Zafarani v Salton/Maxim Housewares, Inc.
2007 NY Slip Op 30239(U)
February 27, 2007
Supreme Court, Kings County
Docket Number: 0037355
Judge: Bernadette Bayne
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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of February, 2007

P R E S E N T:

HON. BERNADETTE BAYNE,
Justice.

- -X

FELIX ZAFARANI, AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN, SANDRA ZAFARANI, JACK ZAFARANI, AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN SANDRA ZAFARANI, AND SANDRA ZAFARANI, INDIVIDUALLY,

Plaintiffs,

- against -

Index No. 37355/01
Third Party Index No. 75316/03

Salton/Maxim Housewares, Inc., et al.,

Defendants.

- -X

SALTON, INC.,

Third-Party Plaintiff,

- against -

ELECTRICAL & ELECTRONICS LTD.,

Third-Party Defendant.

- -X

ELECTRICAL & ELECTRONICS LTD.,

Second Third-Party Plaintiff,

- against -

KETAKA ELECTRIC CO., LTD., et ano.,

Second Third-Party Defendants.

- -X

The following papers numbered 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3, 4, 5, 6
Reply Affidavits (Affirmations)	7
____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant/second third-party defendant Ketaka Electric Co., Ltd. (Ketaka) seeks to renew its prior motion for summary judgment, pursuant to CPLR 3212, seeking the dismissal of the second amended complaint of plaintiffs Sandra Zafarani, individually and as mother and guardian of Felix Zafarani and Jack Zafarani (plaintiffs) and the third party complaint of defendant/third-party defendant/second third-party plaintiff Electrical & Electronics Ltd. (E&E) and all cross-claims asserted against Ketaka based upon lack of *in personam* jurisdiction.

Factual Background

This action arises out of an incident, which occurred on February 26, 2001, when the infant plaintiffs Felix and Jack Zafarani sustained injuries as a result of an allegedly defective condition of a Salton "Aqua Presto" KE5 hot water dispenser (also known as a jar pot). Plaintiffs commenced the within action against, *inter alia,* defendant/third-party plaintiff Salton, Inc. (Salton), Ketaka, E & E and defendant/second third-party defendant Kencorp

Electric Co., Ltd., (Kencorp) seeking to recover damages on the basis of their involvement in the design, production, distribution, advertising, marketing and sale of the hot water dispenser/jar pot. Plaintiffs' second amended complaint asserts claims for, *inter alia,* negligence, strict products liability and breach of warranty. Specifically, plaintiffs allege that the injuries were caused by the defectively designed lid and lid assembly of the dispenser/jar pot, which resulted in the lid opening up and disengaging from the urn after the urn was accidentally tipped over, thereby causing scalding hot water inside the urn to pour out onto the infant plaintiffs. Plaintiffs also allege that the power supply cord was too long for such a kitchen appliance, which contributed to causing the hot water urn to tip over.

Ketaka is a Japanese corporation, which designs and manufactures various electric appliances including, among other things, jar pots and hot water dispensers and toaster ovens in Japan. Ketaka was a member of a joint venture that formed Kencorp, a Hong Kong corporation, with Ketaka owning 40% of Kencorp's stock and having a 40% profit participation in Kencorp's profits. The other two joint venturers were Eltrinic Enterprises Ltd. (EEL) and Nichimen Corporation, another Japanese Corporation, who owned 40% and 20% of Kencorp's stock, respectively. EEL is a Hong Kong Corporation, and its subsidiary, E&E is a Hong Kong based corporation engaged in the business of designing and manufacturing household appliances. The subject jar pot was, at least partly, designed by Ketaka and manufactured by Kencorp for distribution by E&E. E&E, in turn , sold it to Salton, an American company that manufactures and distributes household and kitchen

appliances throughout the United States, including New York. Salton sold the subject jar pot to Beeper Sound, which is the Brooklyn retail store that sold the product to the plaintiffs.

In or about September 2003, Ketaka sought summary judgment dismissing E&E's second third-party complaint, plaintiffs' complaint and all claims asserted against it on the ground that this court lacked *in personam* jurisdiction. By decision and order dated March 11, 2004, this court (Hon. Gerard H. Rosenberg) granted Ketaka's motion and dismissed all claims and cross claims asserted against Ketaka. On appeal, the Second Department reversed the March 11, 2004 decision and order, and denied Ketaka's motion (*see Zafarani v Salton/Maxim Housewares, Inc.*, 18 AD3d 651 [2005]). In so holding, the Second Department stated that Ketaka could seek to renew its motion upon the completion of discovery with respect to the relationship between Ketaka and Kencorp. The parties thereafter engaged in discovery. Presently before this court is Ketaka's renewed motion for summary judgment asserting lack of personal jurisdiction. Plaintiffs, E&E and Salton[1] oppose the motion, asserting that the long-arm jurisdiction afforded under CPLR 302(a)(3)(ii) subjects Ketaka to the jurisdiction of New York courts.

Discussion

As an initial matter, plaintiffs argue that Ketaka's summary judgment motion should be denied because it is not supported by evidentiary proof in admissible form. Specifically,

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[1] Salton adopts the arguments of the plaintiffs – that summary judgment should be denied because Ketaka has failed to satisfy its burden, and because, in any event, Ketaka is subject to personal jurisdiction pursuant to CPLR 302 (a) (3) (ii).

plaintiffs point out that Ketaka has submitted signed statements of individual declarants in support of its motion, and labeled those statements as "declarations" made pursuant to 28 U.S.C. § 1746,[2] rather than "affidavits," and that such unsworn "declarations" (of Messrs. Tanaka and Nozawa) are improper on a motion for summary judgement.

Here, although the challenged statements were unsworn, they were dated and each contained an affirmation nearly identical to that suggested in section 1746. Thus, for the purposes of ruling on the instant motion, the court finds that the declarations submitted herein substantially comply with the requirements set forth in 28 U.S.C. § 1746 and, therefore, may be substituted for affidavits provided in support of Ketaka's motion for summary judgment (*see McLaughlin v Cohen*, 686 F. Supp. 454, 458 [SD NY 1988] [noting that Section 1746 "permits an unsworn declaration made under penalty of perjury to substitute for a sworn affidavit"]; *Carney v U.S. Dept. of Justice,* 19 F3d 807, 812 [2d Cir.], *cert. denied*, 513 US 823 [1994] ["In accordance with 28 U.S.C. § 1746 (1988), unsworn declarations, subscribed by the declarant as true under penalty of perjury, may be substituted for affidavits."];*Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v Star,* Slip Copy, 2007 WL 74304 [ED NY 2007]). Furthermore, the court notes that Ketaka's motion is supported by additional evidence such as deposition transcripts as well as other documentation in addition to the challenged declarations of Messrs. Tanaka and Nozawa.

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[2] 28 U.S.C. § 1746 provides that, whenever a rule requires a matter to be supported by sworn affidavit, the matter may be supported instead by an unsworn, written declaration or statement "subscribed ··· as true under penalty of perjury, and dated."

Parties' Contentions

In support of its motion, Ketaka analyzes each of this state's jurisdictional statutes and concludes that none of the requirements have been satisfied in this case. Ketaka maintains that it is a Japanese corporation, with its principal place of business in Tottoro, Japan. Ketaka claims, *inter alia*, that it: (1) has not had any physical presence in New York; (2) has never had any office or factory in New York; (3) has not owned any property or assets in New York; (4) has not maintained any bank accounts in New York; and (5) has not had any employees in New York. Ketaka further maintains that it does not pay taxes in New York, was not licenced or authorized to do business in New York, and had no agent for the service of process in New York. Ketaka additionally asserts that it has never advertised, sold or shipped any of its products to New York, and that it does not have any exclusive revenue from the sale of its products in the United States or New York. Ketaka further asserts that it has designed, manufactured and sold its products in the Japanese market only, and that since January 1, 1999, it has not sold any of its products in the United States or the State of New York through third parties.

Ketaka further maintains that only14,000 jar pots were sold by Kencorp to E&E for the United States market and that the decision as to where the jar pots would be sold was entirely up to E&E. Although Ketaka concedes that approximately 50,000 jar pots were fabricated by Kencorp for E&E for sale to nations outside of Japan, Ketaka claims that it did

not know that Kencorp was selling jar pots to E&E for distribution in Australia, Canada and the United States.

With respect to Kencorp, Ketaka maintains that it and Kencorp are completely separate corporate entities, and that it has not exercised any control over Kencorp's day-to-day operations. In this regard, Ketaka points out that, during the relevant time period, it and Kencorp had their own Board of Directors which conducted their own meetings. While Ketaka concedes that it and Kencorp shared some mutual directors, it maintains that there was never a complete overlap of directors. Ketaka further asserts, *inter alia*, that it and Kencorp had their own separate bank accounts, and each issued their own separate financial statements. Thus, Ketaka argues that Kencorp cannot be deemed its "agent" and/or "alter ego " for purposes of establishing personal jurisdiction over it.

In opposition, plaintiffs and E&E contend that personal jurisdiction over Ketaka exists under CPLR 302 (a) (3) (ii) because (1) Ketaka committed a tortious act outside of New York State (i.e., the defective design of the product) which (2) caused an injury to the infant plaintiffs in this State, (3) that Ketaka reasonably expected its actions to have consequences in New York, and (4) that it (Ketaka) through its formation of, agency of and/or involvement with Kencorp, derives substantial revenue from interstate and international commerce. Plaintiffs and E&E maintain that both Kencorp and E&E acted directly for the benefit of Ketaka, and as Ketaka's agents for the distribution of the subject jar pots in international commerce. In this regard, the parties claim that Kencorp was created in order to allow

Ketaka's original designed products, such as the jar pot at issue, to be manufactured and sold outside of Japan, in international commerce. In support of this contention, the parties have submitted a copy of the "Joint Venture Agreement" between Ketaka, E&E and Nichimen whereby Kencorp was created. A review of the Agreement states that the intent of creating Kencorp was "to manufacture and distribute electric home appliances in the domestic market within the territory of China and in the market of Japan and *third countries*" (emphasis added). Pursuant to Article 15 of the Agreement, Ketaka's role with respect to Kencorp involved, *inter alia*, the "[d]esign, selection and procurement of production equipment, machinery and tools," the "[g]uidance for most rationalized factory management and despatch of necessary personnel," the "[d]evelopment of products and general production technology," and the "[e]ducation, training and exercise of the technical staff and workers".

Additionally, plaintiffs and E&E point out that two of Kencorp's five directors were also directors of Ketaka. Plaintiffs and E&E further claim that Ketaka helped manage Kencorp and maintain that the decisions made and actions taken by Kencorp were not only known by Ketaka personnel, but were approved by them. Thus, plaintiffs and E&E contend that Ketaka was fully aware of the fact that Kencorp was manufacturing jar pots for the purpose of exporting and selling same internationally including the United States, and ultimately New York, and that it was integrally involved in and profited from Kencorp's activity, thereby making it foreseeable to Ketaka that the defective design of its product would have consequences in this State.

Long-Arm Jurisdiction Pursuant to CPLR 302(a)(3)(ii)

As the parties seeking to assert personal jurisdiction, the plaintiffs and E&E, as second third-party plaintiffs, bear the burden of proof on this issue (*Ying Jun Chen v Lei Shi*, 19 AD3d 407 [2005]; *Brandt v Toraby*, 273 AD2d 429, 430 [2000]; *see also, O'Brien v Hackensack University Medical Center*, 305 AD2d 199 [2003]). Plaintiffs and E&E maintain that personal jurisdiction may be obtained over Ketaka on the basis of CPLR 302 (a) (3) (ii) of the New York "long-arm" statute, which provides in relevant part:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary * * * who * * *:
>
> "3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he * * *
>
> "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" (CPLR 302 [a] [3] [ii]).

To assert personal jurisdiction under CPLR 302 (a) (3) (ii), plaintiff must establish five elements: (1) that the Defendant committed a tortious act within New York, (2) that the cause of action arises from that act, (3) that the act caused an injury within New York, (4) that Defendant expected or reasonably should have expected the act to have consequences within New York, and (5) that Defendant derived substantial revenues from interstate or international commerce (*see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]; *Ingraham v Carroll,* 90 NY2d 592, 597-98 [1997]).

Here, the evidence in the record demonstrates that Ketaka was at least partially involved in the design of the subject hot water dispenser at issue.[3] Thus, it is clear that the alleged tortious act, i.e., the alleged defective design and/or co-design of the dispenser/jar pot occurred outside the State, and the injury to the infant plaintiffs occurred within the State. Accordingly, the first three elements for personal jurisdiction under CPLR 302 (a) (3) (ii) are satisfied.

With respect to the fourth element of foreseeability that the act would have consequences in New York, the record reveals that Kencorp was created by Ketaka, E&E and Nichimen to expand the export of hot water dispenser/ jar pot products globally and internationally by "manufactur[ing] and distribut[ing] electric home appliances in the domestic market within the territory of China and in the market of Japan *and third countries* . . . ." (Joint Venture Agreement, dated March 18, 1994 [emphasis added]). The plain terms of the Joint Venture Agreement underscore Ketaka's knowledge and intent that the jar pots were to be sold outside of Japan and internationally, including the United States and New York. Chapter 4, Article 6 of the Joint Venture Agreement specifically states that an objective of Kencorp was to "reinforce[] international competitiveness in price, quality and

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[3] During his deposition, Yuji Nozawa, a Kencorp representative and former Ketaka employee, testified that Ketaka was responsible for designing the lid-hinge and locking mechanism which was on the subject jar pot model involved in the accident (# EP-10N), and that Kencorp was created to sell the jar pot outside of Japan. Additionally, Mr. Shinji Yoshida, a Ketaka manager, conceded in a declaration dated September 8, 2003, that "Ketaka participated in the design of the subject hot water dispenser".

delivery for the expansion of export, so that the corporat[ion] will be strengthened globally with a satisfactory economic effect in favour of investors."

Additionally, it is undisputed that two of the five directors on Kencorp's Board were also directors on Ketaka's Board. Documentation dated March 7, 1995, which was forwarded from E&E to Mr. T. Yamano, one of Ketaka's managers, confirms that Ketaka was on notice of the pending UL application for the jar pot product in the United States and thus, the contemplated sale of same in that market. Furthermore, the deposition testimony of Mr. Ichiroo Tanaka, Ketaka's Managing Director, and Mr. Yuji Nozawa, indicates that Ketaka's Board of Directors discussed the possibility of selling jar pots in the United States after Kencorp was formed, and that the Board was fully aware of the fact that E&E would be selling Kencorp-manufactured jar pots in the United States, including New York.

Under the circumstances, the court finds that Ketaka, through Kencorp, expected or reasonably should have expected consequences in New York resulting from the defective design/co-design of its product (*see Darienzo v Wise Shoe Stores, Inc.*, 74 AD2d 342 [1980] [non-domiciliary shoe manufacturer should have expected New York consequences from its manufacture of shoes because it was aware that a Tennessee distributor to which its shoes were shipped would distribute them to New York retailers]; *see also Kernan v Kurz-Hastings, Inc.,* 997 F.Supp. 367 [WD NY 1998]; *Jones v LaBofa A/S*, 1997 WL 642468, at *3 [ND NY 1997] [foreign chair manufacturer's distributorship agreements in the

United States supported finding that manufacturer reasonably should have expected use of it's chairs in New York]).

The court now turns to the remaining fifth element of whether Ketaka derived substantial revenue from international or interstate commerce. The "substantial revenue" prong is intended to preclude the exercise of personal jurisdiction over non-domiciliaries" 'whose business operations are of a local character.' "(*LaMarca,* 95 NY2d at 215, *quoting Ingraham v Carroll,* 90 NY2d 592, 599 [1997]; *see also Bensusan Restaurant Corp. v King*, 126 F.3d 25, 29 [2d Cir.1997] [quotation and citations omitted]). In determining whether Ketaka derived substantial revenue from international commerce, the court is not limited to the year this action was filed or when the incident giving rise to the lawsuit occurred, as Ketaka contends. Rather, analyzing the substantial revenue requirement over a period of years "yields a fairer and more accurate representation of a defendant's financial position"(*Justus v Toyo Kensetsu Kohki Co., Ltd.*, 228 F.Supp.2d 215, 220 [ND NY 2002]).

Here, based upon Ketaka's own admissions, during the years 1997 through 1999, Kencorp manufactured "a grand total of about 50,000 jar pots for E&E distribution outside of Japan (to Australia, Canada, the United States and elsewhere)" at a unit price of approximately $32.00 each, resulting in total sales of approximately $1,600,000. Although Ketaka asserts that only 14,000 of those jar pots were specifically manufactured and sold by Kencorp to E&E for the United States market, and that it is unclear how many units were actually sold in New York, the court finds that international revenue of 1.6 million is

sufficient to exercise jurisdiction over Ketaka under section 302 (a) (3) (ii) (*see United Res.1988-I Drilling & Completion Program, L.P. v. Avalon Exploration, Inc.*, 1994 WL 9676, *4 [SD NY 1994] [international revenue of approximately five percent of defendant's total revenue based on transactions amounting to $2,000,000 sufficient to exercise jurisdiction under section 302 (a) (3) (ii)]). Indeed, viewing the record as a whole, the court cannot hold, as a matter of law, that Ketaka's business is so local in character that it cannot be expected to defend lawsuits in a foreign forum. Accordingly, the court finds that Ketaka derived substantial revenue from international commerce during the relevant period for purposes of the New York long-arm statute. Accordingly, this court has no difficulty in finding Ketaka within the reach of New York's long-arm statute pursuant to CPLR 302 (a) (3) (ii).

Federal Due Process Prerequisites

The question now turns to whether Ketaka's actions satisfy the Federal due process prerequisites for a State's assertion of personal jurisdiction. Due process requires that a defendant have "minimum contacts" with the foreign State so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" (*see International Shoe Co. v Washington*, 326 US 310, 316 [1945]; *see also LaMarca,* 95 NY2d at 217). The Supreme Court has explicitly declared that "The foreseeability that is critical to due process analysis is not the mere likelihood that the product will find its way into the foreign State. Rather it is that the defendant's conduct in connection with the foreign State are such that he

should reasonably anticipate being hauled into court there." (*World-Wide Volkswagen Corp. v Woodson,* 444 US 286, 297 [1980]). The foreseeability requirement is itself restricted by the purposeful affiliation requirement (*see Darienzo v Wise Shoe Stores*, 74 AD2d 342, 346 [1980]). Indeed, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protection of its laws" (*see Hanson v Denckla*, 357 US 235, 253 [1958]).

Applying the foregoing principles here, the court finds that the assertion of jurisdiction under CPLR 302 (a) (3) (ii) is proper under Federal due process standards of minimum contacts and fair play and substantial justice (see *LaMarca,* 95 NY2d at 214-219; *World-Wide Volkswagen Corp. v Woodson*, 444 US 286 [1980]). A review of the record presently before this court demonstrates that Ketaka entered into the Kencorp Joint Venture for the purpose of selling jar pots, designed in part by Ketaka, on a global basis in international markets including the United States and New York and that it profited from those sales. In this regard, the court finds that Kencorp was in fact an agent of Ketaka under CPLR 302(a) (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *see also Kernan v Kurz-Hastings, Inc.*, 175 F.3d 236 [2d Cir.1999]). Under these circumstances, any inconvenience arising from Ketaka defending itself in this State is outweighed by its efforts, through Kencorp, to forge ties with an international market which included the United States, which resulted in numerous sales of its products here in New York. As a result of this purposeful action, Ketaka, had every reason to foresee that there could be the

prospect of being hauled into court here if its defective products caused injury (*see LaMarca*, 95 NY2d at 217-218).

Furthermore, the court cannot detect anything offensive to "traditional notions of fair play and substantial justice" in the idea that Ketaka could possibly be hauled into court in New York. Accordingly, the exercise of personal jurisdiction over Ketaka pursuant to CPLR 302 (a) (3) (ii), comports with due process requirements.

Conclusion

Based upon the foregoing, Ketaka's motion seeking summary judgment dismissing all claims against it on the ground that the court lacks personal jurisdiction over it is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C