

**Trell, Inc. v Fresh Aircraft Sales, LLC**

2018 NY Slip Op 33860(U)

February 27, 2018

Supreme Court, Westchester County

Docket Number: 58580/2017

Judge: Lawrence H. Ecker

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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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TRELL, INC.,

Plaintiff,

-against-

FRESH AIRCRAFT SALES, LLC, CENTERLINE AIRCRAFT, LLC and NORMAN HELDMAN d/b/a AIR AMERICA ATLANTIC,

Defendants.

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INDEX NO. 58580/2017

DECISION/ORDER

Submission Date: 01/10/18

Motion Seqs. 1,2

The following papers numbered 1 through 14 were considered on the motions of defendants CENTERLINE AIRCRAFT, LLC, ("Centerline") [Mot. Seq. 1]<sup>1</sup> and FRESH AIRCRAFT SALES, LLC ("Fresh Aircraft") [Mot. Seq. 2] each made pursuant to CPLR 3211 (a) (8), for orders dismissing the complaint in its entirety for lack of personal jurisdiction, as against TRELL, INC. ("plaintiff"):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion to Dismiss (Centerline) [Mot. Seq. 1], Affirmation, Exhibits A-B	1- 4
Notice of Motion to Dismiss (Fresh Aircraft)[Mot. Seq. 2], Affirmations (2), Exhibits A-B	5-9
Plaintiff's Affirmations (3) in Opposition to Mot. Seq. 1 & 2 Exhibits 1-2	10-14

Upon the foregoing papers, the court determines as follows:

This action arises out of the sale of an aircraft (FAA registration number N6274V) ("the Airplane"). Fresh Aircraft buys and sells aircrafts and has a principal place of business

<sup>1</sup>On December 4, 2017 the motion by Wilenchik & Bartness, PC to withdraw as counsel for defendant Centerline Aircraft, LLC was granted (Lefkowitz, J.) [Mot. Seq. 3]. The action was stayed for thirty days to permit defendant to obtain new counsel.

in Cincinnati, Ohio, and a second office in Scottsdale, Arizona. Sidney Ellner ("Ellner") is the president and sole shareholder of plaintiff, which is located in Bedford, New York, and purchases aircrafts for personal use and investment purposes.

Plaintiff alleges that it hired defendant Norman Heldman d/b/a Air America Atlantic ("Heldman") from Tuxedo, New York to negotiate the terms of the purchase of the Airplane. Heldman was also tasked with hiring a licenced aircraft mechanic to perform the pre-buy inspection of the relevant aircraft in Arizona. It is undisputed that the Airplane was located in Scottsdale, Arizona at the time. Heldman informed plaintiff that the inspection failed to reveal any discrepancies or items in need of disrepair.

On July 1, 2016, defendant Centerline Aircraft, LLC ("Centerline"), which is located in Scottsdale, Arizona, completed its repair work on, and inspection of, the Airplane, while the aircraft was still in Arizona. While Centerline's managing member, Lawrence Afana, Jr., states in his affidavit that he remembers speaking to Ellner on the telephone, he alleges that he received directions from, invoiced the work to and received payment from only Fresh Aircraft. Afana, on behalf of Centerline, alleges he did not provide a warranty on the work, has no record of selling services to New York customers, does not transact business in New York, does not solicit New York business, and owns no real property in New York.

On August 28, 2016, Fresh Aircraft entered into an Aircraft Purchase Agreement with plaintiff for the sale of the Airplane. In the Agreement [NYSEF # 15], Fresh Aircraft lists its principal address as 8<sup>th</sup> Street, Cincinnati, Ohio. Plaintiff's address is listed as 25 Hissarlik Way, Bedford, New York.

The Agreement provides, in relevant part, that:

"3. Title . . . Upon delivery of the Aircraft and payment of the balance of the purchase price, in accordance with this Agreement, Seller shall execute a bill of sale granting [good title to the Buyer]."

In addition, the Agreement provides for non-binding mediation<sup>2</sup> of disputes and specifies that the contract is to be construed under the laws of the State of Arizona.

Thereafter, the Airplane was flown from Arizona to Westchester County Airport, landing on September 17, 2016. The transport pilot was not paid by plaintiff. Sometime thereafter, plaintiff had the Airplane inspected, which revealed that the aircraft was not airworthy in accordance with the standards of the FAA.

Plaintiff commenced this action by summons and complaint dated May 22, 2017, against Fresh Aircraft, Centerline and Heldman, seeking monetary damages based upon claims of misrepresentation [first cause of action], negligence [second cause of action],

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<sup>2</sup>While the Agreement calls for non-binding mediation, the parties do not argue that the mediation provision is grounds for dismissal of this action.

fraudulent concealment [third cause of action], and breach of warranty [fourth cause of action]. Heldman has not yet appeared or answered the complaint. Fresh Aircraft and Centerline have now move, pre-answer, to dismiss the complaint, for lack of personal jurisdiction (CPLR 3211[a][8]).

*Fresh Aircraft's Motion [Mot Seq. 2].*

Fresh Aircraft alleges that this transaction took place in Arizona; that it does not transact business in New York; that it is not authorized to do business in New York; and that it has no office or any operations in New York State. Fresh Aircraft points out that the Agreement provides that Arizona law governs any dispute regarding the airplane sale, that the inspection took place in Arizona, and that the closing was handled by an Oklahoma company. In addition, the Airplane was stored in Arizona and it has not been established that the transport pilot worked for Fresh Aircraft, although it does not deny paying the transport pilot. Furthermore, the fact that the Airplane was delivered to New York is insufficient to create jurisdiction or to demonstrate adequate minimum contacts in New York to establish personal jurisdiction.

Plaintiff counters that Fresh Aircraft entered into a contract to supply, and did, in fact, deliver the Airplane to it in New York, thereby supplying goods to this State. Stressing that the Agreement specifically provides that it is only "upon delivery of the Aircraft and payment of the balance of the purchase price, in accordance with this Agreement, Seller shall execute a bill of sale granting [good title to the Buyer]," plaintiff argues that the Agreement itself proves that Fresh Aircraft contracted to transact business in New York.

In addition, plaintiff avers that Fresh Aircraft had sufficient contacts within New York to warrant a finding that it subjected itself to the jurisdiction of the New York courts. In support of this contention, plaintiff states that Fresh Aircraft widely advertised in print, and on the internet, to sell airplanes that were stored in New York, and to sell airplanes to prospective purchasers located in New York. Plaintiff further argues that Heldman (the broker) is located in New York, and had an ongoing relationship with Fresh Aircraft in arranging the sale of the Aircraft. Furthermore, upon information and belief, plaintiff alleges that Fresh Aircraft paid the transport pilot to deliver the aircraft to New York. These facts, plaintiff asserts, prove the existence of sufficient contacts in New York and warrant the denial of defendant's motion.

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant" (CPLR 3211 [a] [8]). Under New York's long-arm jurisdiction statute, a court may exercise jurisdiction over a 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 (CPLR 302 [a] [1]; *Grimaldi v Guinn*, 72 AD3d 37 [2d Dept 2010]; see *Bogal v Finger*, 59 AD3d 653 [2d Dept 2009]).

CPLR § 302(a) is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, as long as the defendant's activities here were purposeful, and there is a substantial relationship between the transaction and the claim asserted (*Grimaldi v Guinn, supra; see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]). “[T]he growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it” (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs., supra*). Therefore, so long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not “present” in that State (*Grinaldi v Guinn, supra, Kreutter v McFadden Oil Corp.*, 71 NY2d 460 [1988]).

New York courts may exercise personal jurisdiction over a defendant who “transacts any business within the state, or contracts anywhere, to supply goods or services in the state” (CPLR §302 [a] [1]), even where that defendant has never physically entered the state (*see Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 17 [1970]), “so long as the defendant's activities here were purposeful and there is a substantial relationship between the transactions and the claim asserted” (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Bogal v Finger, supra*).

Here, plaintiff satisfied its burden, at this stage of the litigation, of showing that this standard has been met (*see Bogal v Finger, supra; Fischbarg v Doucet*, 9 NY3d 375 [2007]; *Deutsche Bank Sec., Inc. v Montana Bd. of Invs., supra; Popescu v Forexware, LLC*, 2018 NY Slip 01159 [1<sup>st</sup> Dept 2018]). The Agreement provides that the parties' obligations, pursuant to the Agreement, are not satisfied until the aircraft is delivered from Arizona to New York. Fresh Aircraft advertises that it has aircrafts for sale in various mediums within New York, including airplanes located in New York and, here, it negotiated with Heldman for the sale of the Airplane. It is noted that Fresh Aircraft does not deny that it arranged, if not paid for, the transport and delivery of the Airplane from Arizona to New York.

The court finds that exercising jurisdiction over the defendant in the circumstances presented here is consistent with traditional notions of due process, fair play, and substantial justice (*see International Shoe Co. v Washington*, 326 US 310, 316 [1945]; *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214-215 [2000]; *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 247-248 [2d Dept 2005]; *Nick v Schneider*, 150 AD3d 1250 [2d Dept 2017]). Fresh Aircraft's actions demonstrate that it purposefully created a continuing relationship with plaintiff, centered around the project at issue in this action, i.e., the sale and purchase of the Airplane. In addition, Fresh Aircraft had an undenied relationship with the New York-based broker (Heldman) which was also germane to the consummation of the transaction. All this being so, the court finds that exercising jurisdiction over Fresh Aircraft, a movant herein, under the circumstances presented here, is not inconsistent with traditional notions of due process, fair play and substantial justice (*Grimaldi v Guinn, supra; Bogal v Finger, supra; see International Shoe Co., v Washington, supra*). As such, it is clear that Fresh Aircraft has contracted to supply goods and services within New York, such that

personal jurisdiction is found to exist pursuant to CPLR § 302 (a) (1). Having found jurisdiction based on CPLR § 302 (a)(1), it is unnecessary to determine whether personal jurisdiction exists under the remaining provisions of CPLR §302(a) <sup>3</sup> (see *Reynolds v Aircraft Leasing, Inc.*, 194 Misc2d 550 [Sup. Ct., Queens Co. 2002]).

*Centerline's Motion [Mot. Seq. 1].*

Plaintiff does not oppose Centerline's motion for an order dismissing the complaint as against it based on lack of personal jurisdiction, but instead argues that Centerline is not an indispensable party under CPLR § 1001. Fresh Aircraft, however, while conceding that there is no personal jurisdiction over Centerline, disagrees with plaintiff and asserts that Centerline is an indispensable party.

CPLR § 1001 sets forth the rules governing when joinder of parties is necessary to continue an action affecting the rights of those parties. The statute directs that persons must be brought into the action when joinder is necessary to accord "complete relief" between the parties, or when the interests of the person might be "inequitably affected by a judgment in the action" (CPLR §1001[a]). Where a person who should be joined nevertheless cannot be joined, courts must decide whether the action can proceed without the "necessary party" [*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 [2003]].

Parties who must be joined, lest the action be dismissed, are termed "indispensable parties." CPLR § 1001(b) provides five factors for courts to consider in deciding whether to dismiss an action where, as here, jurisdiction over the necessary party can be obtained only by his consent or appearance:

1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined" (CPLR §1001[b] )*[Id.]*.

No single factor is determinative (*Red Hook/ Gowanus Chamber of Commerce v New York City Bd. Of Standards and Appeals*, 49 AD3d 749 [2d Dept 2008]; *Lindkvist v Honest Ballot Ass'n.*, 31 Misc3d 1234 (A)[Sup. Ct., New York Co. 2011]).

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<sup>3</sup> Plaintiff alleges that jurisdiction exists under CPLR §§ 302(a)(2) and 302 (a)(3) without citing any convincing legal precedent to support plaintiff's position. The court need not reach the issue, however, as personal jurisdiction exists here under §302(a)(1).

Under the facts presented, and applying the governing principles set forth above, the court finds that Centerline is not an indispensable party under the CPLR § 1001. Plaintiff has consented to dismissal of its claims against Centerline, rather than causing a dismissal of this action. Centerline does not allege that it will be prejudiced by this action proceeding without him, while acknowledging it would eliminate any such prejudice by consenting to remaining as a party herein. Further, Fresh Aircraft will not suffer any prejudice, as the claims that it proposes to assert against Centerline, i.e. breach of contract or warranty, are based upon Centerline's conduct in Arizona, are distinct and independent from the liability issues presented here, and can be resolved fairly in a separate action in Arizona.

In contrast, plaintiff cannot improve the situation by re-serving Centerline, as it is not subject to the jurisdiction of this court. No party has argued that a protective order is desired or necessary. Given these circumstances, the court finds that an effective and fair judgment can be reached in this action, without the presence of Centerline, which was not in privity with plaintiff, while at the same time, not jeopardizing Fresh Aircraft's right to pursue its claims against Centerline in a separate action brought in a court of competent jurisdiction. Accordingly, the court finds that Centerline is not an indispensable party under CPLR § 1001, whose motion to dismiss the complaint is granted, and the action will proceed against the remaining parties (*see Saratoga County Chamber of Commerce, Inc. v Pataki, supra; Feder v Town of Islip Zoning Bd. Of Appeals*, 114 AD3d 782 [2d Dept. 2014]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant CENTERLINE AIRCRAFT, LLC [Mot. Seq. 1], made pursuant to CPLR 3211(a)(8), for an order dismissing the complaint in its entirety, for lack of personal jurisdiction, as against plaintiff TRELL, INC. is granted; and it is further

ORDERED that the motion of defendant FRESH AIRCRAFT SALES, LLC [Mot. Seq. 2], made pursuant to CPLR 3211(a)(8), for an order dismissing the complaint in its entirety, for lack of personal jurisdiction as against plaintiff TRELL, INC. is denied; and it is further

ORDERED that the remaining parties are directed to appear in the Preliminary Conference Part, as previously scheduled, in Room 811, on March 29, 2018, at 9:30 a.m.; and it is further

ORDERED that defendant FRESH AIRCRAFT SALES, LLC shall serve a copy of this order upon all parties, with notice of entry, by first class mail and certified mail/return receipt requested, within ten days of the entry.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
February 27, 2018

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

**Appearances**

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