

**Diallo v Mill Pen Corp.**

2009 NY Slip Op 32308(U)

October 5, 2009

Supreme Court, New York County

Docket Number: 114093/07

Judge: Carol R. Edmead

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDMEAD  
Justice

PART 35

AISSATOU DIAWO  
- v -  
MILL PEN CORP

INDEX NO. 114093/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 5  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
OCT 07 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

PAPERS NUMBERED \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the order to show cause by defendants Triunfo Import & Export Corp. s/h/a Triunfo Foods Import & Export Corp. and Triunfo Specialty Foods to dismiss the instant action pursuant to (1) CPLR 327(a) on the ground of *forum non conveniens*, and (2) CPLR 3211(a)(10) on the ground that the Court should not proceed in the absence of Silampos -Sociedade Industrial De Louca Metalica Campos, S.A., is denied; and it is further

ORDERED that the cross-motion by defendants Mill Pen Corp. d/b/a Eastern Store Equipment Co., Joseph Buser d/b/a Eastern Store Equipment Co. to dismiss the instant action pursuant to (1) CPLR 327(a) on the ground of *forum non conveniens*, and (2) CPLR 3211(a)(10) on the ground that the Court should not proceed in the absence of Silampos -Sociedade Industrial De Louca Metalica Campos, S.A., is denied; and it is further

ORDERED that defendants Triunfo Import & Export Corp. s/h/a Triunfo Foods Import & Export Corp. and Triunfo Specialty Foods serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/5/09

[Signature]

HON. CAROL EDMEAD J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
AISSATOU DIALLO and IVAN ZACHARY  
BURROUGHS,

Plaintiffs,

-against-

MILL PEN CORP. D/B/A EASTERN STORE  
EQUIPMENT CO., JOSEPH BUSER D/B/A EASTERN  
STORE EQUIPMENT CO., TRIUNFO FOODS  
IMPORT & EXPORT CORP., TRIUNFO SPECIALTY  
FOODS CORP., SILAMPOS-SOCIEDADE  
INDUSTRIAL DE LOUCA METALICA CAMPOS,  
S.A.,

Defendants.  
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 114093/07

DECISION/ORDER

**FILED**  
OCT 07 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

MEMORANDUM DECISION

In this products liability action, defendants Triunfo Import & Export Corp. s/h/a Triunfo Foods Import & Export Corp. and Triunfo Specialty Foods (“Triunfo”) move, and Mill Pen Corp. d/b/a Eastern Store Equipment Co., Joseph Buser d/b/a Eastern Store Equipment Co. (“Eastern Store”) cross move to dismiss the instant action pursuant to (1) CPLR 327(a) on the ground of *forum non conveniens*, and (2) CPLR 3211(a)(10) on the ground that the Court should not proceed in the absence of previously named defendant, Silampos-Sociedade Industrial De Louca Metalica Campos, S.A. (“Silampos”), the manufacturer of the allegedly defective product.

*Factual Background*

Plaintiffs allege that Aissatou Diallo (“plaintiff”) sustained injuries on September 14, 2007 in her home located in New York, New York when food was ejected from a pressure cooker manufactured by Silampos. Mrs. Diallo was treated in hospitals located in New York,

New York. Silampos, the manufacturer of the allegedly defective product, is located in Portugal. Triunfo was a distributor of the pressure cooker, and is located in New Jersey. Plaintiff allegedly purchased the pressure cooker at Eastern Store in Queens, New York.<sup>1</sup> Plaintiffs allege defendants negligently sold and/or distributed the pressure cooker to the plaintiff, breached the warranty of merchantability, and failed to inspect the pressure cooker.

In June 2009, Silampos moved to amend its answer *nunc pro tunc* to delete admissions which acknowledged that it was subject to personal jurisdiction in New York, in conjunction with its prior motion for summary judgment to dismiss plaintiffs' complaint and all cross-claims asserted against it. Silampos claimed that it had no physical presence in the United States and no longer sold any of its products in the United States. By order dated August 4, 2009, this Court granted Silampos's motion to amend its answer, and subsequently dismissed the plaintiffs' complaint and all cross-claims against Silampos.<sup>2</sup>

### *Order to Show Cause*<sup>3</sup>

Triunfo argues that plaintiffs' complaint should be dismissed pursuant to CPLR 327 on the ground of *forum non conveniens*. Among the factors to be considered when analyzing a

---

<sup>1</sup> According to plaintiffs, Eastern Store is the d/b/a name of defendants Mill Pen Corp. and/or Joe Buser.

<sup>2</sup> As noted in the Court's decision, the Court previously instructed plaintiffs to commence an action in New Jersey where Triunfo received the pressure cooker from Silampos, to avoid a potential statute of limitations problem. However, by letter dated July 21, 2009 plaintiffs' counsel advised the court that they would not pursue an action in New Jersey.

<sup>3</sup> According to Triunfo, it brought this matter by order to show cause because the statute of limitations for plaintiffs to bring their action in New Jersey was set to expire on September 14, 2009. Plaintiff could not seek relief prior to this time, because Silampos previously admitted in its answer that it was subject to jurisdiction in New York and proceeded as a party to this action until over four months after the Note of Issue was filed. It was not until six months after the filing of the Note of Issue that Silampos sought to amend its answer and it was not until August 4, 2009 that the court found that Silampos is not subject to personal jurisdiction in New York, and dismissed it entirely from the action.

dismissal under his section are the potential hardship to the defendant and the unavailability of an alternative forum in which plaintiff may bring suit. Here, the interests of justice and fair play necessitate that the manufacturer of an allegedly defective product be a party to the action.

Triunfo contends that in the Court's August 4, 2009 decision, the Court noted that a) Silampos is a Portuguese manufacturer of pressure cookers; b) Triunfo placed orders in New Jersey for pressure cookers from Silampos, and the pressure cookers were delivered to Triunfo in New Jersey; c) Triunfo received the pressure cookers from Silampos in closed boxes, which were distributed to retailers in the same closed boxes; and d) the closed boxes received from Silampos were never opened by Triunfo. Triunfo who simply resold the pressure cooker in a box without opening it, cannot properly defend an action sounding in strict products liability for conduct of a manufacturer, without the manufacturer being a party to the action. Thus, Triunfo is unduly burdened by the resulting limits placed on their substantive defense to the action. Any active liability giving rise to the subject accident took place during the design and manufacture of the pressure cooker by non-party Silampos. Here, Triunfo's only avenue of potential liability to the plaintiffs is not based on negligence, but "only by imputation of law." Triunfo will be unable to mount an effective defense on the merits, since without the presence of Silampos in the action, Triunfo will be unable to compel the production of a witness or witnesses under the control of Silampos, whose witnesses reside in Portugal and are not subject to the subpoena power of New York. Furthermore, a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product and accordingly should be awarded conditional indemnification.

The joinder of the main action with movants' indemnification action against the

manufacturer furthers the interests of justice and judicial economy by affording the indemnitees, Triunfo, "the earliest possible determination as to the extent to which [they] may expect to be reimbursed." Given that the pressure cooker's manufacturer, the party solely responsible for the instant loss, is no longer a party to this action, this matter is now appropriately venued and prosecuted in New Jersey. Non-party Silampos is subject to personal jurisdiction in New Jersey due to their shipment of pressure cookers and other items directly to New Jersey and their conducting of business in New Jersey. Moreover, as a party to the plaintiffs' action, they may be compelled to present further documentation necessary to the prosecution and defense of this matter. And, the Triunfo defendants are subject to personal jurisdiction in New Jersey by virtue of its status as New Jersey corporations. Resolving this action in New Jersey furthers the interests of justice and fairness by permitting both the substantive and indemnification portions of this action to be resolved on the merits where all of the pertinent parties are subject to jurisdiction.

Plaintiffs' complaint should be also dismissed pursuant to CPLR 3211 (a)(10) because the manufacturer of the pressure cooker is a necessary party who is not currently a party to the subject action. Here, non-party Silmpos manufactured the allegedly defective pressure cooker. Permitting the action to continue without the solely culpable party, violates the letter of CPLR 3211(a)(10) and the interests of justice in making parties liable for their culpable conduct. Proceeding in the absence of the solely culpable party, who retains exclusive control of knowledge of the extent and nature of its negligence, pertinent documents and discovery and the identity of any relevant witnesses, creates a "guessing game" as to the merits of the main action. Triunfo will be prejudiced if they are forced to defend themselves on the merits without the

benefit of the court's jurisdiction over Silampos. The only way to prevent prejudice is for the court dismiss plaintiffs action, thereby compelling the plaintiffs to commence the within action in New Jersey.

*Eastern Store's Cross-Motion*

Eastern Store adds that this Court granted Eastern Store indemnification over and against Triunfo. The Court found that as Eastern Store was the retailer of the allegedly defective pressure cooker it was entitled to indemnification from the entities "higher" on the chain of distribution. In this case, the two entities higher on the pressure cooker's distribution chain were Silampos, the manufacturer, and Triunfo, the distributor. While the Court dismissed the action against manufacturer Silampos based solely on lack of personal jurisdiction, the Court awarded indemnification for Eastern Store over and against Triunfo only. As such, there is now an inherent link between Triunfo and Eastern Store, as the distributor will now be indemnifying the retailer. If the case were to be dismissed as to Triunfo, it would also have to be dismissed as to Eastern Store, which cannot remain as the sole defendant in the action because of the indemnification it has over Triunfo.

Eastern Store argues that despite its indemnification, Eastern Store will be unable to mount a proper defense to the plaintiffs' claims without the Court's jurisdiction over Silampos. Any liability giving rise to the subject accident took place solely under Silampos' direction and control. As this Court has previously held, Eastern Store was merely the retailer. Thus, it would be manifestly unfair to force the mere retailer of an allegedly defective product to defend an injured party's claims while the manufacturer and distributor, parties directly responsible for any defect to await for the commencement of an indemnification action against them in another

forum. The defendant Eastern Store who merely retailed the product cannot properly defend an action sounding in strict products liability for conduct of a manufacturer, without the manufacturer being a party to the action. Without the presence of Silampos at trial, it will be unable to compel the production of witnesses under the control of Silampos, such as Celia Soaris, the director of products quality control who appeared for a deposition.

New York is an inappropriate venue for trial. Resolving the action in New Jersey furthers the interest of justice and fairness by permitting the substantive portions of this action be resolved on the merits where all pertinent and necessary parties are subject to jurisdiction.

*Plaintiffs' Opposition*

Triunfo's application on the ground of *forum non conveniens* must be denied because Triunfo failed to demonstrate that (a) any evidence is unavailable in New York, (b) that there exists an alternative forum available, (c) or that any other public or private interest factors favor New Jersey as the proper forum. In fact, plaintiffs' choice of forum, New York, is the appropriate forum; it is the location of the accident, the place where the allegedly defective product was sold and used, and the location of the vast majority of the evidence; the product merely passed through the State of New Jersey, without anything of significance occurring there. The residency of the parties also strongly favors the New York forum. All plaintiffs and defendants Mill Penn and Joseph Buser are residents of New York. In contrast, Triunfo is the only resident of New Jersey. The burden on the Courts also favors New York. Since the action involves an injury to a New York resident from a product sold in New York; New Jersey has a much smaller interest in punishing local distributors from passing defective products through the State, where the product was not sold to a New Jersey resident or used in New Jersey. Further, discovery is complete and

a note of issue has been filed, so a majority of the "burden" on New York Courts has already taken place. In contrast, in New Jersey, litigation will have to begin anew, creating a redundant and increased burden on the Court. Additionally, the "hardship" that is a factor in *forum non conveniens* analysis refers to the unavailability of material witnesses and evidence, not the unavailability of a potentially indemnifying party. Although Triunfo argues that it will suffer a hardship by the New York forum, it fails to indicate what discovery is unavailable to it in New York. Triunfo failed to identify witnesses who would be inconvenienced by the New York jurisdiction and their likely testimony. There are no witnesses or documents in New Jersey, except for those in Triunfo's possession and control, all of the medical evidence and eyewitnesses are in New York, and Triunfo already took discovery of Silampos, including a deposition that can be used at trial. Triunfo also fails to appreciate that the statute of limitations in New Jersey will have expired before this motion is heard and fails to demonstrate that there is personal jurisdiction over two of the defendants in New Jersey. As is readily apparent, New York is the correct forum for this action, as it is the locus of the accident, the residence of a majority of the parties, and the location of all evidence.

Nor is there any basis for dismissing an action due to the absence of Silampos; Silampos is not a necessary party within the meaning of CPLR 3211. Caselaw demonstrates that manufacturers are not considered necessary parties to product liability actions. Further, CPLR § 1602 also states that the limitations set forth in Article 16 pertaining to limits to joint and several liability do not apply to "any person held liable in a product liability action where the manufacturer of the product is not a party to the action." This implicitly demonstrates that manufacturers are not indispensable parties in product liability actions whose absence warrants

dismissal.

Eastern Stores, like the Triunfo failed to show that the public and private factors are strongly in favor of New Jersey over New York as the proper forum for this action or that manufacturers are necessary parties whose absence requires dismissal.

### *Discussion*

#### *Forum Non Conveniens*

A court may stay or dismiss an action if it finds “that in the interest of substantial justice the action should be heard in another forum” (CPLR §327(a)). “The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation” (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). “This burden becomes even more onerous where the plaintiff is a New York resident” as in the case at bar (*Highgate Pictures, Inc. v De Paul*, 153 AD2d 126, 129 [1 Dept 1990]). However, a defendant can overcome this burden by showing that they will suffer disproportionate hardship. Among the factors to be considered are the residence of the parties, the location of the transaction giving rise to the cause of action, the applicability of the laws of another state or country, the location of the witnesses and any pending discovery, the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum where the plaintiff may bring suit (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479; *Daly v Metropolitan Life Ins. Co.*, 4 Misc 3d 887, 894 [2004]). Further, no one factor is controlling, since the doctrine of *forum non conveniens* is flexible in application, based on the facts and circumstances of each case. Dismissal on the ground of *forum non conveniens* is appropriate when “plaintiff’s chosen forum imposes a heavy burden on the

defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice" (*Piper Aircraft Co. v Reyno*, 454 U.S. 235, 249 [1981]).

In the case at bar, the defendants have failed to demonstrate that they would suffer disproportionate hardship if the court denied their motion to dismiss for *forum non conveniens*. Indeed, consideration of all of the factors noted above militate in favor of maintaining this action in York.

The location of the accident favors New York as the proper forum. The pressure cooker was sold in New York, was used in New York, and the accident occurred in New York. The residency of the parties also strongly favors the New York forum, in that all remaining parties, except for Triunfo, reside in New York. The factor concerning the burden on the Courts also favors New York. New York State has a greater interest in this case, than New Jersey, in that New York has an interest in protecting its residents from defective and dangerous products. Moreover, discovery is complete, whereas any action now commenced in New Jersey would have to begin afresh. The factor concerning the hardship faced by Triunfo and Eastern Store also favors New York as the proper forum. The argument that the truly liable party, Silampo, is unavailable in New York, and thus Triunfo and Eastern Store will not be able to procure evidence from Silamos necessary to mount a defense lacks merit. It is uncontested that discovery of Silamos has been obtained, including a deposition that can be used at trial. Further, defendants failed to identify any witnesses who would testify at trial that would be inconvenienced by the New York jurisdiction (*see Fireereen Ltd. v Claxton*, 160 AD2d 409, 553 NYS2d 765 [1st Dept 1990] [holding that the court properly exercised its discretion in denying dismissal for *forum non conveniens* pursuant to CPLR 327 on the ground that, in part, defendants

failed to identify those witnesses who would be inconvenienced by a New York trial]).

It appears that all medical records are in New York, all eyewitnesses to the accident and injuries are in New York, and all records of sale to the plaintiff are in New York. Notably, the medical records are in the control of non-parties who are not subject to New Jersey subpoenas. Also, Triunfo is located in Newark, New Jersey, not far from New York City (*see Brodheron v V. Ponte & Sons*, 209 AD2d 276, 277, 618 NYS2d 350, 351 [1st Dept 1994] [finding that defendants failed to demonstrate that New Jersey is a more appropriate forum as the accident occurred in New York, plaintiff received extensive medical care in New York and an important witness is a New York City police officer...Further, there is no indication that defendants will be unduly burdened in a New York forum, especially in light of the fact that the New Jersey County in which they seek to have this matter heard is just a short drive across the George Washington Bridge]).

Further, as pointed out by plaintiffs, defendants Joseph Buser and Mill Penn Corp. are not located in New Jersey and have no known connections to New Jersey. Therefore, plaintiffs would be unable to bring suit against Eastern Store (the d/b/a name of Mr. Buser and/or Mill Penn Corp.) in New Jersey. As such, New York is the proper forum to bring this action against the seller of the product.

Accordingly, Triunfo's application seeking dismissal on *forum non conveniens* grounds must be denied.

#### *Dismissal Based on the Absence of Necessary Party*

CPLR 3211(a)(10) provides that a party may move for judgment dismissing an action on the ground that "the court should not proceed in the absence of a person who should be a party."

Caselaw indicates that actions have been brought against distributors or sellers without the presence of manufacturers (*see Miller v Staples the Off. Superstore E" Inc.*, 52 AD3d 309, 860 [1st Dept 2008] [brought against the distributor and seller, but not the manufacturer due to lack of personal jurisdiction]; *Hughes v Ataka America. Inc.*, 48 AD2d 808, 369 NYS2d 723 [1st Dept 1975]). Further, that Silampos is arguably the solely responsible party does not render it a necessary party in this action, as a matter of law. Thus, the moving defendants failed to demonstrate that Silampos is an indispensable party as a matter of law.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the order to show cause by defendants Triunfo Import & Export Corp. s/h/a Triunfo Foods Import & Export Corp. and Triunfo Specialty Foods to dismiss the instant action pursuant to (1) CPLR 327(a) on the ground of *forum non conveniens*, and (2) CPLR 3211(a)(10) on the ground that the Court should not proceed in the absence of Silampos -Sociedade Industrial De Louca Metalica Campos, S.A., is denied; and it is further

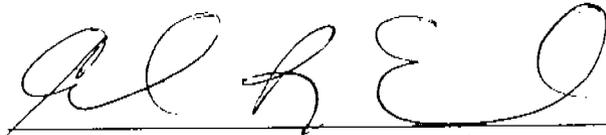
ORDERED that the cross-motion by defendants Mill Pen Corp. d/b/a Eastern Store Equipment Co., Joseph Buser d/b/a Eastern Store Equipment Co. to dismiss the instant action pursuant to (1) CPLR 327(a) on the ground of *forum non conveniens*, and (2) CPLR 3211(a)(10) on the ground that the Court should not proceed in the absence of Silampos -Sociedade Industrial De Louca Metalica Campos, S.A., is denied; and it is further

ORDERED that defendants Triunfo Import & Export Corp. s/h/a Triunfo Foods Import &

Export Corp. and Triunfo Specialty Foods serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 5, 2009



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
OCT 07 2009  
COUNTY CLERK'S OFFICE  
NEW YORK