

**Beck v Law Sch. Admission Council (LSAC)**

2023 NY Slip Op 33310(U)

September 21, 2023

Supreme Court, New York County

Docket Number: Index No. 159316/2022

Judge: Richard Latin

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

**PRESENT: HON. RICHARD LATIN PART 46M**

*Justice*

-----X

DAVID BECK

Plaintiff,

- v -

LAW SCHOOL ADMISSION COUNCIL (LSAC),

Defendant.

-----X

INDEX NO. 159316/2022

MOTION DATE 11/21/2022,  
02/06/2023

MOTION SEQ. NO. 001 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 6, 7, 9 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 21, 22, 23, 24, 25, 26, 27, 28 were read on this motion to/for DISMISSAL.

In this article 78 proceeding, respondent Law School Admission Council (LSAC) moves, pursuant to CPLR 3211 (a) (2) and (8), to dismiss the amended petition brought by petitioner David Beck and this special proceeding on the grounds that the court lacks both subject matter and personal jurisdiction over it. For the reasons set forth below, the motion is granted, and the amended petition and this special proceeding are dismissed.

**Background**

Respondent, a not-for-profit corporation with a principal place of business in Newtown, Pennsylvania, is in the business of facilitating the admissions process for applicants and law schools approved by the American Bar Association (NY St Cts Elec Filing [NYSCEF] Doc No. 17, amended petition, ¶¶ 2, 7-8).

In 2009, petitioner, a New York County resident, graduated from Queens College with a bachelor’s degree in political science (*id.*, ¶¶ 1 and 13). That same year, petitioner created an

account with respondent with the intention of applying to law school (*id.*, ¶ 15). Respondent calculated his undergraduate GPA as 3.03 (*id.*, ¶ 16). Respondent based its calculation on grades petitioner received from Queens College as well as grades he received from four other universities he attended as an undergraduate between 2004 and 2007, during which time he suffered from an opioid-use disorder (*id.*, ¶¶ 11 and 16). Petitioner ultimately “chose a different path” and pursued a second degree in accounting (*id.*, ¶ 17). Petitioner graduated from Queens College with a bachelor’s degree in accounting and a cumulative 4.1 GPA in 2012, and he received a master’s degree in accounting from the same institution in 2014 (*id.*, ¶¶ 18 and 22).

In 2022, petitioner sought to apply to law school once more and updated his account with respondent to include more recent transcripts from Queens College (*id.*, ¶¶ 21 and 23). Respondent ignored the transcript related to his undergraduate accounting degree in calculating his undergraduate GPA and designated his second bachelor’s degree as graduate coursework (*id.*, ¶¶ 24-25). Petitioner alleges such action is arbitrary and capricious as the combined GPA for all his undergraduate work at Queens College is 3.98 (*id.*, ¶¶ 29 and 34). Petitioner appealed the decision, but respondent denied the appeal by letter on August 10, 2022 (*id.*, ¶ 26).

Petitioner now brings this proceeding for equitable relief, specifically to compel respondent to consider petitioner’s transcript for his second undergraduate degree in accounting from Queens College, or in the alternative, to compel respondent to consider all of petitioner’s undergraduate coursework from Queens College in calculating his grade point average (GPA). In response, respondent moved to dismiss the petition for lack of subject matter jurisdiction under CPLR 3211 (a) (2) and for lack of personal jurisdiction under CPLR 3211 (a) (8) (NYSCEF Doc No. 10). This court denied the motion without prejudice to renew after petitioner amended the petition (NYSCEF Doc No. 16). Petitioner has since amended his petition. This motion follows.

Respondent argues the petition should be dismissed on two grounds. First, respondent contends the court lacks subject matter jurisdiction to address an article 78 petition against a foreign corporation. Second, respondent submits the court lacks personal jurisdiction over it. In support, respondent tenders an affidavit from its vice president for legal and corporate affairs, Amy Beth Dambeck, Esq., who avers that respondent was incorporated under Delaware law and maintains its principal place of business in Pennsylvania (NYSCEF Doc No. 22, Amy Beth Dambeck, Esq. [Dembeck] aff, ¶¶ 4-5; NYSCEF Doc Nos. 23-24, Dambeck aff, exhibits A-B). Dambeck further avers that respondent neither maintains offices nor owns real property in New York, and that its law school application service is operated and directed from its Pennsylvania headquarters (NYSCEF Doc No. 22, ¶¶ 6-7).

Petitioner counters the court has both personal jurisdiction over respondent, and as such, the court has subject matter jurisdiction. In addition, petitioner argues the motion should be denied as procedurally defective, as respondent should have moved by notice of cross-motion.

### **Discussion**

As a preliminary matter, CPLR 7804 (f) provides that a “respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition.” Thus, the statute does not expressly require the submission of a cross-motion, as has been suggested. Even if a cross-motion is required, CPLR 2001 allows the court to disregard such a mistake, provided that “a substantial right of a party is not prejudiced.” Petitioner has not demonstrated it has suffered any prejudice from respondent’s mistake in failing to label the motion as a “cross-motion.”

CPLR 3211 (a) (2) allows the court to dismiss an action for lack of subject matter jurisdiction. “Subject matter jurisdiction ‘refers to objections that are fundamental to the power of adjudication of a court’ ... that the matter before the court was not the kind of matter on which

the court had power to rule” (*Garcia v Government Empls. Ins. Co.*, 130 AD3d 870, 871 [2d Dept 2015] [citation omitted]). “[W]here subject matter jurisdiction is lacking, an action must be dismissed and “[where] the Court does not have subject matter jurisdiction, it should refrain from any further exercise of power”” (*Dyer v Cahan*, 150 AD2d 172, 173 [1st Dept 1989] [citation omitted]).

Here, respondent has not demonstrated that this court lacks subject matter jurisdiction. Petitioner’s claim is in the nature of a mandamus to compel (*see* CPLR 7801). “[M]andamus is an ‘extraordinary remedy’ that is ‘available only in limited circumstances’” (*Matter of County of Chemung v Shah*, 28 NY3d 244, 266 [2016] [citation omitted]). “Mandamus is used to enforce an administrative act positively required to be done by a provision of law” (*id.* [internal quotation marks and citation omitted]). CPLR 7803 provides, in relevant part, that:

“The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, or is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.”

CPLR 7802 (a) defines a “body or officer” to include a “corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article.” A corporation, even a not-for-profit corporation, can constitute a “body or officer” for purposes of article 78 mandamus relief (*see Matter of Sines v Opportunities for Broome*, 156 AD2d 878, 878 [3d Dept 1989]). Furthermore, the “Supreme Court ‘is a court of original, unlimited and unqualified jurisdiction’” (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007], quoting *Kagen v Kagen*, 21 NY2d 532, 537 [1968]; *see also*

NY Const, art VI, § 7 [a]), and CPLR 7803 directs that the court may hear proceedings against a body or officer. Thus, the motion insofar as it seeks dismissal for lack of subject matter jurisdiction is denied.

CPLR 3211 (a) (8) provides for dismissal of a complaint on the ground that the court lacks personal jurisdiction over a party. The party opposing a motion brought under CPLR 3211 (a) (8) bears the burden of coming ““forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction”” (*Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 [2007] [internal citation omitted]). The evidence must be sufficient to demonstrate a prima facie basis for personal jurisdiction (*see Aramid Entertainment Fund Ltd. v Wimbledon Fin. Master Fund, Ltd.*, 105 AD3d 682, 683 [1st Dept 2013], *lv denied* 22 NY3d 858 [2013]).

It is well settled that public and private corporations ““may be subject to CPLR article 78 as quasi-governmental bodies because they are ‘beholden to the [s]tate for their franchise or charter or the exercise of their functions’” (*Matter of American Univ. of Antigua v CGFNS Intl.*, 126 AD3d 1146, 1148 [3d Dept 2015] [citation omitted]; *Matter of Gray v Canisius Coll. of Buffalo*, 76 AD2d 30, 33 [4th Dept 1980], quoting *Matter of Weidenfeld v Keppler*, 84 App Div 235, 237 [1st Dept 1903], *affd* 176 NY 562 [1903] [“a writ of mandamus has been made applicable to corporations, both public and private, because these institutions are creations of the government and ‘a supervisory or visitorial power is always impliedly reserved to see that corporations act agreeably to the end of their institution, that they keep within the limits of their lawful powers, and to correct and punish abuses of their franchises’”]; *see also* Siegel, NY Prac § 558 at 1069 [6th ed 2018]). Thus, “[w]hen a foreign corporation accepts a license to do business in this state or does some act which subjects itself to the jurisdiction of this state, it may be treated as a domestic corporation to the extent of rendering it subject to the writ of mandamus” (*People ex rel. Solomon*

*v Brotherhood of Painters, Decorators & Paperhangers of Am.*, 218 NY 115, 119 [1916]; see also *Matter of Gray*, 76 AD2d at 33 [article 78 proceeding an appropriate vehicle to ensure that a corporation fulfills the obligations imposed on it by statute and by its internal rules]).

The exercise of general jurisdiction over a non-domiciliary corporation is proper where its “affiliations with the [s]tate are so ‘continuous and systematic’ as to render them essentially at home in the forum [s]tate” (*Daimler AG v Bauman*, 571 US 117, 127 [2014], quoting *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011]). CPLR 301 is New York’s general jurisdiction statute, and “[t]o be subject to general jurisdiction under CPLR 301, a defendant corporation must either be incorporated in New York or have its principal place of business in New York” (*Brocco v Eastern Metal Recycling Terminal LLC*, 211 AD3d 628, 628 [1st Dept 2022]; accord *Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]).

As applied here, respondent has demonstrated, and petitioner does not dispute, that respondent is incorporated in Delaware and maintains its principal place of business in Pennsylvania. Nevertheless, petitioner maintains that general jurisdiction is proper under the solicitation-plus doctrine. Under this doctrine, “personal jurisdiction may properly be found if (1) the solicitation is substantial and continuous, and (2) defendant engages in other activities of substance in the state” (*La Piel, Inc. v Richina Leather Indus. Co. Ltd.*, 2013 WL 1315125, \*9, 2013 US Dist LEXIS 46328, \*34 [ED NY, Mar. 29, 2013, No. 10-CV-1050 (JFB) (ETB)], quoting *Landoil Resources Corp. v Alexander & Alexander Services*, 918 F2d 1039, 1043 [2d Cir 1990]). Petitioner argues that respondent regularly solicits business from New York residents by way of its website, but “[m]ere solicitation of business within New York will not subject a defendant to ... [CPLR 301] jurisdiction” (*Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 913 [2d Dept 2014]). Moreover, under the solicitation-plus doctrine, courts will “frequently look to the

percentage of a company's revenue attributable to New York business" to determine whether the corporation's solicitation was substantial and continuous (*Overseas Media, Inc., Skvortsov*, 407 F Supp 2d 563, 569 [SD NY 2006] [collecting cases]). Petitioner's assertions that thousands of New York residents spend hundreds of dollars on respondent's website to apply to law schools throughout the country are conclusory, and thus, he fails to demonstrate that respondent derived a significant amount of its income from New York (*id.* at 569-570 [no jurisdiction found under solicitation-plus doctrine where New York sales were not significant]).

Whether specific jurisdiction over a non-domiciliary is proper under CPLR 302, New York's long-arm statute, involves a two-step inquiry (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]). First, the court must determine whether jurisdiction is permissible under CPLR 302 (*id.*). Second, the exercise of jurisdiction must comport with federal due process (*id.*). Because petitioner contends that CPLR 302 (a) (1) confers specific jurisdiction over respondent, the court limits its discussion to that subsection.

CPLR 302 is a single-act statute (*State of New York v Vayu, Inc.*, 39 NY3d 330, 340 [2023]), and CPLR 302 (a) (1) provides for jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." Whether jurisdiction under CPLR 302 (a) (1) is proper involves a two-prong inquiry: (1) "the defendant must have conducted sufficient activities to have transacted business in the state"; and (2) "the claims must arise from the transactions" (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016], *reh denied* 28 NY3d 1161 [2017]). The exercise of specific jurisdiction must also comport with federal constitutional due process requirements (*id.* at 330). This requires "first that a [non-domiciliary] have minimum contacts with the forum state such that [it] should reasonably anticipate being haled into court there, and second, that the prospect of having to defend a suit in New York comports



with traditional notions of fair play and substantial justice” (*State of New York*, 39 NY3d at 346-347 [internal quotation marks and citation omitted]).


To begin, petitioner has not shown that respondent is licensed to conduct business in New York such that it is subject to a writ of mandamus (*see People ex rel.*, 218 NY at 119). That said, even an unlicensed foreign corporation may be subject to a writ of mandamus, provided that it does business in New York (*see Matter of Lavin v Lavin Co.*, 264 App Div 205, 205-206 [2d Dept 1942] [reversing decision dismissing an article 78 to compel an unlicensed Connecticut corporation to allow petitioner to inspect its corporate books and records]). Here, however, petitioner fails to demonstrate that respondent transacted business in New York. Although petitioner is located in this state, the center of gravity of the parties’ business arrangements was in Pennsylvania (*see Wohl v Landmark Capital II, LLC*, 2012 NY Slip Op 33542[U], \*4 [Sup Ct, Westchester County 2012] *affd* 112 AD3d 815 [2d Dept 2013] [center of gravity of the transaction in Colorado]; *see also Mednik v Specialized Loan Servicing, LLC*, 2021 WL 707285, \*5, 2021 US Dist LEXIS 34059, \*11-12 [ED NY, Feb. 23, 2021, No. 20-CV-427 (MKB)] [failure to correct erroneous reporting occurred outside of New York]; *Timothy Coffey Nursery Landscape v Soave*, 2018 WL 11211498, \*7, 2018 US Dist LEXIS 240830, \*18 [ED NY, Jan. 8, 2018, No. CV 17-1436 (SJF)] (ARL)], *affd* 760 Fed Appx 58 [2d Cir 2019] [work to be performed outside of New York]). Thus, petitioner has not demonstrated that CPLR 302 (a) (1) confers jurisdiction over respondent.

Accordingly, it is

ORDERED that the motion brought by respondent Law School Admission Council (LSAC) to dismiss the petition is granted; and it is further

ADJUDGED that the application is denied and the petition is dismissed; and it is further ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and judgment of the Court.

<u>9/21/2023</u> DATE		 RICHARD LATIN, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE