SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

JACQUELINE D. CALIFANO as Administratrix of the Estate of MICHAEL J. CALIFANO, deceased, and JACQUELINE D. CALIFANO, individually,

Plaintiff(s),

-against-

JOSE A. GAGO, JR., NICOLE YATES, JOHN R. KALEY, A AND N AUTO SERVICE, LLC, P.V. HOLDING CORP., AVIS RENT A CAR SYSTEM, LLC, AVIS BUDGET GROUP, INC., COLONIAL HONDA OF DARTMOUTH, COLONIAL AUTOMOTIVE GROUP, INC., GORDON CHEVROLET-GEO, INC., and COLONIAL CHEVROLET OF ACTION,

Defendant(s).

ORIGINAL RETURN DATE:06/17/11
SUBMISSION DATE: 07/28/11
INDEX No.: 4668/11

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2, 3
Supplemental Affirmation in Opposition.....	4
Reply.....	5

Motion pursuant to CPLR 3211(a)(8) by defendants, Colonial Honda of Dartmouth, Colonial Automotive Group, Inc. and Gordon Chevrolet-GEO, Inc., for an order dismissing the complaint against them on the grounds that, *inter alia*, there exists no *in personam* jurisdiction over them. The Court agrees.

In February 2011, Nassau County Police Officer Michael J. Califano ("Officer Califano") was killed when his patrol car, in which he was seated, was struck on the Long Island Expressway by a flatbed, transport truck (Cmplt., ¶¶ 79-80, 228, 275, 367-369). The transport, which was carrying a 2010 Nissan Versa, was allegedly owned by codefendant, A & N Auto Service, LLC ("A & N"), and operated by A & N employee John R. Kaley (Cmplt., ¶¶ 96-97; 104-118, 373-374).

Immediately prior to the accident, Officer Califano had pulled over another vehicle operated by codefendant, Jose A. Gago ("Gago"), and then parked his marked patrol car behind Gago's vehicle on the westbound, median strip of the Long Island Expressway in the vicinity of Exit 39. Officer Califano was in the process of issuing a summons to Gago when the A & N flatbed truck carrying the Nissan struck his patrol car and propelled it into the rear portion of Gago's vehicle (Cmplt., ¶¶ 379-381).

The "off lease" Nissan, which was being transported by A & N, had been acquired in January 2011 by codefendant Colonial Honda of Dartmouth ("Colonial"), a Massachusetts corporation engaged in the wholesale-retail purchase and sale of new and used cars (Surdis Aff., ¶¶ 5-6; 10-11).

Colonial originally acquired the Nissan through an independent entity known as Openlane, an online auction company used by "most car dealers in the U.S. [ ] to buy and/or sell wholesale vehicles" (Surdis Aff., ¶¶ 9-10). At the time, the Nissan Versa which was owned by codefendant P.V. Holding Corporation, a Virgina-based corporation, and was located at the seller's place of business, a car dealership in Brooklyn, New York (Surdis Aff., ¶¶ 10-14 [Exs. 2, 3]; Downes Reply Aff., ¶ 10).

Pursuant to Openlane's online purchasing system, buyers place internet bids on stated vehicles, after which those vehicles are then "automatically sold" or awarded to the successful bidder, who may not necessarily know where the vehicles they

have acquired are located (Surdis Aff., ¶¶ 10-11). Openlane alone then "automatically makes the arrangement for delivery of the vehicles to the buyers and adds the transportation costs to the purchase price" (Surdis Aff., ¶10).

According to Nicholas Surdis, Colonial's general manager, Colonial had no involvement in the "selection of the transporter or the transporting driver" and in no sense controlled or supervised the manner in which the delivery was to be accomplished (Surdis Aff., ¶¶ 11-14). With respect to the subject transaction, Openlane handled and maintained exclusive control over the shipping arrangements relating to the Nissan, and hired A & N to transport the vehicle from Brooklyn to Colonial's Massachusetts offices (Surdis Aff., ¶¶ 5-6; 11-16).

It is settled that "New York's long-arm statute provides that 'a court may exercise personal jurisdiction over any non-domiciliary * * * who in person or through an agent * * * transacts any business within the state or contracts anywhere to supply goods or services in the state'" (*Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 7 NY3d 65, 71 [2006], *quoting from*, CPLR 302(a)(1); *see also*, *Fischbarg v. Doucet*, 9 NY3d 375, 380-381 [2007]; *Ehrenfeld v. Bin Mahfouz*, 9 NY3d 501, 508-509 [2007]; *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

Pursuant to "this 'single act statute' * * * proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *see*, *Fischbarg v. Doucet*, 9 NY3d 375, 380-381 [2007]; *Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, *supra; Kimco Exchange Place Corp. v. Thomas Benz, Inc.*, 34 AD3d 433; *Muse Collections, Inc. v. Carissima Bijoux, Inc.*, 86 AD3d 631, 632)

The "overriding" criteria necessary to establish transaction of business are volitional acts by which a defendant "'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Fischbarg v. Doucet*, 9 NY3d at 380-381, *quoting from, McKee Elec. Co. v. Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967]; *Hanson v Denckla*, 357 US 235, 253 [1958]; *see, Johnson v. Ward*, 4 NY3d 516, 519-520 [2005]; *Executive Life*

Ltd. v. Silverman, 68 AD3d 715, 716-717; *see also, LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d 210 [2000]).

However, "[n]ot all purposeful activity * * * constitutes a 'transaction of business' within the meaning of CPLR 302(a)(1)" (*Fischbarg v. Doucet*, 9 NY3d 375, 380 *see, Ehrenfeld v. Bin Mahfouz, supra*). Rather, "court[s] must look at the totality of the defendant's actions to determine whether the defendant purposefully invoked the benefits and protections of the laws of New York" (*SBR Realty Corp. v. Pave-Mark Corp.*, 175 AD2d 240, 241; *see, Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 NY2d 443, 457-458 [1965]; *see generally, Fischbarg v. Doucet, supra*, at 380; *Johnson v. Ward*, 4 NY3d at 519-520; *Benifits By Design Corp. v. Contractor Management Services, LLC*, 75 AD3d 826, 829-830; *Parsons v Kal Kan Food, Inc.*, 68 AD3d 1501, 1502-1503; *Executive Life Ltd. v. Silverman*, 68 AD3d 715, 716). The ultimate burden of proof rests with the party asserting that jurisdiction exists (*see, College v. Brady*, 84 AD3d 1322, 1323; *Brandt v. Toraby*, 273 AD2d 429, 430).

With these principles in mind, and even upon favorably construing and crediting the complaint's relevant averments (*Weitz v. Weitz*, 85 AD3d 1153; *Brandt v. Toraby, supra*), the Court agrees that plaintiff has failed to rebut the movants' evidentiary showing with respect to the issue of *in personam* jurisdiction.

Preliminarily, there is no material dispute that Colonial is a Massachusetts-based entity that does not itself conduct or transact any meaningful business activities in the State of New York (Surdis Aff., ¶¶ 7-8; *see,* Isaac Aff. at 2). Accordingly, and in order to establish jurisdiction over the moving defendants under CPLR 302, plaintiff primarily argues that A & N's alleged negligence should be attributed to Colonial based on the theory that A & N acted as Colonial's agent.

Although foreign corporations, which have not personally transacted business in New York, may still be subject to jurisdiction based upon the actions of an agent (CPLR 302(a); *Kreutter v. McFadden Oil Corp.*, 71 NY2d at 467; *see also, Karabu Corp. v. Gitner*, 16 F.Supp.2d 319, 323 [S.D.N.Y.1998]), the evidence adduced here does not support the existence of an agency relationship within the meaning of CPLR 302.

To establish that a defendant acted through an agent, a plaintiff must "convince the court that [the New York actors] engaged in purposeful activities in this State in relation to his transaction for the benefit of and with the knowledge and consent of [the defendant] and that they exercised some control over [the New York actors]" (*Kreutter v. McFadden Oil Corp.*, 71 NY2d at 467; *Alan Lupton Associates, Inc. v. Northeast Plastics, Inc.*, 105 AD2d 3, 8; *see also, Kimco Exchange Place Corp. v. Thomas Benz, Inc.*, 34 AD3d 433, 434; *Polansky v Gelrod,* 20 AD3d 663, 664; *J Professional Personnel Management Corp. v. Southwest Medical Associates, Inc.*, 216 AD2d 958, 959; *Barbarotto Intern. Sales Corp. v. Tullar*, 188 AD2d 503, 504; *J. E. T. Adv. Assoc. v Lawn King*, 84 AD2d 744, 745).

"The critical factor is the degree of control * * *" (*Barbarotto Intern. Sales Corp. v. Tullar*, 188 AD2d 503, 504), and a plaintiff makes "a prima facie showing of "control" where he or she has "detail[ed] the defendant's conduct so as to persuade a court that the defendant was a 'primary actor' in the specific matter in question" (*Briese Lichttechnik Vertriebs GmbH v. Langton*, ___F.Supp2d__, 2010 WL 4615958, at 3 [S.D.N.Y. 2010]; *see, Karabu Corp. v. Gitner*, 16 F.Supp.2d 319, 324 [S.D.N.Y.1998]; *see generally*, *Glassman v Hyder*, 23 NY2d 354, 362-363 [1968]; *Finkel v. A.B. Recycling LLC*, ___F.Supp.2d___ 2010 WL 3218387, at 4 [E.D.N.Y. 2010]; *Barron Partners, LP v. Lab123, Inc.*, ___ F.Supp.2d___, 2008 WL 2902187, at 10-11 [S.D.N.Y.2008] *cf., Kreutter v. McFadden Oil Corp., supra; Arroyo v. Mountain School*, 68 AD3d 603, 605).

While evidence establishing that the existence of a "formal agency relationship" existed is not required (*Kreutter v. McFadden Oil Corp., supra*; *Barbarotto Intern. Sales Corp. v. Tullar, supra*), inconclusive or "bland" assertions of agency will not suffice (*see*, *Polansky v Gelrod,* 20 AD3d 663, 664; *Glenn v. SBPartners LLC*, ___Misc.3d___ 2008 WL 239524, at 7 [Supreme Court, Nassau County 2008]; *Finkel v. A.B. Recycling LLC*, 2010 WL 3218387, at 4; *Barron Partners, LP v. Lab123, Inc.*, 2008 WL 2902187, at 10-11; *Karabu Corp. v. Gitner*, 16 F.Supp.2d at 323-324 *cf., Lamarr v. Klein*, 35 AD2d 248, *aff'd,* 30 NY2d 757 [1972]).

Here, the credible evidence before the Court establishes that the movants were not actors who exercised control, supervision or any authority over the manner in which, and by whom, the subject vehicle was to be transported (*Kimco Exchange Place Corp. v. Thomas Benz, Inc.*, 34 AD3d 433; *Polansky v Gelrod,* 20 AD3d

663, 664; *J. E. T. Adv. Assoc. v Lawn King*, 84 AD2d 744, 745; *Del Bello v Japanese Steak House*, 43 AD2d 455, 457).

Rather, the record indicates in this respect that the vehicle was acquired from an independently operated, online auctioneer, Openlane, and then "automatically" shipped by that entity to the online bidder (Colonial) for a prescribed fee. Openlane alone retained control over shipping process and was solely responsible for retaining the transporter truck which was to carry the vehicle from its Brooklyn location to Colonial's Massachusetts offices.

Colonial's affiant on the motion has demonstrated in this respect that Colonial had no input into the selection of, *inter alia*, the independent transporter, the driver who was to operate the transport or even the route the driver was to take in making the delivery (*Parsons v Kal Kan Food, Inc.*, 68 AD3d 1501, 1502-1503; *Polansky v. Gelrod,* 20 AD3d at 664). To sustain jurisdiction upon this tenuous basis would arguably subject nondomiciliary, internet purchasers, whose orders are delivered by third-party carriers over whom they have no real control, to personal jurisdiction anywhere that carrier might later be involved in an accident, largely because the product being delivered happened to be physically present in the carrier's vehicle when an accident occurs.

Absent an agency relationship linking Colonial to A & N's allegedly negligent operation of the transport, the nexus, if any, between Colonial's business activity and the State of New York is attenuated and remote (*see generally, Johnson v Ward*, 4 NY3d at 519-520). Indeed, the record belies the inference that Openlane's bidding procedures create a meaningful or substantial nexus to any specific jurisdiction. Rather, the evidence suggests that any link to a specific jurisdiction would arise randomly and by "mere fortuity" – not through volitional acts or by purposeful design (*McGowan v. Smith*, 52 NY2d 268, 272-273 [1981]), *i.e.*, that any nexus would exist primarily by happenstance, based upon the coincidental location of whatever vehicle satisfied the needs of Openlane's online, bidding customers at the time a bid is accepted (*e.g., Milliken v. Holst*, 205 AD2d 508, 509 *cf.*, *Johnson v Ward*, *supra*; *Executive Life Ltd. v. Silverman*, 68 AD3d 715, 717).

Upon these facts, Openlane's nondomiciliary bidders are not purposefully or substantially availing themselves of benefits associated with a particular jurisdiction (*Ehrenfeld v. Bin Mahfouz*, 9 NY3d at 508-509; *Andrews v Modell*, 84 AD3d at 844-845) but rather merely submitting internet bids based upon the attributes of a stated vehicle or model, which vehicle could be located in any number of jurisdictions. According to Colonial, Openlane's online bidders do not even know for certain where the vehicle they are bidding on is physically located (Surdis Aff., ¶¶ 5-6). Indeed, the Nissan acquired by Colonial could just as readily have been located in another, entirely different jurisdiction without altering the underlying nature and import of the subject, online auction transaction (*Milliken v. Holst*, 205 AD2d at 509).

Furthermore, the operative event out of which plaintiff's claim arose was the allegedly negligent operation of a motor vehicle, which was then exiting the State of New York. The incident did not occur in any relevant sense because a car acquired by Colonial in an online auction happened to be present on a flatbed truck when accident took place. It is settled that the exercise of *in personam* "jurisdiction is not justified where the relationship between the claim and transaction" is attenuated, "coincidental" or where defendants' activities are remote in their connection to the State of New York (*Johnson v Ward*, 4 NY3d at 519-520; *see also, Ehrenfeld v. Bin Mahfouz,* 9 NY3d at 509, fn 6; *McGowan v. Smith*, 52 NY2d at 272-273 [1981]; *Andrews v. Modell,* 84 AD3d at 844; *Arroyo v. Mountain School,* 68 AD3d 603, 605; *Copp v. Ramirez,* 62 AD3d 23, 28-29; *Polansky v. Gelrod,* 20 AD3d 663, 664-665).

Lastly, and upon the record presented, the Court agrees that plaintiff has not established the need for further discovery relating to the issue of personal jurisdiction, even under the less demanding evidentiary standards applicable to motions to dismiss pursuant to CPLR 3211(a)(8); (*see, Benifits By Design Corp. v. Contractor Management Services, LLC,* 75 AD3d 826, 830; *Copp v. Ramirez,* 62 AD3d 23, 31-32; *Edelman v. Taittinger, S.A.*, 298 AD2d 301, 302-303; *see also, Peterson v Spartan Indus.*, 33 NY2d 463, 465-466 [1974]; *HBK Master Fund L.P. v. Troika Dialog USA, Inc.,* 85 AD3d 665, 666; *Morgan ex rel. Hunt v. A Better Chance, Inc.*, 70 AD3d 481, 482 *cf.*, CPLR 3212[f]).

The Court has considered plaintiff's remaining contentions and concludes that they are insufficient to defeat defendants' motion to dismiss the complaint insofar as interposed against them.

Accordingly, defendants', Colonial Honda of Dartmouth, Colonial Automotive Group, Inc. and Gordon Chevrolet-GEO, Inc., motion pursuant to CPLR 3211(a)(8) for an order dismissing the complaint against them is granted.

The caption of this action is amended to read as follows:

"JACQUELINE D. CALIFANO as Administratrix of the Estate of MICHAEL J. CALIFANO, deceased, and JACQUELINE D. CALIFANO, individually,

Plaintiff,

-against-

JOSE A. GAGO, JR., NICOLE YATES, JOHN R. KALEY, A AND N AUTO SERVICE, LLC, P.V. HOLDING CORP., AVIS RENT A CAR SYSTEM, LLC, AVIS BUDGET GROUP, INC., and COLONIAL CHEVROLET OF ACTION,

Defendants."

The parties are reminded that a Preliminary Conference is scheduled to be held on September 26, 2011, at 9:30 a.m.

This decision constitutes the order of the court.

Dated: 9-8-11

HON THOMAS P. PHELAN

J.S.C.

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