

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**

**At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17<sup>th</sup> day of June, two thousand and nine.**

Present:

HON. ROGER J. MINER,  
HON. RICHARD C. WESLEY,  
*Circuit Judges,*  
HON. TIMOTHY C. STANCEU,\*  
*Judge.*

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DNT ENTERPRISES, INC.,

*Plaintiff-Appellant,*

- v -

No. 08-2210-cv

TECHNICAL SYSTEMS, A DIVISION OF RAE CORPORATION,

*Defendant-Appellee.*

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For Appellant: SAMUEL E. KRAMER, New York, NY.

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\* The Honorable Timothy C. Stanceu, Judge of the United States Court of International Trade, sitting by designation.

For Appellee:           DAVID E. ROSS, (Eric D. Herschmann, Kimberly A. Horn, *on the brief*),  
Kasowitz, Benson, Torres & Friedman LLP, New York, NY.

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1       \_\_\_\_\_ **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**  
2       **DECREED** that the judgment of the United States District Court for the Southern District of  
3       New York be **AFFIRMED**.

4       \_\_\_\_\_ DNT Enterprises, Inc. (“DNT”) appeals the order of the United States District Court for  
5       the Southern District of New York (Stanton, *J.*), entered on April 22, 2008, granting the motion  
6       of defendant-appellee Technical Systems (“TSI”) to dismiss for lack of personal jurisdiction  
7       pursuant to Federal Rule of Civil Procedure 12(b)(2). *DNT Enters., Inc. v. Tech. Sys.*, No. 07  
8       civ. 8661, 2008 WL 1809441, at \*1 (S.D.N.Y. Apr. 21, 2008).

9           DNT, incorporated in Delaware with its principal place of business in New York, sold  
10       cooling systems, e.g., condensers, chillers, and fluid coolers (“HVAR equipment”), manufactured  
11       by TSI, an Oklahoma corporation with its principal place of business in Oklahoma, in New York  
12       from 1996 to 2008. DNT and TSI executed contracts – each of which lasted one year – that  
13       established DNT as TSI’s “direct manufacturer’s representative.” At issue is one of these  
14       contracts, signed March 2, 2007. The contract expressly makes DNT an “independent  
15       contractor” for sale of certain TSI products in the New York City metropolitan area. Under the  
16       contract, DNT submitted all orders to Oklahoma. The contract was executed in Oklahoma and  
17       governed by Oklahoma law. According to the contract, TSI could terminate the contract if TSI  
18       determined DNT

19           has failed to develop a fair share of the market reasonably available for the  
20           Products in light of prevailing business conditions, has failed to provide adequate  
21           customer service for the products, lacks sufficient working capital to provide the  
22           representation required by the trade in territory, or otherwise fails to use the  
23           resources necessary to effectively represent Technical Systems . . . .  
24

1 The contract also required that TSI give DNT thirty-days' protection on outstanding price quotes  
2 to customers.

3 On September 21, 2007, Kevin Trowhill, Vice President of Sales for RAE Corporation,  
4 TSI's parent company, wrote Neil Thakker, President of DNT, that Trowhill was "canceling  
5 DNT[']s . . . representation contract for [TSI]" effective on that day, with thirty-days' protection  
6 on quotes. Trowhill indicated that "it is in [TSI's] best interest to pursue a different direction for  
7 representation." On October 4, 2007, Trowhill sent DNT a follow-up letter rescinding TSI's  
8 prior cancellation of the contract.

9 Invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1), DNT sued TSI in  
10 district court, raising, *inter alia*, claims of breach of contract and anticipatory breach of the  
11 March 2007 contract, stemming from the action taken by the Trowhill letter. The district court  
12 dismissed for lack of personal jurisdiction because "DNT assert[ed] no 'cause of action arising  
13 from any' transactions by TSI in New York." *DNT Enters.*, 2008 WL 1809441, at \*2 (quoting  
14 N.Y.C.P.L.R. § 302(a)). DNT appeals, claiming that the district court had personal jurisdiction  
15 because TSI transacted business, or entered into contracts for the supply of goods in New York  
16 within the meaning of N.Y.C.P.L.R. § 302(a), and in the alternative, the district court should  
17 have conducted an evidentiary hearing to settle "factual disputes relating to [TSI's] presence in  
18 New York." We assume the parties' familiarity as to the facts, the procedural context, and the  
19 specification of appellate issues.

20 "We review de novo a district court's decision to dismiss a complaint for lack of personal  
21 jurisdiction." *Porina v. Marward Shipping Co., Ltd.*, 521 F.3d 122, 126 (2d Cir. 2008). A  
22 "plaintiff[] need only make a prima facie showing of personal jurisdiction over the defendant[,]  
23 [and] . . . we construe the pleadings and affidavits in the light most favorable to plaintiffs,  
24 resolving all doubts in their favor." *Id.*

25 To determine whether a federal court sitting in diversity has jurisdiction, we "must

1 determine whether there is jurisdiction over the defendant under the relevant forum state’s laws.”  
2 *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). In  
3 New York, “[t]o determine the existence of jurisdiction under section 302(a)(1), a court must  
4 decide (1) whether the defendant transacts any business in New York and, if so, (2) whether this  
5 cause of action arises from such a business transaction.” *Best Van Lines, Inc. v. Walker*, 490 F.  
6 3d 239, 246 (2d Cir. 2007) (internal quotation marks and brackets omitted). To satisfy this test,  
7 this Court first looks to: (1) “whether a defendant has transacted business in such a way that it  
8 constitutes purposeful activity”; and (2) whether “there is an articulable nexus, or a substantial  
9 relationship, between the claim asserted and the actions that occurred in New York.” *Id.*  
10 (internal quotation marks omitted). “[P]urposeful activity . . . [is] some act by which the  
11 defendant purposefully avails itself of the privilege of conducting activities within the forum  
12 State, thus invoking the benefits and protections of its laws.” *Id.* (internal quotation marks  
13 omitted). “Transitory presence” by the defendant or its representative is insufficient. *See*  
14 *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007) (citing *McKee Elec. Co., Inc. v. Rauland-Borg*  
15 *Corp.*, 20 N.Y.2d 377, 382 (1967)).

16 DNT claims that TSI subcontractors and representatives “made personal visits to New  
17 York in connection with the installation of HVACR equipment as well as sales calls and social  
18 events sponsored by Appellant.” In support of this, DNT cites only one incident during the  
19 relevant period (March 2007 to September 2007) – employees of RAE Corporation attending a  
20 meeting in Huntington, New York – but fails to demonstrate how the employees’ attendance at  
21 this meeting was in any way related to the March 2007 contract or its termination.

22 TSI has no physical presence in New York. TSI has no headquarters or real property in  
23 New York. It is not licensed to do business in New York. It sells its products through  
24 independent contractors such as DNT and does not solicit sales in New York. *Cf. Deutsche Bank*  
25 *Secs., Inc. v. Mont. Bd. of Investments*, 7 N.Y.3d 65, 72-73 (2006). According to the contract at

1 issue, which was executed in Oklahoma and governed by Oklahoma law, DNT must send all  
2 orders for TSI equipment to Oklahoma. The action stated in the September 21, 2007 letter, in  
3 which Trowhill notified DNT that he was “canceling” the representation contract, was taken in  
4 Oklahoma.<sup>1</sup> The March 2007 contract gave DNT the right to be TSI’s “direct manufacture’s  
5 representative” and distribute TSI products in the New York City area, but the March 2007  
6 contract also expressly stated DNT was an “independent contractor” and “prohibited [DNT] from  
7 making any representation on behalf of [TSI]” or “imply[ing] . . . that [DNT] [was] an agent of,  
8 or ha[d] the authority to bind [TSI].” In sum, DNT has pointed to no purposeful activity on the  
9 part of TSI to avail itself of the laws of New York with respect to the March 2007 contract and  
10 any conduct pursuant to that contract.

11 Accordingly, for the reasons set forth above, the judgment of the district court is

12 AFFIRMED.

13 For the Court:  
14 Catherine O’Hagan Wolfe, Clerk  
15

16 By: \_\_\_\_\_  
17

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<sup>1</sup> DNT also claims that Trowhill’s email and letter terminating the March 2007 contract – and his subsequent communications to DNT rescinding the termination – constituted sufficient contact with New York for purposes of exercising jurisdiction. However, to the degree these communications, originating out of state, constituted purposeful availment of New York laws, they go to termination of the March 2007 contract for DNT to be an independent contractor selling TSI products and not to the sale of products by TSI in New York.