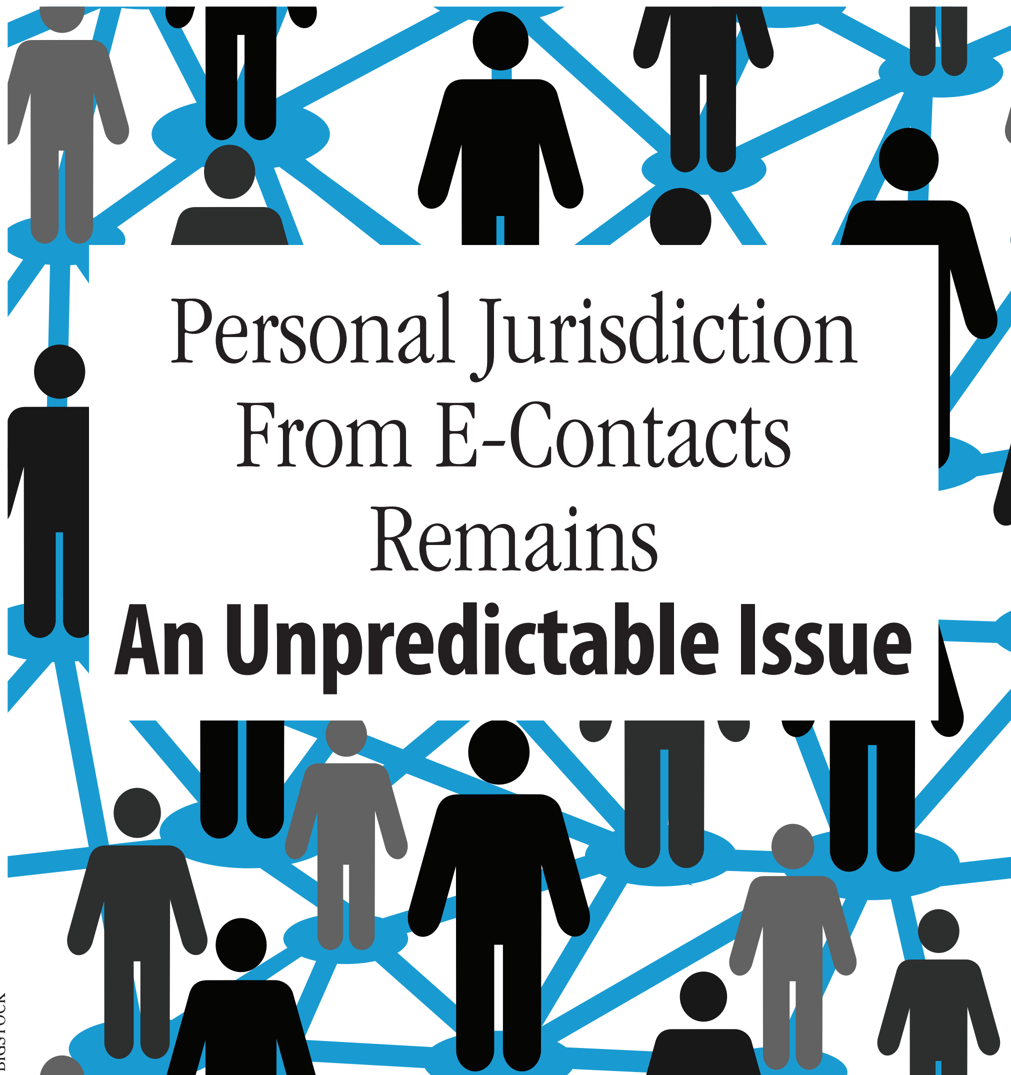
New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
An ALM Publication
Litigation
WWW.NYLJ.COM
MONDAY, FEBRUARY 25, 2013


BIGSTOCK

Personal Jurisdiction From E-Contacts Remains An Unpredictable Issue

BY ROBERT S. FRIEDMAN AND MARK E. MCGRATH

Advances in technology continue to have an interesting and quixotic effect on the way in which courts grapple with personal jurisdiction. Commercial interaction across state and international borders continues to challenge the traditional analysis of minimum contacts and purposeful availment. Since our 2009 article[1] updating the jurisprudence relating to electronic contacts, New York courts have continued to use the sliding scale of interactivity to determine whether websites can provide a basis for personal jurisdiction, along with the traditional indicia of doing business, namely, the totality of connections with New York. The result is that personal jurisdiction analysis has become even more fact specific and unpredictable.

Updated Progeny of 'Fischbarg'

The New York Court of Appeals' decisions in *Fischbarg v. Doucet*[2] and *Deutsche Bank Securities v. Montana Board of Investments*[3] remain the seminal cases in New York on whether electronic communications are sufficient to exercise personal jurisdiction over a non-domiciliary.

Golden Archer Investments v. Skynet Financial Systems[4] is another example of how an out-of-state defendant can be subject to personal jurisdiction based on communications with New York residents. In *Golden Archer*, the plaintiff, a New York entity, began negotiating the terms of a contract to develop a securities-trading program that would be hosted on the plaintiff's servers in New York. The negotiations were done through email, Internet-based video chats and telephone calls as well as an in-person meeting in Chicago.[5] Ultimately, the parties executed a contract for the development of the software program in September 2010. The parties also negotiated a confidentiality agreement containing an arbitration clause designating New York as the forum in the event of a breach of that agreement.[6] Between Oct. 1, 2011 and April 2011, the parties communicated regularly about the project via email, Internet-based video conference and telephone. Skynet's programmers regularly logged onto the plaintiff's servers to upload, edit and test the software. Other than remotely accessing the plaintiff's servers, the defendants never visited New York to meet with the plaintiff or work on the project.[7] In April 2011, Skynet estimated it would take an additional four months to complete the project. The plaintiff refused to make any further payments, so Skynet ceased working on the project.

Subsequently, plaintiff commenced the action in the New York Supreme Court and the defendants removed the case. Thereafter, the defendants moved for lack of personal jurisdiction. Relying on *Fischbarg*, Judge Richard J. Sullivan held that Skynet "projected itself into New York 'to engage in a sustained and substantial transaction of business.'"[8] Skynet argued that remote

ROBERT S. FRIEDMAN *is a partner in Sheppard Mullin Richter & Hampton's business trial and white collar practice groups in New York.* MARK E. MCGRATH *is an associate in the business trial and intellectual property practice groups.*

communications are generally not sufficient to sustain personal jurisdiction. The court held, however, that "[w]hen a defendant's remote communications effectuate some purposeful business in New York, personal jurisdiction will be found."[9] Sullivan found that the emails, video conferences and telephone calls between the plaintiff and Skynet "go beyond mere 'conduits' to contract formation and instead go to the heart of the commercial transaction between the parties."[10] The court also found that even though Skynet performed all of the development for the software in Chicago, Skynet knew the project was for a New York entity and that the software would be hosted on servers in New York. Accordingly, Skynet's process of logging onto the plaintiff's servers to upload, edit and test the software also provided a basis to exercise personal jurisdiction.[11]

Another illustrative case is *Three Five Compounds v. Scram Technologies*.[12] There, the defendant was based in Maryland and produced advanced projector displays. In 2009, the defendant decided to increase production of these displays and contacted the manufacturer of the LED chips it used to see if the manufacturer could meet the demand. The manufacturer referred the defendant to the plaintiff, who was based in New York and was the manufacturer's exclusive LED chip distributor. The defendant contacted the plaintiff by telephone regarding the LED chips and the plaintiff confirmed it could provide chips that met the required specifications. The parties subsequently communicated via email and telephone for several weeks, resulting in a contract. Thereafter, the defendant issued a purchase order to the plaintiff for the chips.[13] The plaintiff delivered samples of the LED chips in October 2009 and February 2010. It is not clear what happened next but the parties ultimately met twice in New York in March and April 2010 to discuss issues relating to the LED chips. The parties were unable to resolve the issues and the plaintiff subsequently commenced the action against the defendants for breach of contract.[14]

Defendants moved to dismiss the action for lack of personal jurisdiction, which Judge Richard J. Holwell granted. In reaching that conclusion, the court evaluated, among other things, the hundreds of telephonic and email communications between the parties and the two meetings in New York. After discussing the law relating to communications, Holwell held that those communications were an insufficient basis to exercise personal jurisdiction over the defendant because those communications related to a single order and lasted less than a year. The court noted that the "order, as distinguished from the parties' interaction about it via telephone and e-mail, had little connection to New York other than the fact that the goods were to be shipped from New York. That is insufficient to establish jurisdiction under New York law."[15] Accordingly, the court granted the motion to dismiss.[16]

Websites: Interactivity and Connection

Since 2009, a number of courts have addressed the issue of whether personal jurisdiction exists based on connections arising out of a website. While New York has never expressly adopted the sliding scale enunciated in *Zippo Mfg. v. Zippo Dot Com*,[17] New York courts have continued to use a *Zippo*-type analysis to evaluate whether personal jurisdiction exists.

> The New York Court of Appeals' decisions in 'Fischbarg' and 'Deutsche Bank Securities' remain the **seminal cases** in New York on whether electronic communications are **sufficient to exercise personal jurisdiction** over a non-domiciliary.

In *Chloé v. Queen Bee of Beverly Hills*,[18] the Second Circuit reversed the trial court's dismissal for lack of personal jurisdiction. The plaintiff alleged trademark infringement and unfair competition based on the sale of one counterfeit bag. The trial court found that the only evidence of an allegedly infringing sale was made to an employee of plaintiffs' counsel. The trial court held that since all of the relevant activity by defendants took place outside of New York, "it would be unreasonable to exercise personal jurisdiction over defendants in this district on the basis of a contact that would not have existed but for this litigation."[19] The trial court also found that even though defendants' website was commercially interactive, the fact that the website did not target New York consumers specifically and there were no sales of the allegedly infringing bag other than the one to plaintiffs' counsel's employee were not enough to exercise personal jurisdiction over defendants.[20]

On appeal, the Second Circuit found that the transaction at issue was "part of a larger business plan purposefully directed at New York consumers."[21] In particular, Queen Bee's website was interactive because it offered Chloé bags for sale to New York consumers, permitted customers to purchase those bags and facilitated shipment into New York.[22] Queen Bee engaged in 52 separate transactions involving New York consumers through its website and trunk shows, all of which did not involve the allegedly infringing product. The Second Circuit held that the trial court "too narrowly construed the nexus requirement, which merely requires that the cause of action 'relate to' defendant's minimum contacts with the forum."[23] Accordingly, the Second Circuit held that personal jurisdiction existed because the minimum contacts included the over 50 sales to New York consumers, not just the one sale to the plaintiff's law firm.

In *Mrs. United States National Pageant v. Miss United States of America Organization*,[24] the plaintiff asserted numerous claims based on the defendants' alleged use of the plaintiff's trademarks. The defendants were South Carolina residents who were formerly associated with the plaintiff as well as a South Carolina entity that the individuals set-up to compete with the plaintiff. The South Carolina entity established a website for its business.[25] The website contained numerous links, including one that allowed potential contestants to download forms to register as a contestant and provided information on where to submit the form. The website contained other links that allowed people to contact the defendants via email; provided defendants' email address and telephone number; permitted potential contestants to submit electronic payments along with an address to send payments via mail; and allowed the purchase of goods containing the logo and name of the defendant organization. There was also a link to a page entitled "2012 Contestants" containing the flags of all 50 states and three other jurisdictions.[26]

The defendants moved to dismiss for lack of personal jurisdiction. After setting forth the *Zippo* sliding scale, the court found that the defendants' website occupied the middle ground of interactivity. The court focused on the fact that the defendants sought contestants from New York, provided the means for New York residents to become contestants, offered products for sale and were seeking directors for each state. The court concluded that "[s]uch activity indicates that defendants knowingly and purposefully reached out to New York residents

in furtherance of their pageant business."[27] The court rejected the defendants' argument that they did not "target" New York because it would not "be sensible, or equitable, to interpret the references in the case law to 'targeting' a jurisdiction as meaning that the defendants must have *singled out* New York as a particular focus of their commercial activity."[28] Because the defendants' website seeks contestants from every state, the court concluded that "[i]f defendants choose to reach out in that way to each state, they should not be heard to complain if they are haled into court in one of those states as a result of that activity."[29] Accordingly, the court denied the motion to dismiss.

Courts have also addressed situations where the defendants did not operate a website, but either had a Facebook page or posted advertisements on websites operated by others. In *Katiroll v. Kati Roll & Platters*,[30] the plaintiff asserted service mark and trade dress infringement as well as unfair competition under the Lanham Act. Prior to opening a store in New Jersey, the officers of the defendant met with the plaintiff's president and sought a franchise. Plaintiff declined. The defendant subsequently set up the store and there were many comparisons of the parties' restaurants on websites as well as other alleged evidence of confusion. The plaintiff then sued the defendant, alleging that the defendant targeted New York residents and enthusiasts of New York restaurants by posting on Facebook and other websites, which posts promoted the defendant's business. The court held that those posts were insufficient to establish personal jurisdiction over the defendant because advertising without more is insufficient to establish personal jurisdiction.[31] The court focused on the fact that the plaintiff failed to allege sales through any website and "has not alleged any facts from which it could be rationally inferred that Defendant's solicitation of New York residents to its restaurants via posting on various websites is supplemented by any transactions occurring in New York or any other indicia of Defendant's permanence and continuity in New York."[32]

Go Figure

Two cases that involve similar fact patterns, *Grimaldi v. Guinn*[33] and *Skrodzki v. Marcello*,[34] are instructive because they reach opposite results on similar facts. In *Grimaldi*, the plaintiff, a New York resident, owned a vintage 1969 Chevrolet Camaro. During fall 2005, the plaintiff was contemplating purchasing a "cross-ram" manifold and carburetor assembly (collectively, the cross-ram) from a non-party located in Georgia. The non-party referred the plaintiff to defendant Wayne Guinn of defendant Guinn's Engineering, both of which were located in New Jersey, to authenticate the cross-ram. Subsequently, the plaintiff called and emailed Guinn using the contact information posted on Guinn's website, which also included a statement that he performed restoration services in the Northeast. The plaintiff and Guinn then had a telephone conversation about the cross-ram and Guinn apparently offered to work with others located in Pennsylvania to install the cross-ram. Plaintiff's wife subsequently ordered Guinn's book from the Internet; Guinn wrote a personalized inscription to the plaintiff encouraging the plaintiff to use Guinn to install the cross-ram and then Guinn shipped the book to the plaintiff's residence in New York.[35]

Plaintiff purchased the cross-ram from the non-party in May 2006 and, based on Guinn's promises that he could install the cross-ram and a $20,000 estimated cost of doing so, Guinn delivered the vehicle to another defendant located in Pennsylvania in September 2006. While at the Pennsylvania location, the plaintiff learned that another person, defendant Allen Tischler of New Jersey, would be involved in the project. Guinn and the Pennsylvania defendants posted to their respective websites that Guinn's vehicle has been delivered and Guinn's website released the information as a "news break," which the plaintiff alleged was to generate additional business. The plaintiff tendered partial payment. Subsequently, the plaintiff called the defendants on a number of occasions to inquire as to the status of the project, but defendants apparently tried to evade the calls. When the parties did speak, the defendants were vague regarding their progress, the completion date and the cost. In January 2007, the defendants sent photographs showing the progress to the plaintiff, which photographs showed that the vehicle was disassembled and not close to completion. For the next four months, the plaintiff continued to call the defendants to check the status, but the defendants continued to be evasive. In March 2007, Tischler called the plaintiff and told him more funds were required and, upon the plaintiff's request, Tischler faxed an invoice to the plaintiff.[36] In April 2007, the defendants sent more photographs to plaintiff and those photographs showed some progress but also demonstrated that the project was not close to completion and that the quality of the work was poor. By May 2007, the plaintiff had paid $32,000 to the defendants. In fall 2007, Tischler sent a DVD to the plaintiff containing pictures and a video showing Tischler working on the vehicle. In November 2007, the plaintiff recovered the vehicle but it and the cross-ram were totally disassembled. The plaintiff alleged that between May and November of 2007, he received at least 12 calls from Guinn and 15 calls from Tischler regarding the status of the project.

Guinn and Tischler moved to dismiss for lack of personal jurisdiction. The trial court denied that motion and Guinn appealed. The Second Department observed that the *Zippo* sliding scale of interactivity was useful in performing a jurisdictional analysis and held that Guinn's website "was thoroughly passive in nature" and would not by itself support the exercise of personal jurisdiction.[37] The Second Department then analyzed that nature of Guinn's other contacts with New York. Relying on *Fischbarg* and *Deutsche Bank Securities*, the Second Department held:

> [I]n light of the number, nature and timing of all the contacts involved, including the numerous telephone, fax, e-mail and other written communications with the plaintiff in New York that Guinn initiated subsequent to his initial involvement in the project, as well as the manner in which Guinn employed his decidedly passive Web site for commercial access, Guinn must be deemed to have sufficient contacts with [New York].[38]

In reaching this conclusion, the Second Department focused on the fact that even though the plaintiff initiated contact with Guinn, the nature and quality of the contacts and relationship established are determinative.[39] The court found that it was "clear that Guinn engaged in the 'purposeful creation of a continuing relationship' with the plaintiff."[40] The Second Department reasoned that following the plaintiff's initial emails to Guinn, Guinn "by virtue of his telephone calls and e-mails to the plaintiff…affirmatively attempted to establish a relationship with the plaintiff whereby he would be involved in the project."[41] Accordingly, the Second Department held that personal jurisdiction existed under CPLR §302 because "Guinn purposefully created a continuing relationship with the plaintiff centered on the project at issue"[42] and, therefore, "[i]t is beyond dispute that there is a substantial relationship between the transaction at issue and the claims asserted by the plaintiff; all of the plaintiff's claims arise directly from the subject transaction."[43]

Skrodzki involved an almost identical fact pattern. In particular, (1) the plaintiff was a

New York resident, (2) the defendants were residents of another state, (3) the defendants never visited New York and did no business in New York, (4) the plaintiff initiated contact with a defendant through a website that was advertising cranes that were available for sale and the defendants also operated their own website containing details about those cranes as well as a method to contact the defendants via email, (5) the parties negotiated the contracts via email, telephone and facsimile for a number of months, (6) the contract was for a single transaction, (7) the parties communicated for approximately six months after the contract was entered into about the crane and its shipment to Poland, (8) payment was sent from New York to another state, and (9) the defendants failed to perform under the contract. Defendants moved to dismiss for lack of personal jurisdiction. Judge Arthur D. Spatt held that no personal jurisdiction existed because the contract was a one-time agreement and did not require an ongoing relationship. The court rejected the argument that there was an ongoing relationship because "'attempts to adjust a dispute as to performance of a contract or to discuss differences under an existing contract have no jurisdiction[al] consequences.'"[44] Spatt also held that the defendants did not "actively project" themselves into New York because:

> [t]he center of gravity for the commercial transaction between the parties was either Mississippi, where the defendants executed the contract, or Poland, where the Crane was to be delivered and ultimately used in a construction project.[45]

Spatt cited *Grimaldi* and distinguished the Second Department's finding on the following basis: (1) the vehicle would be delivered to New York whereas the crane would be delivered to Poland, respectively, (2) the parties communicated after the contract was entered into for approximately one year and six months, respectively, and (3) the wife of the plaintiff in *Grimaldi* purchased a book from a website and the defendants sent the book to the plaintiff in New York with a personalized inscription.

Conclusion

Litigants continue to seek jurisdiction over parties who have never set foot in New York. While the sliding scale of interactivity continues to be used to evaluate the impact that a defendant's website will have on the personal jurisdiction analysis, the more important issue for both website and electronic communication cases is the nature of the relationship between the parties and the quality of the contacts with New York. As the foregoing cases demonstrate, the more attenuated the connection, the less likely that personal jurisdiction will be found to exist over the defendant. The analysis will become more complicated as people and entities use social networks and cloud-based programs to promote and solicit business. These technologies are based on the use of websites and servers of third parties and, thus, the "traditional" analysis of contacts with a forum state becomes more antiquated. Practitioners should be aware of these cases and the close factual analysis inherent in modern jurisdictional motions.

1. Robert S. Friedman and Mark E. McGrath, "Virtual Contacts and Personal Jurisdiction: The Next Frontier," NYLJ, June 15, 2009.
2. 9 N.Y.3d 375 (2007), aff'g, 38 A.D.3d 270 (1st Dept. 2007). The Court of Appeals' decision is discussed at length in our 2008 article, Robert S. Friedman and Mark E. McGrath, "E-Contacts and New York's Long Arm Statute," NYLJ,, April 7, 2008, Litigation Special Section, at S3.
3. 7 N.Y.3d 65 (2006). This case is fully discussed in our 2007 article, Robert S. Friedman and Mark E. McGrath, "Think Remote, Electronic Contacts Will Keep Jurisdiction Away?" NYLJ,, June 18, 2007, Litigation Special Section, at S4.
4. No. 11 Civ. 3673 (RJS), 2012 WL 123989 (S.D.N.Y. Jan. 3, 2012).
5. See id. at *1.
6. The court never addressed the significance of the arbitration clause on the personal jurisdiction analysis, presumably because the confidentiality agreement was not signed by the plaintiff. See id. at *2.
7. See id.
8. Id. at *4 (quoting *Fischbarg*, 9 N.Y.3d at 382).
9. Id. (citing *Deutsche Bank*, 7 N.Y.3d at 71-72).
10. Id. at *5.
11. See id.
12. No. 11 Civ. 1616 (RJH), 2011 WL 5838697 (S.D.N.Y. Nov. 21, 2011).
13. See id. at *1.
14. See id. at *2-3.
15. Id. at *11.
16. Compare *Three Five Compounds* with *JPS Capital Partners v. Silo Point Holding*, No. 603721/08, 2009 N.Y. Slip Op. 51747(U) (Sup. Ct. NY Cty. July 30, 2009). In *JPS Capital*, the court denied the Maryland-based defendants' motion to dismiss for lack of personal jurisdiction based on the defendant's agent sending promotional materials and more than 60 emails to the plaintiff in order to induce the plaintiff to procure financing for the defendant's real estate project.
17. 952 F. Supp. 1119 (W.D. Pa. 1997).
18. 616 F.3d 158 (2d Cir. 2010).
19. *Chloé v. Queen Bee of Beverly Hills*, 571 F. Supp. 2d 518, 526 (S.D.N.Y. 2008).
20. See id. at 527-30.
21. 616 F.3d at 167.
22. See id. at 166.
23. Id. at 167 (citing *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127-28 (2d Cir. 2002); *Solé Resort, S.A. de C.V. v. Allure Resorts Mgmt.*, 450 F.3d 100, 104 (2d Cir. 2006)).
24. 875 F. Supp. 2d 211 (W.D.N.Y. 2012).
25. See id. at 218.
26. See id. at 221.
27. Id. at 222.
28. Id. (emphasis in original).
29. Id. (citations omitted).
30. No. 10 Civ. 1703 (LTS)(RLE), 2010 WL 2911621 (S.D.N.Y. July 9, 2010).
31. See id. at *4 (citing *Virgin Enters. v. Virgin Eves*, No. 08 Civ. 8564, 2009 WL 3241529, at *4 (S.D.N.Y. Sept. 30, 2009)).
32. Id. at *5; see also *Lyons v. Rienzi & Sons*, No. 09-CV-4253, 2012 WL 1393020 (E.D.N.Y. April 23, 2012) (holding that no personal jurisdiction existed based on a defendant's Facebook page and no other contacts to New York).
33. 72 A.D.3d 37 (2d Dept. 2010).
34. 810 F. Supp. 2d 501 (E.D.N.Y. 2011).
35. See *Grimaldi*, 72 A.D.3d at 38, 42.
36. Tischler maintained a website and also posted on eBay, both of which contained statements that he performed restoration services in the Northeast. See id. at 43.
37. Id. at 50.
38. Id. at 51.
39. See id. (citing *Fischbarg*, 9 N.Y.3d at 382-83).
40. Id. (quoting *Fischbarg*, 9 N.Y.3d at 381) (further citation omitted).
41. Id.
42. Id. at 52 (citing *Fischbarg*, 9 N.Y.3d at 381) (further citation omitted).
43. Id. (citing *Deutsche Bank*, 7 N.Y.3d at 71) (further citation omitted).
44. *Skrodzki*, 810 F. Supp. 2d at 510 (quoting *CutCo Indus. v. Naughton*, 806 F.2d 361, 367 (2d Cir. 1986)) (alternation in original).
45. Id. at 513 (quoting *DirecTV Latin Am. v. Park, 610*, 691 F. Supp. 2d 405, 420 (S.D.N.Y. 2010)) (further citation omitted). The court also examined whether defendant Mitchell Crane's website or the advertisement on the third-party website provided a basis to support personal jurisdiction. The court held that both websites were passive because they provided information about cranes that were available, the contact information for the defendants and a link to communicate directly with the defendants. The court further found that the websites did not include other tools that supported a finding of personal jurisdiction, such as providing the services electronically or permitting the downloading or completion of forms to purchase cranes. The court also held that the websites were targeted at a national audience, not New York specifically, and, thus, were akin to national advertisements, which are insufficient to support a finding of personal jurisdiction.

Reprinted with permission from the February 25, 2013 edition of the NEW YORK LAW JOURNAL © 2013 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-02-13-35