

<b>Saker v Darnborough</b>
2018 NY Slip Op 33075(U)
November 28, 2018
Supreme Court, Kings County
Docket Number: 513107/2018
Judge: Loren Baily-Schiffman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

KINGS COUNTY CLERK  
FILED

2018 NOV 30 AM 7:34

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 28<sup>th</sup> day of November, 2018.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**

JUSTICE

ADRIAN SAKER,

Plaintiff,

- against -

DARREN DARNBOROUGH,

Defendant.

Index No.: 513107/2018

Motion Seq. # 1

**DECISION & ORDER**

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion	3
Plaintiff's Reply Affirmation, Affidavit and Exhibits	4

Upon the foregoing papers Defendant, Darren Darnborough ("Defendant"), moves this Court for (a) an Order pursuant to CPLR § 3211(a)(1), (5), (7) and (8) dismissing the Complaint; (b) for sanctions and awarding Darrenborough's costs and reasonable attorneys' fees as a result of Plaintiff, *pro se*, Adrian Saker's ("Plaintiff") alleged frivolous conduct in bringing and maintaining this lawsuit; and (c) for such other and further relief as this Court deems just and proper.

### Background

Plaintiff and Defendant are both software developers. Defendant resides in California, and none of the documents provided show that he was ever domiciled in New York. In 2012, Plaintiff and Defendant contracted to perform software development for Perlan Project Inc.

("Perlan"), an Oregon company. A dispute about compensation occurred between Plaintiff and Perlan. Orange Peel S.L. ("Orange Peel"), a Spanish company, agreed to provide services to Perlan and requested design and consultant services from Plaintiff to assist with providing these services. On August 12, 2014, an Agreement of Settlement was reached wherein Plaintiff accepted 25% of all sponsorship commissions from the project and Plaintiff discharged all claims against Orange Peel and its "Affiliates and Subsidiaries." However, Plaintiff claims that Defendant entered into a contract with him for 4.19% of the total commission Defendant received from Orange Peel. Plaintiff has provided emails in support of this claim, however, none of them show in any way that there was a contract between the two parties.

On June 5, 2017, Plaintiff filed a complaint for breach of contract, equitable estoppel and detrimental reliance in the United States District Court for the Eastern District of New York. On October 13, 2017, Plaintiff voluntarily withdrew the complaint without prejudice. In his Memorandum in Opposition to Motion to Dismiss, Plaintiff explains his reason for voluntarily dismissing the Federal case was "because the claim [w]as not of value in excess of \$75,000, as required to establish diversity jurisdiction in the federal courts."

In the current action, Plaintiff brings the same claim as he brought in the above action in Federal court, namely, breach of contract, equitable estoppel and detrimental reliance. Defendant moves this court to dismiss the complaint on the grounds that (a) Plaintiff released the claims he now asserts in the Agreement of Settlement; (b) that this Court lacks personal jurisdiction over Defendant; (c) that the Plaintiff fails to state a claim; and finally, (d) that claim for breach of contract is barred by the statute of frauds.

### Discussion

A New York court “may exercise personal jurisdiction over any non-domiciliary or his executor or administrator, who... transacts any business within the state or contracts to supply goods or services in the state.” **CPLR § 302(a)**. Upon a motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the “ ‘ultimate burden of proof’ ” to establish a basis for such jurisdiction. ***America/Intl. 1994 Venture v. Mau*, 146 AD3d 40, 51 (2<sup>nd</sup> Dept 2016)**. The facts alleged in the complaint and affidavits in opposition to such a motion to dismiss are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in favor of the plaintiff. ***Nick v. Schneider*, 150 AD3d 1250,1251 (2<sup>nd</sup> Dept 2017), citing *Weitz v Weitz*, 85 AD3d 1153, 1154 (2<sup>nd</sup> Dept 2011)**. The inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions. ***Id.*** In order to defeat a motion to dismiss, a plaintiff need only establish, prima facie, that the defendant was subject to the personal jurisdiction of the Supreme Court. ***Carrs v. AVCO Corp*, 124 AD3d 710 (2<sup>nd</sup> Dept 2015)**.

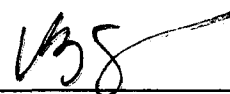
Here, Plaintiff fails to make even a prima facie showing that Defendant transacted business in the State of New York. According to the complaint, Defendant was part of a team which performed work for Perlan, an Oregon company. Nothing in the papers indicates that Defendant conducted any activities whatsoever in New York. This court cannot exercise personal jurisdiction simply because a party entered into an agreement to pay a New York resident money, as Plaintiff claims. As this court does not have jurisdiction over Defendant, Defendant’s other grounds for dismissal need not be addressed.

Turning to the branch of Defendant's motion for sanctions and award for attorneys' fees, Defendant cites CPLR § 8303-a as authority. The present case was brought under a breach of contract theory and is beyond the scope of actions "to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime" as highlighted by that statute. *See CPLR § 8303-a*. Moreover, there are no facts set forth in the papers that merit the imposition of sanctions under 22 NYCRR 130-1.1. Accordingly, it is

ORDERED that Defendant's motion to dismiss the complaint is granted in its entirety.

This is the DECISION AND ORDER of the court.

ENTER



LOREN BAILY-SCHIFFMAN

JSC

**HON. LOREN BAILY-SCHIFFMAN**

KINGS COUNTY CLERK  
FILED  
2018 NOV 30 AM 7:35