

Market Serv., Inc. v S.P. Discount, Inc.

2007 NY Slip Op 34099(U)

December 10, 2007

Supreme Court, Nassau County

Docket Number: 7885-07/

Judge: Leonard B. Austin

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.

INDEX
No. 07885-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 6-26-07
Submission Date: 9-13-07
Motion Sequence No.: 001/MOT D

_____ x
MARKET SERVICE, INC. D/B/A
ACCOUNTS RECEIVABLE
MANAGEMENT SOLUTIONS

COUNSEL FOR PLAINTIFF
Dilimentin & Dilimentin, Esqs.
1979 Marcus Avenue - Suite 210
Lake Success, New York 11042

Plaintiffs,

- against -

COUNSEL FOR DEFENDANTS
Wolf & Shapiro, LLC
299 Broadway - Suite 605
New York, New York 10007

S.P. DISCOUNT, INC., RAND
WHOLESALE INC., VAL VOLKOVAS
A/K/A VITALIJUS VOLKOVAS,
VLADIMIR A. POLSKI and YURIY
SHVARTS,

Defendants.

_____ x

ORDER

The following papers were read on the motion to dismiss made by Defendant Yuriy Shvarts and Rand Wholesale Inc.:

- Notice of Motion dated June 1, 2007;
- Affirmation of Alexander Shapiro, Esq. dated June 4, 2007;
- Affidavit of Michael Ayzenshtat sworn to on May 30, 2007;
- Affidavit of Yuriy Shavarts sworn to on May 30, 2007;

MARKET SERVICE, INC. v. S.P. DISCOUNTS, INC., *et al.*
Index No. 7885-07

Affirmation of Anthony K. Dilimetin, Esq. dated June 25, 2007;
Affidavit of Larry Sarf sworn to on June 22, 2007;
Affirmation of Alexander Shapiro, Esq. dated July 18, 2007.

Defendants, Rand Wholesale, Inc. ("Rand") and Yuriy Shvarts ("Shvarts"), move to dismiss the complaint on the grounds that (1) the Court does not have personal jurisdiction over them; (2) the complaint fails to state a cause of action; and/or (3) the causes of action against these Defendants are barred by documentary evidence.

BACKGROUND

Plaintiff, Market Services, Inc. d/b/a Accounts Receivable Management Solutions ("Market Services") is the assignee and agent for Bic USA, Inc., Prestige Brands Holdings, Inc. and Cadbury Schweppes d/b/a Cadbury Adams.

Market Services' assignors allegedly sold and delivered goods to Defendant, S.P. Discounts, Inc. ("Discounts"). Discounts is alleged to have accepted the goods and failed to pay the fair, reasonable and agreed upon value of the goods.

The first cause of action involves a claim against Discounts for goods sold and delivered. The second cause of action involves a claim against Discounts for an account stated.

Market Services further alleges the Defendant, Val Volkovas a/k/a Vitalijus Volkovas ("Volkovas"), personally guaranteed payment of all debts owed by Discounts to Bic USA, Inc. The third cause of action seeks to recover on that guarantee.

MARKET SERVICE, INC. v. S.P. DISCOUNTS, INC., *et al.*
Index No. 7885-07

In the fourth cause of action, Market Services alleges Discounts transferred all of its assets to Rand without receiving fair consideration. This transfer is alleged to have rendered Discounts insolvent.

Market Services further alleges that Shvarts, Volkovas and/or Defendant, Vladimir Polski ("Polski") are the alter ego of Rand.¹ Rand's corporate veil should be pierced to hold Shvarts, Volkovas and/or Polski personally liable.

The fifth cause of action contains similar allegations and makes specific reference to the transfer of the assets by Discounts to Rand being in violation of Debtor and Creditor Law §273.

Shvarts moves to dismiss alleging he is a resident and domiciliary of the State of Illinois who has no contact with New York. He avers that, in January 2005, he transferred his interest in Discounts to Volkovas. Shvarts claims that, since he sold his shares in Discounts to Volkovas, he has had no management or other affiliation with Discounts and has not been involved in its operation in any way. He claims that he does not presently have and has never had an interest or involvement in Rand.

Shvarts asserts the first time he learned of the transactions involved in this litigation was when he was served with process.

Rand is a corporation organized and existing pursuant to the laws of the State of Illinois. Michael Ayzenshtat ("Ayzenshtat") avers that he is the president of Rand and its

¹ It is not clear from the papers what relationship, if any, Shvarts, Volkovas and Polski have with Rand.

MARKET SERVICE, INC. v. S.P. DISCOUNTS, INC., *et al.*
Index No. 7885-07

sole shareholder. Rand was incorporated in July 2006. He avers that Rand never purchased or received any merchandise from Discounts. Ayzenshtat claims that neither he nor Rand has ever had an interest in Discounts.

Rand does not do or transact any business in New York.

Ayzenshtat avers the only commonality between Rand and Discounts is that Rand now has and uses a telephone number previously assigned to Discounts.

Rand's certificate of incorporation indicates its registered office is located at 1335 Winslowe Drive, Unit 202, Palatine, Illinois. The invoices regarding the goods sold and delivered indicate Discounts' address to be 2203 Lively Boulevard, Elk Grove Village, Illinois.

Service was made upon the Rand by serving a copy of the summons and complaint upon Vladimir Spevak ("Spevak") at the offices of the corporation in Des Plaines, Illinois. The affidavit of service indicates Spevak is the owner and authorized agent fo Rand.

Shvarts was served by delivering a copy of the summons and complaint to a person of suitable age and discretion, his wife, at their residence in Mt. Prospect, Illinois and by mailing a copy of the summons and complaint to him at that address.

DISCUSSION

Plaintiff asserts that personal jurisdiction over Rand and Shvarts has been obtained.

MARKET SERVICE, INC. v. S.P. DISCOUNTS, INC., et al.
Index No. 7885-07

CPLR 302(a)(3)(i) permits the court to exercise personal jurisdiction over a non-domiciliary if the non domiciliary:

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

(i) regularly does or solicits business, or engages in any persistent course or conduct, or derives substantial revenue from goods, used or consumed or service rendered in the state..."

The party asserting jurisdiction over the non-domiciliary must establish all three elements of CPLR 302(a)(3)(i). Siegel, *New York Practice 4th* §88.

The party asserting that the New York courts have jurisdiction over a non-domiciliary has the burden of establishing that a factual basis exists for the courts to exercise jurisdiction over the non-domiciliary or must show that such evidence may exist. Brandt v. Toraby, 273 A.D.2d 429 (2nd Dept. 2000); Roldan v. Dexter Folders, 178 A.D.2d 589 (2nd Dept. 1991); and Spectra Products, Inc. v. Indian River Citrus Specialties, Inc., 144 A.D.2d 832 (3rd Dept. 1988).

The complaint does not contain a single factual allegation relating to Shvarts or Rand engaging in any of the statutorily required activities in New York. The papers submitted in opposition to the motion does not correct this deficiency by including any factual allegations establishing either Shvarts or Rand engaged in any activities in New York that would create a jurisdictional basis pursuant to CPLR 302(a)(3)(i). Market Services does not suggest that such evidence may exist.

MARKET SERVICE, INC. v. S.P. DISCOUNTS, INC., *et al.*
Index No. 7885-07

The transfer of property that is alleged to constitute a fraudulent conveyance took place in Illinois. Rand is a foreign corporation that is not authorized to do business in New York. Market Services does not even suggest that Rand engaged in any of the types of activity in New York that would subject it to this Court's jurisdiction pursuant to CPLR 302(a)(3)(i).

Shvarts is a resident and domiciliary of Illinois. Market Services does not suggest that he is engaged in any of the activities required by CPLR 302(a)(3)(i).

Market Services has not established that either Rand or Shvarts have even minimal contacts with New York. Requiring them to defend this action in New York would offend the basic notions of substantial justice and fair play. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

Market Services' reliance upon the "Terms of Credit" agreement which provides that a cause of action arising out of that agreement shall be brought in New Haven County, Connecticut or elsewhere at the option of Bic USA, Inc. is misplaced. Neither Rand nor Shvarts are parties to that agreement. Volkovas is a party to that agreement which forms the basis of the third cause of action.

For the foregoing reasons, this Court lacks *in personam* jurisdiction over Rand and Shvarts. Since there is no jurisdiction over these Defendants, the issue of whether the fraudulent conveyance and piercing the corporate veil actions are dismissible pursuant to CPLR 3211(a)(1)(7) need not be reached.

MARKET SERVICE, INC. v. S.P. DISCOUNTS, INC., *et al.*
Index No. 7885-07

Accordingly, it is,

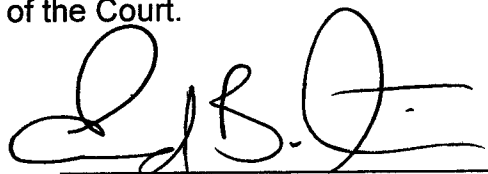
ORDERED, that the motion of the Defendants Rand Wholesale, Inc. and Yuriy Shvarts to dismiss on the grounds that the court lacks personal jurisdiction over them is **granted**. The complaint as to them is hereby dismissed; and it is further,

ORDERED, that the action against the remaining Defendants is hereby severed and continued; and it is further,

ORDERED, that counsel for the remaining parties shall appear for a preliminary conference on January 15, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 10, 2007



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

DEC 13 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**