CARLISLE HALPERN AND CENTONE
ON CPLR UPDATE 2013

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Carlisle, Halpern & Centone on CPLR 2013

CLE Program

March 18, 2013

Pace University School of Law

White Plains, NY

1. Recent Developments in Civil Practice 2013 - CPLR & Evidence: Jurisdiction
   Jay C. Carlisle

2. Statute of Limitations, Unjust Enrichment, Pleadings and Damage Limitations for Criminal Legal Malpractice Actions
   Jay C. Carlisle

3. Recent Statute of Limitations Developments in the New York Court of Appeals
   Jay C. Carlisle

4. Justice James D. Hopkins: Jurist, Dean, Scholar And Expert On New York Law
   Jay C. Carlisle & Anthony DiPietro
JURISDICTION

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Overview

This Overview preceding “2012 Case Citations and Reference” will assist those taking the course for the first time and will be a useful refresher material for experienced lawyers.

I. JURISDICTION

The bench and bar of New York devote substantial time trying to determine what constitutes jurisdiction. If a court does not possess jurisdiction, it cannot render a binding judgment on the merits. This means that any action taken by a court without jurisdiction is subject to attack. In New York state courts, jurisdiction has three necessary components: First, subject matter jurisdiction; second, jurisdiction over the person or property of the defendant; third, proper notice in strict compliance with the applicable service statute. If any of the three components are not satisfied, there is no jurisdiction. Further, courts can refuse to exercise jurisdiction on the grounds of forum non-conveniens (NY CPLR Rule 327). Finally, jurisdiction principles under Article 3 of the CPLR should not be confused with venue considerations under Article 5 of the CPLR.

A. SUBJECT MATTER JURISDICTION

In General

All courts in New York State, with the exception of the Supreme Court, are courts of limited subject matter jurisdiction. How is subject matter jurisdiction attained? Is the court competent to act under New York State’s constitution and statutes? See Lachs v. Lacks, 41 N.Y.2d 71 (1976) (broad definition of Supreme Court’s competence to hear matrimonial matter) and Kagen v. Kagen, 21 N.Y.2d 532 (1968) (broad grant of subject matter jurisdiction pursuant to Section 7 of Article VI of the N.Y. State Constitution).

An objection to subject matter jurisdiction cannot be waived; nor can it be conferred on the court by consent or stipulation of the parties. An objection to subject matter jurisdiction may be taken at any stage of the action by any party or sua sponte by
the court. If a court lacks subject matter jurisdiction, its judgment is void and may be subject to direct or collateral attack. Unlike federal practice, problems with subject matter jurisdiction are infrequent in New York State courts.

1. **Statutory Limitations on a Court’s Exercise of Subject Matter Jurisdiction**

   Do the federal courts have exclusive jurisdiction over the subject matter? 28 U.S.C. § 1331 (Admiralty, Maritime, Bankruptcy, etc.); B.C.L. § 1314(b) (an action or special proceeding against foreign corporation may be maintained by another foreign corporation of any type or kind or by a nonresident only if conditions are satisfied); C.L. § 1312(a) (a foreign corporation shall not maintain any action or special proceeding in New York State unless it is doing business here). See also *Sohn v. Calderon*, 78 N.Y.2d 755 (1991) (Supreme Court lacked subject matter jurisdiction because administrative agency was charged with implementing rent and eviction regulations).

2. **Concurrent Subject Matter Jurisdiction**


3. **Jurisdiction of Particular Courts**

   With the exception of the Supreme Court, all the original and appellate courts in New York have limited subject matter jurisdiction. The Supreme Court had general but not unlimited jurisdiction. The following courts should be noted:

   a. **COURT OF APPEALS**
      
      Very limited subject matter jurisdiction, primarily law and limited review of facts, certification powers.

   b. **APPELLATE DIVISIONS**
      
      Law and fact plus some original jurisdiction.
c. APPELLATE TERMS
   In First and Second Departments.

d. SUPREME COURTS
   Statewide jurisdiction, cannot hear damage claims against New York State.

e. COURT OF CLAIMS
   Claims for damages against New York State.

f. FAMILY COURTS
   No subject matter jurisdiction over divorce but has subject matter jurisdiction over all other matters relating to the family.

g. SURROGATES COURTS
   Almost all matters relating to the decedent.

h. COUNTY COURTS
   Criminal and civil jurisdiction up to $25,000.

i. CIVIL COURTS
   Only in New York City, limited equitable jurisdiction and civil jurisdiction up to $25,000.

j. CRIMINAL COURTS
   Only in New York City, primarily misdemeanors.

k. DISTRICT COURTS (SUFFOLK and NASSAU)

l. CITY, TOWN and VILLAGE COURTS.

4. Mistake in Choice and Removal

   NY CPLR § 325 and the Uniform Rules for the New York State Trial Courts § 202.13 provide that an action filed in the wrong court will usually not be dismissed but transferred to the correct court. See NY CPLR § 352(a). Similarly, if the action is filed in the correct court but the plaintiff wants more or different relief than that court can grant, NY CPLR § 325(b) permits a transfer “up” for more relief. NY CPLR § 325(c) permits a transfer “down” on consent and § 325(d) authorizes a transfer “down” without consent. In
this respect, when equitable and monetary relief are demanded in a Supreme Court
action, subsection (d) does not permit a transfer “down” to a lower court. Chung v. Kim,

B. JURISDICTION OVER THE PERSON AND PROPERTY

The traditional bases for the exercise of *in personam jurisdiction* developed in
New York prior to the adoption of the CPLR and were incorporated by CPLR § 301.
Thus, presence, domicile, consent, and doing business in New York all permit a New
York Court to assert general jurisdiction over a defendant irrespective of whether the
cause of action arose from those contacts. Similarly, principles of *in rem* and *quasi in rem*
(as qualified by the US Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977)) permit
Artoc*, 62 N.Y.2d 65 (1984), the Court of Appeals expressly authorized the use of *quasi in rem* (*“attachment”*) jurisdiction to fill the gap in New York’s restricted long-arm
statute. NY CPLR § 302 became effective in 1963. It allows New York courts
jurisdiction over non-domiciliary individuals and foreign corporations not subject to
CPLR § 301 general jurisdiction, if they have contacts with our state enumerated in §
302. This “long-arm” jurisdiction is limited by the terms of CPLR § 302 and by state and
federal constitutional considerations to claims that arise from the defendant’s activity that
is related to New York. This is the key distinction between specific and general
jurisdiction. NEW YORK HAS A RESTRICTED LONG-ARM STATUTE WHICH
DOES NOT GO AS FAR AS THE CONSTITUTION PERMITS.

1. General Jurisdiction (CPLR § 301)

Transient presence (“tagging”) is sufficient jurisdictional basis in New
York. See *Burnham v. Superior Court of California*, 110 S.Ct. 2105
defendant domiciled in New York at the time service of process is made
can be served anywhere in the world. But see CPLR § 313 (If the
defendant is domiciled in New York when the cause of action arises and then changes his domicile prior to service, then New York’s long-arm statute is applicable). Consent can be formal (CPLR § 318), statutory (VTL § 253) and contractual (National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)). Doing business under CPLR § 301 requires office, employees, bank accounts, telephone listings, solicitations, etc. See Tuaza v. Susquehanna Coal Co., 220 N.Y. 259 (1911) and Bryant v. Finnish National Airline, 15 N.Y.2d 426 (1965). Solicitation alone is not enough for general jurisdiction. Laufer v. Ostrow, 55 N.Y.2d 305 (1982). Also, the New York Court of Appeals has held, albeit by dicta, that maintenance of an office is not an absolute prerequisite for general jurisdiction. Landoil Resources v. Alexander & Alexander, 77 N.Y. 2d 28, 563 N.Y.S.2d 739 (1990). The most difficult “doing business” cases that arise are those where the defendant has major interests in New York which are served by a nominally independent entity, such as a subsidiary. See Delagi v. Volkswagenwerk AG of Wolfsburg, Germany, 29 N.Y.2d 426 (1972) and Frummer v. Hilton Hotels, Int’l., 19 N.Y.2d 533 (1967). The existence of a parent subsidiary relationship is not enough. New York courts regard one factor as essential to the assertion of jurisdiction: Common ownership. Although common ownership is essential there are three other important factors: (1) Financial dependency of the subsidiary on the parent corporation; (2) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities; and (3) the degree of control over marketing and operational policies of the subsidiary exercised by the parent. See Barter Corp. v. Consider, Inc., 1995 WL 357479 (1st Dep’t. 1995) (Appellate Division held complaint was properly dismissed in action involving a European and American company with a parent-subsidiary relationship because there was no proof that the U.S. subsidiary
was either an agent or a department of the European firm). Also, using “agency” principles, a subsidiary may be found to be present in New York if its parent is here. See Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65 (S.D.N.Y. 1979).

2. Specific Jurisdiction (CPLR § 302)
   a. INTRODUCTION

   New York’s restricted long-arm statute allows a court to exercise jurisdiction as to a cause of action arising from any of the acts enumerated in CPLR § 302 over a non-domiciliary or his executor or administrator, who in person or through an agent, commits one or more of the enumerated acts. See Syrbon Corp. v. Wetzal, 46 N.Y.2d 197 (1978). Once the defendant properly raises this jurisdictional objection, the plaintiff has the burden of showing by a preponderance of the evidence that the long-arm statute is applicable.

   b. CPLR § 302(a)(1) REQUIREMENTS

   The key language for subsection (a)(1) are the “transaction of business” and “contracts anywhere” clauses. There are a few “contracts anywhere” cases but it is clear that under the minimum contacts due process standards, something more than a contract to supply goods or services in New York is necessary. Paradise Products Corp. v. All-Mark Equipment Col., Inc., 526 N.Y.S.2d 119 (2nd Dep’t 1988). However, payment guarantee clauses (providing for payment under contract to a New York entity) seem to satisfy due process requirements. See A.I. Trade v. Petra, 989 F.2d 76 (2nd Cir. 1993). A “transaction of business” is less than “doing business” under CPLR § 301. One transaction of business may satisfy the long-arm statute. See Parke-Bernet Galleries v. Franklyn, 26 N.Y.2d 13 (1970) (“...it is a single-act statute requiring but one
transaction – albeit a purposeful transaction – to confer jurisdiction in New York...”).


Bootstrapping is not sufficient for jurisdiction in New York. Haar v. Armendaris Corp., 31 N.Y.2d 1040 (1973) and the “fiduciary shield” doctrine have been rejected by the Court of Appeals. See Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460 (1988) (fiduciaries acting on behalf of a corporation are not insulated from long-arm jurisdiction for acts performed in a corporate capacity).

c. ARISING OUT OF REQUIREMENT

Once it has been established that the defendant’s acts fit into the “transaction of business” or the “contracts anywhere” clause, then the burden is on the plaintiff to show that the “arising out of” requirement has

d. CPLR § 302(a)(3) REQUIREMENTS

This provision is applicable when a non-domiciliary commits a tortuous act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (1) first “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” (one showing) OR (2) second, “expects of should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce” (two showings).

(According to Appellate Division, 99 percent of defendant Selbern Shoe Co.'s products entered interstate commerce but only 5 percent reached New York. Still, this was 5 percent of millions of dollars so it must be inferred that "Selbern did or should have reasonably expected forum consequences to arise in New York"). Compare with Martinez v. American Standard, 457 N.Y.S.2d 97 (2nd Dep't 1982) (Plaintiff's decedent died as a result of a faulty air conditioner. Plaintiff sued the manufacturer ("A") and the maker of the compressor in the air conditioner ("B"). B impleaded "C" who had, on B's orders, shipped terminal pins for the compressor to B's midwestern plant. C contested the assertion of personal jurisdiction in New York. Its motion to dismiss was granted by the Appellate Division which held that the expectation showing required by CPLR § 302(a)(3)(ii) was not met.).

3. In Rem and Quasi In Rem ("Attachment") Jurisdiction


4. Matrimonial Jurisdiction

Long-arm jurisdiction exists under CPLR § 302(b) for certain financial aspects of the marriage (support, alimony and maintenance). See Levy v. Levy, 592 N.Y.S.2d 480 (3rd Dep't. 1993). Jurisdiction for separation and divorce are pursuant to CPLR § 314(1).
5. **Jurisdictional Discovery**

In *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463 (1974) the Court of Appeals expressly encouraged jurisdictional discovery pursuant to CPLR § 3211(d) and § 3212(f).

6. **Enforcement of Foreign Judgment**

When a foreign judgment is being enforced pursuant to the full faith and credit clause, whose law governs with respect to whether the foreign forum has jurisdiction? See *China Express, Inc. v. Volpi & Son Machine Corp.*, 513 N.Y.S.2d 388 (1st Dep’t. 1989) and *Drexler v. Kozloff*, 210 F.3d 389 (C.A. 10th Cir. 2000) (Colorado judgment vacated for lack of jurisdiction, only contacts were Colorado as place of payment on note and assignment to Colorado resident.).

7. **Appearance**

A defendant appears pursuant to CPLR § 320 by answering, filing a motion (CPLR § 3211 and § 3024) of filing an entry of appearance. A defendant can also make limited, restricted qualified and informal appearances. Timing is crucial because failure to properly appear may result in a waiver of the defendant’s jurisdictional objections. See *Addesso v. Shemtob*, 70 N.Y.2d 687 (1987). Avoid boiler-plate jurisdictional defenses.

II. **COMPLIANCE WITH NOTICE REQUIREMENTS, SERVICE AND SUMMONS**

A. No single type of notice is constitutionally mandated. The Supreme Court has indicated that the defendant is entitled to “best reasonable notice under the circumstances,” *Green v. Lindsey*, 456 U.S. 444 (1982). It should be noted that most New York State service statutes are constitutional but due process considerations should be given to every notice problem.
B. Assuming the applicable service statute does not have constitutional problems, plaintiff must make service on the defendant in strict compliance with the statute. Failure to do so may result in a dismissal for lack of jurisdiction.

C. New York authorizes service of process by mail, personal service, leave and mail, nail and mail, court-ordered service, service on a designated agent, service by publication and service under the vehicle and traffic laws. The key is to strictly comply with the service statute.


6. CPLR § 310 Service on a partnership. See Hayes v. Apples & Bells, Inc., 624 N.Y.S.2d 490 (4th Dep’t. 1995) (Service on one partner brings the partnership within the jurisdiction of the court as does service on a representative designated by statute.).

50 N.Y.2d 265 (1980) (Service on Ann Robertson was proper because of a unique combination of factual circumstances).


D. Hague Convention

In addition to strict compliance with the applicable New York service statute, service outside New York on a defendant residing in a nation which is a signatory to the Hague Convention must be in accordance with provisions of the treaty, including any reservations made by the nation in which service is to be made. See Vasquez v. Sund Emba AB, 548 N.Y.S.2d 728 (2nd Dep’t. 1989) and Reynolds v. Koh, 490 N.Y.S.2d 295 (3rd Dep’t. 1995). Although the Hague Convention governs the manner of service in a foreign nation, it is domestic law that determines where service must be effected. Thus, if under state law service may properly be made within the United States on a foreign corporation, the Convention is not relevant. See Volkswagenwerk AG v. Schluck, 108 S.Ct. 2104 (1988).

III. FORUM NON-CONVENIENS

Even if a New York State Court has subject matter and personal jurisdiction (basis and notice), CPLR Rule 327 gives the state court trial judges discretionary power to dismiss the case. Under CPLR Rule 327(a) the court may “stay or dismiss the action in whole or in part on any conditions that may be ‘just’ if it finds that ‘in the interest of substantial justice’ the action should be heard in another forum.” See Martin v. Mieth, 35 N.Y.2d 414 (1974).
Unlike Federal Practice, the availability of an alternative forum is not an absolute pre-requisite for applying the doctrine of *forum non-conveniens*. See *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984) (setting forth standard criteria or application of forum non-conveniens dismissal). Also, CPLR § 328(b) prohibits dismissal if forum selection clause is agreed upon in action arising out of a contract or undertaking to which Section 5-1402 of the General Obligations Law applies. Also, note *VSL Corp. v. Dune Hotels & Casinos*, 70 N.Y.2d 948 (1988), which makes it clear that *sua sponte* dismissals under CPLR Rule 327 are not permitted.
2012 CASE CITATIONS AND REFERENCE

I. Recent US Supreme Court General and Specific Jurisdiction Cases

The U.S. Supreme Court has issued two recent opinions discussing general and specific jurisdiction in tort and product liability matters. Both cases are important to the New York practitioner because the Court has, for the first time in twenty-five years, restricted principles of jurisdictional law. These decisions have already been cited thirteen times in Second Circuit federal courts and can be expected to arise in state practice. Lawyers facing jurisdictional issues should be familiar with the Goodyear and McIntyre cases. Both decisions address issues of in personam jurisdiction and are not concerned with subject matter jurisdiction and the proper notice for commencement of an action.

A. GENERAL JURISDICTION


On June 27, 2011 the US Supreme Court unanimously reversed the North Carolina Supreme Court and held there was no jurisdiction. Respondents were North Carolina residents whose sons died in a bus accident outside Paris, France. They filed a suit for wrongful-death damages in a state court alleging the accident was caused by tire failure. They named Goodyear USA, an Ohio corporation and three Goodyear USA subsidiaries operating in Luxembourg, Turkey and France. The petitioner Goodyear’s tires are manufactured primarily for European and Asian markets and differ in size and construction from tires ordinarily sold in the United States. None of the Goodyear entities were registered to do business in North Carolina, had no place of business, employees or bank accounts in the State. They did not design, manufacture, or advertise their products in the State, and did not solicit business in the State of sell or ship tires to North Carolina customers. Nonetheless, a small percentage of their tires were distributed in North Carolina by other Goodyear USA affiliates. The trial court denied petitioners’ motion to
dismiss the claims against them for want of personal jurisdiction. The North Carolina Court of Appeals affirmed, concluding that the state courts had general jurisdiction over petitioners, whose tires had reached the state through "the stream of commerce". The U.S. Supreme Court held that petitioners were not amenable to suit in North Carolina on claims unrelated to any activity of petitioners in the forum.

The U.S. Supreme Court first distinguished general and specific jurisdiction and noted that in only two decisions postdating *International Shoe v. Washington* had the Court considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952) (general jurisdiction may be appropriately exercised over Philippine corporation sued in Ohio, where the company's affairs were overseen during world War II) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (helicopter owned by Columbian corporation crashed in Peru; survivors of U.S. citizens who died in the crash and Court held they could not maintain wrongful-death actions against the Columbian corporation in Texas. The Court concluded that the corporation's helicopter purchases and purchase-linked activities in Texas were insufficient to subject it to a Texas court's general jurisdiction.) The Supreme Court then stated, "Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction." The court also rejected a belatedly asserted "single enterprise" theory by respondents, which asked that petitioners' ties to North Carolina be consolidated with those of other Goodyear entities.

The Supreme Court's decision in *Goodyear* was an easy one. Defendants had none of the conventional contacts such as an office, employees, solicitations, bank accounts, phone listings, advertisements and purchases. The *Goodyear* case is in line with traditional New York State general jurisdiction case law as discussed in the *Tuza*, *Bryant* and *Landoil* Court of Appeals cases. The Supreme Court did not reach the
question of whether general jurisdiction could be exercised over the subsidiaries by virtue of Goodyear USA’s operations in North Carolina because plaintiffs had failed to preserve that argument in the proceedings below. Whether or not the activities of the parent in North Carolina could be imputed, for general jurisdiction purposes, to the European Goodyear subsidiaries was not raised or decided by the US Supreme Court. It could have been argued that the parent Goodyear’s activities in North Carolina could be imputed to its foreign subsidiaries on an agency theory. See Delagi v. Volkswagenwerk AG of Wolfsburg, Germany, 29 N.Y.2d 426 (1972). Also see Stone v. Ranbaxy Pharmaceuticals, 2011 WL 2462654 (S.D.N.Y. June 16, 2011).

B. SPECIFIC JURISDICTION


On June 27, 2011 the U.S. Supreme Court reversed the New Jersey Supreme Court and held in a six to three opinion there was no jurisdiction in a products liability action brought by a New Jersey resident against an English manufacturer of a metal shearing machine. There is no majority opinion, but six Justices agreed in the result. Plaintiff had severed four fingers in his right hand and sought damages from McIntyre whose product was not marketed in or shipped to New Jersey. The New Jersey Supreme Court held that its courts could exercise jurisdiction over a foreign manufacturer without contravening the Fourteenth Amendment’s Due Process Clause so long as the manufacturer knew or reasonably should have known that its products were distributed through a nationwide distribution system that might lead to sales in any of the States. Invoking this “stream-of-commerce” doctrine of jurisdiction, the court relied in part on Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). Applying its test, the court concluded that J. McIntyre was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the state.
The majority (plurality) of Justice Kennedy, Chief Justice Roberts, Justice Scalia and Justice Thomas stated, “Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction, is a question that arises with great frequency in the routine course of litigation. The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades old questions left open in Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty. (citations omitted).” The court then stated that the New Jersey decision “cannot be sustained” and adopted a no jurisdiction absolute general rule, which requires purposeful availment by the defendant. The court stated, “As a general rule, the exercise of judicial power is not lawful unless the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” The Court then observed, “There may be exceptions, say for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called ‘stream-of-commerce’ doctrine cannot displace it.”

Two of the six justices in the majority (Justices Breyer and Alito) concurred but disagreed with the pluralities refashioning of basic jurisdictional rules. They stated, “The plurality seems to state strict rules that limit jurisdiction where a defendant does not ‘intend to submit to the power of the sovereign’ and cannot ‘be said to have targeted the forum’.” Justices Breyer and Alito disagreed with the absolute approaches of the plurality and the New Jersey Supreme Court. They stated, “...I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case.” They also stated, “At a minimum, I would not work such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests without a better understanding of the relevant contemporary commercial circumstances.”
The dissent (Justices Ginsberg, Sotomayor and Kagen) accused the majority of failing to follow the reasoning of *International Shoe Co. v. Washington* and its progeny and argued that, "...six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities." Using a traditional less absolute approach to analyzing minimum contacts and fairness, the dissent easily finds jurisdiction based on the defendant’s sales to and national operation in the United States plus the close relationship it had with the US distributor of its products. The dissent found the defendant had purposely availed itself of the benefits and protections of the United States market nationwide and therefore of the New Jersey market and concluded that it would be fair and reasonable to have the case heard in the Garden State. The dissent also stated, "While this court has not considered in any prior case the now-prevalent pattern presented here – a foreign country manufacturer enlisting a U.S. distributor to develop a market in the United States for the manufacturer’s products – none of the court’s decisions tug against the judgment made by the New Jersey Supreme Court." The dissent then artfully uses *Worldwide* and *Asahi* to support its conclusion that jurisdiction exists. Finally, the dissent attached an appendix of illustrative cases which support its reasoning.

The plurality opinion raises a serious question about the viability of CPLR § 302 (a)(3)(ii), which allows jurisdiction over an entity that commits a tortious act outside the state causing injury within the state if it expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. Some of these concerns have already been addressed by the New York Court of Appeals in *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 713 N.Y.S.2d 304 (2000). New York state and federal tort and product liability lawyers should become familiar with the three approaches taken by the Supreme Court in *McIntyre* and seek jurisdictional discovery when opposing a motion to dismiss for lack of jurisdiction.
II. **Subject Matter Jurisdiction – State & Federal**


Defendant is a law firm with offices in New York, London, Singapore, and Moscow. Plaintiff, an attorney and former employee, sued defendant for sexual harassment and discrimination she allegedly suffered while working in A & O's Moscow office. She further charged A & O with wrongful termination of her employment, retaliation, breach of contract, intentional infliction of emotional distress, negligent retention and supervision of the attorney who allegedly harassed her, defamation, and conspiracy. The Defendant moved to dismiss the complaint in its entirety and asserted that the Court lacked subject matter jurisdiction over Plaintiff's claims under the New York State Human Rights Law, contending that because Plaintiff was not physically present in New York at the time of the complained of events, she was not a resident of New York at such time.

The Court stated, “The New York State Human Rights Law provides in pertinent part: 'The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state, if such act would constitute an unlawful discriminatory practice if committed within this state ... By its terms, this provision extends the State Human Rights Law to acts committed outside this state against New York residents. The issue before the court is thus whether plaintiff is a 'resident' within the meaning of the statute.”

Further, the Court analyzed the New York Court of Appeals decision in *Hoffman v. Parade Publications*:

“The protections afforded New Yorkers under the State Human Rights Law clearly confer a significant benefit on their recipients. The court is therefore persuaded that proof of domicile would satisfy the requirement
of New York State residence contained in [the New York State Human Rights Law].

Defendant's contention that this reasoning is undermined by the Court of Appeals' decision in *Hoffman v. Parade Publications* (15 NY3d 285 [2010]) is unpersuasive. Hoffman holds that nonresidents who suffer discrimination outside of New York must plead and prove that the discriminatory conduct had an impact in New York. This case does not consider whether a resident must be a domiciliary and, indeed, does not address the extensive authorities, discussed above, that equate domicile with residence where the statutory requirement of residence is a qualification for a privilege or the enjoyment of a benefit."

Stating that since “... it cannot be determined as a matter of law that, upon leaving New York, plaintiff exhibited an intention to relinquish her old domicile or to establish a new one,” the Court concluded that the Plaintiff remained a ‘resident’ and thus did have subject matter jurisdiction over the action, denying the Defendant’s motion.

The Court also pointed out: “Defendant also objects that this court may be called upon to apply English or Russian law to some of plaintiff’s claims. While this is an important consideration in considering a *forum non conveniens* motion ..., it is also true that the courts of this state are fully capable of applying the law of foreign jurisdictions. ... Notably, plaintiff’s case also raises substantial questions of New York law.”


In a *pro se* Plaintiff landlord-tenant action, Plaintiff sought $1.2 million in medical and emotional damages alleging exposure to mold, lead paint, and asbestos during the course of his tenancy, as well as from defendant's alleged failure to provide notice of repairs to plaintiff. The Court found that it lacked subject matter jurisdiction in the action because the Plaintiff did not “plead a colorable federal claim” that “[arose] under the Constitution or laws of the United States.”
Plaintiff had asserted federal jurisdiction under multiple federal statutes. With respect to Plaintiff’s OSHA claim, the Court found that it did not have subject matter jurisdiction since OSHA did not provide a private right of action brought by a citizen attempting to enforce OSHA or its regulations,” and that it was thus inapplicable to the dispute. The Plaintiff also brought claims under the Toxic Substances Control Act and the Clean Air Act, which the Court noted did provide a citizen suit provision. However, the Court found that the Plaintiff also failed to satisfy the Court’s subject matter requirements under these statutes, as both statutes required notice be given to the EPA Administrator by the Plaintiff.

Since “A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists,” the Court found that it did not have subject matter jurisdiction under pro se Plaintiff’s alleged federal claims in the action and dismissed the complaint.


This was an action on a management and production contract, where the Southern District denied the defendant’s motion to dismiss for lack of subject matter jurisdiction. Plaintiff Lumpkin had sent Sony an Assignment Agreement stating that Lumpkin had retained Defendant Reives and Experimental Pop Music, Inc. (“EPM”), a New York Corporation founded by Reives, to act as executive producer for “The Bachelor” album, which was recorded at Pyramid Sound Studios in Ithaca, New York from 1996–1997. Reives filed a complaint stating that Lumpkin had failed to pay Reives any royalties, fees, or commissions owed to him under the Management Contract and Production Contract.

The Court began by noting that “[w]hether diversity exists depends on the facts at the time the complaint was filed,” and that the Plaintiff and Defendant were indeed citizens of different states. Then the Court took more time in its discussion of the amount in controversy requirement:
“The Supreme Court ruled in *St. Paul Mercury Indemnity Co. v. Red Cab Co.* that, with regard to meeting the amount in controversy requirement:

‘The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal ... The fact that a valid defense to the claim may exist does not indicate bad faith or preclude jurisdiction. 303 U.S. 283, 288–289 (1938) (footnotes omitted).

Federal courts have consistently held that absolute certainty in meeting the threshold requirement is not required, “but the party invoking the jurisdiction of the federal court has the burden of proving that it appears to a ‘reasonable probability’ that the claim is in excess of the statutory jurisdictional amount.” *Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir.1994); see also, *Moore v. Betit*, 511 F.2d 1004, 1006 (2d Cir.1975).”

Although the Plaintiff’s allegations in the Complaint had crossed the $75,000 threshold, Plaintiff admitted to the Court that “… he does not know exactly how much he is owed, because he does not know the exact amount Lumpkin has earned since the formation of the Management Contract.” The Court then concluded, “I cannot say to a legal certainty that there is less than $75,000 in controversy. I might well suspect that there is less than $75,000 in controversy, but that does not entitle me to dismiss the complaint for want of subject matter jurisdiction. I suspect that same thing in most of the automobile accident cases I see, and indeed, most of them are resolved for amounts well under the jurisdictional limit, but I am not able to dismiss them in the absence of evidence demonstrating ‘to a legal certainty’ that this lawsuit is over a sum less than $75,000.”
III. General & Specific Jurisdiction – State & Federal §§ 301, 302

A. Federal Cases


In Defendants’ motion to dismiss for lack of personal jurisdiction under CPLR § 302, the Southern District found no jurisdiction and dismissed without prejudice “on a close question [of] facts concerning the formation of the contracts between Aquiline, a New York-based private equity firm investing globally in financial services, Financial Architects, a Belgium company and NIBC Capital, a Netherlands company.” Aquiline had asserted specific jurisdiction over Financial Architects and NIBC pursuant to New York’s long-arm statute, CPLR 302(a)(1), alleging that each defendant “transacted substantial business within the State of New York, including the negotiation of the contract that is the subject of this action.” The court found no jurisdiction over any of the defendants in a long exposition of minimum contacts + fairness analysis, a discussion of New York’s long-arm statute caselaw, citing as well to Landoil, Asahi, World-Wide Volkswagen and Parke-Bernet.

With respect to the ‘Financial Architects’ defendants, the Court found, “Here, even assuming that Financial Architects had sufficient minimum contacts with New York, subjecting the company to jurisdiction in the state would not satisfy the requirements of due process. The Defendants are foreign companies that had no prior relevant contact with Aquiline in New York. ... All of the Defendant's relevant representatives reside in Belgium and the Hague. ... Thus, it would be time-consuming and financially onerous for the Defendants to travel to New York for trial. In addition, all of Financial Architect's relevant documents, records and other evidence are also located in Belgium, and some of these materials would need to be translated from Flemish.”

With respect to the ‘NIBC’ Defendants, the court’s decision was easier. The court stated, “Given that NIBC Capital is incorporated under the laws of the Netherlands,
headquartered in the Hague and maintains no office of place of business in New York or anywhere else in the U.S., together with the fact that the Plaintiff failed to allege the existence of a single jurisdictionally significant contact between NIBC Capital and York, NIBC’s motion to dismiss based on lack of personal jurisdiction is granted.” Although the Court noted that the Plaintiff had alleged that NIBC Capital sent certain emails and faxes to New York in response to Aquiline’s solicitation of business in Belgium, the Court concluded, “...those sporadic contacts are not sufficient to establish specific jurisdiction over NIBC Capital.”


The Second Circuit affirmed the District of Connecticut’s dismissal of a complaint alleging intentional torts of assault and battery, intentional infliction of emotional distress, bystander emotional distress, and loss of consortium. Following an appeal, remand, and subsequent appeal, the Second Circuit held that New York law did not permit the exercise of long-arm jurisdiction over the complaint. The Plaintiffs had alleged that they were attending Camp Yale, which the complaint alleges is a Yale-sponsored event for its students to socialize prior to the beginning of the fall semester. The complaint further alleged that after a day of partying and drinking, the Defendant accompanied the Plaintiff to her dorm room, where he proceeded to assault her.

Referencing NY CPLR § 302(a)(3) and noting, “It is well-settled in New York that the original injury generally must occur in New York,” the Court stated, “The district court correctly determined that because it was undisputed that the original injury—the assault—occurred in Connecticut, New York law did not permit the exercise of long-arm jurisdiction. At oral argument, counsel conceded that the injury to [the Plaintiff], to the extent it differed from and was not derivative of [the second Plaintiff’s] injury, also occurred in Connecticut. It simply does not matter what other contacts [the Defendant] has with New York—in the absence of the original injury occurring in New York, jurisdiction does not exist. Connecticut law thus applies, and bars plaintiffs' claims.”

Eastern District Judge Dearie held that Plaintiff – imprisoned for over one month in Abu Dhabi under harsh conditions – failed to make out a *prima facie* case of personal jurisdiction over entities related to the Dubai corporation which had hired him, and who had made assurances to Plaintiff that “weapons in his checked baggage would pose no problems with the authorities.” Plaintiff had brought federal and state law claims against both the airline defendants and the airport security provider.

“According to the Complaint, these Global Defendants sought ‘to take advantage of security and intelligence businesses on a worldwide level by holding themselves out to the public’ and ‘conduct[ing] themselves] as a single economic unit and enterprise.’ … For example, Global UK personnel in London ‘perform[ed] functions for other Global entities around the globe,’ such as responding to email and telephone inquiries.”

“I need not decide whether the Global Defendants are alter egos of one another as plaintiff contends and the defendants vigorously deny … Even accepting as true plaintiff’s allegation that the Global Defendants do operate in reality as a single entity, plaintiff still fails to make out a *prima facie* case of jurisdiction because none of the Global Defendants, alone or in tandem, was doing business in New York when the Complaint was filed, as required under N.Y. C.P.L.R. § 301.”

The Court also noted, “The ‘traditional set of indicia’ for personal jurisdiction is not present in this case … None of the Global Defendants is or has ever been headquartered in New York, incorporated in New York, maintained an office or bank account in New York, or had any employees who work in New York … Rather, plaintiff predicates his argument for personal jurisdiction over the Global Defendants entirely on GTEC’s contacts with New York. Taken together, however, GTEC’s alleged contacts are not the ‘continuous, permanent and substantial activity in New York,’ required for personal jurisdiction.” *See Landoil*, 918 F.2d at 1043.
7. *Licci ex rel. Licci v. Lebanese Canadian Bank*, *SAL*, 673 F.3d 50 (2nd Cir. March 5, 2012)

Circuit Judge Sack certified two questions to the New York Court of Appeals regarding NY CPLR § 302(a)(1) in this appeal coming out of the Southern District of New York. As of this writing, the Court of Appeals has not yet rendered their decision on the certified questions.

Israeli residents who were injured or whose family members were killed in a series of terrorist rocket attacks on civilians in Israel brought an action under the Anti-Terrorism Act, Alien Tort Statute, and Israeli tort law against Lebanese bank, which allegedly facilitated terrorist organization's acts by using correspondent banking account at New York bank to effectuate wire transfers on behalf of a terrorist organization totaling several million dollars. The bank moved to dismiss for lack of personal jurisdiction or failure to state a claim. The United States District Court for the Southern District of New York, George B. Daniels, J., 704 F.Supp.2d 403, granted the motion, on the grounds that “LCB’s maintenance of a correspondent banking account in New York and use of that account to wire funds on behalf of the Hizbollah affiliate were insufficient to establish specific personal jurisdiction over LCB under the New York long-arm statute, N.Y. C.P.L.R. § 302(a)(1). The court [below] concluded both that ‘[t]he execution of wire transfers ... alone is [not] sufficient to confer jurisdiction over a foreign bank,’ *Licci v. Am. Express Bank Ltd.*, 704 F.Supp.2d 403, 407 (S.D.N.Y. 2010), and that there was no ‘articulable nexus or substantial relationship ... between LCB’s general use of its correspondent account for wire transfers through New York and the specific terrorist activities by Hizbollah underlying plaintiffs’ claims,’ id. at 408."

In his opinion, Second Circuit Judge Sack determined, “The question of whether, and if so to what extent, personal jurisdiction may be established under N.Y. C.P.L.R. § 302(a)(1) over foreign banks based on their use of correspondent banking accounts in New York remains unsettled. We conclude that New York law is insufficiently developed in this area to enable us to predict with confidence how the New York Court of Appeals
would resolve these issues of New York State law presented on appeal. We therefore certify to the Court of Appeals two questions concerning the application of the New York long-arm statute."

The questions certified to the New York Court of Appeals:

(1) Does a foreign bank’s maintenance of a correspondent bank account at a financial institution in New York, and use of that account to effect “dozens” of multimillion dollar wire transfers on behalf of a foreign client, constitute a “transact[ion]” of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)?

(2) If so, do the plaintiffs’ claims under the Anti-Terrorism Act, the ATS, or for negligence or breach of statutory duty in violation of Israeli law, “aris[e] from” LCB’s transaction of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)?


Captain of yacht brought action against his employer for injuries allegedly incurred when he slipped and fell while working on yacht. Various third-party claims were brought, and then the Italian yacht designer moved to dismiss for lack of personal jurisdiction. Judge Weinstein’s opinion began, “A yacht designer, resident abroad, whose work was done in Europe, was sued after a seafarer was injured on a vessel, allegedly because of faulty naval architecture. It asserts lack of personal jurisdiction. As indicated below, there is no personal jurisdiction. It should also be noted that the movant’s mere possession of an account on Facebook is not, in the context of this case, a sufficient predicate for hauling it into a court in New York.”
Going one step further in his analysis, Judge Weinstein also addressed the Italian Defendant’s due process concerns and the Supreme Court’s recent opinion in *J. McIntyre v. Nicastro*: “And even assuming without deciding that the exercise of personal jurisdiction over Nuvolari would be appropriate under Section 302(a) (3)(i)—based on the allegation that Nuvolari received some $30,000 for its design of the Brianna ... —the constitutional guarantee of due process prohibits the exercise of personal jurisdiction on that basis. (The derivation of revenue by Nuvolari for the design of the vessel is the only basis that might suffice to allow for the exercise of personal jurisdiction under the long-arm statute; Nuvolari did not regularly conduct business or solicit business in New York, or engage in a persistent course of conduct in the state. ... ) Due process bars the exercise of personal jurisdiction over Nuvolari since it did not take advantage of benefits provided by the State of New York, nor was it contemplated that it would do so.” *See J. McIntyre Mach., Ltd. v. Nicastro, —— U.S. ——, 131 S.Ct. 2780, 2788, 180 L.Ed.2d 765 (2011) (plurality opinion).*


Also note that Judge Weinstein’s conclusion remarked, “The result is not entirely satisfying to a plaintiff seeking relief in a liability suit based upon allegations of defects in a product designed, produced, and sold in different states and nations. *See*, e.g., Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders 324 (2012). But for the moment it is based upon applicable law in this state and nation.” This is particularly noteworthy in light of his reference to the Supreme Court’s opinion in *J. McIntyre v. Nicastro*, in his analysis of the Defendant’s due process concerns.


   Attorneys brought an action against relatives of former client, alleging defamation under New York law. The defendants' motion to dismiss the complaint for lack of
personal jurisdiction was granted by the Southern District of New York and the attorneys appealed. The Defendants were residents of Colorado and had allegedly posted YouTube videos and contacted New Yorkers via email and telephone seeking responses to the allegedly defamatory statements. The Second Circuit affirmed the Southern District, also finding no jurisdiction over the Colorado residents in this defamation action.

Noting that New York courts construe the “transacting business” test of § 302(a)(1) more narrowly in defamation cases than in other contexts, and that New York courts do not interpret transacting business to include ‘defamatory utterances’ sent into New York state, unless the conduct also included “something more.” The Second Circuit found: “However, [the Plaintiff's] argument is foreclosed by SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass'n, in which the Third Department held that a person's defamatory comments on a website, coupled with phone calls to New York and donation of money to a New York entity, were insufficient to establish the “something more” required by C.P.L.R. § 302(a)(1).” See SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass’n, 74 A.D.3d 1464, 903 N.Y.S.2d 562 (App. Div. 3rd Dep't. June 3, 2010).

The Second Circuit went one step farther, and held that were it to find that the “transacting business” test had been met, the “arising out of requirement” still fell short of the mark: “Furthermore, even if Benedict and Van Pelt had transacted business within the meaning of C.P.L.R. § 302(a)(1), they cannot demonstrate that an articulable nexus or a substantial relationship existed between the alleged defamatory conduct and the actions that occurred in New York.”

The Court found, "Defendants' alleged defamatory comments were not made while they were physically present in New York, but rather were published after they had returned to their out-of-state domiciles. Although the YouTube videos bear a relationship to the proceedings in New York and defendants' alleged commercial interest in New York, the district court correctly found that defendants' interaction with New York during the publication of the videos was too marginal to establish the required articulable nexus. Accordingly, the district court properly determined that plaintiff's failed to show a


A personal injury action – arising from injuries allegedly sustained by the plaintiff while working on a job site in Taiwan – was filed in New York State Supreme Court, Erie County, and the case was removed to the Western District of New York based on diversity jurisdiction. The plaintiff moved to compel jurisdictional discovery on the issue of long-arm jurisdiction under NY CPLR § 302(a)(1), and the Court allowed it, citing Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618, 2009 U.S. Dist. LEXIS 106798, at *12–13 (S.D.N.Y. Nov. 16, 2009): “Jurisdictional discovery is allowed when plaintiff makes a threshold showing that there is some basis for the assertion of jurisdiction … It is within this Court's discretion to determine whether plaintiff is entitled to conduct jurisdictional discovery.” The Court found that the Plaintiff made a prima facie threshold showing sufficient for such jurisdictional discovery, where the complaint alleged that the defendants regularly did and solicited business in New York, that they transacted business in New York, and that the claim arose from that transaction.


This case is one of a number of civil lawsuits brought by and on behalf of online poker players who lost access to money in player accounts they maintained on the online gambling website, fulltiltpoker.com, on April 15, 2011. On that date—also known as “Black Friday” in the online gambling world—the United States Attorney for the Southern District of New York shut down the websites of the three largest online poker companies then operating in the United States, Full Tilt Poker, Absolute Poker and PokerStars. Department of Justice instituted a civil suit against individuals and entities
associated with the three poker companies, seeking forfeiture of all assets and proceeds they derived from their allegedly illegal activities.

Defendants argued that, because they are not New York residents and do not conduct any business in New York, the Court lacked personal jurisdiction over them and moved to dismiss. The Court discussed NY CPLR § 302(a), and found no jurisdiction over the individual Defendants, but upheld jurisdiction over the corporate Defendants.

Regarding the individual Defendants, the Court stated, “Even assuming arguendo that playing online poker against a New York consumer, or playing in a poker game broadcast in New York is sufficient to constitute a transaction of business in New York, thereby satisfying the first prong of the § 302(a)(1) jurisdictional test, plaintiffs still have not alleged sufficient facts to establish the second prong of § 302(a)(1): namely, that the claims against the Individual Defendants ‘arose out of’ these online games.” The Court found that the Plaintiff’s allegations that “these individuals played poker games against New York consumers on the website, and that they helped promote the brand by playing live poker games that were broadcast into New York” were insufficient to confer jurisdiction under § 302(a)(1).

A different result was reached with respect to the corporate Defendants. “…[W]e agree that by operating or facilitating the operation of the Full Tilt poker website, they transacted business in New York under the ‘purposeful availment’ test. Corporations purposefully avail themselves of the privilege of conducting business in a state when they operate a website that ‘projects itself’ into New York by dynamically interacting with New York users.” See Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 170–171 (2d Cir.2010).

The Court also cited Frummer v. Hilton Hotels, stating, “The website also satisfies the ‘transacts any business’ prong of the jurisdictional test with respect to Tiltware and Pocket Kings Consulting, the remaining two Corporate Defendants. Neither of these corporations appear to have directly maintained the website. Nonetheless, they
provided valuable services to it that, were they not around, the website maintainers would have had to do on their own. In this capacity they functioned as 'agents' of the companies that maintained the website, to whom jurisdiction can be imputed."


In a negligence and medical malpractice action brought by Plaintiff on behalf of her infant child, Defendants moved to dismiss and the Court granted the motion, finding no jurisdiction over the Defendants under either NY CPLR § 301 or § 302.

Passing on § 301, the Southern District held that the Plaintiff did not satisfy the 'doing business' standard: "Plaintiff has not satisfied her burden of showing the defendants are subject to 'doing business' jurisdiction under Section 301. Plaintiff concedes that [the Defendants] are citizens of Connecticut and conduct business in Connecticut. Plaintiff further concedes [that the hospital] is incorporated and has its principal place of business in Connecticut. There is no indication from the amended complaint or the papers in opposition that defendants keep offices, property, or bank accounts in New York. [The Hospital] admits it occasionally advertises in media channels possibly viewed by New York residents. However, advertising, without further business transactions accompanied by a fair measure of permanence in the state, does not confer personal jurisdiction over defendants."

Passing on § 302(a)(3), the Court also found no jurisdiction:

"In medical malpractice cases, the appropriate forum is the location where plaintiff received medical treatment, not where resultant damages are felt by plaintiff. [internal citations omitted].

There is no evidence demonstrating the original injurious event occurred in New York. In the amended complaint, plaintiff seeks damages for the injuries ... incurred due to defendants' "pre-, peri-, and neonatal care." Plaintiff claims [that her infant child] was born at Stamford Hospital and sustained the alleged injuries at birth. Neither plaintiff's affidavit, nor her
amended complaint, indicates that she or [her infant child] was treated by any defendant in New York. Further, defendants allege plaintiff and [her infant child] were treated only in Connecticut, which plaintiff does not contest in any of the documents filed after the amended complaint. This makes Connecticut, not New York, the site of the original injurious event. Therefore, plaintiff cannot establish an essential element of Section 302(a)(3).”


In a motion to dismiss for lack of personal jurisdiction under FRCP 12(b)(2), the court found jurisdiction, “at the very least,” under NY CPLR § 302(a)(1). The out-of-state defendants had chosen as escrow agent for a transaction with the plaintiff, a legal partnership organized under and having its principal place of business in New York. After plaintiff wire transferred $680,000 to the escrow agent, plaintiff was supposed to have received a $16 million standby letter of credit (“SLC”). Upon learning that the SLC was fraudulent, plaintiff demanded the return of the $680,000, but defendants failed to do so.

In analyzing the existence of an agency relationship between the multiple defendants for purposes of finding jurisdiction under § 302(a)(1), the court said, “In determining whether an agency relationship exists for the purposes of CPLR 302, courts ‘have focused on the realities of the relationship in question rather than the formalities of agency law.’ CutCo, 806 F.2d at 366. ‘Whether a representative of the defendant qualifies as an agent for jurisdictional purposes does not turn on legalistic distinctions between being an agent or independent contractor,’ and ‘no showing of a formal relationship between the defendant and the agent is required.’ Robert Diaz Assoc. Enters., Inc. v. Elete, Inc., No. 03–CV–7758, 2004 WL 1087468, at *5 (S.D.N.Y. May 14, 2004) (internal quotation marks omitted).” Citing World-Wide Volkswagen, the court said, “Plaintiff has plausibly alleged that by specifically choosing the New York-based …
Defendants as their agents and entering into the Escrow Agreement in which they agreed to submit to the exclusive jurisdiction of New York courts, Porter and the POF Defendants “purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State’ (internal citations omitted).


Plaintiffs brought a class action against a number of defendants, asserting claims for consumer and common law fraud, false advertising, and breach of contract, among others, which arise out of purported fraudulently induced contracts for merchant card processing services. The ‘Merchant Defendants’ moved to dismiss as to them for lack of personal jurisdiction and the Court granted the motion. Although the Plaintiffs had attempted to apply either CPLR §§ 301 or 302(a)(1), the Court pointed out that “There is nothing evidencing a ‘continuity’ or ‘permanence’ of ‘doing business’ in New York by any of the Merchant Defendants, nor does the Complaint allege plausibly that any of the Merchant Defendants are ‘transacting business’ here or that the causes of action asserted arose in New York,” which would set forth a plausible *prima facia* case for the Court’s jurisdiction over the ‘Merchant Defendants’.

The Court took a moment to correct the Plaintiff’s misstatement of the law regarding personal jurisdiction – where the Plaintiffs asserted that, as they had pleaded facts establishing personal jurisdiction, the burden shifted to the Defendants to *affirmatively* prove a *lack* of jurisdiction – by reminding them: “The burden of establishing jurisdiction over the Merchant Defendants rests squarely with plaintiffs.” The Court found no jurisdiction under either CPLR §§ 301 or 302(a)(1) – where at best the Plaintiff’s basis for jurisdiction over the Merchant Defendants would have grown out of a single, isolated transaction in New York flowing from a lease agreement, which “simply does not meet the ‘continuous’ or ‘permanent’ contacts necessary for personal jurisdiction under CPLR § 301(a) ... or the ‘substantial nexus’ between the ‘transaction of business’ and the claim in this action for jurisdiction under CPLR § 302.” The Court concluded by pointing out that dismissal of the Merchant Defendants would not foreclose
the Plaintiff's opportunities for recourse against them, as the parties did not dispute that there was a parallel putative class action proceeding in the Northern District of California against the same defendants, in which the Plaintiff in this case may be a class member if a class is certified.


In a declaratory judgment action seeking determinations of non-infringement and invalidity respecting a patent owned by Defendant Hantover for a universal knife holder, the Defendant moved to dismiss for lack of personal jurisdiction and the Southern District granted the motion, finding no general or specific jurisdiction under NY CPLR §§ 301 or 302. Plaintiff Bodum was a Delaware corporation with its principal place of business in New York, and Defendant Hantover was a Missouri corporation with its headquarters and operating facilities located in Kansas City, Missouri.

Regarding general jurisdiction under CPLR § 301, the Court noted that “In its Complaint, Bodum fails to allege facts sufficient to support a finding of general jurisdiction over Hantover. Bodum merely uses conclusory language that tracks the case law, and makes no specific factual allegations. Hantover has none of the usual contacts considered in the general jurisdiction inquiry: it owns no property in New York and has no offices, employees, bank accounts, post office boxes, telephone lines, or mailing addresses within the state.” Also discussing the applicability of the “solicitation-plus” doctrine – which might give rise to general jurisdiction – the Court found,

“Nonetheless Bodum argues that Hantover's New York sales represent a systematic and continuous course of business that gives rise to general jurisdiction. Under the “solicitation-plus” doctrine, direct sales must first rise to the level of “substantial solicitation.” In the year the suit was filed, less than one percent of Hantover's sales were in New York. District courts in this Circuit have repeatedly held that where a foreign corporation
derives less than five percent of its revenue from New York, that amount is insubstantial and cannot support a finding of personal jurisdiction over the defendant. The Court cannot proceed to the second prong of the “solicitation plus” test, because these direct sales do not constitute a significant portion of Hantover’s business activities. The mere fact that Hantover sells its product in New York is not enough to justify an exercise of general jurisdiction, and Bodum makes no other factual allegations or arguments that would support a finding of general jurisdiction. Therefore, on the facts currently pled, section 301 does not provide a basis for asserting personal jurisdiction over Hantover.”

With regard to specific jurisdiction, the Court’s inquiry was more brief, finding “Bodum relies primarily on the two cease and desist letters Hantover’s counsel sent to Bodum’s New York office in [attempting to assert specific jurisdiction]. Bodum does not make any other factual allegations regarding specific jurisdiction. However, the Federal Circuit has repeatedly held that ‘cease-and-desist letters alone do not suffice to justify personal jurisdiction,’ requiring instead that ‘the defendant [must also] have engaged in ‘other activities' that related to the enforcement or the defense of the validity of the relevant patents.’ Bodum fails to specifically allege any of these ‘other activities.’ Therefore, Bodum has not met its burden of showing a prima facie case of specific jurisdiction under section 302(a)(1).”


In a trademark infringement action in the Southern District of New York, Defendant San Diego Rock Church, a California corporation, and Defendant Miles McPherson, a California citizen, contended that the Court lacked personal jurisdiction over them and moved to dismiss. Plaintiff alleged that the Court had jurisdiction pursuant to N.Y. C.P.L.R. § 302(a)(1) and (3).
The Court found that the Plaintiff had made a prima facia showing of personal jurisdiction under CPLR § 302(a)(1). Plaintiff alleged that Defendants' infringing actions included selling McPherson's book, "DO Something: Make Your Life Count," in New York, promoting McPherson's book in New York and advertising and offering items for sale to New York residents via interactive websites. Citing *Chloe v. Queen Bee of Beverly Hills*, the Court stated, "[P]roof 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."

The Court also found jurisdiction under CPLR § 302(a)(3). Citing to *Penguin Group v. American Buddha* and *LaMarca v. Pak-Mor Mfg. Co.*, the Court stated,

"Plaintiff's causes of action are alleged to arise in part from Defendants' acts of trademark infringement committed outside of New York. Plaintiff, a New York corporation, sufficiently alleges injury to its person or property in New York because "the first effects of trademark infringement ... are typically felt where the trademark owner resides and conducts business, and can include injury in the form of damage to goodwill, lost sales, or lost customers." ... With respect to a defendant expecting consequences in New York, "courts have focused on whether there were concrete facts known to the nondomiciliary that should have alerted it that its product would enter the New York market." ... Plaintiff satisfies this requirement in alleging purposeful acts by Defendants to target entry into the New York market.

The revenue requirement "is designed to narrow the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but whose business operations are of a local character." ... Plaintiff satisfies this requirement in alleging that Defendants operate interactive websites that advertise and
Plaintiff ING Global brought a diversity suit against UPS and others. The suit arose out of Plaintiff’s contract with UPS to deliver containers. Plaintiff alleged that UPS and its employees fraudulently induced the plaintiff to enter into the contract and that, even if it is a valid contract, defendant UPS breached the contract. Defendant UPS and the Individual Defendants (collectively “the defendants”) moved to dismiss the Complaint in part, and the Court granted that motion, concluding that the Court lacks personal jurisdiction over the Individual Defendants. The Plaintiff had asserted that the Defendants should be subjected to the specific jurisdiction of the Court.

Discussing CPLR § 302(a)(1), the Court found no jurisdiction:

“In order for out-of-state communication about a contract alone to confer personal jurisdiction, the “center of gravity” of that contract must be New York. In other words, “where a defendant's ‘contacts with New York consist of telephone calls, fax transmissions, and correspondence in connection with the negotiation of a contract that has a center of gravity well outside the state,’ there is no personal jurisdiction under C.P.L.R. § 302(a)(1). ... In determining the center of gravity of the contract, the most significant factor is where the performance of the contract is to take place.

Here, the center of gravity of the contract was not New York. The contract at issue did not require any performance to take place in New York.... The contract had choice of law and choice of forum provisions in favor of
Georgia .... Moreover, according to the Complaint, the products at issue in this case are used in “United Parcel Service's operations in the United States and around the world.”...

Plaintiff argues that it was based in New York and directed activity under the Contract from its headquarters in New York. If plaintiff's location and activity in New York alone were sufficient to establish New York as the focal point of the contract, however, then nearly every time an out-of-state defendant entered into a Contract with a New York corporation, the center of gravity of the contract would be New York. This would vitiate the separate center of gravity requirement. Therefore, the plaintiff has failed to state a prima facie case of personal jurisdiction against the Individual Defendants on the transacted business basis of personal jurisdiction.”

The Court also rejected the Plaintiff’s § 302(a)(3) theory, stating, “Although UPS may have regularly conducted business in New York, the Complaint does not adequately allege that the Individual Defendants regularly conducted business in New York. The Plaintiff has not alleged that the Individual Defendants conducted any ongoing activity in New York outside of their contacts with ING, and their actions taken with respect to ING alone are not enough to establish a course of ongoing activity in New York. Plaintiff has thus failed to establish a prima facie case of jurisdiction under the out-of-state tort basis of jurisdiction.”


In an action seeking a declaratory judgment and misappropriation of trade secrets against defendant Intrepid Solutions, the Court found no personal jurisdiction. The Court found that personal jurisdiction could not be exercised over Intrepid because IBG failed to satisfy § 302(a)(3)(ii), where IBG was unable to show that Intrepid caused an injury within New York. The Court stated, “[w]hile Plaintiff declares that the misappropriation
of its trade secrets and proprietary information would harm IBG's efforts to reap an award of a contract on [a bidding project], it has not shown that that injury-occurred ‘within New York’.”

Comparing this case’s circumstances to both Penguin v. American Buddha and Syrbon Corp. v. Wetzel, the Court concluded, “Unlike the circumstances found in either of the above-referenced cases, Defendant Intrepid neither acquired the trade secrets at issue in New York, nor threatens to pilfer significant New York customers. Moreover, the complications that the Internet posed in Penguin Group (USA) Inc. are similarly absent and the Court can easily correlate IBG’s lost sales to a particular state. To the extent Intrepid’s alleged tortious activity caused harm, that harm would result in the loss of business from a Virginia based organization on a project to be performed in part within Virginia.”

A second Defendant was, however, found to be subject to the jurisdiction of the Court, as he had expressly waived any inconvenient forum objection through a restrictive covenant agreement with Plaintiff IBG. The Court explained, “The Second Circuit has articulated a four-part test for determining whether to dismiss a claim based on a contract’s forum selection clause: (1) whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is mandatory or permissive, i.e., to decide whether the parties are required to bring any dispute to the designated forum or simply permitted to do so; (3) whether the claims and parties involved in the suit are subject to the forum selection clause; and (4) whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, enforcing them would contravene a strong public policy of the forum state or that the clause was invalid for such reasons as fraud or overreaching. Horvath v. Banco Comercial Portugues, S.A., 461 Fed. Appx. 61, 62–63 (2d Cir.2012).”

In a diversity action seeking relief for alleged tortious interference with its business expectancies and violations of the Connecticut Unfair Trade Practices Act by defendant Rivo Software, Inc., the Defendant moved to dismiss Safety Software Ltd.'s ("SSL's") complaint for lack of personal jurisdiction and improper venue pursuant to Rules 12(b)(2) and 12(b)(3) of the Federal Rules of Civil Procedure. The Southern District granted the Defendant's motion in its entirety.

Plaintiff SSL is a United Kingdom-based LLC organized under the law of the U.K. of Great Britain and Northern Ireland, and designs and develops web-based software applications, including the software at issue in this litigation—"AIRSWEB," which tracks workplace accidents and claims for businesses. Rivo is a Delaware corporation with its principal place of business in Connecticut, and Rivo markets software that manages business risk and compliance. At the heart of the action is SSL's allegation that Rivo used SSL's trade secrets to compete with SSL, and did so successfully. SSL based its choice of venue on its alleged information and belief that "Rivo has an office address in the Southern District of New York," and transacts business in this District. SSL asserted that dismissal is improper because Rivo "held itself out" as doing business in New York, but stresses that, at a minimum, SSL is entitled to jurisdictional discovery.

In examining whether the Court could assert general jurisdiction under CPLR § 301, the Court observed, "Plaintiff asserted that because Rivo held itself out as 'doing business' in New York, it should be subject to the Court's general jurisdiction. Specifically, plaintiff alleged that Rivo maintained an office in New York and a New York mailing address, and directed 'others' to contact it via that New York mailing address. According to the sworn declaration of Rivo's President, Rivo maintained a mail and package receipt and forwarding arrangement with Corporate Suites, a virtual-office
service provider’ located at the Madison Avenue address previously listed on Rivo’s website.” However, the Court pointed out,

“Indeed, plaintiff’s own evidence shows that Rivo was not holding itself out as located in New York. As the email which lists the Corporate Suites address demonstrates, Hook was holding Rivo out as being “based over in Connecticut as we have recently opened our U.S. office.” ... Listing a New York address on an email is insufficient to establish that Rivo had an office in New York.”

In examining whether § 302(a)(1) would allow the Court to assert long-arm jurisdiction over the Defendant, the Court quickly concluded that “There is simply no allegation—and plaintiff has not averred otherwise—that the cause of action arose out of Rivo’s transacting business in New York. Indeed, plaintiff essentially concedes that it does not seek jurisdiction under the long-arm statute by arguing only that this Court has general jurisdiction over Rivo under CPLR § 301. ... Accordingly, the Court cannot exercise jurisdiction over Rivo under New York's long-arm statute.”

Assuming arguendo that personal jurisdiction could be proper, the Court still found that the choice of venue would have been improper: “[V]enue in this diversity action would not be proper in this District. In a diversity action, venue is proper in the chosen forum: (1) if it is where the defendant resides (if all defendants reside in the State in which the district is located); (2) if a ‘substantial part’ of the events that gave rise to the claims at issue occurred in the district; or (3) if the defendant is subject to personal jurisdiction ‘if there is no district in which an action may otherwise be brought’.” In this regard, the Court found that Rivo ‘resided’ in Connecticut rather than New York, the claims giving rise to the Plaintiff’s cause of action did not occur in New York, and there was another District where the action could be brought: The District of Connecticut, where Rivo had maintained its principal place of business.

In a patent & trade-dress infringement and unfair competition action, Plaintiff Scottevest sought a default judgment against Defendant AyeGear who had made no appearance. The Court expressed some concern regarding the Plaintiff’s affidavit of service upon the Defendant, which identified the defendant as AyeGear Glasgow Limited, as distinguished from AyeGear Glasgow Limited.

According to the Complaint, plaintiffs are organized under the laws of Idaho with their principal places of business in Ketchum, Idaho. Defendant was alleged to be organized “under the laws of the country of Scotland, having corporate offices in Lankarkshire, Scotland.” The Plaintiff also alleged that the Scottish defendant “contracts to supply goods and transacts business in New York and is within this judicial district ....” The Plaintiff, however, made no other allegations as to the defendant's presence in New York except to assert that it “owns and operates an interactive web site, with a U.S. based ‘.com’ domain name (http://ayegear.com), from which Defendant sells the infringing goods in to the United States and New York.” The Plaintiff also alleged that after it launched its website, the “Defendant began offering for sale and selling” its allegedly infringing products “in the United States.”

The Court found that the Plaintiff’s “generalized assertion that the defendant contracts to supply goods and transact business in New York [was] unsupported by [the] evidentiary submissions or factual allegations” under CPLR § 302(a)(1). The Court stated, “The Complaint includes no allegation as to business transacted in this state and does not identify contracts by which the defendant supplied goods to New York. The attorney declaration similarly contains no factual assertions or exhibits that reflect such activity. Without more, this Court has no basis to conclude that it has personal jurisdiction over the defendant under CPLR 302(a)(1).”

The Southern District also addressed *J. McIntyre v. Nicastro*: 

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“As to exercising jurisdiction consistent with defendant’s due process rights, in *J. McIntyre Machinery, Ltd. v. Nicastro*, — U.S. ——, ——, 131 S.Ct. 2780, 2788, 180 L.Ed.2d 765 (2011), the Supreme Court recently emphasized that due process “permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.” It emphasized that “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.” Id. at 2789. “[F]oreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.” Id. at 2789–90. A foreign company’s participation in the broader U.S. market does not mean that it has established minimum contacts in a specific state. Id. at 2790–91.

Neither the Complaint nor the attorney declaration sets forth facts that establish personal jurisdiction over the defendant. They do not reflect purposeful conduct directed toward New York, as required by *J. McIntyre Machinery*. Similarly, beyond a generalized assertion, the Complaint does not identify an injury in New York, explain why the defendant should have anticipated injury in New York, or set forth an allegation as to defendant’s revenue gained in international commerce. *Penguin Group*, 640 F.3d at 499. This is insufficient to establish long-arm jurisdiction over the defendant.”

B. State Cases


In defendant’s appeal from a judgment confirming an arbitrator’s award of $14,097 against defendant law firm client who had disputed the firm’s fees, defendant
sought de novo review of the arbitrator’s award. The issue presented in this appeal was whether the defendant timely ‘commenced an action’ on the merits of that fee dispute in a court of competent jurisdiction. Explaining the limited jurisdiction of the Civil Court of the City of New York and analogizing the relevant jurisdictional statute in this matter, NY CCA § 404(a)(1), to NY CPLR § 302 (a)(1), the Court said that the defendant lacked a proper basis to assert long-arm jurisdiction over the law firm under NY CCA § 404(a). The Court stated, “[Defendant] asserted that [the law firm] was subject to the jurisdiction of the Civil Court because it had transacted business within the City of New York. However, [Defendant] stated that the subject of the Civil Court action was a contract with [the firm], pursuant to which that entity was to provide legal services for him in Suffolk County, New York. The only relationship he cited between the jurisdiction and the contract was his own presence in the City of New York while signing the contract with [the firm], and his posting of the signed contract … from a post office box located in the Bronx. These activities by [the defendant] in the Bronx were insufficient to confer jurisdiction on the Civil Court over [the firm].”


In this action, plaintiff insurance company had originally sought a declaratory judgment stating that the defendants were not entitled to no-fault insurance benefits. Defendant-Hospitals in New Jersey then brought this CPLR § 3211(a)(8) motion to dismiss for lack of personal jurisdiction, but the court found personal jurisdiction under CPLR § 302. Citing LaMarea v. Pak-Mor Mfg., the court held, “In the instance case, Defendants billed a New York Corporation, in the State of New York, as an assignee under a New York insurance policy and pursuant to New York’s ‘No-Fault’ laws. Thus, Defendants have purposefully transacted business within the state and said transaction is the basis of the claim asserted by Plaintiffs. Furthermore, by seeking compensation under a New York insurance policy in accordance with New York’s ‘No-Fault’ laws, Defendants purposefully availed itself of the privileges of conducting activities within the
state. Accordingly, this court's exercise of personal jurisdiction over Defendants is proper pursuant to CPLR § 302(a)(1)."


In a defamation action, Defendant “Little” (appearing pseudonymously) moved to dismiss for lack of personal jurisdiction. Plaintiff Deer, a Nevada corporation doing business in Guandong, China, is a publicly traded company which manufactures and sells small home appliances. Deer alleged that Little authored several defamatory reports, published on a website operated by Seeking Alfa, Ltd. (“SAL”), an Israel-based company, as part of an overall scheme to artificially drive down the price of Deer's common stock in order to profit on short sales.

The Court denied Defendant Little's motion to dismiss for lack of personal jurisdiction under NY CPLR § 301, allowing jurisdictional discovery on the § 301 issue and stating, “[t]he evidence in this case is insufficient for the court to determine, at this time, whether the Court can exercise jurisdiction over Little pursuant to CPLR 301 based on his domicile. Little's personal website, www.alfredlittle.com, his LinkedIn profile, and the reports published by Little on the SAL's and other websites, all state in the “About” [the author] section, that “Little now resides in New York and Shanghai” ... However, Little denies this jurisdictional fact, asserting that he has not resided in New York for last 12 months. At the same time, Little raises a defense of truth to the defamatory reports he is being sued on, but denies the truth of the statements in the “About” section. Due to such conflicting evidence, whether personal jurisdiction over Little exists pursuant to CPLR 301, cannot be determined on this motion.”

Discussing NY CPLR § 302(a)(1), the court noted,

[W.D.Pa.1997], according to which websites are classified as (1) interactive [a defendant provides goods and services over the internet or knowingly and repeatedly transmits computer files to customers in other states]; (2) middle ground [permits the exchange of information between users in another state and the defendant], and (3) passive [makes information available to users] (see also Royalty Network Inc. v. Dishant.com, LLC, 638 F.Supp.2d 410 [S.D.N.Y.2009]). Thus, it has been held that exercising personal jurisdiction over the owner of an internet website accessible in New York, required that the site be “highly interactive” and more than mere presence on the internet (Citigroup Inc. v. City Holding Co., 97 F.Supp.2d 549, 565 [S.D.N.Y.2000] [analyzing the scale of interactivity] ). On the other hand, web sites, as here, where a user can exchange information with the host computer, occupy a middle ground, and the exercise of jurisdiction in these cases is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site (id.; Best Van Lines, at 251 ). Where website falls somewhere in the “middle ground,” the jurisdictional inquiry requires closer evaluation of its contact with New York residents (Royalty Network Inc. v. Dishant.com, LLC, 638 F.Supp.2d 410 [S.D.N.Y.2009])."

The Court held that § 302(a)(1) provided no basis for jurisdiction over Little: "...Little's internet activities do not constitute ‘transaction of business’ in New York within the meaning of section 302(a)(1) ... there is nothing in this record to support a finding that Little purposefully transacted business via his website with New York residents. In the context of a section 302(a)(1) jurisdictional inquiry, such failure is fatal.”

In a defamation case, Defendant website operator's action in posting alleged defamatory statements on internet webpage was found insufficient to establish personal jurisdiction over the website operator. The website operator lived in Georgia, her webpage was operated out of Georgia, she used services in Georgia to operate her webpage, she did not regularly conduct business in state, and she did not derive substantial revenue from state. See NY CPLR § 302.

The Court also noted that the single case that the Plaintiff had relied on did not avail them of jurisdiction over the Defendant, quoting Telebyte, Inc. v Kendaco, Inc. 105 F. Supp. 2d 131, at 134 (E.D.N.Y. 2000):

"The existence of a web site outside New York, even one that offers a product for sale, cannot alone confer jurisdiction over the defendant under CPLR 302(a)(2). Although it is in the very nature of the Internet that the allegedly [defamatory remarks] contained in these web sites can be viewed anywhere, this does not mean that the [act] occurred everywhere. Courts have held that, when web sites display [allegedly defamatory remarks], the tort is committed where the web site is created and/or maintained [internal quotation marks and citations omitted]."


In an action to recover attorney's fees arising out of representation provided by Plaintiffs to Defendant in connection with a dispute with the United Nations, pro se Plaintiff and his law firm sought a default judgment against the Defendant for failure to answer or appear. The Court had to determine "... (1) whether the Court can exercise personal jurisdiction over defendant in the first instance, and if so, (2) whether defendant was properly served in India. Plaintiffs allege upon information and belief that defendant
is a foreign corporation with its principal place of business in the city of Chandigarh, India.”

Regarding personal jurisdiction under New York’s long-arm statute, the Court held that the Defendant’s activities were sufficient to invoke long-arm jurisdiction: “It is alleged, without opposition, that the Court can assert jurisdiction over defendant because the defendant transacted business in New York by meeting with plaintiffs in NY, retaining plaintiffs for an arbitration proceeding conducted in NY and attending the arbitration proceedings with plaintiffs which took place in NY. Insofar as defendant has filed no opposition to this motion, it is deemed to have admitted the facts as asserted by plaintiffs. … The Court finds that based on these allegations, defendant's activities were sufficient to invoke jurisdiction and there is a substantial relationship between the transaction and the claim asserted.”

Regarding service of process, the Court had also to determine whether the Plaintiff had complied with the Hague Convention: “With respect to the second question as to whether or not defendant was properly served in India, plaintiffs submit proof demonstrating service pursuant to the CPLR, and in addition proof that defendant was served in accordance with the Hague Service Convention treaty. CPLR § 313 provides that a person subject to jurisdiction in NY may be served in the same manner without the state, as service is made within the state, by a person authorized to make such service by the laws of the country in which service is made. In accordance therewith, plaintiffs proffer proof that defendant was seemingly served in accordance with CPLR § 311(a)(1).” The Court found that the Defendant had been properly served: “[T]he Hague Service Convention is implicated because India is a signatory to that convention. The Hague Service Convention provides a procedure to effect service through the Indian Central Authority. In connection therewith, plaintiffs have submitted sufficient proof that the ‘documents’ … were served on defendant on July 2, 2011 in accordance with the Hague Service Convention.”

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In a defamation action, the New York Court of Appeals found no jurisdiction over an Ohio non-profit corporation and its president, under NY CPLR § 302(a)(1). The Court of Appeals found that the Ohio non-profit corporation and its president did not transact business in New York within the meaning of the long arm statute – in this defamation action brought by a New York animal shelter – based on statements published on the corporation’s website. Although the non-profit corporation’s president made three phone calls and two visits to the shelter totaling less than three hours, and corporation donated cash and leashes to the shelter, the president did not visit the shelter to gather information to publish on the website, and the allegedly defamatory statements were equally available in any jurisdiction. The Court also pointed out that “there must be a ‘substantial relationship’ between [the purposeful] activities and the transaction out of which the cause of action arose,” quoting Talbot v. Johnson Newspaper Corp., 71 N.Y.2d 827, 829, 527 N.Y.S.2d 729, 522 N.E.2d 1027 (1988).

The Court noted that “Defamation claims are accorded separate treatment to reflect the state’s policy of preventing disproportionate restrictions on freedom of expression—though, ‘[w]here purposeful transactions of business have taken place in New York, it may not be said that subjecting the defendant to this State’s jurisdiction is an ‘unnecessary inhibition on freedom of speech or the press’ ... ’” and cited to the Second Circuit’s decision in Best Van Lines, Inc. v. Walker, 490 F.3d 239, 248 (2d Cir.2007) that “New York courts construe ‘transacts any business within the state’ more narrowly in defamation cases than they do in the context of other sorts of litigation.”

However, Justice Pigott did file a dissenting opinion in which Justices Graffeo and Smith concurred, stating, “... in my view, the American Working Collie Association (AWCA) and its president, Jean Levitt, engaged in ‘purposeful activities’ in New York and there was a ‘substantial relationship’ between those activities and the defamation causes of action lodged by the SPCA of Upstate New York, Inc. (SPCA) and its
executive director ...” The dissenting opinion mainly relied on a factual analysis of the record, in which dissenting Justice Pigott did find purposeful activities and a substantial relationship. With regard to the Defendant’s free speech defenses, the dissent noted, “[s]o long as a plaintiff can establish purposeful activities on the part of the defendant and a substantial relationship between those activities and the defamation claim, there is little danger of chilling free speech through the exercise of long-arm jurisdiction.”


Defendant-Appellant Stella Maris Insurance Co. (‘SMI’) appealed from an order denying its motion to dismiss for lack of personal jurisdiction. The 4th Department affirmed. SMI is a single-parent captive insurance company doing business in the Cayman Islands. Its sole shareholder, Catholic Health East (‘CHE’), a not-for-profit Pennsylvania corporation that is authorized to do business in New York, has a joint operating agreement with Catholic Health System, which is the sole member of Sisters of Charity Hospital (Sisters Hospital) in Buffalo. CHE and its affiliates, including Catholic Health System and, in turn, Sisters Hospital, are named as “covered persons” in the professional liability policy issued by SMI to CHE.

The Court stated: “The record establishes that SMI and CHE negotiated the insurance contract in the Cayman Islands; that the policy was issued in the Cayman Islands, where it was delivered to CHE; and that CHE retains the policy in Pennsylvania ... Further, CHE pays premiums to SMI; SMI does not collect premiums from CHE’s New York affiliates ... Thus, plaintiff failed to present prima facie evidence that any of the enumerated activities were conducted in this state, as required by Insurance Law § 1101(b)(1)(A) and (C) ... We note that, in any event, under the facts presented here, Insurance Law § 1101(b)(2), which enumerates activities that ‘shall not constitute doing an insurance business in this state,’ would apply inasmuch as the policy was ‘negotiated, issued and delivered without this state in a jurisdiction in which [SMI] is authorized to do an insurance business,’ i.e., the Cayman Islands ... We therefore conclude that plaintiff
failed to make a prima facie showing that SMI transacts business in New York State (see CPLR 302[a][1])."

The Court rejected the plaintiff’s ‘mere department’ theory: “Here, the record establishes that SMI and CHE maintain corporate formalities inasmuch as the policy was negotiated between CHE and the management company with which SMI contracts to run its day to day operations; that CHE does not have access to SMI’s bank accounts; that there is no commingling of funds or investments; and that SMI’s board, although appointed by CHE, owes a fiduciary duty to SMI. We therefore conclude that plaintiff has failed to make a prima facie showing that CHE’s control over SMI’s activities ‘[are] so complete that [SMI] is, in fact, merely a department of [CHE].’"

However, the Court found long-arm jurisdiction under CPLR § 302: “We nevertheless conclude that plaintiff made a prima facie showing that SMI contracted in the Cayman Islands to provide services in New York ... Although, by its nature, a single-parent captive insurance company insures only its parent and, indeed, CHE is named as the insured in the policy, here, the policy itself states that the ‘persons insured’ are the covered persons, i.e., CHE and its named affiliates, which include Catholic Health System, the sole member of Sisters Hospital, as well as the employees and contract physicians of the covered persons ... Further, plaintiff provided the deposition testimony of CHE’s vice-president who also serves as SMI’s president and CEO, who testified that the list of physicians who contract with Sisters Hospital is provided to SMI’s broker and actuary, and that SMI issues a certificate of insurance to him for CHE and Catholic Health System. We therefore conclude that plaintiff made a prima facie showing that SMI contracted with CHE to insure professional liability risks in New York, and thus that it is subject to the exercise of long-arm jurisdiction.”

Judge Peradotto filed an opinion concurring in the result, but nevertheless disagreeing with the majority in their finding of no jurisdiction vis-à-vis Insurance Law § 1101(b)(1):
"The majority concludes that Insurance Law § 1101(b)(1)(A) is inapplicable under the circumstances of this case because the record establishes that the SMI policy was negotiated and delivered to CHE in the Cayman Islands and was thereafter retained in Pennsylvania. I disagree. There is no question that, had SMI mailed the insurance policy to Catholic Health System or Sisters Hospital in New York or to CHE, which is authorized to do business in New York, section 1101(b)(1)(A) would apply. The statutory language does not, however, limit its application to policies physically delivered into New York. The statute provides that “any of the following acts in this state, effected by mail from outside this state or otherwise ... shall constitute doing business in the state” for purposes of long-arm jurisdiction, including “making ... any insurance contract” (§ 1101[b][1][A] [emphases added] ). In my view, the “or otherwise” language broadens the statute's applicability to any manner of making a contract in this state, not simply to “mail order” insurance arrangements. Inasmuch as one of the primary purposes of Insurance Law § 1101 is to protect New York insureds from foreign insurance companies not licensed in New York, I conclude that the statute can reasonably be interpreted as “any of the following acts in this state, effected by mail from outside this state or [in any other manner from outside this state]” (§ 1101[b][1] [emphasis added] ). Thus, where an insurance company makes an insurance contract covering a New York risk, the applicability of Insurance Law § 1101 should not turn on whether the insurance company mails the contract to the insured in New York or delivers the contract to the New York insured in some other manner. Here, SMI issued a policy covering a New York risk, i.e., malpractice claims stemming from medical incidents at Sisters Hospital and other New York health care facilities. It is therefore, in my view, subject to jurisdiction pursuant to Insurance Law § 1101(b)(1)(A)."

The Appellate Division, First Department, affirmed the order of Judge Bernard J. Fried, Supreme Court, New York County, granting Defendant-Respondent’s motion to dismiss for lack of personal jurisdiction. Plaintiff Royalty Network, a music publisher, had brought an action against Carl Harris, d/b/a “Phat Groove Music,” a music promoter and Georgia resident.

On appeal, Plaintiff-music publisher contested Judge Fried’s determination that the Court lacked personal jurisdiction over the Defendant. The First Department held that the music publisher’s activities in New York could not be attributed to the promoter for purposes of establishing personal jurisdiction under the ‘transacting-business’ provision of New York's long-arm-statute, and that the executive producer agreement between the two parties was insufficient to establish that the promoter contracted to supply goods or services in New York for purposes of establishing personal jurisdiction under New York's long-arm-statute. The First Department stated,

“...The court properly determined that New York does not have jurisdiction over defendant, a Georgia resident. Plaintiff, a New York music publishing corporation, did not make a sufficient showing of conduct by which the nondomiciliary defendant purposefully availed himself of the privilege of transacting business so as to invoke the benefits and protections of New York's laws (CPLR 302[a][1] ). The consulting agreement between the parties, the various communications plaintiff relies upon which concern the songwriters that defendant referred to plaintiff for administration and co-publishing agreements in New York, are not, under the circumstances herein, adequate transactional predicates for an assertion of jurisdiction .... Rather, all of the New York activities relating to the consulting agreement, including publishing, administering and exploiting the songwriter's compositions in New York's media outlets,
were performed by plaintiff and cannot be attributed to defendant .... Similarly, the executive producer agreement between the parties which required defendant to produce, market, promote, and distribute an album and two music videos, was not sufficient to establish that defendant ‘contract[ed] anywhere to supply goods or services in the state’... indeed, the agreement contains no geographic qualifications at all. Although defendant was required to send a completed album to plaintiff in New York, nothing shows that he intended to take advantage of New York’s unique resources in the entertainment industry.”

IV. Notice Cases – State & Federal

The reader’s attention should be called to the new state law expected to accelerate the pace of e-filing in New York. See NYS Assembly Bill A8368/S5635, that will allow the Office of Court Administration to expand e-filing authority considerably. Also note that the Administrative Code of New York City was amended in 2010 to more effectively regulate process servers. See Int. 0006-2010 (April 14, 2010), amending NYC Code § 20-403 and related sections. All process servers must be equipped at all times with a device which can electronically establish and record the time, date and location of service or attempted service, and these records must be retained for seven years. See NYC Code § 20-410. Finally, note the problem of “sewer service” continues to plague low-income defendants.

A. State Case – NY CPLR § 308(1)


The Appellate Division, Second Department ordered a new hearing on the issue of whether the defendants had been properly served in an action to foreclose on a mortgage. A default judgment had been entered against the Defendant.
“To vacate a default ... a defendant who has not been served pursuant to CPLR 308(1) does not have to establish a reasonable excuse ... but must show that he or she did not actually receive notice of the action in time to defend it, and must further show that he or she has a potentially meritorious defense ... The mere denial of the receipt of the summons and complaint is insufficient to rebut the presumption of service established by a process server's affidavit ... However, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit, and necessitates an evidentiary hearing ... Here, in light of the factual recitation in the [Defendant's] sworn denial of service, the Supreme Court should have conducted a hearing to determine whether service of process was properly effected.” See Wells Fargo Bank, N.A. v. Christie, 83 A.D.3d 824, 825, 921 N.Y.S.2d 127 (App. Div. 2nd Dep't. April 12, 2011).

B. State Cases – NY CPLR § 308(2)


In a mortgage foreclosure action, Defendants were served at their home under CPLR § 308(2). The Defendants defaulted and judgment was entered against them. Then the defendants moved under CPLR § 5015(a)(4) to vacate the judgment entered upon their default. In support, the one defendant submitted an affidavit stating that he was not served with a copy of the summons and complaint because, at the time of service, he resided and worked in Florida. The second defendant submitted an affidavit stating that she was not served with a copy of the summons and complaint because the individual who received service did not reside at the subject property. The Supreme Court denied the defendants' motion and on appeal the Second Department affirmed. On Valentine's Day the Second Department Held: “The affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) ... and the defendants' unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service at the address where all notices under the mortgage were to be sent. The
conclusory affidavit of the defendant that the individual receiving service did not reside at the subject property did not rebut the presumption of proper service. Valid service pursuant to CPLR 308(2) may be made by delivery of the summons and complaint to a person of suitable age and discretion who answers the door at a defendant's residence, but is not a resident of the subject property."

32.  *Cherney v. Raynor*, 35 Misc.3d 1210(A) (County Court, Suffolk County April 4, 2012)

    Plaintiff alleged that Defendant, to whom Plaintiff rendered medical services, signed a lien in Plaintiff's favor against proceeds Defendant anticipated receiving in a personal injury suit. This action was to recover payment on that lien, and Defendants moved to dismiss for defective service, stating, "[S]ervice of process was not attained because Defendants' Suffolk County address where process was served was only a satellite office and Defendant Grover only works in the N.Y. City office."

    The Court denied the motion and held, "To accept the Defendants' arguments would create a 'round-robin' defense wherein Defendant can contest service at any of its offices by claiming another is the principle office. Instead, it must be viewed from the perspective of the person searching for Defendant and, in this case, one can only conclude that Defendants conducted business at the Hauppauge office. In as much as the CPLR § 308 commentaries offer little insight into the definition of 'actual place of business,' it does state that there is no clear definition ... Upon the facts presented, there is a real and rational basis to conclude that Defendants operated an office in Hauppauge, Suffolk County."


    The Appellate Division, Third Department, affirmed the lower court's entry of a default judgment in a mortgage foreclosure action.
"Mortgagors failed to adequately rebut presumption of proper service created by mortgagee's affidavits of service, reflecting that two copies of summons and complaint for foreclosure were left with mortgagors' 22–year–old daughter at their residence and mailed two days later to same address; mortgagors' bare claim that they did not receive the pleadings was not a detailed and specific contradiction of allegations in process server's affidavit sufficient to create question of fact warranting hearing.” See NY CPLR § 308(2).


In Plaintiffs' action to recover damages for invasion of privacy allegedly from Defendants' installation of cameras on premises where Plaintiffs were tenants, Defendants moved to dismiss the complaint for lack of personal jurisdiction. The court found that service upon one of the defendants was defective, and thus no jurisdiction over one of the defendants:

Plaintiffs' attorney had attested in his affidavit to delivering the summons and complaint to a person of suitable age and discretion, to demonstrate service on Defendant Babad. However, the Court still found the service fatally defective: “[T]he affidavit nowhere indicates compliance with the mailing requirement. ... No hearing is necessary to determine this deficiency. [The attorney’s] affidavit would [therefore] require dismissal of the complaint against Babad.” See NY CPLR § 308(2).

The Court found service on the corporate Defendants to be proper under § 311, and noted that, “Although an office manager is not a title listed in C.P.L.R. § 311(a)(1), delivery to a lower ranked employee acting as the corporation's managing or general agent may qualify as valid service.” See *Fashion Page v. Zurich Ins. Co.*, 50 N.Y.2d at 271, 428 N.Y.S.2d 890, 406 N.E.2d 747 (1980).

In an action to recover on a promissory note and personal guaranty, defendants moved for an order pursuant to CPLR 317 and CPLR 5015 vacating the default judgment entered against them. The court granted the motion to the extent of having a *traverse* hearing on the issue of service of process on the defendant. In support of the motion to vacate the default judgment, the defendant had submitted an affidavit stating that the summons and complaint were "not personally served on me and I was never made aware of this matter until I received the Marshall's Notice on or about June 27, 2011." The defendant also challenged the content of the affidavit of service by stating, "I do not know who [the allegedly authorized recipient] is, the person who allegedly accepted service on my behalf." Citing *Finkelstein Newman Ferrara LLP v. Manning*, 67 A.D.3d 538 (1st Dep't 2009), the Court concluded that the sworn statement of the defendant in this motion, specifically denying any knowledge as to the allegedly authorized recipient, was sufficient to controvert the veracity and content of the plaintiffs' affidavits of service which stated that the person served was "authorized of recipient." The court stated, "Such sworn, non-conclusory denial raises issues of fact requiring a traverse hearing as to whether [the recipient] is 'a person of suitable age and discretion' at [the defendant's] 'actual place of business, dwelling place or usual place of abode,' within the meaning of CPLR 308(2), and whether [the recipient] is authorized to accept service on behalf the corporation."


*See NY CPLR § 308(2).* The movant failed to strictly comply with the service statute: "The affidavit of service annexed to the motion papers indicates that a copy of the judicial subpoena was delivered to a person of suitable age and discretion authorized to accept service at her actual place of business. However, the affidavit of service did not reflect a mailing of the subpoena within 20 days of the personal delivery to the person of
suitable age and discretion. Having failed to demonstrate compliance with both of the requirements of CPLR 308(2), service was not completed. Therefore the motion is denied on that basis.”

C. **Federal Case – NY CPLR § 308(2)**


The Southern District denied Plaintiff’s motion for entry of a default judgment against the Defendant, who was employed as president and chief operating officer of the Plaintiff, Overnight LLC. Overnight is an independent film production company led by producer Rick Schwartz, who has produced notable films such as Machete, Gangs of New York, The Aviator, and The Others. Kaufman was Overnight’s former president and chief operating officer and was terminated for cause. Overnight alleged, among other things, that Kaufman breached the terms of his employment contract by recruiting or soliciting a personal and business associate of Schwartz’s, to join Kaufman in forming a separate venture. The Defendant opposed the entry of the default judgment, arguing that he was improperly served.

In passing on the propriety of Plaintiff’s service upon the Defendant under NY CPLR § 308(2), the Court held: “Accordingly, because Overnight satisfied both requirements of N.Y. C.P.L.R. § 308(2), the Court finds that Kaufman was properly served and that he defaulted.” Notwithstanding proper service, the Court permitted the Defendant’s request that he be excused ‘for good cause:’

“To determine whether to excuse a default for good cause, courts should consider the following factors: “(1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and (3) whether a meritorious defense is presented.” *Powerserve Int’l, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir.2001).

The Court is not convinced that Kaufman’s default was not willful. Nonetheless, Overnight has not given the Court any reason to think that it
would be prejudiced by excusing the default. Meanwhile, Kaufman has alleged facts in support of his general denials of Overnight's allegations, presented affirmative defenses, and claims to have counterclaims to assert. In view of this Court's "strong preference for resolving disputes on the merits"; and for resolving "all doubts ... in favor of the party seeking relief from the default judgment," it will not impose on Kaufman the "severe sanction" of default and excuses it for "good cause."

D. State & Federal Cases – NY CPLR § 308(4)

38. 287 Franklin Avenue Residents' Ass'n v. Meisels, 2012 WL 832281 (E.D.N.Y. March 12, 2012)

Motion for the entry of a default judgment against the defendant. The Clerk of Court had previously rejected plaintiff's request to enter default on the ground that that the documents submitted by plaintiff in support of the request did not clearly establish that defendant was properly served with the Complaint. However, the court found that five unsuccessful attempts to personally serve the defendant, followed by a sixth attempt where the process server was physically assaulted, amounted to adequate notice of the complaint and amounted to proper service. The court found that the defendant's aggressive behavior towards the process server and the plaintiff strongly suggested that the defendant understood the purpose for their visit. The process server informed the defendant of the nature of the documents before attempting to hand them to the defendant a final time, but the defendant again refused to accept them. Finally, the process server left the documents in a conspicuous location under a windshield wiper of the red SUV from which he had observed the defendant retrieve paperwork.

Under these circumstances, the court concluded that the defendant was given adequate notice of the complaint and was thus properly served. The court further noted that, following the sixth and final attempt to personally serve the defendant, "Even if I were to conclude that the service described above were somehow deficient, I would still
find that Henry has been properly served because, after attempting to personally serve [the defendant], [plaintiff] mailed the Summons and Complaint ... and affixed those documents to the front door of his apartment building.” The Court concluded, “Such ‘nail and mail’ service is authorized under New York law where personal service cannot be made with due diligence. See N.Y. C.P.L.R. § 308(4).” See also Travelers Cas. and Sur. Co. of America v. Brenneke, 551 F.3d 1132, 1135 (9th Cir.2009) (“If the defendant attempts to evade service or refuses to accept delivery after being informed by the process server of the nature of the papers, it usually is sufficient for the process server to touch the party to be served with the papers and leave them in defendant's presence, or, if a touching is impossible, simply to leave them in the defendant's physical proximity.”)

39. Board of Managers of Wingate Condominium v. Ruf, 35 Misc.3d 1241(A) (Sup. Ct. Queens County June 15, 2012)

In a CPLR § 308(4) “nail & mail” method of service of the summons and complaint in an action to foreclose a lien on a condominium unit allegedly owned by named defendant Ruf and some unnamed “Does,” the Court found that the Plaintiff’s proof of due diligence necessary for such method of service inadequate as a matter of law. Although the Court said, “The use of a fictitious name such as “John Doe” or “Jane Doe” in the caption of a summons and complaint is authorized when a plaintiff has a cause of action against a defendant whose name is unknown to the plaintiff (see CPLR § 1024), provided that plaintiff has used due diligence in seeking to ascertain the defendant's name prior to the commencement of the action,” but that “...A defendant whose name is unknown must be described in such a way as to fairly apprise the party that he or she is an intended defendant.” The Court found that in fact, the ex-post intended ‘Does’ “could not have been the intended defendants since plaintiff’s attorneys advise that it was only upon conducting a foreclosure lien search ... following the commencement of the action, that they discovered that ... Ruf was deceased.” Thus, the Court held that “As a result of the improper commencement of the action against
decedent and the deficiencies in naming the fictitious parties, the entire action is jurisdictionally defective."


The Second Department affirmed the decision of the lower court denying the Defendant’s motion to dismiss for lack of personal jurisdiction due to defective service of process under NY CPLR § 308(4) in this personal injury action. The Court pointed out that prospective Defendants should keep their addresses updated:

"Furthermore, the plaintiff's proof disclosed that the defendant was served at the residence address of the owner of the subject vehicle listed on the registration record maintained by the Commissioner of the Department of Motor Vehicles. In rebuttal, the defendant testified that he no longer lived at the address listed on the registration record and had moved from that address more than four years before service of the summons and complaint. As the registered owner of the subject vehicle, the defendant was required to notify the Commissioner of any change of residence within 10 days of the change ... A party who fails to comply with this provision is estopped from challenging the propriety of service made at the former address."


Plaintiff sought injunctive relief and damages allegedly arising from trespass and private nuisance. The Defendant alleged that the Plaintiff never personally served the summons and complaint on her, and that plaintiff resorted to “nail and mail” service, pursuant to CPLR 308(4), without first exercising due diligence.

The Court held that, due to the conflicting affidavits with respect to service and landlord's process server's inconsistent affidavits, a traverse hearing was required. Absent proper service, the court lacked jurisdiction over tenant, and all subsequent proceedings
would be rendered null and void, even if tenant subsequently received actual notice of landlord's lawsuit for trespass and private nuisance. See NY CPLR § 308(4).


In a legal malpractice action, judgment was entered upon attorney's default in appearing or answering complaint. The Supreme Court, Kings County, denied attorney's motion to vacate judgment and to dismiss the complaint but the Appellate Division reversed, holding that the defendant was not properly served with the summons and complaint. The affidavit of service of the plaintiff's process server alleged that the process server attempted to deliver the summons and complaint to the defendant at her "dwelling house" or "usual place of abode," rather than her actual place of business.

The Appellate Division held that the NY CPLR § 308(4) "nail & mail" method was defective as a matter of law where the Defendant presented proof that the address where service was attempted was in fact her office address, and two of three attempts at service were at times when the Defendant could not reasonably be expected to be at work — one on a national holiday and the other prior to 7 o’clock in the morning — and no attempt to effectuate service was made at defendant's actual "dwelling place or usual place of abode," nor did process server make genuine inquiries to ascertain the Defendant's actual residence or place of employment.

However, the Court noted that since the commencement of the action was timely, "Under the circumstances of this case, despite the dismissal of the complaint on the ground of lack of personal jurisdiction, the plaintiff should be permitted, if she be so advised, to re-serve the appellant within 120 days of the date of this decision and order (see CPLR 306–b)."

In action to recover damages for personal injuries, the Supreme Court, Westchester County, Lefkowitz, J., had denied review of judicial hearing officer's finding of jurisdiction over defaulting defendants, and, per Friedman, J., denied defendants' motion to vacate default judgment and to dismiss complaint for lack of personal jurisdiction. Defendants appealed, and the Second Department held that plaintiffs failed to establish the due diligence required before using "nail and mail" method of service.

The Appellate Division found, "For the purpose of satisfying the 'due diligence' requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment ... Here, the process server did not make any inquiries about the defendants' work schedules or their respective business addresses. He simply reviewed the residential address on each summons and complaint, and made four attempts at personal service at that address. The plaintiffs knew that the defendant ... owned and operated a service station less than a mile from the parties' neighboring homes, but inexplicably, the process server was unaware of this and he never attempted to personally deliver a summons and complaint at that location. Furthermore, each of the process server's attempts at personal service '[was] made on weekdays during hours when it reasonably could have been expected that [the defendants were] either working or in transit to work' ... Under these circumstances, the plaintiffs failed to establish that they exercised 'due diligence' in attempting to effectuate service pursuant to CPLR 308(1) or (2) before using the 'nail and mail' method pursuant to CPLR 308(4)."

The Appellate Division also noted, "What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality."
E. State & Federal - Impracticability of Service - NY CPLR § 308(5)


A patient who suffered a stroke brought a medical malpractice action against hospital, treating neurologist, and other defendants. Plaintiffs moved *in limine* for a court order directing treating physician, who was a New Jersey resident, to appear and testify in patient’s case. Plaintiff sought a court order to compel the treating physician to testify on their direct case in accordance with the Court of Appeals case *McDermott v. Manhattan Eye, Ear & Throat Hospital*, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E.2d 469. Defendants contended that they do not have to produce the defendant treating physician, because he is outside the jurisdiction of the court and is not amenable by service of a trial subpoena personally under CPLR § 2303, and the Judiciary Law § 2–b.

The Court held, “While a subpoena must be served in the state of New York, it does not expressly require the in-state physical presence of the person served at the time of service. As the Appellate Division of the First Department stated in *Coutts Bank Ltd. v. An良性*, 275 A.D.2d 609, 611, 713 N.Y.S.2d 45, ‘Judiciary Law 2–b is concerned not with where a witness is located, but rather where service is made. Our courts have not been hesitant extending the reach of service outside the State if they have a presence in the State and service is effectuated in the State.’ Therefore, where a person is a party to an action pending in New York, a trial ‘subpoena can be personally served upon the parties counsel pursuant to CPLR § 308(5) because the court has jurisdiction over the party who has appeared and answered in the pending litigation by virtue of the party submitting himself to the jurisdiction of the court.’

“Since defendant’s counsel is capable of being served personally pursuant to CPLR § 308(5) within New York State, the need to do so is obviated by the more recent statute CPLR § 2303—a which allows service upon counsel pursuant to CPLR § 2103. Therefore, if plaintiff seeks to produce defendant Dr. Bhawsar, he can do so by serving
defendant's Bhawsar's counsel under CPLR § 2103(a)." The Court also noted, "The Court of Appeals has held that a corporation amenable to the jurisdiction of New York court may be subpoenaed to produce a person under its control that has knowledge of the transaction at issue. See Standard Fruit & Steamship Co. v. Waterfront Commission, 43 N.Y.2d 11, 400 N.Y.S.2d 732, 371 N.E.2d 453 (1977).


The Southern District said “not allowed” when Defendant Chase Bank moved for an order permitting service of process by Facebook message. Chase’s motion had sought authorization for alternate methods of service upon a third-party defendant, Nicole Fortunato, who had allegedly opened credit card accounts with Chase in her mother’s name, and could not be located by Chase’s investigator. Defendant Chase requested authorization for alternate methods of service via email, Facebook message, publication, and delivery to Nicole’s mother. See *NY CPLR § 308(5)*. The Court stated,

“In shaping a method of alternate service, the Court must bear in mind that ‘[c]onstitutional due process requires that service of process be ‘reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” ... Defendant argues that service by private Facebook message, email to the address listed on the Facebook profile, and delivery of the summons and complaint to Lorri are all reasonably calculated to notify Nicole of these proceedings.

“Service by Facebook is unorthodox to say the least, and this Court is unaware of any other court that has authorized such service. Furthermore, in those cases where service by email has been judicially approved, the movant supplied the Court with some facts indicating that the person to be served would be likely to receive the summons and complaint at the given email address … Here, Chase has not set forth any facts that would give
the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by Nicole or that the email address listed on the Facebook profile is operational and accessed by Nicole. Indeed, the Court's understanding is that anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the Nicole Fortunato the investigator found is in fact the third-party Defendant to be served.”

The Southern District did, however, grant Defendant Chase’s motion for alternate service by publication, under CPLR § 316(a).

F. State Case – NY CPLR § 310-a


In an action to recover damages for personal injuries, the Second Department reversed the lower court’s order denying Plaintiff’s motion pursuant to CPLR 3215(e) for leave to enter judgment on the issue of liability against the defendant upon the defendant’s failure to appear or answer the complaint, and granting Defendant’s cross motion pursuant to CPLR 3012(d) to compel him to accept its late answer.

“The plaintiff demonstrated his entitlement to enter judgment against the defendant upon the defendant’s failure to appear or answer the complaint by submitting proof of service of a copy of the summons and complaint upon the defendant, proof of a viable cause of action, and proof that the defendant did not serve a timely answer or motion upon him ... To avoid the entry of a default judgment, the defendant was required to demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action ... In opposition, the defendant did not contend that the address that it had on file with the Secretary of State was incorrect, and the defendant's refusal to accept the duplicate copy of the summons and complaint sent to it by certified mail, return receipt requested, did not constitute a reasonable excuse for the default ... The defendant did not
proffer any other excuse for its default, and it did not proffer an excuse for its delay in serving a late answer five months after the time to serve an answer had expired.”

The Court stressed that “The process server’s affidavit of service created a rebuttable presumption that the plaintiff served the defendant by delivering a copy of the summons and complaint to the Secretary of State.” See NY CPLR § 310-a.

G. State & Federal Cases – NY CPLR § 311

47. Almonte v. Suffolk County, 2012 WL 1820581 (E.D.N.Y. May 16, 2012)

Following a traverse hearing before a Magistrate Judge, the Court found that the plaintiff did not effectuate proper service over the defendants Suffolk County and Suffolk County Police Department. Analogizing FRCP § 4(j)(2) with NY CPLR § 311(a)(4), the Court concluded that the Plaintiff’s alleged service of process did not meet those criteria: “Based on the testimony, it appears that [the process server] served process at the Criminal Courts building, likely upon a representative of New York State, and completed the affidavit while under the mistaken belief that he served process upon a representative of the County at the adjacent Griffing building. With respect to proving sufficiency of service of process, the Court noted that the Plaintiff bears the burden of proving that service was adequate, and that ‘conclusory statements’ that service was properly effected are insufficient to carry that burden. Accordingly, because no service was effectuated upon the County, plaintiff failed to satisfy the requisites of FRCP § 4(j)(2) and CPLR § 311(a)(4).


In a personal injury action arising out of a two-car accident, the Southern District found that the Plaintiff failed to properly serve both the individual and corporate defendant. The individual defendant first received the complaint by regular mail well after 120 days after the filing of the Complaint, and although the parties stipulated to an extension of time for the Defendant to Answer the Complaint, the Court noted, “a stipulation extending defendant’s time to answer ‘does not equate to a waiver of personal
jurisdiction objections"… citing Berkowitz by Berkowitz v. New York City Bd. of Educ., 921 F.Supp. 963, at 969 (E.D.N.Y.1996). The Court also pointed out, "this defective service is not cured by the fact that [the] defendant ... later came to have actual notice of the complaint."

The Court also found Plaintiff's service upon the corporate defendant car rental service defective. The Plaintiff stated that service had been attempted "on a man at the rental car office who 'refused to give [his] name'." Notwithstanding the liberal construction that courts have given to NY CPLR § 311, the Court held, "A person who works at a rental car outlet and refuses to give his name to a process server does not, without more, qualify as ... 'an officer, director, managing or general agent, or cashier or assistant cashier or ... any other agent authorized by appointment or by law to receive service,' N.Y. C.P.L.R. § 311, on behalf of that corporation."

The Court also found that there was no apparent authority here that would have been sufficient to uphold proper service: "A mere desk clerk who refuses to give his name to a process server does not, without more, convey 'apparent authority' to accept service for the corporate entity for which he works."


Franchisees filed petition to vacate two arbitration awards in favor of the Home of the $5 Footlongs. The First Department unanimously affirmed the decision of the lower court, holding, "Petitioners failed to show that the petition was served on a person authorized to receive service of process pursuant to CPLR § 311(a)(1). The provision of the parties' franchise agreements on which petitioners rely concerns only service of a notice required by the agreements, not service of process required by the CPLR. Moreover, commencement of the proceeding was untimely, since the purported service occurred more than 90 days after the awards were received."

The Appellate Division, First Department, unanimously affirmed the lower court's grant of the Respondent's motion to vacate a default judgment against it, and dismissing a petition to vacate an arbitration award.

"Petitioner failed to show that the petition was served on a person authorized to receive service of process pursuant to CPLR 311(a)(1). The provision of the parties' franchise agreement on which petitioner relies concerns only service of a notice required by the agreements, not service of process required by the CPLR. Moreover, commencement of the proceeding was untimely, since the purported service occurred more than 90 days after the award was received."


In a commercial nonpayment summary proceeding, defendant-tenant moved to vacate a default judgment entered against it, arguing that the court lacks personal jurisdiction over it because it was not properly served. Service upon the defendant was effected by personal delivery at the tenant's business address, not the premises subject to the nonpayment proceeding. The defendant argued that the service was defective under CPLR § 311 because notice was delivered to a "mere employee" of defendant-tenant. Under § 311(a)(1), service can be made "by delivering the notice of petition to an officer, director, managing or general agent, cashier, assistant cashier, 'or to any other agent authorized by appointment or by law to receive service'." The court noted that "Service will be upheld, however, when made upon a person who is not enumerated by CPLR 311(a)(1) if, under the circumstances, the process server acts reasonably and with due diligence, and it was reasonable for the process server to believe the person receiving process had the authority to do so." Citing *Fashion Page v. Zurich Insurance Co.*, 50 N.Y.2d 265 (1980), the court held, "In our opinion, as an employee with supervisory
duties who had accepted process in the past, the general manager had apparent authority to accept service on tenant's behalf."

52. *Cooke v. Berkshire Farm Center and Services for Youth*, 2012 WL 668612 (E.D.N.Y. February 29, 2012)

Plaintiff commenced this action alleging violations of the Americans with Disabilities Act ("ADA"), Family Medical Leave Act ("FMLA"), Pregnancy Discrimination Act, and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") by her former employer. Defendant moved to dismiss, among other things, pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(5). Defendant argued that the Plaintiff's initial attempt at service of process by U.S. Mail was insufficient, and that Plaintiff's attempt to cure that defect was not adequately supported by the evidence before the Court. That portion of the Defendant's motion seeking dismissal due to defective service was denied.

The Court found that the Plaintiff's initial attempt at service of process was inadequate, where Plaintiff only 'served' the complaint by mailing a copy via 'United States Postal Service Express Mail.' The Court noted that "[t]he question of whether the Defendant actually received this mailing is irrelevant."

However, the Court did find that the Plaintiff cured the defect: "Plaintiff subsequently cured this defect by serving an authorized agent in the Office of the Secretary of State . . ., and has filed an affidavit of such service. See Fed.R.Civ.P. 4(e)(1); C.P.L.R. 311(a)(1); N.Y. Not-for-Profit Corp. Law § 306(a)-(b) . . . The Court is satisfied plaintiff's second attempt at service of process was proper. Therefore, defendant's motion is denied insofar as it seeks dismissal of the action pursuant to Rules 12(b)(5) and 12(b)(2)."
H. Service under Business Corporations Law § 306


Plaintiff made a motion under CPLR § 3215(a) for a default judgment against non-appearing ‘Provider Defendants,’ who had sought no-fault coverage. Plaintiff had served the summons and complaint against the Provider Defendants via the Secretary of State under BCL § 306. The Plaintiff failed to attach, however, an affidavit of additional mailing pursuant to CPLR § 3215(g)(4)(i). The Plaintiff attempted to cure this defect in its Reply Affirmation in support of its motion for the default judgment, but the court stated: “Additional evidence in admissible form submitted for the first time in a Reply will not be considered by this Court.” The Court denied the Plaintiff’s motion for the default judgment, and noted that even if it were to take into account the additional evidence in the moving party’s Reply Affirmation, “The deficiency in the Affidavit is that it fails to attach a notice advising the corporations that service of the summons and complaint was previously made pursuant to BCL § 306. Further, the Affidavit fails to show that the mailing was completed at least twenty (20) days before the Plaintiff’s application for the default judgment. To the contrary, the Affidavit states that the summons and complaint was mailed to the Provider Defendants on July 29, 2012, a date which has yet to occur.”


In a personal injury action, Plaintiff executed service of process on all Defendants via NY BCL § 306. Defendants removed the case to the Southern District and Plaintiff then moved for an order remanding the case to state court as untimely removed. The Court denied the motion, pointing out that “[t]he time to file a notice of removal to Federal Court is governed by Federal Law,” and “Courts within this circuit addressing section 1446(b) [the removal statute] have consistently held that the thirty-day period for removal does not begin to run until the defendant—and not its statutory agent—receives notice that service has been made.”

The Appellate Division reversed on the law in Defendant Witter’s appeal from an adverse decision of the lower court, which had denied Defendant’s motion for an extension of time to respond to the complaint and resulted in a default judgment against them.

Although personal jurisdiction in this civil action was obtained over corporate defendant Witter Inc. by Plaintiffs’ delivery of a copy of the summons and complaint to the office of the Secretary of State in accordance with Business Corporation Law § 306(b), the First Department found that the record showed that Witter Inc. did not receive proper notice of the action from the Secretary of State – Plaintiffs occupied Witter Inc.’s former corporate address (where a copy of the summons and complaint would have been sent by the Secretary of State), and Plaintiffs never delivered to Witter Inc. such a notice even though plaintiffs, who had recently left Witter Inc.’s employ, undertook to collect and forward mail addressed to Witter Inc. to its agent. The First Department held, “Under the circumstances, which indicated that Witter Inc. lacked notice of the summons in time to respond, and in light of Witter Inc.’s prompt application to remedy its default and its demonstration of a meritorious defense, Witter's application for an extension of time to respond to the complaint should have been granted.”

Board of Trustees of UFCW Local 174 Pension Fund v. Jerry WWHS Co., Inc., 2012 WL 729261 (E.D.N.Y. March 5, 2012)

In a motion to dismiss resulting from allegedly defective service, the Eastern District held that the service was proper:

“Defendant appears to be arguing that Plaintiff was required to serve process on the Assignee. However, the exact same argument was rejected by District Judge Arthur D. Spatt in a related proceeding involving these same parties. See Abondolo v. Jerry WWHS Co., --- F.Supp.2d ---, 2011 WL 6012504, at *3 (E.D.N.Y. Dec.1, 2011). There,
Judge Spatt denied the Assignee's motion to dismiss for lack of proper service stating that:

“The fact that [West Washington Meats] had an outdated address on file with the Secretary of State does not compel a different result. “[I]t is a corporation's obligation to keep on file with the Secretary of State the current address of an agent to receive service of process” and therefore “service of process on a corporation is deemed complete when the Secretary of State is served, regardless of whether such process ultimately reaches the corporate defendant’.”

*3 Id. (alteration in original) (quoting Cedeno v. Wimbledon Bldg. Corp., 207 A.D.2d 297, 298, 615 N.Y.S.2d 40, 40–41 (1st Dep't 1994)). Accordingly, for the same reasons articulated by Judge Spatt in Abondolo, Defendant's motion to dismiss the present action for insufficient process is DENIED.” See CPLR § 311(a)(1) and BCL § 306(b)(1).

I. Waiver


In this summary judgment motion, the individual defendants had been served under CPLR § 308(4) and BCL § 306 respectively. In the motion papers, the Defendants raised as affirmative defense in their Answer concerning a lack of personal jurisdiction due to improper service. The Court said, “CPLR 3211(e) states that where a defense of improper service is raised in an Answer, such defense ‘is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends that time upon the ground of undue hardship’.” The court noted that the Defendants had made no such motion and “thus, any claim of improper service has been waived by them.”
J. Other Cases


Defendant’s motion to vacate the entry of a default judgment. See CPLR § 3215(c). The motion was denied. “What gives the court pause on this motion to vacate the default judgment is whether the defendant has a reasonable excuse for his delay. In evaluating this particular situation, it is clear that the defendant has engaged in a pattern of conduct to delay the resolution of this matter on its merits.” The Court said that, although the Defendant pointed out that “Plaintiffs made their motion for entry of a default judgment more than a year after the court found defendant to be in default and granted them leave to move for a default judgment, CPLR § 3215(c) provides that where a Plaintiff fails to take proceedings to enter judgment within a year, the complaint should be dismissed … This statutory provision, however, applies only when a defendant has never answered … Here, defendant ‘answered’ the summons with notice. Furthermore, he appeared by counsel at the preliminary conference. Thus, by law he is deemed to have appeared in this action.” See CPLR 320(a).


Defendants did not appear in this action, and submitted no response to Plaintiff’s motion. Defendant was properly served under CPLR § 308 by serving the New York Secretary of State. Thus, “CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215(f). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party.”
V. Forum Non-Conveniens – NY CPLR Rule 327


Plaintiff brought this action against defendants American Medical Response, Inc. (“AMR”) and Global Medical Response (“GMR”) for injuries she sustained while riding in an ambulance in Trinidad and Tobago. Defendants moved to dismiss the complaint for lack of personal jurisdiction and on *forum non conveniens* grounds. The Plaintiff had alleged that the Defendant corporations – both Delaware corporations with their principal place of business in Colorado – were ‘operated as a single enterprise.’ The Plaintiff is a citizen of Trinidad and Tobago but currently residing in New York.

Plaintiff was in Trinidad and Tobago, riding in an ambulance with her sister and niece on the way to a hospital, when the vehicle “exploded and burst into flames.” The driver and paramedic abandoned it, leaving the passengers trapped.

Using the Second Circuit’s three step analysis for dismissal under *forum non conveniens* grounds – first, the Court must determine the degree of deference to accord plaintiff’s choice of forum; second, the Court must consider whether an adequate alternative forum exists; and, third, the Court must weigh relevant public and private interests – the Eastern District found that the balance of conveniences did not weigh so heavily in Defendants’ favor as to warrant dismissal. The Court also stated, “With respect to the public interest factors, this case does not appear to be of particular public importance in Trinidad and Tobago, nor do defendants claim that it poses a novel or complex issue of that country's law. While Trinidad and Tobago has an interest in adjudicating disputes arising from accidents that occur within its boundaries, ‘the United States courts have an interest in adjudicating matters affecting its residents,’ ... and this dispute is between a United States resident and two United States corporations.”

The Eastern District also denied Defendants’ motion to dismiss for lack of personal jurisdiction, allowing the action to proceed pending limited jurisdictional
discovery. The Court stated, “The complaint here alleges that GMR and AMR are alter egos, in which case jurisdiction for one would establish jurisdiction for the other,” and pointed out that Plaintiff did allege that Defendant GMR had offices in Brooklyn. From that material the Court concluded, “Neither the relationship between AMR and its subsidiaries nor the degree of defendants' presence in New York is clear from the material before the Court. Where a plaintiff has failed to make a prima facie showing, but has ‘made a sufficient start toward establishing personal jurisdiction,’ limited discovery may be appropriate.”

61. *Aon Risk Services v. Cusack*, 34 Misc.3d 1234(A) (Sup. Ct. N.Y. County February 28, 2012)

Defendant Alliant, the new employer of defendant Cusack in this action involving claims for breach of contract, breach of fiduciary duty, breach of the duty of loyalty, aiding and abetting breach of fiduciary duty, conspiracy, intentional interference with contractual relations, and tortious interference with prospective economic advantage, moved to dismiss under CPLR § 327(a) on the ground of *forum non-conveniens*. Alliant was headquartered in Orange County, California. Citing to *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984) and *Martin v. Meith*, 35 N.Y.2d 414 (1974), the court denied the motion and held, “A balancing of the relevant factors reveals that Alliant has not met the “heavy burden” of demonstrating that this action should be dismissed on forum non conveniens grounds ... To the contrary, each one of the factors demonstrates that New York is the appropriate forum for this dispute.”

The court noted that there was a strong nexus between New York and the misconduct alleged, that New York is also a proper forum because Aon Northeast, [the defendant-employee’s] previous employer, is a resident of New York, and that where the plaintiff is a resident of New York, the defendant will bear a “heavy burden in attempting to establish that New York is an inappropriate forum.” The Defendant also failed to either show that the litigation would place an ‘undue burden’ on a New York court or show any undue hardship on the Defendant resulting from defending the case in New York:
“Where the Defendant was a billion-dollar global insurance company with six offices in New York, ... clearly has a significant presence in New York, and also has ‘ample resources’ to bring relevant witnesses or documents to New York, it is not unduly burdened by litigating here.”


In action seeking to recover under a promissory note, the Supreme Court, New York County, had granted plaintiff's cross-motion to strike defendant's affirmative defense of lack of personal jurisdiction, granted plaintiff's motion for a preliminary injunction enjoining defendant from prosecuting a pending action in Israel, denied defendant's motion to dismiss, and denied defendant's motion to renew and reargue. Defendant appealed.

Reversing on the law with regard to the *in-personam* jurisdiction issue, the First Department held that the defendant had not waived the affirmative defense of lack of personal jurisdiction: “The IAS court erred in granting plaintiff's motion to strike defendant's affirmative defense of lack of personal jurisdiction. Contrary to plaintiff's contention, defendant did not waive this defense by moving for summary judgment dismissing the complaint on the merits, given that defendant had previously raised the jurisdictional defense.”

The First Department affirmed the lower court’s denial of the Defendant’s motion to dismiss pursuant under CPLR 327 *forum non conveniens*. The Court held that the promissory note contained a clause selecting New York as the forum, thus barring defendant's motion to dismiss on grounds of *forum non conveniens*. See, *e.g.*, *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478–479, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984).

_Pro se_ Plaintiff-employee brought an action against IBM US and IBM Japan ("IBM") with claims including discrimination, breach of contract, and violations of various Japanese Labor Laws. Among other things, IBM Japan sought dismissal under _forum non-conveniens_.

The Court began by discussing whether it could exercise jurisdiction over IBM Japan in the first instance. The Plaintiff had alleged that the Court had jurisdiction over IBM Japan under CPLR § 301, and the Court addressed the 'mere department' theory that would permit the exercise of general jurisdiction over IBM Japan as a subsidiary of its alleged parent, IBM US. The Court noted that it appeared that the _pro se_ Plaintiff had, perhaps erroneously, abandoned a theory of jurisdiction under New York’s long-arm statute (See _opinion_, at footnote 10).

"A subsidiary will be considered a mere department of [a parent corporation] where the [parent's] control over the subsidiary is pervasive enough that the corporate separation is more formal than real. ... In deciding whether a foreign entity is a 'mere department' of a New York corporation, courts look to four factors: (1) common ownership; (2) 'financial dependency of the subsidiary on the parent'; (3) 'the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities'; and (4) 'the degree of control over the marketing and operational policies of the subsidiary exercised by the parent.' _Volkswagenwerk_, 751 F.2d at 120–22. While the first factor is 'essential,' _id._ at 120, '[e]ach of the [other factors] need not weigh entirely in plaintiffs' favor'; rather, _Volkswagenwerk_ necessitates a balancing process ...".
The Court found that, "...while Plaintiff's arguments are fairly conclusory, IBM Japan has not actually provided any information about the company that would show why IBM U.S. and Japan are distinct entities; instead, it simply states that Plaintiff is incorrect and distinguishes the case law relied on by Plaintiff. To be sure, Plaintiff bears the burden of making out a prima facie case of personal jurisdiction. But given that (1) Plaintiff has made a "sufficient start" at showing that the exercise of personal jurisdiction over IBM Japan might be proper, ... which IBM has not refuted; and (2) jurisdictional allegations should be construed liberally, ... and in light of Plaintiff's indirect requests for limited discovery, ... I find that Plaintiff has made a showing sufficient to at least warrant limited discovery in order to determine whether personal jurisdiction over IBM Japan is proper.” See also Pandesosingh v. Am. Med. Response, Inc., 2012 WL 511815, at *5 (E.D.N.Y. Feb. 15, 2012).

Addressing IBM Japan's *forum non-conveniens* motion, the Southern District said 'not yet':

"Although the arguments suggesting that this case ought to be adjudicated in Japan are quite compelling, IBM Japan has failed to show that an adequate alternative forum exists. Nowhere in its Memorandum of Law does IBM Japan fully grapple with this issue. In its reply to Plaintiff's assertion that the statute of limitations has run in Japan for bringing a Japanese Labor Law claim, ... IBM Japan merely asserts that 'Japan provides a forum for these claims (including the Prefectural Labor Bureau, the Perfectural [sic] Labor Committee, and the court system in Japan),’ ... without any nod to Plaintiff's statute of limitations argument or assurance that Plaintiff's claims can actually be brought in those forums. ... Therefore, IBM Japan has failed to fulfill its burden at this stage, although this does not foreclose the possibility of a successful *forum non conveniens* argument at a later stage.”
VI. Special Cases

64. DirecTV Latin America, LLC v. Pratola, 94 A.D.3d 628, 942 N.Y.S.2d 528 (App. Div. 1st Dep’t. April 24, 2012)

The First Department affirmed an order of the Supreme Court, New York County, which granted the Defendants’ motion to dismiss the complaint for lack of personal jurisdiction.

“The issue whether New York courts have personal jurisdiction over defendants ...pursuant to CPLR 301 and 302 was determined in the prior federal action and, pursuant to the doctrine of collateral estoppel, may not be relitigated ... Although plaintiff Latin American Sports, LLC was not a party to the federal action, it may be collaterally estopped because it is a limited liability company wholly owned by DirecTV, and its interests with respect to the claims against defendants are identical to those of DirecTV.”

The First Department also found that another Defendant – who allegedly received funds from a bank account in New York via one of the principal defendants – was not subject to the jurisdiction of the Court, as that act was insufficient as a ‘transaction of business’ to confer jurisdiction under NY CPLR § 302(a)(1). See Pramer S.C.A. v. Abaplus Intl. Corp., 76 A.D.3d 89, 96, 907 N.Y.S.2d 154 (2010).


Asia Optical had sought a declaratory judgment that certain third-party defendants were obligated to indemnify AO for any damages awarded Plaintiff Eastman Kodak Company, and sought damages based on breach of contract, or in the alternative unjust enrichment. The Southern District found that, since a New York court had already concluded that there was no personal jurisdiction over the two Japanese defendants, AO was collaterally stopped from relitigating that determination. The earlier action had been
in the New York Supreme Court, Westchester County, which had dismissed the action for lack of personal jurisdiction. Asia Optical did not appeal that order.

The Southern District set forth the law of collateral estoppel in New York:

“Under New York law, collateral estoppel bars relitigation of an issue when (1) the identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate the issue in the prior action. ‘Collateral estoppel is an equitable doctrine—not a matter of absolute right. Its invocation is influenced by considerations of fairness in the individual case.’ King v. Fox, 418 F.3d 121, 130 (2d Cir.2005) (citation omitted). ‘The party asserting issue preclusion bears the burden of showing that the identical issue was previously decided, while the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in the prior proceeding.’ Colon v. Coughlin, 58 F.3d 865, 869 (2d Cir.1995).”


After a tractor-trailer that allegedly exceeded the limitations of Vehicle and Traffic Law § 385 damaged the underside of a bridge in the Town of Batavia, Genesee County, plaintiff commenced this action against defendants, who are Canadian, and were served by mail. Defendants moved to dismiss the complaint, contending that service by mail upon them was not permitted by the Hague Convention. The Supreme Court granted the motion on that basis, noting that “it was bound to do so by virtue of this Court’s decision in Reynolds v. Woosup Koh, 109 A.D.2d 97, 490 N.Y.S.2d 295 [1985] and
cogently suggesting that Reynolds be revisited in light of subsequent developments in the law."

The Third Department reversed the lower Court, stating, "Both the United States and Canada are signatories to the Hague Convention, a multilateral treaty 'intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad' [quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988)] ... The Second and Fourth Departments have [pointed toward] the history and usage of the Hague Convention in determining that article 10(a), while perhaps carelessly drafted, nevertheless allows service by mail."

In its examination of the Hague Convention, the Third Department noted,

"A review of the history of the negotiations reveals that the treaty's drafters 'intended the language [of article 10(a)] to include the service of process' ... Indeed, the official account of the conference that resulted in the Hague Convention stated that the first paragraph of article 10 'was intended to permit service by mail' ..., and the American delegation to the conference agreed that article 10 allowed 'alternative channels for the transmission of the documents for the purpose of service' ... The drafters' view of article 10(a) is reinforced by the subsequent actions of signatories to the Hague Convention, a majority of whom make 'no objection to the service of judicial documents coming from abroad directly by mail in their territory' ..."

In conclusion, the Third Department held, "It is therefore now evident that article 10(a) of the Hague Convention permits service of process by mail and, as such, plaintiff was free to serve defendants pursuant to Vehicle and Traffic Law § 253."

The Southern District granted an Indian politician's motion to dismiss, finding that the Plaintiffs failed to properly affect service and that the Court lacked personal jurisdiction over him. The complaint had alleged nine claims against the Indian politician, Nath, for violations of international law under the ATCA and TVPA and under state law for wrongful death, negligence, public nuisance, battery, intentional infliction of emotional distress and negligent infliction of emotional distress.

The Southern District held that Plaintiff's attempt to serve process upon the Indian politician outside of the Indian consulate was ineffective, because no one handed summons or complaint to the politician outside of consulate, the consulate was not the politician's place of business or dwelling or abode, and the politician had not granted authority to any agent to receive service of process. See NY CPLR § 308(2).

The Court also found that such service of process did not comport with the Vienna Convention, which prohibits service of process at consular premises. Plaintiffs' Hague Convention service was also defective, where Plaintiffs only attempted Hague Convention service after 120-day period to serve process, and failed to establish good cause for their failure to serve politician or to attempt Hague Convention service during 120-day period. The Court also noted that the Politician's actual notice of the lawsuit did not serve to waive plaintiffs' failure to effectively serve process.

Finally, the Court also found that it did not have personal jurisdiction over the Indian politician: "Nath has no office in New York, no bank accounts or other property in New York, and no employees or agents in New York. Defendant had no purely personal visits to the United States in the six years prior to the commencement of this action. While he had a couple of free days during his official visits to the United States, these were minimal (no more than seven in the six years before this suit) ... and are insufficiently permanent or continuous to establish general jurisdiction under NY CPLR
§ 301.” See also Landoil Resources Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039, 1043–46 (2nd Cir. 1990).


The Second Circuit affirmed the Southern District’s dismissal of Plaintiff’s complaint in this appeal from a determination that the Court lacked personal jurisdiction over the Defendant. The Court stated,

“In reviewing Stengel’s challenge to the district court’s adverse determination as to personal jurisdiction, we are mindful that on three prior occasions, New York federal and state courts have dismissed Stengel’s claims arising out of the same facts alleged here, concluding that New York’s long-arm statute, see N.Y. C.P.L.R. § 302(a), does not authorize courts sitting in New York to assert personal jurisdiction over Stengel’s claims against Black, a resident of Ohio, arising out of Black’s Ohio diamond purchase … ‘It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.’ Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 9 (1982). Although a dismissal for lack of jurisdiction is not an adjudication on the merits of a claim … such a dismissal precludes re-litigation of the issue it decided. Stengel does not claim that the facts relevant to Black’s amenability to New York long arm jurisdiction have changed since the prior cases were decided. Accordingly, the district court correctly held that decisions in Stengel’s earlier cases precluded it from exercising personal jurisdiction over Black on Stengel’s claims arising out of the same facts.”
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