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New York Commercial Division Round-Up BLOG
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New York Commercial Division Round-Up

April 4, 2011 by Sheppard Mullin

Are You A Foreign Company With A Relationship To A New York Company? It May Be Your Agent And Provide A Basis For Jurisdiction

By Kathryn J. Hines

In *Arbeeny v. Kennedy Executive Search,* Index No. 105733/2007 (Sup. Ct., NY County, Jan. 14, 2011) ("*Arbeeny*"), Defendants Jason Kennedy ("Kennedy") and Kennedy Associates ("Kennedy Associates ") (collectively the "Moving Defendants") moved to dismiss on the basis of Plaintiff Daniel Arbeeny's failure to serve the complaint in a timely manner pursuant to CPLR § 306-b. Justice Eileen Bransten, of the New York Commercial Division, granted the Moving Defendants' motion to dismiss as to Kennedy but denied it as to Kennedy Associates. In so doing, she addressed issues that may be important to United States-based companies that have a relationship with foreign corporations.

Background

Plaintiff was formerly employed by Kennedy Executive Search ("KES"). KES was a New York-based executive search firm and was affiliated with Kennedy Associates, a British executive search firm. The underlying suit arose when KES allegedly lowered Plaintiff's salary and terminated him for refusing to accept the reduction, allegedly a violation of Plaintiff's employment agreement. Plaintiff commenced the action seeking to recover outstanding salary and commission pay.

KES and Jack Kandy, the former president of KES, were the only defendants that Plaintiff served. These defendants moved to dismiss. The court granted their motion to dismiss in April of 2008, but the First Department reversed in part in January of 2010. After the case was remanded, Kennedy Associates and Kennedy, moved to dismiss on the ground that they had not been served.

"Mere Department" and Agency Theories

In opposing Kennedy Associates' motion to dismiss, Plaintiff argued that service upon KES constituted service upon Kennedy Associates because KES was a "mere department" of Kennedy Associates. Plaintiff also argued that KES was Kennedy Associates' agent.

New York courts have repeatedly held that where a subsidiary is shown to be a "mere

department" of a parent corporation, service on the subsidiary will constitute service on the parent. Though she acknowledged this history, Justice Bransten ultimately held that Plaintiff failed to show that KES was a mere department of Kennedy Associates. In so doing, she relied on a number of factors identified by the Second Circuit in *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120-22 (2d Cir. 1984)*. These factors include (i) the financial dependency of the subsidiary on the parent, (ii) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and (iii) the degree of control over the marketing and operational policies of the subsidiary. *See id.* While Plaintiff alleged that these factors were present, Justice Bransten found that Plaintiff failed to submit evidence to support the allegations and, therefore, the Court held that KES was not a "mere department" of Kennedy Associates.

However, Justice Bransten found Plaintiff's agency theory to be meritorious. Because KES and Kennedy Associates were commonly owned and KES was established to do all the business that the United Kingdom-based Kennedy Associates could do if it were present in New York, Justice Bransten held that KES was, for jurisdictional purposes, an agent of Kennedy Associates. Thus, service upon KES was sufficient for service upon Kennedy Associates.

The Moving Defendants asserted that the "mere department" and agency theories were inapplicable in actions where New York's long-arm statute, CPLR § 302, is the alleged basis for personal jurisdiction. The Moving Defendants argued that because Plaintiff's cause of action had a basis in New York, Plaintiff could not invoke the "presence doctrine" where another basis for jurisdiction existed. The presence doctrine provides that if an entity is doing business in New York, it is "present" in New York for jurisdictional purposes. Justice Bransten rejected Moving Defendants' argument. The Court held that while there is no requirement that a court undertake the presence doctrine analysis when the long-arm statute provides a basis for personal jurisdiction over the parent corporation, this does not mean that the presence doctrine cannot be used when there is an alternative basis for personal jurisdiction. *See Arbeeny*, at pg. 6.

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