2017).

Court of Appeals Precedent

Section 302(a)(1) is known as a “single-act statute,” meaning that “proof of one transaction in New York is sufficient to invoke jurisdiction,” provided that the claims arise from that transaction. *Deutsche Bank Sec., Inc., v. Mont. Vd. Of Invs.*, 7 N.Y.3d 65, 71 (2006). New York courts have held that “single-

act” personal jurisdiction may exist even where the defendant was never physically present in New York, but transacted business in New York through electronic means. Two New York Court of Appeals decisions remain of great importance when determining when electronic communications are sufficient to establish personal jurisdiction over a foreign defendant.

First, in *Deutsche Bank*, Deutsche Bank and the Montana Board of Investments (“MBOI”) agreed to a stock purchase through communications over an instant messaging service. When the MBOI informed Deutsche Bank that it would not proceed with the deal, Deutsche Bank sued in New York for breach of contract, and the MBOI responded by asserting that the New York court lacked personal jurisdiction over it. The trial court agreed, dismissing the case, but the Appellate Division reversed and the Court of Appeals affirmed. The Court of Appeals noted that because “technological advances in communication enable a party to transact enormous volumes of business within a state without physically entering

* Thomas J. Hall and Judith A. Archer are partners with Norton Rose Fulbright LLP. Max Kellogg, a Norton Rose Fulbright US LLP associate, assisted in the preparation of this article.

it,” New York courts have “recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions.”

The second case, *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007), involved California defendants who retained a New York attorney to represent them in a case in Oregon. The defendants never set foot in New York during the course of that attorney-client relationship. Instead, the parties spoke by phone twice a week, and the defendants sent 31 emails to the plaintiff in New York. The attorney later sued in New York to recover legal fees. The Court of Appeals held that such contacts were sufficient for personal jurisdiction in New York, noting that “[a]lthough it is impossible to precisely fix those acts that constitute a transaction of business, our precedents establish that it is the quality of the defendants’ New York contacts that is the primary consideration.” Thus, the “purposeful creation of a continuing relationship with a New York corporation” supported the exercise of personal jurisdiction.

Commercial Division Cases

New York courts have not explicitly defined what level of electronic communication into New York constitutes the transaction of business in the State. While the Court of Appeals’ guidance is clear that a single act may constitute a transaction if found purposeful and related to the claim, it has also expressed that no minimum number of emails, phone calls, or other electronic communications are necessary for personal jurisdiction. Instead, New York courts conduct a fact-based analysis, and weigh the connection between the defendant’s purposeful New York contacts and the claim asserted.

A recent Commercial Division decision addressing this issue comes from Justice Joel Cohen of the New York County Commercial Division in *High St. Capital Partners, LLC v. ICC Holdings, LLC*, No. 652592/2018, 2019 BL 180439 (N.Y. Co. May 14, 2019). In *High Street*, a New York-based company entered into a Letter of Intent (“LOI”) for the acquisition of assets of an Illinois company. The LOI had an exclusivity period during which the Illinois sellers were prohibited from discussing with other companies a possible sale of those same assets. The New York company filed suit in New York alleging breach of that exclusivity provision, and the Illinois company challenged personal jurisdiction. The defendants did

not dispute that they had engaged in “voluminous electronic communications” consisting of emails and phone calls with the New York plaintiff, but disputed that such communications were adequate to support personal jurisdiction.

In determining that the defendants were subject to Section 302 jurisdiction in New York, Justice Cohen relied on *Deutsche Bank and Fischbarg*. The defendants argued they were physically located in Illinois for every email, phone call or text, but the court noted that “the focus must be on the business being transacted, not the Defendants’ physical location.” The court concluded that the defendants had projected themselves into the State to create an ongoing contractual relationship with the New York plaintiff, and did so through repeated, purposeful communication.

In a similar fashion, in *Awasthi v. Dillon*, 2018 NY Slip Op. 30366(U) (N.Y. Co. Feb. 28, 2018), Justice Barry Ostrager of the New York County Commercial Division held that one in-person meeting in New York combined with other communications into New York were sufficient to establish personal jurisdiction. In *Awasthi*, the dispute arose over an oral agreement between plaintiffs and defendants regarding the establishment of an investment fund, with the plaintiffs alleging the defendants had mismanaged that fund and used its assets to purchase luxury items. Justice Ostrager found that the parties’ regular contact through email and telephone, and one meeting in New York to discuss the structuring of the fund and plaintiff’s investment, were sufficiently purposeful and that there was a substantial relationship between those activities and the claims asserted.

As mentioned above, however, the personal jurisdiction analysis can be unpredictable, and what appear to be similar factual patterns may not necessarily lead to the same result. While an ongoing relationship with a New York corporation was sufficient in *High Street*, other cases have declined to exercise personal jurisdiction based on similar levels of electronic communications. For example, in *Larsen v. Virtual Technologies, Inc.* 42 Misc. 3d 1210(A) (2014), a New York plaintiff purchased shares of the defendant California corporation, and loaned that corporation \$50,000 pursuant to a promissory note. After an alleged default on the note, the plaintiff sued in New York, and the defendants moved to dismiss for lack of personal jurisdiction. Justice Elizabeth Emerson of the Suffolk County Commercial Division found personal jurisdiction to be lacking despite the electronic communication between California defendants

and the New York plaintiff. The court reasoned that, while a relationship between the parties was developed through those communications, the note itself was executed in California, was negotiated entirely by telephone and mail without any New York presence by the defendants, and provided it was governed by California law. As the claim was on the note, the court found the defendants' New York contacts regarding the note itself to be insufficient to establish that the defendants intended to project themselves into ongoing New York commerce or that the defendants purposefully availed themselves of the New York forum.

More recently, Justice Saliann Scarpulla of the New York County Commercial Division decided *AM Pitt Hotel, LLC v. 400 5th Ave., L.P.*, 2019 NY Slip Op. 30665 (N.Y. Co. March 18, 2019), holding that one meeting in New York in addition to several emails and phone calls were insufficient to establish jurisdiction. There, the plaintiff hotel had spoken with defendants about investing in the defendant's building in Pennsylvania. Representatives of both parties met once in New York to discuss the possible investment, and subsequent communications took place only via telephone and email. Ultimately, they executed their sale agreement, but the defendants largely negotiated that agreement from Pennsylvania, and executed that agreement, which provided it was governed by Pennsylvania law, in Pennsylvania. When

the plaintiff sued in New York for breach of that agreement, the defendants moved to dismiss for lack of personal jurisdiction. Justice Scarpulla agreed, finding that "the parties' contractual relationship centered in Pennsylvania." The court stated that "the defendant's telephone and email communications with plaintiff, concerning the negotiation and performance of the Sale Agreement, [do not] suffice to constitute the transaction of business in New York . . . [s]uch communications relate to ongoing business in Pennsylvania rather than this forum"

Conclusion

There is no exact science to determine whether a foreign defendant's out-of-state communications into New York are sufficient to establish personal jurisdiction. Although CPLR Section 302(a)(1) is a "single-act statute," the determination of whether personal jurisdiction exists under that statute can be quite difficult when based on contacts that are primarily electronic. A greater number of electronic contacts into New York presumably will favor the exercise of personal jurisdiction, but the number of contacts alone may not be determinative. Rather, the court will focus on the transaction at issue and whether those communications into New York support the conclusion that the transaction itself is centered in New York.

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices.

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.