

Blanco v Alfaparf SRL, BIP, Inc.

2009 NY Slip Op 30230(U)

January 23, 2009

Supreme Court, New York County

Docket Number: 104456/03

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

MARIA BLANCO,
Plaintiff,

Index No.: 104456/03
Third Party 590839/05
Motion Date: 06/10/08

- v -

Motion Seq. No.: 004
Motion Cal. No.: _____

ALFAPARF SRL, BIP, INC. d/b/a ALFAPARF,
USA, and PIERMARCO GROUP IMPORTS, LTD,

Defendants.

ALFAPARF SRL, BIP, INC. d/b/a
ALFAPARF, USA,
Third Party Plaintiff,

- v -

NUOVO VITROFIN SRL and BORMIOLI ROCCO E
FIGLIO SPA,

Third Party Defendants.

FILED
FEB 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
_____	1
_____	2, 3
_____	4

Cross-Motion: Yes No

Plaintiff Maria Blanco is a hairdresser and owner of a hair salon located in New York. Defendant Alfaparf SRL, BIP, Inc. sells and distributes a hair growth/hair loss retardation product called Lipoxin.

In this products liability action, plaintiff alleges

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

that on June 25, 2002, while attempting to open a vial of Lipoxin, the vial broke cutting her hand.

Alfaparf's Lipoxin product has various components: a glass vial manufactured by Nuova Vitrofin; a tripartite Cap, containing a well, a plunger, and a cap (or seal), ("Caps") manufactured by Bormioli; a powder manufactured by a non-party; and a liquid supplied by another non-party. To open the Lipoxin, the customer would depress the plunger, thereby perforating the membrane on the bottom of the well in which the powder rested; the powder would then descend into the vial and mix with the liquid.

According to plaintiff, when she applied more force to depress the plunger of the Cap to mix the powder and liquid, the bottom of the of the glass vial dropped out and detached from the edges of the vial.

The Caps produced by Bormioli Rocco were multi-purpose, off the shelf Bormioli products, which Alfaparf Srl, Bip, Inc. ("Alfaparf") began using in 1994. Alfaparf and Bormioli never had a written agreement for the supply of Caps. Instead Alfaparf would simply place orders with Bormioli on an "as-needed" basis.

Plaintiff's alleges that there was a defect in the component parts of the product marketed by Alfaparf. Alfaparf has impleaded third party defendant Nuova Vitrofin Srl ("Nuova"), the component parts manufacturer of the glass vial and Bormioli

Rocco, the producer of the force-actuated cap. Nuova has defaulted, and this Court has granted a default judgment in favor of Alfaparf.

Third party defendant Bormioli Rocco, a domiciliary of Italy, has appeared and defends itself against the third party complaint. It now moves to dismiss the third party complaint on the grounds that there is a lack of personal jurisdiction pursuant to CPLR § 302(a)(3)(i) and pursuant to CPLR § 3212 as to the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth causes of action asserted in the third party complaint.

Third party defendant Bormioli Rocco's motion to dismiss shall be denied because Bormioli Rocco has regularly done business within the New York State and derived substantial revenue from the sale of its goods in the state.

Opposing the motion, Alfaparf argues that this court has personal jurisdiction over Bormioli Rocco pursuant to CPLR § 302(a)(3)(i). CPLR § 302(a) empowers the court to grant judgments over a "nondomiciliary", which includes, but is not limited to corporations, associations, and partnerships. Siegel, NY Prac § 85, at 146 [4th ed]. Such provision is applicable whether listed activities were carried out by the defendant in person or through an agent. (Id.)

In all instances under paragraph 3 of CPLR § 302(a), to

confer personal jurisdiction over the domiciliary, it must be shown that (1) the defendant committed a tortious act outside New York and (2) that the act caused injury within New York, which was foreseeable. The last element that must be met under subparagraph (I) of CPLR § 302(a)(3) is that defendant must be shown to be regularly doing or soliciting business or engaging in any persistent course of conduct, or deriving substantial revenue from goods used or consumed or services rendered in the state. Siegel, NY Prac § 88, at 159 [4th ed].

The parties dispute whether Bormioli Rocco regularly did or solicited business within the State of New York and whether it derived substantial revenue from its good in the State.

CPLR § 302(a)(3)(I) requires a foreign corporation to regularly do or solicit business or engage in any other persistent course of conduct within the state. The burden of proof falls on the plaintiff to prove the defendant in fact regularly solicits business within the state. Siegel, NY Prac § 93, at 168 [4th ed]. The amount of business that must be done to satisfy the subparagraph is less than the required for the conventional doing business standard, but more than a "one shot" business transaction. (McKinney's Cons Law of NY, Book 7b, CPLR C302:12). Soliciting business is not satisfied when the defendant "merely solicits" business in the state. (Id.).

In the case of *Taca Int'l Airlines v. Rolls-Royce of England* 21 AD2d 73 [1965], the Court determined the defendant Ltd. was doing business in New York through Inc., as its separately incorporated department or instrumentality. The court found Ltd. was in fact doing business within the state because Inc. only sold Rolls-Royce automobiles, but owned none. Instead, when a sale was made, Inc. purchased cars from Rolls-Royce Ltd. (*Taca*, AD2d 101). Rolls Royce Ltd. would in turn pay for service rendered to customers. The *Taca* court held that therefore, Inc. was a "mere department" of the parent company because not only does Inc. sell only products manufactured by the parent, but also Inc. conducted no other business, principle personnel was shared, and all operations of Inc. were reported to Rolls Royce (*Id*, 101). Thus, all relevant factors coupled together satisfied the requirement of doing business within New York.

The requirement of regularly doing or soliciting business is hotly disputed by the parties. Third party defendant Bormioli Rocco claims it have never shipped goods directly to customers located in New York, did not directly solicit customers in the State of New York; and is not authorized to do business within New York. Alfaparf counters that Bormioli Rocco is soliciting business within the state through their wholly owned subsidiary Bormioli Glass. Alfaparf also claims Bormiolo Rocco is soliciting business via the internet, in which an entire website

is devoted to its presence not only in New York, but the United States. Lastly, Alfaparf argues the Bormioli Rocco maintains a catalogue specifically for customers in the United States, as well as a list of various major retailers within New York.

A review of the record before the court shows that while Bormioli Rocco claims Bormioli Glass is an indirect subsidiary of Bormioli, according to the Bormioli Rocco website, Bormioli Glass is a "branch" of its company. Bormioli Glass is located on Madison Avenue; at this location, Bormioli Glass's sole business is the selling of Bormioli Rocco products. Bormioli Rocco also makes access to their products available to the people of New York by offering various products through major retailers throughout the state. With respect to the location of its headquarters, Bormioli Rocco's website lists the State of New York, not only as a location where purchases can be made from its showroom, but also at its fourth headquarters location.

Viewing all of these facts: that Bormioli Rocco views Bormioli Glass as a branch of its company, and as a "mere department" that sells Bormioli Rocco products as well as uses the State of New York as a place for its headquarters, it is uncontroverted that Bormioli Rocco through Bormioli Glass solicits business under CPLR 302(a)(3)(i).

Bormioli Rocco also satisfies the substantial revenue requirement under CPLR § 302(a)(3)(I) because during the most

recent fiscal year in which figures were available, Bormioli Rocco made 514 million Euro, of which seven percent or 36 million Euros (56 million USD) was derived from sales in North America. The "substantial factor" requirement of the statute is designed to narrow "the long-arm reach to preclude the exercise of jurisdiction over non-domiciliaries who might cause direct, foreseeable injury within the state, but "whose business operations are of local character" *LaMarca v Pak-Mor Manufacturing Co.*, 95 NY2d 210, 308 [2000]. Determination of whether the revenue arose from interstate commerce or was "substantial" may be based on either percentages or revenues or raw dollar amounts (McKinney's Consolidated Laws of NY, Book 7b, CPLR C302:13).

In *LaMarca*, the Court of Appeals found that the operations of Pak-Mor, a Texas corporation with a manufacturing facility in Virginia, was not "of local character." *Id.*, at 904. The Court based its ruling on the facts that Pak-Mor (1) not only advertised nationally, but also maintained a New York distributor and (2) had total sales revenue over 18 million, over half a million of which was derived solely from New York. The Court held that the sale figures alone demonstrated that the company in fact derived substantial revenue from interstate commerce.

Looking at the facts at bar, it is clear that third party defendant Bormioli Rocco derives substantial revenue in the State

of New York. In the most recent figures available, \$56 million dollars of revenues were generated in North America. Included in the \$56 million is the income derived from its New York subsidiary, Bormioli Glass. By affidavit, third party defendant Bormioli Rocco's General Director, Fabian Piaggio, stated that this income constituted seven percent of the sales of the total global Bormioli Rocco business.

Though Bormioli argues that the amount of sales derived specifically from New York is not available, based on the fact that Bormioli generates nearly \$56 million in North America alone, it is clear that Bormioli Rocco, with its New York City showroom for its products, as well as major retailers within the state selling its products, derives "substantial" revenue from goods through interstate commerce.

The foregoing uncontroverted facts establish that defendant regularly does or solicits business within New York State and derives substantial revenue within this State.

Nor has third party defendant Bormioli Rocco brought forth evidence that prima facie establishes any defense to the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth cause of action contained in the third party complaint.

Accordingly, it is

ORDERED that the motion to dismiss the third party

complaint against third party defendant BORMIOLI ROCCO F FIGLIO SPA for lack of personal judgment pursuant to CPLR § 302(a)(3)(i) is DENIED; and it is further

ORDERED that the motion to dismiss the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth causes of action in the third party complaint as a matter of law is DENIED; and it is further

ORDERED that the parties and their counsel are directed to attend a mediation conference before Part Mediation-1 on March 13, 2009, at 10:30 A.M. If the case does not settle in Part Mediation-1, the parties' counsel are directed to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on April 14, 2009 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: January 23, 2009

ENTER:

HON. DEBRA A. JAMES J.S.C.

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