

2019 WL 1259333 (N.Y.Sup.), 2019 N.Y. Slip Op. 30665(U) (Trial Order)  
Supreme Court of New York.  
Commercial Division  
New York County

**\*\*1** AM PITT HOTEL, LLC, Plaintiff,  
v.  
400 5TH AVE., L.P., Defendant.

No. 652792/2018.  
March 19, 2019.

**Decision and Order**

Hon. [Saliann Scarpulla](#).

**MOTION DATE 10/25/2018**

**MOTION SEQ. NO. 001**

\*1 The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22, 26 were read on this motion to/for *DISMISS*.

In this contract dispute, defendant 400 5th Ave., L.P. moves to dismiss the complaint for lack of jurisdiction, pursuant to [CPLR 3211\(a\)\(8\)](#), and for forum non conveniens, pursuant to [CPLR 327\(a\)](#). Plaintiff AM Pitt Hotel, LLC opposes dismissal.

***Background***

Defendant is a Pennsylvania limited partnership with a principal place of business in Pennsylvania and owns the historic “Kaufmann’s” building (“Building”) in Pittsburgh, Pennsylvania. Non-party Core Realty, Inc. (“Core”) is the managing member of defendant, and it is the construction manager responsible for renovating the Building. Core is a Pennsylvania limited liability company with a principal place of business in Pennsylvania.

\*\*2 Akiva Feinsod (“Feinsod”) attests on behalf of plaintiff that Core spoke with the Melohn Group (“Melohn”), a New York real estate firm, concerning investment in the Building. According to Feinsod, he met once with a Core representative at a New York restaurant to discuss the investment opportunity. Melohn thereafter agreed to pursue the investment, and Melohn formed plaintiff to facilitate the investment. Plaintiff is a Delaware limited liability company, and it negotiated with Core from its principal place of business in New York. Core, however, never returned to New York to negotiate any part of the transaction, and the parties instead communicated via telephone and e-mail.

On November 24, 2015, the parties contemporaneously entered into a sale and development agreement (together, “Sale Agreement”), whereby plaintiff purchased part of the Building from defendant to develop a hotel. Defendant executed the Sale Agreement in Pennsylvania. Notably, the Sale Agreement has a choice of law provision designating Pennsylvania law as applicable, but it does not have a forum selection clause.

Plaintiff alleges that defendant's construction delays have prevented plaintiff from completing the hotel as planned, and the parties have entered three separate amendments to extend construction deadlines. Feinsod further attests that a representative of Melohn has been onsite at the Building to communicate any progress to plaintiff, but the construction remains incomplete.

Plaintiff commenced this action against defendant for, *inter alia*, breach of the Sale Agreement, seeking liquidated damages for defendant's construction delays. Defendant now moves to dismiss the complaint for lack of jurisdiction.

### **\*\*3 Discussion**

“On a motion to dismiss pursuant to [CPLR 3211\(a\)\(8\)](#), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction.” *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 (1st Dept 2017) (citations omitted); *see also Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 (1st Dept 2015).

Plaintiff does not assert general jurisdiction exists over defendant, a Pennsylvania limited partnership with its principal place of business in Pennsylvania. Instead, plaintiff asserts that long arm jurisdiction exists over defendant, pursuant to [CPLR 302\(a\)\(1\)](#), because defendant solicited an investor in New York and thereafter communicated via phone and email with plaintiff located in New York.

**\*2** Under [CPLR 302\(a\)\(1\)](#), the relevant inquiry is whether “defendant purposefully availed itself of ‘the privilege of conducting activities’ in the state by transacting business in New York.” *D & R Glob. Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297-98 (2017). “As relevant here, purposeful availment occurs when the non-domiciliary ‘seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship’ ” *D & R Glob. Selections*, 29 N.Y.3d at 298 (2017).

Here, plaintiff has failed to demonstrate that defendant transacted business in New York. Defendant's single initial meeting at a restaurant in New York does not suffice to constitute transaction of business in New York where (1) defendant never returned to **\*\*4** New York to negotiate the Sale Agreement; (2) defendant executed the Sale Agreement and subsequent amendments in Pennsylvania; (3) plaintiff traveled to Pennsylvania in connection with construction delays; and (4) the parties' contractual relationship is centered in Pennsylvania. *See Ripplewood Advisors, LLC v Callidus Capital SIA*, 151 A.D.3d 611, 612 (1st Dep't 2017).

Neither do defendant's telephone and email communications with plaintiff, concerning the negotiation and performance of the Sale Agreement, suffice to constitute the transaction of business in New York. *See Kennedy v Yousaf*, 127 AD3d 519, 520 (1st Dept 2015) (“The fact that defendants negotiated the agreement and communicated with plaintiffs via email and telephone is insufficient to constitute the transaction of business in New York”). Such communications relate to ongoing business in Pennsylvania rather than this forum and, in any event, plaintiff's assertion of jurisdiction based on its own New York activities cannot be attributed to defendants. *See Kennedy*, 127 AD3d at 520.

Therefore, plaintiff failed to demonstrate that defendant transacted business here to subject defendant to long-arm jurisdiction.

In accordance with the foregoing, it is

ORDERED that defendant 400 5th Ave., L.P.'s motion to dismiss is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

**\*\*5** ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint.

This constitutes the decision and order of the Court.

**DATE 3/18/19**

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**SALIANN SCARPULLA, J.S.C.**

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