

**85 Unleashed, LLC v Florida Detroit Diesel-Allison,
Inc.**

2010 NY Slip Op 33294(U)

November 23, 2010

Sup Ct, Suffolk County

Docket Number: 10-15893

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART ~~46~~ SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 6-30-10 (#001)
MOTION DATE 7-13-10 (#002)
ADJ. DATE 7-27-10
Mot. Seq. # 001 - MD
002 - MD

-----X
85 UNLEASHED, LLC,

Plaintiff,

- against -

FLORIDA DETROIT DIESEL-ALLISON, INC.,
MTU DETROIT DIESEL, INC. and
MARINE TECHNOLOGIES, L.L.C.,

Defendants.
-----X

DOUGLAS J. BILOTTI, ESQ.
Attorney for Plaintiff
Evo Merchant Services
515 Broadhollow Road
Melville, New York 11747

BURKE & PARSONS
Attorneys for Defendant Florida Detroit Diesel
100 Park Avenue
New York, New York 10017-5533

HERZFELD & RUBIN, P.C.
Attorneys for Defendant MTU Detroit Diesel
125 Broad Street
New York, New York 10004

MARINE TECHNOLOGIES, LLC
Defendant pro se
16201 East Main Street
Galliano, LA 70354

Upon the following papers numbered 1 to 39 read on these motions for dismissal; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 17; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 18 - 23; 24 - 26; Replying Affidavits and supporting papers 27 - 34; 35 - 39; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Florida Detroit Diesel-Allison, Inc. for dismissal and this motion by defendant MTU Detroit Diesel, Inc. for dismissal are consolidated for the purpose of this determination; and it is further

ORDERED that this motion by defendant Florida Detroit Diesel-Allison, Inc. for an order pursuant to CPLR 3211 (a)(8) dismissing the complaint as against it for lack of personal jurisdiction is denied, without prejudice; and it is further

ORDERED that this motion by defendant MTU Detroit Diesel, Inc. for an order pursuant to CPLR 327 dismissing this action is denied.

This is an action to recover damages for the alleged failure to install a dynamic position system to the engine controls on plaintiff's 85 foot custom sport fishing vessel, the "Double Down." Plaintiff commenced this action on May 4, 2010 against the alleged manufacturer of the dynamic position system, defendant Marine Technologies, LLC, the manufacturer of the engines on said vessel, defendant MTU Detroit Diesel, Inc. (MTU), and a subsidiary of MTU, defendant Florida Detroit Diesel-Allison, Inc., (Florida Detroit Diesel) that sells and services marine engines. By its complaint, plaintiff alleges causes of action in breach of contract, breach of implied warranty of merchantability, breach of express warranties; negligence, fraudulent inducement, quantum meruit and unjust enrichment.

Florida Detroit Diesel now brings this pre-answer motion to dismiss for lack of personal jurisdiction asserting that it is a Florida corporation with its principal place of business in Florida and is not authorized to sell and service MTU products in New York, does not conduct any business or have any employees in New York, and does not own any property in New York. In addition, Florida Detroit Diesel asserts that it is a distributor of MTU products in accordance with the terms of a Distributor Agreement limiting its area of responsibility to Florida and the Commonwealth of the Bahamas.

The sworn statement of the vice president of Florida Detroit Diesel, Donald F. Mann (Mann), indicates that the principal place of business of Florida Detroit Diesel is in Miami, Florida; that Florida Detroit Diesel does not transact any business in New York, does not own or lease property in New York, does not have any corporate officers or employees or agents in New York; and that Florida Detroit Diesel does not advertise in any publications aimed specifically at New York residents or businesses. In addition, Mann states that Florida Detroit Diesel does not have any bank accounts, telephone lines or assets in New York and that it does not pay any taxes in New York or derive substantial income from interstate commerce. Mann also states that Florida Detroit Diesel does not regularly solicit business within New York, does not engage in any persistent course of conduct in New York, and does not derive revenues from goods sold or serviced in New York. Mann further states that this was a Florida-based transaction inasmuch as in May 2005 Florida Detroit Diesel sold the subject engines to Tribute Performance Boats, Inc. (Tribute) in Jupiter, Florida; that Florida Detroit Diesel did not participate in any meetings or negotiations concerning the instant matter in New York; and that Florida Detroit Diesel was not involved in servicing or repairing the vessel "Double Down" in New York.

In opposition to the pre-answer motion by Florida Detroit Diesel, plaintiff contends that Florida Detroit Diesel solicited its sole member and manager through telephone calls and other communications to New York, where plaintiff has its principle place of business, to purchase and install the MTU engines and the dynamic position system on his 85 foot Tribute Sport Fish. In addition, plaintiff contends that discovery is required to determine if personal jurisdiction may be established over Florida Detroit Diesel inasmuch as the documents and information required to oppose the motion are in the sole possession, custody and control of Florida Detroit Diesel. Plaintiff's submissions in support of its opposition include the affidavit of its sole member and manager, Ray Sidhom (Sidhom), stating that Florida Detroit Diesel has always been aware in the eight years of their interactions that Sidhom resides in New York and that the principal place of business of 85 Unleashed is in New York. Sidhom also states in his affidavit that Florida Detroit Diesel would routinely contact him and forward work orders and invoices to his New York office and submits copies of several invoices from Florida Detroit Diesel to Sidhom at a Plain Valley, New York or Melville, New York address purportedly concerning service to the "Double Down." Sidhom points out that Florida Detroit Diesel was aware of his intention to sell his 61 foot Viking and build the 85

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foot Tribute Sport Fish and that Florida Detroit Diesel solicited him by telephone calls and other communications to New York for his purchase and installation of MTU engines and a dynamic position system on the 85 foot Tribute Sport Fish.

In his sworn reply statement, Mann contends that Florida Detroit Diesel's estimated annual revenue from interstate or international sales is less than 10 percent and that the remainder is derived from sales within Florida; that Florida Detroit Diesel declined to service Sidhom's two vessels telling him that he would need to obtain services from Atlantic Detroit Diesel-Allison; and that the invoices submitted by plaintiff all relate to his 61 foot Viking and not the subject 85 foot vessel. Mann further contends that none of the work orders submitted by plaintiff demonstrate that Florida Detroit Diesel provided parts or services in New York.

The complaint alleges that defendants are subject to personal jurisdiction in New York pursuant to CPLR 302 (a)(1) and CPLR 302 (a)(3). "CPLR 302 (a) is a 'single act statute [and] proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' " (*Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434, 824 NYS2d 353 [2d Dept 2006], quoting *Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71, 818 NYS2d 164 [2006], cert. denied 549 US 1095, 127 S Ct 832 [2006]; see, *Grimaldi v Guinn*, 72 AD3d 37, 44, 895 NYS2d 156 [2d Dept 2010]).

While the ultimate burden of proof rests with the party asserting jurisdiction, a plaintiff, in opposition to a motion to dismiss pursuant to CPLR 3211 (a)(8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the Supreme Court (see, *Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986, 845 NYS2d 797 [2d Dept 2007]). In opposing a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth "a sufficient start, and show [] their position not to be frivolous" (*Shore Pharmaceutical Providers, Inc. v Oakwood Care Center, Inc.*, 65 AD3d 623, 624, 885 NYS2d 88 [2d Dept 2009] citing *Peterson v Spartan Indus.*, 33 NY2d 463, 467, 354 NYS2d 905 [1974]).

Here, plaintiff established that facts "may exist" in the form of solicitations by telephone and other methods of communication to its sole member and manager located in New York so as to exercise personal jurisdiction over Florida Detroit Diesel and has made a "sufficient start" to warrant further discovery on the issue of personal jurisdiction over it, which, pursuant to CPLR 3211(d), is within the Court's discretion to grant (see, *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 408, 796 NYS2d 126 [2d Dept 2005]; see also, *Grimaldi v Guinn*, 72 AD3d 37, 895 NYS2d 156 [2d Dept 2010]). Therefore, the motion by Florida Detroit Diesel pursuant to CPLR 3211(a)(8) to dismiss the complaint as against it for lack of personal jurisdiction is denied without prejudice to renewal upon the completion of discovery on the issue of whether personal jurisdiction may be established over it (see, *Castillo v Star Leasing Co.*, 69 AD3d 551, 552, 893 NYS2d 123 [2d Dept 2010]).

MTU moves for an order pursuant to CPLR 327 dismissing the complaint based on forum non conveniens arguing that this action has no connection with New York or Suffolk County. MTU asserts that none of the transactions or occurrences with respect to the subject vessel or discussions relating to the

installation of the dynamic position system occurred in New York and that the subject vessel was purchased from a Florida corporation in Florida. MTU points out that plaintiff, a Delaware corporation, purchased the vessel in Florida from non-party Tribute located in Jupiter, Florida; the dynamic position system was purchased from defendant Marine Technologies, LLC, a Louisiana limited liability company; MTU is a Delaware corporation with a principal place of business in Michigan that manufactures marine engines; and Florida Detroit Diesel is a distributor for MTU pursuant to a distributorship agreement and sold MTU engines to Tribute for plaintiff's vessel. MTU also asserts that all the witnesses are in Florida including Carlos Sanchez, an employee of Florida Detroit Diesel as well as employees from non-party Tribute.

In opposition to MTU's motion, plaintiff contends that inasmuch as Sidhom is a resident of New York, plaintiff's principal place of business is located in Suffolk County, New York and plaintiff's sole asset, the Double Down, is located in New York six months out of the year, MTU's conduct has direct consequences in New York. In addition, plaintiff contends that inasmuch as each of the parties in this action is located in a different state, Florida is no more of a convenient forum than New York. Plaintiff's other assertions in opposition include that defendants' defense of this action in New York would be no more onerous than in any other jurisdiction compared to plaintiff, a single asset limited liability company with no source of income, for whom transferring the action out of New York would significantly increase the cost of litigation and therefore be more prejudicial to plaintiff. Plaintiff notes that MTU acknowledges that it is subject to jurisdiction in New York and does not explain how the testimony of certain identified out-of-state residents, who allegedly would be overburdened or unavailable, would be relevant.

In reply, MTU contends that the factors considered in determining a convenient forum indicate that New York is inappropriate and Florida is the better forum inasmuch as MTU's connection to this matter has been either by remote means such as by e-mail or telephone or in Florida, it would be difficult for the large number of out-of-state witnesses to come to New York or an additional burden on the Court to process motions seeking open commissions to depose out-of-state witnesses, and all the alleged transactions and occurrences took place in Florida. MTU submits the affidavit of Matt Reaume (Reaume), an employee in its Marine Application Engineering Department, stating that the sale and support of the engines and controls primarily occurred in Michigan, the location of MTU's principal place of business, or Florida; that he saw the subject vessel Double Down while it was under construction; and that to the best of his knowledge, at no time did he or anyone else from MTU travel to New York to see the Double Down or its owner. Reaume further states that he received phone calls and e-mails concerning the vessel's control system while working at MTU, not while in New York, and that since he resides in Ontario, Canada and works in Michigan he would be severely inconvenienced if he had to travel to New York to appear as a witness at trial or for depositions. MTU also submits an affidavit from Mann indicating that Carlos Sanchez was the Florida Detroit Diesel employee principally involved in this transaction; all Florida Detroit Diesel employees reside and work in Florida; and Florida Detroit Diesel and its employees would be severely inconvenienced if they had to travel to New York to appear as witnesses for trial or depositions on this matter.

A motion to dismiss pursuant to CPLR 327 (a) on the ground of forum non conveniens is addressed to the sound discretion of the trial court, and the resulting determination will not be set aside absent an improvident exercise of that discretion or a failure by the court to consider the relevant factors (*see, McGuire v W.R. Schmidt, LLC*, 75 AD3d 538, 903 NYS2d 918 [2d Dept 2010])[internal citations

omitted]). The factors to be considered on the motion include the residence of the parties, the burden on the New York court, the jurisdiction where the underlying acts occurred, the location of evidence and nonparty witnesses, the potential hardship to the defendants, and the availability of an alternative forum, with no one factor being dispositive (*see, id.*).

Here, MTU failed to demonstrate that New York is an inconvenient forum (*see, Zirmak Investments, L.P. v Miller*, 290 AD2d 552, 736 NYS2d 421 [2d Dept 2002]). MTU failed to show that defendants, with their potential witnesses in Canada/Michigan and Florida, would be any more inconvenienced by New York litigation than plaintiff's sole member and manager would be by Florida litigation (*see, O'Connor v Bonanza Intern., Inc.*, 129 AD2d 569, 514 NYS2d 67 [2d Dept 1987]). Although the location and extent of negotiations concerning the installation of a dynamic position system to the engine controls of the subject vessel are unclear at this juncture and require discovery and the subject vessel was constructed in Florida, it is clear that the subject vessel is no longer located in Florida and that plaintiff's sole member and manager resides in New York. Therefore, the motion by MTU for dismissal based on forum non conveniens is denied.

Dated: 11/23/10

Emily Pines
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION