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Application of New York's Long-Arm Statute to Professional Fee Disputes

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Formation of Attorney-Client Relationship and Subsequent Communication with Lawyer in New York Sufficient for Long-Arm Jurisdiction

In *Fischbarg v. Doucet*, 9 N.Y.3d 375, 849 N.Y.S.2d 501 (2007), six judges of the New York Court of Appeals (with Judge Smith abstaining) unanimously upheld the exercise of jurisdiction under CPLR 302(a)(1) over two defendant-residents of California who retained and communicated with a lawyer in New York to represent their interest in a suit in Oregon. During the eleven-month representation, the lawyer never traveled to Oregon or California, and allegedly worked 238.4 hours from New York for a fee claimed to be $57,096.05. The clients, now defendants, never traveled to New York but communicated with the attorney via email, telephone, fax and U.S. mail. The Court noted that, during the representation, plaintiff and defendants spoke twice a week by telephone; defendants sent 31 emails and three faxes to plaintiff; and defendants sent documents by email or mail seven times. *Id.*, 9 N.Y.3d at 378, 849 N.Y.S.2d at 504. The Court characterized this course of communication as "regular" and "frequent."

After a dispute over the terms of engagement, Fischbarg resigned as attorney and sued for his fees in Oregon. The Oregon court denied his application for a fee while the underlying Oregon case was still pending. Shortly after the Oregon case settled, Fischbarg filed suit in New York. Defendants moved to dismiss for lack of personal jurisdiction under CPLR 3211(a)(8). The Supreme Court, and the Appellate Division in a 3-2 decision, denied the motion.

The Court of Appeals affirmed. The Court found that a defendant need not physically enter 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." *Id.*, 9 N.Y.3d at 380, 849 N.Y.S.2d at 505 (citations omitted). Purposeful activity requires a defendant to "avail[] itself of the privilege of conducting activities within the forum State, thus invoking the privileges and benefits of its laws." *Id.* (citations omitted).

The defendants' acts of reaching into New York to hire an attorney and "their frequent communications with him in this state" were sufficient to confer long-arm jurisdiction

over the defendants. In a footnote, the Court noted that defendants benefited from New York's "Client Bill of Rights" found in 22 NYCRR 1210.1, which includes the right to a reasonable fee. That is the only benefit noted in *Fischbarg*. In fact, clients often receive additional "benefits" in New York. These include receipt of an engagement letter for representations likely to involve a fee in excess of $3,000, pursuant to 22 NYCRR 1215, and the right to arbitration, pursuant to Part 137 of the Rules of the Chief Administrator of the State of New York. The *Fischbarg* defendants apparently did not receive either of these benefits. *See Fischbarg v. Doucet,* 38 A.D.3d 270, 276; 832 N.Y.S.2d 164, 169-170 (1st Dept. 2007) (dissenting opinion) ("Plaintiff did not prepare a retainer statement;" the corporate defendant wrote to plaintiff to confirm the arrangement.).

In finding that defendants availed themselves of "the benefits and protections of New York's laws governing lawyers" by "*project*[*ing*] themselves into New York via telephone" to establish a "continuing attorney-client relationship" and "repeatedly *projecting* themselves into New York" via telephone, mail, e-mail and facsimile, the Court ruled that requiring defendants to defend a suit arising out of these contacts "properly comport[ed] with traditional notions of fair play and substantial justice." *Fischbarg*, 9 N.Y.3d at 385, 849 N.Y.S.2d at 509.

***Haar* Distinguished.** *Fischbarg* surprised some observers in light of *Haar v. Armendoris Corp.*, 31 N.Y.2d 1040, 342 N.Y.S.2d 70 (1973). In *Haar*, the Court of Appeals denied jurisdiction in a lawsuit filed by a New York licensed lawyer hired in Massachusetts by a Delaware Corporation to represent it in a transaction in New York. This representation by plaintiff was defendants' only connection with New York. The *Haar* Court, however, found an agent cannot rely on its own activities in a forum to sue its principal. Adopting the dissenting decision of the Appellate Division, the Court of Appeals in *Haar* found that "the present plaintiff is relying on his own activities within the State, rather than on defendant's *independent* activities." *Haar v. Armendoris Corp.*, 40 A.D.2d 769, 770, 337 N.Y.S.2d 285, 288 (1st Dept. 1972) (dissenting opinion).

Would the defendant in *Haar* find itself subject to suit in New York if it had emailed, called and/or faxed its attorney while he negotiated the transaction in New York? What if the attorney filed and litigated a prolonged lawsuit here? The *Fischbarg* Court concluded that "the defendant in *Haar* had no New York contacts in connection with the plaintiff's representation of it. Its contacts were with its attorney in Massachusetts." What the *Fischbarg* Court meant by "no New York contacts" is unclear as the record in *Haar* makes no mention if the client communicated with its counsel in New York or not. *See Haar*, 40 A.D.2d 769, 337 N.Y.2d 285. In any event, the practice of law in the 21st Cen-

tury involves much greater and more active communication through mobile phone and PDA-enabled electronic mail than existed in 1973. These telecommunication "advances" make facts as existed in *Haar* increasingly uncommon (*viz*., obtaining client instruction in one state and, then, going into New York as an advocate *incommunicado* with client).

Read together, *Haar* and *Fischbarg* suggest that the location of the lawyer hired affects the client's subsequent amenability to suit in New York. They also raise significant questions about how much location matters and the limits of these decisions. Practitioners seek meaningful practical guidance for prospective matters. Yet, like so many cases and courts before it, the *Fischbarg* Court reminds us that "it is impossible to precisely fix those acts that constitute a transaction of business." This view begets more questions. Would the Court in *Fischbarg* find jurisdiction based solely on the New York engagement in circumstances where the lawyer traveled to Oregon and most of the communications took place there? Illustrating the same idea, what if most of the communications were outgoing from New York rather than directed into the forum?

New York precedent to date suggests no jurisdiction in these circumstances. Lower court decisions addressing the question typically involve qualitatively greater contacts with New York. For example, the Appellate Division found jurisdiction where the defendant hired a New York lawyer to represent it in New York litigation, hired other New York lawyers and participated in the proceeding through an "agent." *Colucci & Umans v. 1 Mark, Inc.*, 224 A.D.2d 243, 637 N.Y.S.2d 705 (1st Dept. 1996). Likewise, jurisdiction was found where defendant participated actively in bankruptcy and other proceedings venued here. *Otterbourg, Steindler, Houston & Rosen v. Shreve City Apts. Ltd.*, 147 A.D.2d 327, 543 N.Y.S.2d 978 (1989). The court in *Otterbourg* identified the issue which *Fischbarg* leaves unaddressed: "We need not, however, reach the issue of whether the retention of New York counsel to provide services in connection with legal proceedings in this State, without more, is sufficient to confer jurisdiction on the courts of this State in any action brought by the attorneys to recover their fees." *Id.*, 147 A.D.2d at 332, 543 N.Y.S.2d at 981.

In *Otterbourg*, the Appellate Division observed that the "defendants did more than merely retain plaintiff," noting 93 telephone calls, letters, settlement negotiations, settlements applying New York law, and retention of other attorneys among other activity directed at or in New York. *Id.* Likewise, the underlying matter in *Otterbourg* was venued in New York. The *Fischbarg* decision certainly demands far fewer purposeful acts than *Otterbourg*. *Kaczorowski v. Black and Adams*, 293 A.D.2d 358, 741 N.Y.S.2d 28 (1st

Dept. 2002) potentially required even less. In *Kaczorowski*, the court found jurisdiction where plaintiff was retained and "repeatedly consulted" in New York on the matter. Unfortunately, the single-page decision does not expound on what is meant by "repeatedly consulted." *Id.*, 741 N.Y.S.2d at 29.

Physical Presence and Single-Transaction Jurisdiction. There has been considerable discussion whether or not a single act of "particular quality or nature" is enough to establish long-arm jurisdiction in New York. *See, e.g.*, *Hi Fashion Wigs, Inc. v. Hammond Adver., Inc.*, 32 N.Y.2d 583, 347 N.Y.S.2d 47 (1973); *Reiner & Co., Inc. v. Schwartz*, 41 N.Y.2d 648, 651-52, 394 N.Y.S.2d 844, 846 (1977). The "clearest" and perhaps only case for single-transaction jurisdiction involves physical presence. *See Reiner*, 41 N.Y.2d 648, 394 N.Y.S.2d 844. As a result, physical presence continues to be an important element of New York jurisdictional analysis. At the same time, physical presence is decreasingly relevant to the facts of professional services disputes which have, since the telecommunications revolution, increasingly been consummated and maintained without the professional and client ever meeting face-to-face. *Fischbarg* provides guidance on the type of non-physical contact sufficient to sustain long-arm jurisdiction.

The *Fischbarg* Court emphasized the "quality" of the defendants' New York contacts. The Court noted that, after establishing an attorney-client relationship, defendants were communicating with plaintiff "regularly," "frequent[ly]," and "repeatedly." Additionally, plaintiff never left the state during the entirety of the representation. This necessarily increased the quality (and quantity) of contacts with New York.

Conclusions to be drawn from *Fischbarg*. First conclusion: telecommunication has come of age. The Court treated each email and telephone call as a significant, "qualitative" contact with New York. In particular, the attorney in *Fischbarg* was rendering services in an action pending in Oregon. The only activity in New York noted by the Court was a retention that did not even yield an engagement agreement and limited communication which of greatest significance included 31 emails and weekly telephone calls. Yet, in an age where it is not exceptional for people to exchange 31 electronic messages in a single day, New York now finds this sufficient to assert statutory jurisdiction. This is a significant development in the evolution of New York's jurisdictional law. Certainly not without basis, *Fischbarg* moves New York away from the importance of physical presence and, at the same time, gives greater legal consequence to acts of telecommunication. The *Fischbarg* Court analogized the facts of the case to the "similar" facts in *Reiner* yet noted the lack of physical presence in *Fischbarg* was "immaterial," which is not something the *Reiner* Court was willing to say. The Court of Appeals, in ef-

fect, ruled that, where the dispute arises out a professional services contract, 31 emails and weekly telephone calls are the jurisdictional equivalent of one visit to New York.

Second conclusion: despite *Fischbarg's* emphasis on "quality," the quantity of non-physical contacts still matters. In the context of professional services contracts, one federal court observed that New York is a "retention-plus" jurisdiction meaning "jurisdiction is normally upheld if the defendant has additional contacts with the state in addition to, and relating to, the retainer agreement." *Winston & Strawn v. Dong Won Secs. Co., Ltd.*, 02 Civ. 0183, 2002 U.S. Dist. LEXIS 20952, at *9-10 (S.D.N.Y. November 1, 2002). Keeping in mind the principle that New York's long-arm statute does not extend to the limits of due process, *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 512, 851 N.Y.S.2d 381 (2007), *Fischbarg* requires more than hiring a New York attorney to give rise to personal jurisdiction, but not much more. One, two or three emails would not be enough. Indeed, while New York claims to be a jurisdiction where a single contact is sufficient to uphold jurisdiction, *see Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195 (1988), few significant cases involve a single contact as the basis for jurisdiction. Primarily, we look to *Reiner*, 41 N.Y.2d 648, 394 N.Y.S.2d 551, as a case where the exercise of personal jurisdiction was based on what can be called a "single transaction," namely the negotiation and signing at plaintiff's Albany, New York headquarters of an employment agreement as a salesman in New England that gave rise to the cause of action.

Otherwise, beginning with *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965), the Court of Appeals has avoided reliance on a single transaction and instead found a combination of contacts met the statutory and constitutional standard. *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337 (1970), held a non-paying customer amenable to suit based not only on his participation in an auction through an "open telephone line" but also his letters in setting up the line and use of one of plaintiff's employees as an agent for purposes of the auction. *Hi-Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc,* 32 N.Y.2d 583, 347 N.Y.S.2d 47, found jurisdiction not only on the delivery of a personal guarantee in New York, but also based on a company that did business in New York and a contract that called for all services to be rendered in New York. *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 427 N.Y.S.2d 604 (1980), involved suit by a broker-dealer arising from two reverse repurchase agreements with defendant. On two separate occasions, an individual claiming to represent the defendant called plaintiff in New York and delivered the purchase price to a bank there. Additionally, in a four-month period, defendant entered at least "22 separate transactions" with New York institutions for an "aggregate value of $44 million." *Id.*, 49 N.Y.2d at 577, 427 N.Y.S.2d at 606. The Court of Appeals

in *Kreutter* held the defendants amenable to suit based on the acts of its agent. *Kreutter*, 71 N.Y.2d 460, 527 N.Y.S.2d 195.

Most recently before *Fischbarg*, the Court of Appeals in *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71, 818 N.Y.S.2d 164 (2006), upheld the exercise of jurisdiction based on the defendants' use of instant messaging service on the Bloomberg Message System. The Court was careful to note, however, that in the thirteen months prior to the trade at issue, the counterparty executed eight other bond trades with the plaintiff, as part of $471 million in trades the defendant placed the preceding year with banks in New York. *Id.*, 7 N.Y.3d at 77 n.2, 818 N.Y.S.2d at 167 n.2.

As the case law discussed here suggests, while New York theoretically permits one qualitatively-sufficient transaction to support long-arm jurisdiction, the Court of Appeals usually grounds its decision upon more. *Fischbarg* merely extends this concept to the context of a professional services contract.

Lessons to be learned. *Fischbarg* recognizes that an attorney-client relationship is, by its very nature, "continuing" until terminated. Yet, *Fischbarg* did not base its decision solely on the on-going attorney-client relationship. Rather, *Fischbarg* relied upon additional purposeful acts beyond retention to uphold jurisdiction. At the same time, *Fischbarg* leaves no doubt that telephone, mail e-mail and facsimile are qualitatively sufficient additional acts, and, thereby, further eviscerated the requirement of physical presence. *Fischbarg* found jurisdiction based on an eleven month relationship, 31 emails and weekly telephone calls. By its logic, even fewer purposeful acts are necessary for jurisdiction. Given the types of contracts involved in the precedent relied upon by *Fischbarg* (purchase agreements, repo trades and salesman contracts), courts will subsequently extend the rule from the professional services agreement in *Fischbarg* to all types of contract disputes, and beyond. *See, e.g.*, *Pryor Personnel Agency Inc. v. Waage Law Firm*, 14148/06, 2008 N.Y. Misc. LEXIS 1930 (Sup. Ct. Nassau Co. February 28, 2008) (applying *Fischbarg* to an employment agency contract to uphold jurisdiction).

Cross-References

For a general overview of the exercise of long-arm jurisdiction under CPLR 302(a)(1), *see* 2-3 New York Civil Practice: CPLR P 302; 1-3 Weinstein, Korn & Miller CPLR Manual § 3.05; 1-2 LexisNexis AnswerGuide New York Civil Litigation § 2.03; and 1-2 LexisNexis AnswerGuide New York Civil Litigation § 2.05.

For scholarly analysis of the impact of electronic interstate communications and activities on the application of long-arm jurisdiction, *see* Jeffrey A. Van Detta, *Extraterritorial Personal Jurisdiction for the Twenty-First Century: A Case Study Reconceptualizing the Typical Long-Arm Statute to Codify and Refine International Shoe After its First Sixty Years*, 3 Seton Hall Circuit Rev. 339 (Spring 2007) (discussing the need for an overhaul of the current long-arm jurisdiction regime, given the 21st-century realities of electronic interstate communications and activities); Louis U. Gasparini, *Comment: The Internet and Personal Jurisdiction: Traditional Jurisprudence for the Twenty-First Century under the New York CPLR*, 12 Alb. L.J. Sci. & Tech. 191 (2001).

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