

Nationsrent, Inc. v Builders Resource, Inc.

2007 NY Slip Op 34233(U)

December 18, 2007

Supreme Court, Nassau County

Docket Number: 7515-07/

Judge: Antonio I. Brandveen

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

NATIONSRENT, INC.,
Plaintiff,

- against -

BUILDERS RESOURCE, INC., and STEVEN
ALLARD,
Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 7515/07

Motion Sequence No. 001 & 002

The following papers having been read on this motion:

| | |
|--|-------------------|
| Notice of Motion, Affidavits, & Exhibits | <u>1, 2</u> |
| Answering Affidavits | <u>3, 4</u> |
| Replying Affidavits | <u> </u> |
| Briefs: Plaintiff's / Petitioner's | <u> </u> |
| Defendant's / Respondent's | <u>5, 6</u> |

The defendants move for an order pursuant to CPLR 3211 (a) (8) dismissing the summons and complaint and the action against the defendants on the ground (a) the Court lacks jurisdiction of the subject matter or the defendants because the plaintiff is precluded from commencing the action under BCL § 1312; (b) the Court is without jurisdiction over non-long arm causes of action by reason of the CPLR 302 (c); service of process was not made upon the defendant Steven Allard; and (d) certain causes of action should be dismissed upon the grounds of *forum non conveniens* pursuant to CPLR 327. The plaintiff opposes the motion, and cross moves for an order pursuant to CPLR 305 amending the summons and complaint to properly name as Sunbelt Rentals, Inc. upon the

ground Sunbelt Rentals, Inc. acquired the plaintiff as a successor-in-interest corporation as a result of the companies' merger, and for an order denying the defendants' motion to dismiss. The defendants oppose the plaintiff's cross motion. The underlying action seeks money allegedly due for certain rental equipment provided for a construction project in New York, and various projects in New England.

The defendants' attorney states, in a supporting affirmation dated August 2007, upon information and belief, the plaintiff corporation is a foreign corporation not authorized to transact business in New York State, and is therefore precluded from commencing an action under BCL § 1312 (a). The defendants' attorney states the defendant Builders Resource, Inc. has no New York office, so there is no jurisdiction over it at least with respect to the plaintiff's causes of action fourth through twenty second, inclusive, and all of those causes of action involve claims arising from alleged events outside of New York State, so the Court lacks jurisdiction over the non-long arm claims by virtue of CPLR 302 (c), or they should be dismissed upon the grounds of *forum non conveniens* pursuant to CPLR 327. The defendants' attorney states the defendant Steven Mallard was never served with process, and the service of process upon a corporation is not also service upon the individual employee of that corporation.

The defendants' attorney asserts the defendant Builders Resource, Inc. had a sub-subcontract with Coreslab Structures (Conn.), Inc., a Connecticut corporation, to erect pre-cast walls and panels at the Mott Haven substation in the Bronx, New York;

Consolidated Edison is the owner of that project; and D'Onofrio General Contractors Corporation was the general contractor for the project. The defendants' attorney avers the defendant Builders Resource, Inc. finished its work at the Mott Haven substation last fall. The defendants' attorney points to the accompanying affidavits dated August 13, 2007 and August 3, 2007, respectively by Martin Cardon, the General Manager of the defendant Builders Resource, Inc., and the defendant Steven Mallard, a Rhode Island resident, who states he does not have a New York business nor is he the president, secretary nor treasurer of the defendant Builders Resource, Inc., a Massachusetts corporation, and he was never served with the plaintiff's summons and complaint. The defendants' attorney points out Coreslab Structures (Conn.), Inc. filed a notice of mechanics' lien in the County of the Bronx, and if any tortuous activity occurred by these defendants, as the plaintiff alleges, it did not happen within the State of New York nor have an effect within the State of New York. The defendants' attorney notes the plaintiff admits it is a foreign corporation, and in those instances where the defendant Builders Resource, Inc. leased equipment from the plaintiff for projects in New England, the defendant Builders Resource, Inc. dealt exclusively with the plaintiff's office in New England, and not in New York.

The plaintiff's attorney states, in a supporting affirmation dated September 24, 2007, to the cross motion, and in opposition to the defendant's motion to dismiss, the plaintiff's cross motion pursuant to CPLR 305 substituting Sunbelt Rentals, Inc., a

foreign corporation based in the State of North Carolina, as successor-in-interest to the plaintiff should be granted on the ground the change merely corrects a mis-description in the caption, and does not prejudice the defendant. The plaintiff's attorney concedes the plaintiff's summons inadvertently named the plaintiff as NationsRent, Inc. instead of Sunbelt Rentals, Inc., as successor-in-interest to NationsRent, Inc., an equipment rental company with a place of business at 522 Grand Boulevard, Westbury, in the County of Nassau, State of New York, which was registered with the New York Secretary of State, as an authorized foreign corporation. The plaintiff's attorney asserts, in late 2006, NationsRent, Inc. merged with Sunbelt Rentals, Inc. and became Sunbelt Rentals, Inc. The plaintiff's attorney points to various press releases, an internet home page, and invoices by the plaintiff to defendant regarding the New York Con Edison project to clearly identify NationsRent, Inc. as Sunbelt Rentals, Inc. Plaintiff's attorney asserts the invoices to defendant regarding the New York Con Edison project clearly identify NationalRent as a Sunbelt Company and that Sunbelt is a foreign corporation based in North Carolina authorized to transact business in New York. Plaintiff asserts the defendants cannot claim any prejudice as the invoices clearly identified NationalRent was now operating a Sunbelt and the court should permit the proposed amendment of the complaint.

The plaintiff's attorney further states the defendant Steven Allard was properly served on August 22nd and the requisite mailing was made on August 23rd, within 120

days of the filing of the summons and complaint pursuant to CPLR § 306-b.

Plaintiff argues, inter alia, that the defendant Builders Resource, Inc., a foreign corporation duly licensed to transact business in New York State, having filed with the New York Department of State as an active foreign corporation, consented to the exercise of personal jurisdiction by the courts of New York and under New York Law the causes of action need not arise out of any business conducted by the foreign corporation in New York.

The court has carefully considered the submissions of the parties. The court finds that the defendant Builders Resources, Inc. is a foreign corporation duly licensed to transact business in New York State and is subject to all of plaintiff's causes of action pursuant to CPLR § 301 and Bus. Corp. Law § 1314(b). The court further finds that plaintiff's fourth cause of action alleging diversion of trust funds by the defendant Steven Allard within the State of New York sufficient to assert jurisdiction over the defendant pursuant to CPLR § 302(2).

The court finds the affidavit of the defendant Steven Allard asserting that he was never served in this action rebuts plaintiff's affidavit of service and jurisdiction over this defendant must be established by a preponderance of the evidence at a hearing (see, *Verille v Kopic* 304AD2d 823). Therefore a hearing is required regarding service upon the defendant Steven Allard.

Accordingly, the motion by the defendants is granted solely to the extent that a

traverse hearing is ordered on the issue of service upon the defendant Steven Allard.

The cross motion by the plaintiff to amend the summons and complaint to properly name plaintiff as Sunbelt Rental, Inc. on the grounds that Sunbelt Rental, Inc. acquired NationRent as a successor -in interest corporation is granted as the defendants have not submitted sufficient proof that prejudice was result from the amendment is granted.

This matter is referred to the Calendar Control Part (CCP), for a traverse hearing on the issue of jurisdiction of the defendant STEVEN ALLARD to be held on January 22, 2008. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

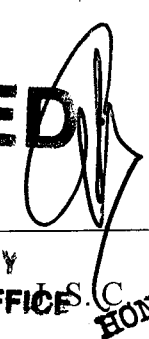
So ordered.

Dated: **December 18, 2007**

ENTER:
ENTERED

DEC 21 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE



HON. ANTONIO I. BRANDVEER

FINAL DISPOSITION

NON FINAL DISPOSITION XXX