

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHILIP SELDON,

Plaintiff,

v.

**EDWARD MAGEDSON, XCENTRIC
VENTURES, LLC, and JOHN
OR JANE DOE,**

Defendants.

Case No: 11-CV-6218

REPLY IN SUPPORT OF MOTION TO DISMISS

In response to the pending Motion to Dismiss, Mr. Seldon amended the Complaint and submitted a response to the Motion. As set forth in the Motion to Dismiss the Amended Complaint, the Amended Complaint did not cure the defects in Plaintiff's case. In addition, Mr. Seldon's argument in favor of the exercise of personal jurisdiction over Defendants lacks merit.

Mr. Seldon asserts that Defendants did not contest jurisdiction in the *Greenky v. Xcentric* matter currently pending before the New York Supreme Court. That is inaccurate. On February 16, 2011, Defendants moved to dismiss the *Greenky* action on the basis of lack of jurisdiction as well as the Communications Decency Act ("CDA"). (Exhibit "A"). That motion is still pending and has not yet been ruled on.

Mr. Seldon also points to the decision rendered in *Intellect Art v. Millewski* that the Plaintiff in that case had pled sufficient facts to allege jurisdiction against these same Defendants. It should be noted that the Judge in *Intellect Art* dismissed the case on CDA grounds and, thus, there was no reason or opportunity to further pursue the jurisdiction issue.

Mr. Seldon also fails to mention that the New York Supreme Court in *A-1 Technology v. Magedson* held that a Complaint that was very similar to Mr. Seldon's Complaint did not sufficiently allege jurisdiction against these defendants. (Exhibit "B").

Finally, Mr. Seldon alleges that his purported telephone conversations with Mr. Magedson establishes jurisdiction. Telephone conversations are not enough to establish jurisdiction. *Mktg., Inc. v. Norm Thompson Outfitters, Inc., No. 99-Civ-10411, 2000 U.S. Dist. LEXIS 95036, at *3* (S.D.N.Y. Apr. 20, 2000) (finding telephone and fax contacts with New York insufficient for long-arm jurisdiction); *Nader v. Getshaw, No. 99-Civ-11556, 2000 U.S. Dist. LEXIS 14308, at *5* (S.D.N.Y. Sept. 29, 2000) (finding no C.P.L.R. 302(a)(1) or (a)(3) long-arm jurisdiction because telephone and mail contacts of defendant were not sufficient for purposes of statute); *Sunward Elec., Inc. v. McDonald, 362 F.3d 17, 22–23* (2nd Cir. 2004) (quoting *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 29* (2nd Cir. 1996)).

Where a contract is supposedly formed over the telephone, the Courts will look to the place of performance. *See Cooper, Robertson & Partners, L.L.P. v. Vail*, 143 F.Supp.2d 367, 371 (S.D.N.Y. 2001) (stating that “[i]n determining jurisdiction, the place of performance is more critical than the place of the execution of a contract”) (emphasis added).

For the reasons above, Defendants Xcentric and Magedson respectfully move the Court for an order dismissing this action for lack of personal jurisdiction, for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction.

Dated this 20th day of December, 2011.

/s/ Maria Crimi Speth
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2011 I mailed a copy of the attached document, First Class Mail, postage prepaid, to:

Philip Seldon
500 East 77th Street
New York, NY 10162
Plaintiff Pro Se

And a courtesy copy of the foregoing mailed to:

HONORABLE MICHAEL H. DOLINGER
United States Magistrate Judge
United States District Court
500 Pearl St.
New York, NY 10007-1312

/s/ Debra Gower