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Activity in Furtherance of Contract Deemed Transaction of Business

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(a)(1) and the requirements of due process under which it functions require New York contacts and there were no such contacts in the case.

Activity in furtherance of contract deemed transaction of business.

There is no set rule to determine whether the act or acts of defendant constitute a transaction of business. Thus, the court must judge each case in the light of its own peculiar circumstances.

The case of *Iroquois Gas Corp. v. Collins*[42] was an action for breach of contract wherein plaintiff alleged that the contract was executed in New York and was to be performed here. Defendant, a resident of Texas, denied the existence of a contract and moved to dismiss on the ground that he was not subject to the court's jurisdiction. The undisputed facts indicated that defendant was low bidder on plaintiff's proposed pipe line crossing the Niagara River. On two separate occasions, defendant's agents spent several days in New York negotiating a contract to construct this pipe line, surveying the construction site and engaging in other activities with reference to the alleged contract. The supreme court held that the activity in furtherance of the contract by the non-resident's agents constituted a "transaction of business and established the necessary minimum contacts."[43]

It had been held prior to the *Iroquois* case that a cause of action arising out of a contract entered into in New York constituted a transaction of business.[44] The court in the instant case, however, takes an even more liberal approach since it was not definitely established whether there was in fact a contract. The activities were sufficient in themselves, and apparently the court found it of little consequence that the contract had not been proved. It was enough that "defendant . . . availed himself of the privileges of conducting business activity within the state, thus invoking the benefit and protection of its law." [45] Sufficient basis was established for jurisdictional purposes; if there was in fact no contract, defendant could establish that later in a hearing on the merits.

The court was influenced in this case by *Kropp Forge Co. v. Jawitz,*[46] wherein the Illinois appellate court sustained in personam jurisdiction over a non-resident defendant on facts very similar to those presented in the instant case. In *Kropp,* the defendant also denied the existence of a contract but had visited plaintiff's premises

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[42] 42 Misc. 2d 632, 248 N.Y.S.2d 494 (Sup. Ct. 1964).

[43] *Id.* at 635, 248 N.Y.S.2d at 497.

[44] Patrick Ellam, Inc. v. Nieves, *supra* note 38; Steele v. DeLeeuw, *supra* note 38.

[45] Iroquois Gas Corp. v. Collins, 42 Misc. 2d 632, 635, 248 N.Y.S.2d 494, 497 (Sup. Ct. 1964).

[46] 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962).

in Illinois and had communicated there with plaintiff's employees. The court held that "either the making of the alleged contract itself, or the activity in furtherance of it, while defendant was physically present . . . is the business shown to have been transacted by defendant within Illinois. . . . " [47] Since section 302 was modeled on Section 17 of the Illinois Civil Practice Act, the case has direct bearing on the former.

In an action for breach of warranty, a foreign corporation was held subject to in personam jurisdiction under section 302(a)(1).[48] The defendant had contracted to sell two machines to plaintiff. The initial agreement stipulated that the contract was made in New York and that New York law governed the transaction. The defendant was not doing business in New York and the machines were delivered f.o.b. Chicago. The court, in sustaining jurisdiction, found it unnecessary to rely on the recital that the contract was made in New York because the pleaded cause of action (breach of warranty) arose out of the transaction of business in New York. Aside from extensive negotiations in New York, the participation of defendant in the installation and testing of the machines required officials and employees of defendant to be present here. The court held that the constitutional requirements of due process were satisfied "because defendant's contacts with New York were so many and so directly physical."[49]

It is important to note that in both *Iroquois* and *Longines* the court laid great stress on the fact that the activities within the state involved the physical presence of defendant or his agents. Absent these physical activities, the courts might not have upheld jurisdiction; in *Hanson v. Denckla*,[50] it was stated that there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." [51] But if the contract *was made* in New York, that fact in itself might be sufficient. In the cited cases, the courts had more to rely on and did not have to reach that question.

In personam jurisdiction in attorney's suit for fees.

The fact of defendant's officer's physical presence in New York was deemed significant in *Lewis v. American Archives Ass'n.*[52] A written contract of employment had been executed in New

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[47] *Id.* at —, 186 N.E.2d at 79.
[48] Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 21 App. Div. 2d 474, 251 N.Y.S.2d 740 (1st Dep't 1964).
[49] *Id.* at 478, 251 N.Y.S.2d at 744.
[50] 357 U.S. 235 (1958).
[51] *Id.* at 253.
[52] 43 Misc. 2d 721, 252 N.Y.S.2d 217 (Sup. Ct. 1964).