

New World Sourcing Group, Inc. v SGS SA
2006 NY Slip Op 30221(U)
June 23, 2006
Supreme Court, New York County
Docket Number: 0602173/2005
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17
(GE)
602173/05

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

New World Sourcing

- v -
SGS SA

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*is held in abeyance
is decided in accordance*

with the attached

FILED
JUL 12 2006
NEW YORK
COUNTY CLERK

EJG

Dated: 6/23/06

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 17

-----X
NEW WORLD SOURCING GROUP, INC.,

Plaintiff,

INDEX NO.: 602173/05

- against -

SGS SA, SGS GROUP, and SGS-CSTC
SHANGHAI BRANCH,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.

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NEW YORK
COUNTY CLERK'S OFFICE

Defendants SGS SA (SGS parent), SGS Group and SGS CSTC Standards Technical Services Co., Ltd (SGS Shanghai), (sued herein as SGS-CSTC Shanghai Branch) move to dismiss plaintiff New World Sourcing Group, Inc.'s (New World) Complaint asserting a claim for negligent misrepresentation on the grounds that: 1) the court lacks personal jurisdiction (long-arm jurisdiction) over SGS parent and SGS Shanghai;¹ and 2) there is no justiciable entity known as SGS Group.² Defendants further request, in the event the court finds personal jurisdiction exists over them, that the action

¹ In their initial papers, defendants asserted that personal jurisdiction was not obtained over SGS parent and SGS Shanghai because New World served all of the defendants at a subsidiary's office in New Jersey and "no one in the United States is authorized to accept service of process on behalf of" SGS parent or SGS Shanghai. Subsequently, service of process as outlined under the Hague Convention was completed as to SGS parent, and defendants have thus withdrawn that aspect of their motion relating to the "insufficiency of the method of effecting service of process on SGS [parent]" (Patrick Brody Affirmation, ¶ 4). Service of process was also made on SGS Shanghai, in compliance with a stipulation agreed to by the parties and under the directives under the Hague Convention. Since service has been effected on both SGS parent and SGS Shanghai, the court will not address the service issue herein.

² New World does not dispute that SGS Group is not a justiciable entity, and therefore dismissal is granted as to SGS Group. Accordingly, jurisdiction issues will be analyzed only as to SGS parent and SGS Shanghai.

must be stayed, pursuant to CPLR 7503, as the dispute is subject to a binding arbitration agreement.

For the reasons stated herein, the court orders discovery on the issue of jurisdiction over SGS parent and SGS Shanghai and refers the matter to a Special Referee to hear and report on that issue. The court makes no determination at this time regarding the applicability of the arbitration provision which is held in abeyance pending the outcome of the hearing.

BACKGROUND

In or around December 2004, New World, a New York corporation with its principle place of business in New York, contracted with non-party Land 'n Sea, Inc. (LSI), a clothing manufacturer located in New York, for the purchase and sale of textile fabric. The fabric was made and located in China. Pursuant to the Fabric Procedures, dated December 17, 2004, between New World and LSI, all fabric purchased overseas was to be examined and tested by "SGS". SGS parent is an international company, incorporated under the laws of the Swiss Confederation, which "provides independent inspection, testing verification and quality services through its worldwide network of subsidiaries, branches and agencies." SGS parent submits its Certificate of Incorporation (denominated as *Registre Du Commerce de Genève*, written in French, without English translation). According to the affidavit of SGS parent's General Counsel, Jean Pierre Mèan, SGS parent does not own, use or possess any real property or have any offices in New York, transact or solicit business in New York, or derive any revenue from services rendered in New York.

The textiles purchased by LSI through New World were inspected by SGS Shanghai, a subsidiary of SGS parent, located in Shanghai, China. According to the affidavit of SGS Shanghai's Managing Director, Helmut Chik, SGS Shanghai is incorporated under the People's Republic of China and is 50% directly owned by SGS

parent. SGS Shanghai submits its Certificate of Incorporation (denominated as Certificate Of Approval, written in Chinese, without English translation).

New World claims that SGS Shanghai's fabric inspections were deficient, resulting in substandard fabric. Specifically, SGS Shanghai rated the purchased fabric as Grade "A". New World submits four fabric inspection reports prepared by SGS Shanghai that were sent by e-mail to LSI in New York, indicating the quality of the fabric. When the fabric was sent to be cut, it was discovered that there were several deficiencies in the fabric. The fabric was then inspected by another subsidiary of SGS parent in Guatemala. There, the fabric was found to be Grade "B" - much of which was flawed and damaged. As a result, LSI rejected the fabric. New World seeks damages in the amount of no less than \$752,909.60.

Non-parties SGS U.S. Testing Company Inc. (SGS New York) and SGS Testcom Inc. (Testcom New York) are two of SGS parent's subsidiaries, both of which are domestic business corporations in New York. SGS New York's principal place of business is located in New Jersey. SGS New York performs various testing of materials, including electrical equipment and plastics (US Department of Labor's OSHA website). Testcom New York's principal place of business is in New York. Testcom New York provides "a range of services" concerning the "implementation and management of motor vehicle inspection programs" (see NYDMV website regarding "New York State Vehicle Inspection Program" and SGS Testcom). The registered agent for both SGS New York and Testcom New York is CT Corporation System, located in New York City. Both subsidiaries are indirectly owned by SGS parent.

New World submits the 2004 Annual Report of SGS parent (Annual Report) as evidence to support its position that SGS New York and Testcom New York act as mere departments or agents of SGS parent sufficient to exercise jurisdiction over the company.

The 2004 Annual Report provides the following:

- None of the companies under the direct or indirect control of SGS parent have listed their shares [or securities] on any stock exchange (Annual Report at 34).
- The earnings of SGS's subsidiaries are included in a consolidated financial statement (Annual Report at 34).
- SGS parent's Board of Directors has ultimate responsibility for the systems of internal controls established and maintained by SGS Group and for periodically reviewing their effectiveness (Annual Report at 39).
- SGS Group has authority to govern the financial operating policies of an enterprise so as to obtain benefits from its activities (Annual Report at 58).
- Subsidiaries of SGS parent are enterprises controlled by SGS Group, defining control as existing when "[SGS] Group has the power, directly or indirectly, to govern the financial and operating policies of an enterprise so as to obtain benefits from its activities" (Annual Report at 58).
- SGS parent "has unconditionally guaranteed or provided comfort to financial institutions providing credit facilities (loans and guarantee bonds) to its subsidiaries and has issued performance bonds to commercial customers on behalf of its subsidiaries" (Annual Report at 94).

DISCUSSION

Where, as here, defendants move to dismiss the complaint asserting that the court lacks personal jurisdiction over them, the plaintiff bears the burden of proof (Chen v Shj, 19 AD3d 407 [2d Dept 2005], citing Brandt v Toraby, 273 AD2d 429, 430 [2d Dept 2000]; Roldan v Dexter Folder Co., 178 AD2d 589, 590 [2d Dept 1991]; Spectra Products v Indian Riv. Citrus Specialties, Inc., 144 AD2d 832, 833 [3rd Dept 1988]). However, "the plaintiff[] need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant[s]" (Chen, 19 AD3d at 408, citing Cordero v City of New York, 236 AD2d 577, 578 [2d Dept 1997]; see also Amigo Foods Corp. v Marine Midland Bank - NY, 39 NY2d 391, 395 [1976]; Peterson v Spartan Indus. Inc., 33 NY2d 463, 467 [1974]). Moreover, the evidence presented by the parties must be viewed in the light most favorable to the plaintiff (Exclaim Assoc. Ltd. v Nygate, 10 Misc3d 1063 (A), 2005 NY Slip Op 52110

U [Sup Ct, NY County 2005], citing Brandt, 273 AD2d at 430).

It is within the court's discretion, pursuant to CPLR 3211 (d), to order further discovery and/or a hearing on the issue of personal jurisdiction, if the plaintiff has "made a sufficient start to warrant [such] discovery" (Chen, 19 AD3d at 408; see also; Peterson, 33 NY2d at 467 [granting plaintiff further opportunity to prove other contacts and activities of defendant in New York as might confer jurisdiction under the long-arm statute]; Nobel v Singapore Resort Motel of Miami Beach, 21 NY2d 1006 [1968] [hearing was necessary to determine scope of relationship between defendant and alleged New York agent prior to ruling on question of whether defendant is doing business in New York]; Jacobsen v Princess Hotels Intl., Inc., 101 AD2d 757 [1st Dept 1984] [discovery is generally essential to find resolution for jurisdictional issues, especially when facts are in dispute]; Exclaim, 10 Misc3d 1063 (A)).

1. SGS Shanghai

SGS Shanghai submits that the court lacks jurisdiction since it is not present in New York. New World argues, however, that jurisdiction over SGS Shanghai is warranted pursuant to CPLR 302 (a) (1) and 302 (a) (3).³

CPLR 302 (a) (1) provides that "a court may exercise personal jurisdiction over any non-domiciliary ..., who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state." One business transaction in New York may be enough to invoke jurisdiction, even though the out-of-state defendant never entered New York, as long as its activities in the state were purposeful and there is substantial relationship between the transaction and the claim

³ In its reply, SGS Shanghai argues that jurisdiction is not warranted since the subsidiaries in New York are not agencies or departments of SGS Shanghai. Since SGS Shanghai raises this argument for the first time in its reply, the court will only consider whether jurisdiction over SGS Shanghai may exist under CPLR 302 (a) (1) and CPLR 302 (a) (3).

asserted (McGowan v Smith, 52 NY2d 268 [1981]; see also Johnson v Ward, 4 NY3d 516 [2005] [under CPLR 302 (a) (1), a "substantial relationship" must be established between a defendant's transactions in New York and a plaintiff's cause of action]).

New World contends that the cause of action arises from the transaction of business in New York between non-party LSI and SGS Shanghai, requiring that the fabric purchased in China, by New World, was to be tested by SGS Shanghai. Although SGS Shanghai asserts that its service was fulfilled in China, all of the Fabric Inspection Reports prepared by SGS Shanghai, indicating the grade level of the fabric, were sent to LSI in New York. "While electronic communications, telephone calls or letters, in and of themselves are not enough establish jurisdiction, they may be sufficient if used by the defendant deliberately to project itself into business transactions occurring within New York State" (Deutsche Bank Sec., Inc. v Montana Bd. of Inv., 21 AD3d 90, 94 [1st Dept 2005] [citations omitted]; aff'd __ NY3d __, NYLJ, June 7, 2006, at 22, col 1 [NY Ct App, Kaye, J.] [finding 302 (a) (1) long-arm jurisdiction over commercial investor who used electronic means, i.e., e-mail and instant messaging, to conduct business transactions]; see also Assil Gem Corp. v Greyhound Leisure Services, Inc., 2000 WL 375244, at *3, n.2 [SD NY April 11, 2000], quoting Granat v Bochner, 268 AD2d 365 [1st Dept 2000] ["sending faxes and phone calls to this State are not, without more, activities tantamount to 'transacting business' within the meaning of the ... long-arm statute"]). Based on the above, New World has provided satisfactory evidence to show that SGS Shanghai may be subject to personal jurisdiction under CPLR 302 (a) (1).

New World also asserts, pursuant to CPLR 302 (a) (3) (i) and (a) (3) (ii), that the alleged negligent misrepresentation constitutes a tortious act which caused injury in New York, permitting jurisdiction over SGS Shanghai. CPLR 302 (a) (3) provides that a court may exercise personal jurisdiction as to a cause of action arising from acts of a non-

domiciliary who commits a tortious act outside of New York causing injury in New York...

if he:

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or;

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

"It is settled law in New York that where a defendant makes a misrepresentation outside of New York intending that it be relied upon within New York, the tort has been committed outside New York for jurisdictional purposes" (Kohlique, Inc. v New High Glass, Inc., 652 F Supp 1254, 1256 [ED NY 1987], citing Marine Midland Bank v Keplinger & Assoc., Inc., 488 F Supp 699 [SD NY 1980]). In determining where the alleged injury occurred in such a case, the place where the plaintiff lost business is the most apt standard "regardless of whether damages were ascertainable or likely recoverable" (see Sung Hwan Co., Ltd. v Rite Aid Corp., NYLJ, June 7, 2006, at 23, col 1 [Ct App, Ciparik, J.], relying on Sybron Corp. v Wetzel, 46 NY2d 197, 204 - 205 [1978]). New World alleges that it has lost over \$700,000 as a result of SGS Shanghai's deficient inspection and LSI's rejection of the textiles thereafter. New World's principal place of business is in New York. Taken the facts in the light most favorable to plaintiff, the element of injury in New York could be satisfied.

Based on the record, SGS Shanghai derives some revenue based on its business in New York. However, a determination as to whether SGS Shanghai regularly conducts or solicits business or engages in any other persistent course of conduct in New York, and what revenue, if any SGS Shanghai derives from New York must be made as required under CPLR 302 (a) (3) (i).

Moreover, SGS Shanghai could have reasonably expected that an improper

inspection of fabrics would have consequences in New York, especially in light of the fact that the Fabric Inspection Reports were sent to LSI in New York for its agent New World, a New York corporation (Fabric Inspection Reports, dated 1/19/05, 1/24/05, 1/31/05, 2/3/05 and 2/4/05) (see Adams v Bodum, Inc., 208 AD2d 450, 451 [1st Dept 1994] [holding defendant should have reasonably expected that people in New York would purchase and use its coffee maker based on the exclusive distributorship agreement covering the entire United States with the co-defendant]). Also, by defendant's own admission, the General Conditions of Service (the Agreement) is a part of every SGS [Shanghai] agreement with its customers to perform inspections, customers which conceivably could be located anywhere fabrics are bought and sold. Further, SGS Shanghai relies on Paragraph 8 of the Agreement, albeit for another purpose, which provides that all disputes arising out of the contract be "finally settled under the Rules of Arbitration of the International Chamber of Commerce..." (emphasis added). Certainly, SGS Shanghai has engaged in some level of international commerce. Based on the record, there is enough information to show that jurisdiction over SGS Shanghai may also exist under CPLR 302 (a) (3) (ii).

The court, therefore, finds that further discovery and an evidentiary hearing is warranted as New World has made a sufficient start in demonstrating jurisdiction over SGS Shanghai.

2. SGS parent

New World argues that personal jurisdiction over SGS parent is warranted pursuant to CPLR 301 based on the presence and activities of its two subsidiaries - SGS New York and Testcom New York. SGS parent submits that New World has not established sufficient facts to warrant jurisdiction since: 1) SGS parent is not present in New York; and 2) New World failed to establish that the New York subsidiaries were acting as an agent or mere department of SGS parent.

A foreign corporation is subject to the jurisdiction of New York courts if it is engaged in such continuous and systematic course of 'doing business' here as to warrant a finding of its presence in this jurisdiction (Landoil Resources Corp. v Alexander & Alexander Services, Inc., 77 NY2d 28, 33 [1990] (citations omitted); see also Frummer v Hilton Hotels Intl., Inc., 19 NY2d 533 [1967], quoting Simonson v International Bank, 14 NY2d 281, 285 [1964]; see also Bryant v Finnish Natl. Airline, 15 NY2d 426 [1965] [other citations omitted]). "Whether a corporation may be deemed to be present by virtue of its doing business in the jurisdiction depends on the application" of a number of factors, (Landoil, 77 NY2d at 33, citing Bryant, 15 NY 2d at 432), including: (1) the existence of an office in New York; (2) the solicitation of business in the state; (3) the presence of bank accounts and other property in the state; and (4) the presence of employees of the foreign defendant in the state (Frummer, 19 NY2d at 537). SGS parent submits that it does not: (1) own, use or possess any real property or have any offices in New York; (2) transact or solicit business in New York; or (3) derive any revenue from services rendered in New York.⁴

New World nonetheless argues the court has jurisdiction over SGS parent based on the presence of its subsidiaries, SGS New York and Testcom New York. Jurisdiction over a foreign corporation may be warranted based on the activities of a subsidiary present in New York (see Frummer, 19 NY2d 533; Bryant, 15 NY2d 426; Taca Intl. Airlines, SA v Rolls-Royce of England, Ltd., 15 NY2d 97 [1965]). There is no dispute

⁴ While Mr. Méan affirms that SGS parent does not advertise any of its services in New York, there is a question of fact as to whether its website, www.sgs.com, constitutes advertisement sufficient to warrant jurisdiction (see generally Obadueki v IBM Corp., 2001 WL 921172 [SDNY Aug. 14, 2001]). Personal jurisdiction is not appropriate solely because a company maintains a website that New York residents may visit, however, if the website is more interactive, jurisdiction may be warranted (*id.* at **3-4). Also, there is nothing in the record to show that SGS parent does not have any employees employed or working in New York.

that SGS New York and Testcom New York are domestic corporations of New York.

In order to have personal jurisdiction over the parent, New World must show that the subsidiary "does all the business which the parent corporation could do were it in New York by its own officials", i.e., that the subsidiary is acting as an agent or mere department of the parent corporation (see Frummer, 19 NY2d at 537; Delagi v Volkswagenwerk A.G. of Wolfsburg, Germany, 29 NY2d 426 [1972]; Taca Intl., 15 NY2d at 102).

Here, New World submits that SGS parent's public documents, including the Annual Report, to support its assertion that SGS New York and Testcom New York are mere departments or agents of SGS parent. Factors to consider are: (1) common ownership; (2) financial dependency of the subsidiary on the parent corporation; (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of control over the marketing and operation policies of the subsidiary exercised by the parent (Goldsmith v Sotheby's, Inc., 9 Misc3d 1120 (A), 2005 NY Slip Op 51702 U [Sup Ct, NY County 2005], citing Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp., 751 F2d 117 [2d Cir 1984]; see also Kossoff v Samsung Co. Ltd., 123 Misc2d 177 [Sup Ct, NY County 1984] [the parent retained complete control over its New York subsidiary where the New York corporation was listed as a branch of the parent, there was a substantial interchange of personnel between the parent and its subsidiaries, the earnings of the subsidiary were consolidated in the financial statement of the parent, and management decisions were dictated by the parent]). While defendants argue that the Annual Report is written for compliance with disclosure laws concerning investors, and not in contemplation of case law concerning personal jurisdiction in New York, the court is not persuaded by this argument.

Based on the Annual Report, evidence exists which may warrant a finding of jurisdiction over SGS parent. SGS parent provides little basis for its assertions concerning the lack of jurisdiction, but simply submits an affidavit of its General Counsel with no specific facts concerning its business structure. In fact, the only documentary evidentiary evidence it submits is the Certificate of Incorporation, which is written in French only (see generally Goldsmith, 9 Misc3d 1120 (A), at *5). According to the Annual Report, SGS parent guarantees loans and bonds provided to its subsidiaries as well as issues bonds on behalf of its subsidiaries, which conceivably would include SGS New York and Testcom New York. The Board of Directors has ultimate responsibility over its subsidiaries, which indicates some level of participation in the selection and assignment of the subsidiary's executive personnel. Moreover, the subsidiaries are controlled by SGS Group, which, in turn, is headed SGS parent. In light of the above, New World has demonstrated that facts "may exist" to exercise personal jurisdiction over SGS parent.

As noted above, CPLR 3211 (d) authorizes a court to order discovery upon a showing that facts favoring jurisdiction may exist but then cannot be stated (Exclaim, 10 Misc3d 1063(A), citing Peterson, 33 NY2d 463; see also Chen, 19 AD3d 407; Nobel, 21 NY2d 1006; Jacobsen, 101 AD2d 757). Since New World has made a "sufficient start" to demonstrate that facts may exist in order to exercise personal jurisdiction over defendants, discovery proceedings limited to the issue of jurisdiction are authorized and necessary. As such, this court orders discovery on the issue of jurisdiction over SGS parent and SGS Shanghai and refers the matter to a Special Referee to hear and report on the issue of personal jurisdiction and to supervise limited discovery.

In order to provide guidance to both the parties and the Special Referee, the court recommends that prior to any hearing the Special Referee supervise limited

discovery regarding the following issues:

- the level of contacts SGS Shanghai had with New York as a result of the inspection at issue, as well as SGS Shanghai's business transactions in New York generally
- SGS Shanghai's revenues based on its ties to New York and international commerce
- documentation and/or communications regarding the allegedly improper inspection of fabrics conducted by SGS Shanghai
- SGS parent's website and the level of interaction the website offers to its users
- whether any of SGS parent's employees are employed or working in New York, and, if so, in what capacity
- the ownership of SGS parent's New York subsidiaries - SGS New York and Testcom New York, their financial dependency on SGS parent, SGS parent's involvement with its New York subsidiaries' selection and assignment of executive personnel, and SGS parent's control over the marketing and operation policies of its New York subsidiaries.

It is hereby

ORDERED that the issue of whether the court has attained personal jurisdiction over SGS parent pursuant to CPLR 301 and SGS Shanghai pursuant to CPLR 302 is referred to a Special Referee to supervise limited discovery and to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that the underlying motion to dismiss on the grounds of lack of jurisdiction over SGS parent and SGS Shanghai and pursuant to an arbitration agreement is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that the motion to dismiss SGS Group, on the basis that it is not a justiciable entity, is granted.

This Constitutes the Interim Decision and Order of the Court.

Dated: June 23, 2006



J.S.C.

HON. EMILY JANE GOODMAN

FILED

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