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Provision Of Services Through Third-Party Websites May Subject Non-Domiciliaries To Personal Jurisdiction In New York

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In Robinson v. Intuit, Inc., et al., Index No. 101160/10 (Sup. Ct. NY County, Sept. 27, 2010) ("Intuit"), Justice Shirley Werner Kornreich held that a foreign corporation with no physical contacts with New York that had contracted to provide services in New York through the website of another party was nonetheless subject to personal jurisdiction in New York. Intuit sheds further light on the extent to which New York courts will exercise long-arm jurisdiction over non-domiciliaries through their "virtual" New York contacts.

Plaintiffs, New York residents, purchased the TurboTax program and a membership with the TurboTax Audit Defense program through the TurboTax website. The membership entitled plaintiffs to legal and accounting services provided by defendant Tax Resources, Inc. ("TRI"), a Florida corporation with its principle place of business in California, in the event plaintiffs were audited by the IRS.

Plaintiffs were audited in 2006. Pursuant to the audit service agreement, TRI assigned plaintiffs a certified public accountant (CPA) named Martin Solomon, also a New York resident, to handle their case. TRI informed plaintiffs not provide any information to the IRS because Solomon would be their "only point of contact with the IRS or state agency," and further stated that TRI would pay Solomon's fees. Unbeknownst to plaintiffs, however, Solomon's CPA license had been revoked in 1998 after he was found guilty of professional misconduct for embezzling client funds. Solomon subsequently failed to forward plaintiffs' relevent paperwork to the IRS or take any other action necessary to aid them in the auditing process. In January 2007, TRI notified plaintiffs that it was terminating their audit service because plaintiffs had failed to provide TRI with required documentation. Plaintiffs brought claims for breach of fiduciary duty and negligence against Intuit, Inc., TurboTax, TRI, and Solomon.

TRI moved to dismiss for, *inter alia*, lack of personal jurisdiction under CPLR 3211 (a)(8). In support of its motion, TRI asserted that it "maintains no office in New York, has no employees in New York, does not conduct any business from New York, has no bank accounts in New York, and maintains no New York phone lines." TRI also argued that the court should not obtain jurisdiction over TRI through Solomon because Soloman was not an employee or agent of TRI, but rather was an independent contractor. TRI pointed to Soloman's 1099 tax form indicating that the money he received from TRI for his services was listed as "[n]onemployee compensation." Finally, TRI noted that "[n]one of the witnesses or records TRI would need to offer are located in New York."

CPLR 302(a)(1) allows New York courts to assert personal jurisdiction over non-domiciliaries "who in person or through an agent . . . transact[] any business within the state or contract[] anywhere to supply goods or services in the state," so long as the cause of action "arises out of" the transaction at issue. New York courts use the so-called "purposeful activities" test to determine whether a defendant "transacts business" within New York. According to the court, "[t]he test calls for a showing of conduct demonstrating the non-domiciliary

projected him or herself into New York by knowingly initiating and pursuing a substantial transaction and, thereby, reasonably should have expected to defend himself in New York." *Intuit* at 5.

The court found that plaintiffs had alleged sufficient facts to make a prima facie showing of personal jurisdiction under both prongs of CPLR 302(a)(1).

TRI was found to have transacted business in New York because Robinson purchased the service on TurboTax's website while in New York. Relying upon *Courtroom Television Network v. Focus Media, Inc., 264 A.D.2d 351, 353 (1st Dept. 1999)*, the court held that "[w]here an agreement is negotiated or executed by telephone, mail, or electronic communication, a defendant may be found to have transacted business due to additional substantive contacts with the state, such as where the agreement calls for complete or substantial performance in New York." Justice Kornreich concluded that, despite the contract's silence as to where TRI would provide the promised tax professional to plaintiffs, it was "logical for TRI to provide an accountant licensed in the jurisdiction in which plaintiffs lived and would be subject to investigation and possible legal action and since TRI, in fact, did provide them with an accountant located in New York, it can be inferred that the contract called for the provision of legal and accounting services to a New York resident." *Intuit* at 7. The court found that provision of a New York accountant "constituted substantial performance of TRI's obligation and a purposeful activity by which TRI availed itself of the privilege of carrying on activities within New York and invoked the benefits and protections of its laws." *Id.*

The court likewise found that TRI had contracted to supply goods or services in New York because TRI had provided a letter to plaintiffs asserting that it would provide plaintiffs with legal and accounting services should they later be subject to an audit and, crucially, these services would be provided "until the time this membership expires as agreed upon by the payment amount." *Id.* at 8.

The court rejected TRI's argument that it had not contracted to supply services in New York, since Solomon, not TRI, had supplied all legal and accounting services in New York. The court, regarding the language in the agreement stating that TRI would provide a "professional tax representative" to plaintiff, and that Solomon was paid by TRI to perform these services, found that Solomon was "merely a conduit through which TRI was to perform services it had promised to plaintiffs." *Id.* at 8. The court found TRI's final letter to plaintiff "particularly telling," because therein TRI stated that "*we*"would "*cease providing* audit representation services" and that the "letter is official notification of *our* complete *withdrawal* of audit representation services." *Id.* (emphasis in original).

Based on the foregoing, the court matter-of-factly concluded that subjecting TRI to jurisdiction under CPLR 302(a)(1) does not offend "traditional notions of fair play and substantial justice," because "it should have been reasonably foreseeable to TRI that it would be haled into a New York court." *Intuit* at 9.

This case demonstrates the relative ease with which entities and individuals may become potential New York litigants. Despite that an entity's contacts with New York are de minimis, and conducted strictly through informal agents, it still may subject to personal jurisdiction in New York. Corporations seeking to avoid being haled into New York Courts should therefore be mindful of agreements to provide services in New York, even if their role is merely to locate a local party to perform those services.

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