

**Albstein v Six Flags Entertainment Corp.**

2012 NY Slip Op 32218(U)

August 16, 2012

Supreme Court, New York County

Docket Number: 109060/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS  
J.S.C.  
Justice

PART 46

ANDREW W. ALBSTEIN, individually and on behalf of all others similarly situated

INDEX NO. 109060/2010

MOTION DATE \_\_\_\_\_

- v -  
SIX FLAGS ENTERTAINMENT CORPORATION and LO-Q INC.

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for dismiss the complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
_____	<u>1</u>
_____	<u>2-3</u>
_____	<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~:

The court denies defendant LO-Q Inc.'s motion to dismiss the complaint against LO-Q pursuant to the accompanying decision. C.P.L.R. §§ 301, 302(a), 327(a), 3211(a)(8).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

AUG 24 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/16/12

Lucy Billings

LUCY BILLINGS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46  
-----x

ANDREW W. ALBSTEIN, individually and  
on behalf of all others similarly  
situated,

Index No. 109060/2010

Plaintiffs

- against -

DECISION AND ORDER

SIX FLAGS ENTERTAINMENT CORPORATION  
and LO-Q INC.,

Defendants  
-----x

FILED

AUG 24 2012

LUCY BILLINGS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Lo-Q Inc. moves to dismiss the complaint based on  
lack of personal jurisdiction over this defendant. C.P.L.R. §§  
301, 302(a), 3211(a)(8). After oral argument, for the reasons  
explained below, the court denies Lo-Q Inc.'s motion.

The parties stipulate that, for purposes of Lo-Q's motion,  
the court may consider as authenticated and admissible the  
License Agreement between defendant Six Flags Entertainment  
Corporation's predecessor and Lo-Q Virtual Queuing, Inc., which  
defendant Lo-Q Inc. treats as itself. While the License  
Agreement specifies New York as the forum only for litigation  
between defendants, and thus far neither defendant has interposed  
any cross-claim, Six Flags Entertainment raises a potential claim  
for indemnification against Lo-Q based on the License Agreement's  
indemnification provision if plaintiff recovers in this action.

The parties further agree that Agency Rent A Car System,  
Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 29 (2d Cir. 1996),

sets forth the factors to be considered in determining whether Lo-Q, incorporated in Georgia, transacted business in New York when plaintiff commenced this action, for purposes of a New York court's personal jurisdiction over this defendant. Regarding the first factor, Lo-Q concedes an ongoing contractual relationship, if not with Six Flags Entertainment, with its predecessor, which maintained an office in New York. Six Flags Entertainment was incorporated in Delaware, but claims the office was defendant successor corporation's principal place of business when plaintiff commenced this action, if not now. At this juncture, Lo-Q has not shown otherwise.

Second, Lo-Q concedes that the License Agreement provides that it "shall be deemed for have been made, entered into, executed, and delivered in the State of New York." Aff. in Opp'n of John S. Rand Ex. A § 17. The court may not alter the parties' mandatory contractual provision and therefore must consider that a contract between defendants related to this litigation, albeit not the direct premise for plaintiff's claims, was negotiated and executed in New York. At this juncture, however, no evidence discloses whether Lo-Q ever met with Six Flags Entertainment or its predecessor or affiliate in New York regarding the contractual relationship, satisfying the remaining element of the second jurisdictional factor.

Nevertheless, Lo-Q also concedes the third and fourth, final, jurisdictional factors, based on the License Agreement's requirements. New York law is to govern the contract's

interpretation and enforceability. Finally, Lo-Q is to provide written notice of any dispute under the contract to Six Flags Entertainment in New York, where Six Flags Entertainment insists it maintained its principal place of business when plaintiff commenced this action.

While further conceding significant economic benefits from the License Agreement, Lo-Q focusses on the lack of connection between plaintiff and the License Agreement, which he and co-defendant Six Flags Entertainment rely on as the central transaction from which all the jurisdictional factors stem. Plaintiff was not a party to the contract and hence does not claim a breach of the contract. Nevertheless, he does claim that the "virtual queuing" system Lo-Q contracted to manage and supply at Six Flags Entertainment's park under the License Agreement malfunctioned, which would breach Lo-Q's contract with Six Flags Entertainment.

Lo-Q eventually may obtain disclosure demonstrating that Six Flags Entertainment's principal place of business was not in New York when plaintiff commenced this action, negating the first jurisdictional factor: an ongoing contractual relationship with a New York corporation. On the other hand, plaintiff and Six Flags Entertainment may obtain disclosure that Lo-Q visited New York to meet with Six Flags Entertainment, its predecessor, or its affiliate in New York regarding the contractual relationship, satisfying the currently missing element of the second jurisdictional factor.

Currently, however, part of the second factor and both the third and the fourth factors are satisfied based on the License Agreement's indisputable terms. As yet, Lo-Q has not shown that the first or the remaining part of the second factor is not met. Before any disclosure revealing what Lo-Q has yet to show, plaintiff and co-defendant have established that Lo-Q's contacts with New York are sufficient to confer jurisdiction over Lo-Q. C.P.L.R. §§ 301, 302(a). Should it eventually establish the absence of (1) its commercial activity in person or through an agent in New York, (2) its generation of business in the state, and (3) a claim in this action arising from a transaction in the state, it may present grounds for dismissal due to lack of personal jurisdiction. C.P.L.R. § 302(a)(1) and (4); Pramer S.C.A. v. Abaplus Intl. Corp., 76 A.D.3d 89, 95-96 (1st Dep't 2010); Arouh v. Budget Leasing, Inc., 63 A.D.3d 506 (1st Dep't 2009); Copp v. Ramirez, 62 A.D.3d 23, 29-30 (1st Dep't 2009); Benefits by Design Corp. v. Contractor Mgt. Servs., LLC, 75 A.D.3d 826, 830 (3d Dep't 2010).

Based on the current record consisting primarily of the License Agreement, it becomes central to the transactional analysis, supporting a conclusion that Lo-Q sought out co-defendant in New York or purposely projected itself into New York to transact business with co-defendant, business activity from which plaintiff's claims arise. C.P.L.R. § 302(a); Fischbarg v. Doucet, 9 N.Y.3d 375, 380-81 (2007); Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 N.Y.3d 65, 71-72 (2006); LaMarca v. Pak-

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Mor Mfg. Co., 95 N.Y.2d 210, 216 (2000); Grimaldi v. Guinn, 72 A.D.3d 37, 44-45, 51-52 (2d Dep't 2010). Lo-Q's transaction of business as described above gave Lo-Q sufficient contacts with New York to reasonably expect to defend an action in a New York court arising from a malfunctioning of Lo-Q's "virtual queuing" system such as plaintiff alleges. C.P.L.R. § 301; Fischbarq v. Doucet, 9 N.Y.3d at 384-85; Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 N.Y.3d at 71-72; LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d at 216-17. Therefore the court denies defendant Lo-Q Inc.'s motion to dismiss the complaint based on lack of personal jurisdiction over this defendant. C.P.L.R. §§ 301, 302(a), 3211(a)(8).

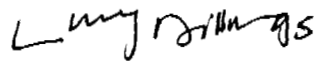
Although Lo-Q tacks on a suggestion of dismissal based on an inconvenient forum, C.P.L.R. § 327(a), Lo-Q's notice of its motion does not include this ground for dismissal. Consequently, neither plaintiff nor co-defendant has addressed it. In any event, Lo-Q merely concludes that most of the material witnesses, material documents, and any other material evidence are outside New York, without specifying who or what, or indicating they are concentrated in any one alternative forum, or addressing the critical factors of hardship or the availability of another suitable forum. Patriot Exploration, LLC v. Thompson & Knight LLP, 75 A.D.3d 482, 483 (1st Dep't 2010); Rabinowitz v. Devereux Connecticut Glenholme, 69 A.D.3d 485, 486 (1st Dep't 2010); Travelers Cas. & Sur. Co. v. Honeywell Intl., Inc., 48 A.D.3d 225, 226 (1st Dep't 2008); Intertec Contracting A/S v. Turner

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Steiner International, 6 A.D.3d 1, 4-5 (1st Dep't 2004). See Shin-Etsu Chemical Co. v. 3033 ICICI Bank Limited, 9 A.D.3d 171, 175-76, 178-79 (1st Dep't 2004); Fox v. Fusco, 4 A.D.3d 313 (1st Dep't 2004); Richtree Inc. v. Movenpick Holding A.G., 301 A.D.2d 412 (1st Dep't 2003). For these combined reasons, this ground for dismissal is inadequately presented. Therefore, insofar as defendant Lo-Q Inc. seeks dismissal based on an inconvenient forum, the court denies dismissal on this ground as well. C.P.L.R. §§ 327(a).

This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: August 16, 2012



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS

**FILED**

**AUG 24 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**