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

PRESENT: Hon. Eileen Bransten Justice Bransten PART 3

Index Number : 600753/2008

ARCELORMITTAL-STAINLESS INTERNAT'L

VS.

JERMAX, INC.,

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 600753-08

MOTION DATE 9/11/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	1
Replying Affidavits	1

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

NYS SUPREME COURT RECEIVED
APR 15 2009
MOTION SUPPORT OFFICE

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

Dated: 4-14-09

Eileen Bransten J.S.C.

HON. EILEEN BRANSTEN

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

CDSP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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ARCELORMITTAL-STAINLESS
INTERNATIONAL USA, LLC,

Plaintiff,

-against-

JERMAX, INC., d/b/a
GULF AND NORTHERN TRADING
CORPORATION,

Defendant.

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Index No. 600753/08
Motion Date: 10/14/08
Motion Seq. No.: 001

EILEEN BRANSTEN, J:

Pursuant to CPLR 311, defendant Jermax, Inc., d/b/a Gulf and Northern Trading Corp. ("Jermax") moves to dismiss the complaint of ArcelorMittal-Stainless International USA, LLC's ("ArcelorMittal") on four separate grounds: (1) lack of personal jurisdiction due to improper service of process; (2) lack of jurisdiction based on the parties' contract and venue choice; (3) lack of personal jurisdiction pursuant to CPLR 301 and 302; and (4) lack of capacity to sue pursuant to NYLLC Law §808, claiming that ArcelorMittal is a foreign LLC not authorized to do business in New York State, and thus is unable to maintain an action in New York State courts.

ArcelorMittal opposes the motion.

Background

ArcelorMittal, a Delaware LLC with its principal office currently located in New Jersey, is a producer and wholesaler of stainless steel (*see* Weitz aff ¶¶4-5). Until June 15, 2007, its principal place of business, where substantially all of its employees worked, was located in New York (*see* DiBenedetto Aff ¶5). Jermax, a New Jersey corporation whose principal place of business is in New Jersey, is a distributor of steel products (*see* Plaintiff Memo ["P Memo"] at 2). Jermax has been buying stainless steel from ArcelorMittal since 2003 (*see* DiBenedetto Aff ¶3). In this action, which was commenced on March 13, 2008, ArcelorMittal asserts breach of contract claims against Jermax, alleging that it failed to pay the full contractual price on 25 invoices for steel and that it repudiated the agreements by stating that it would not accept delivery of outstanding material (*see* Weitz Aff Ex A ¶¶10-29). Most of the purchase orders referenced in the complaint were sent to ArcelorMittal by Jermax when ArcelorMittal was primarily located in New York (DiBenedetto Aff ¶6). ArcelorMittal alleges that Jermax began to fall behind on its payments in July 2007 (*see* Weitz Aff Ex. A ¶10; P Memo Ex 1 ¶4).

Although the parties dispute exactly which documents comprise their agreements, Jermax's Purchase Orders and AcellorMittal's Sales Order Confirmation unquestionably form the base of the relationship (*see* Young Aff ¶3; Weitz Aff Ex A ¶10). Initally, Jermax

would send ArcelorMittal its Purchase Order, which specifies essential terms (*see* Weitz Aff ¶14; P Memo at 2-3). The second page of the Purchase Order contained a clause stating:

> "This Purchase Order and the acceptance thereof shall be a contract made in New Jersey and governed by the laws thereof, and it shall supercede any provisions, terms and conditions contained in any confirmation or other writing Seller has given or may hereafter give. This order may be modified only by Buyer's written change order"

(Weitz Aff Ex. C at ¶11). ArcelorMittal disputes receiving the second page of the Purchase Order. ArcelorMittal, in turn, would review and process the order, make any changes as to what it was able to sell Jermax, call Jermax to discuss the changes and send Jermax a Sales Order Confirmation, which Jermax would initial (*see* Weitz Aff Ex. D; P Memo at 2-3; Young Reply Aff ¶8). ArcelorMittal would then arrange for the orders to be filled and delivered to Jermax in New Jersey (*see* Weitz Aff ¶18; Young Reply Aff ¶8).

The Sales Order Confirmation set forth: "[t]his order is subject to the terms and conditions of this acknowledgment including those terms on the attached sheet" (Weitz aff Ex. D). ArcelorMittal alleges that the "attached sheet" refers to its Terms and Conditions of Sale form, which was not actually attached to the Sales Order Confirmation but rather was allegedly sent to Jermax before the contractual relationship began. The Terms and Conditions of Sale form provides:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be subject to the exclusive jurisdiction of the State or Federal courts located within the

> State of New York. The parties hereto submit to jurisdiction of the Federal and State courts in New York City .... This contract shall be governed by and construed according to the laws of the State of New York to the exclusion of its conflicts of laws provisions"

(Weitz Aff Ex. E at Dispute Resolution and Applicable Law).

Jermax moves to dismiss the complaint pursuant to CPLR 3211(a)(8) claiming lack of personal jurisdiction over it based on (1) improper service, (2) the absence of "doing business" or "transacting business" in New York to satisfy CPLR 301 and CPLR 302 and (3) lack of a contractual basis for jurisdiction. Jermax also seeks dismissal pursuant to CPLR 3211(a)(3) claiming that ArcelorMittal lacks capacity to sue in New York because it is a foreign limited liability company not authorized to do business in New York.

The propriety of service has been rendered moot as ArcelorMittal proffered evidence that it properly re-served the complaint within 120 days of filing (*see* Sept. 11, 2008 Tr. at 8, 10).

Thus the only issues to be decided is whether this court has personal jurisdiction over the defendant either contractually or through CPLR 301 or 302.

Analysis

The plaintiff, as the party asserting jurisdiction, bears the burden of proof of establishing the existence of personal jurisdiction (*see O'Brien v Hackensack University*

Medical Center, 305AD2d 199, 200 [1st Dept 2003]). In the context of a 3211(a)(8) motion to dismiss, however, a plaintiff is not required to make a *prima facie* showing of jurisdiction since such a requirement could "impose undue obstacles for a plaintiff, particularly seeking to confer jurisdiction under the 'long arm' statute...[because] the jurisdictional issue is likely to be complex" (*Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]). In opposition to a dismissal motion, a plaintiff need only demonstrate that facts 'may exist' to demonstrate jurisdiction is proper and that it, therefore, is entitled to the disclosure expressly sanctioned by CPLR 3211(d) (*see id.*). A Court must view the jurisdictional allegations in a light most favorable to the plaintiff and resolve all doubts in its favor (*see Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001] [regarding CPLR 3211(a)(7)]; *Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]).

Contractual Ground for Jurisdiction

ArcelorMittal asserts that it has a contractual basis for jurisdiction in New York based on its Terms and Conditions, that were referenced to in its Sales Order Confirmation forms. The Terms and Conditions of Sale, allegedly produced to Jermax, includes a forum selection clause which reads "[a]ny controversy or claim arising out of or relating to this contract or the breach thereof, shall be subject to the exclusive jurisdiction of the State or Federal courts

located within the State of New York. The parties hereto submit to jurisdiction of the Federal and State Courts in New York City" (P Memo Ex. 5).

Jermax counters that the forum selection clause was never part of the parties' contract. Jermax maintains that it never received the Terms and Conditions until this action was commenced, and that, in any event, the forum selection clause is not part of the parties' agreement by virtue of NYUCC 2-207(2)(b).

NY UCC 2-207, which applies to the parties' contracts because they are for the sale of goods, provides that a written confirmation operates as an acceptance despite the inclusion of additional terms. "The additional terms are to be construed as proposals for addition to the contract" and, between merchants, actually become part of the contract unless "they materially alter it" (NYUCC 2-207[2][b]).

For a term to "materially alter" a contract, it must result in surprise or hardship if incorporated without express awareness by the other party (*see* NYUCC 2-207 Comment 4). Courts applying New York law have held that a forum-selection clause that is first asserted in a confirmation or acknowledgment "materially alters" a contract and therefore would not be deemed part of the agreement without express consent (*Hugo Boss Fashions, Inc. v Sams European Tailoring*, Inc., 293 AD2d 296, 297 [1st Dept 2002]; *see also Lorbrook Corp. v T Industries, Inc.*, 162 AD2d 69 [3d Dept 1990]; *Pacamor Bearings Inc. v Molon Motors & Coil, Inc.*, 102 AD2d 355 [3d Dept 1984]; NYUCC 2-207 Comment 3).

Even if Jermax had the Terms and Conditions allegedly referenced in ArcelorMittal's Sales Order Confirmation forms, the forum-selection clause would not be part of the parties agreement since it is a material alteration to which Jermax never expressly agreed (*see KIC Chemicals, Inc. v ADCO Chemical Co.*, 1996 WL 122420, *5 [SDNY 1996] [clause designating New York as forum materially alters contract with Newark, New Jersey defendant because of the differences between the states such as applicable law, procedural rules, and jury pools - also New Jersey defendant would be required to travel to New York and engage a New York lawyer at its own expense]).

Therefore, ArcelorMittal does not have a contractual basis for jurisdiction here.

CPLR 301 "Doing Business in New York"

Relying on *Laufer v Ostrow*, ArcelorMittal contends that there is general jurisdiction over Jermax in New York because it is present in the state. To establish in-state presence, there must be a showing that a foreign corporation is "doing business" in New York. To be "doing business" in this state, pursuant to CPLR 301 the corporation must be:

> "engaged in [] a continuous and systematic course of doing business in this jurisdiction. The test, though not precise, is a simple pragmatic one: is the aggregate of the corporation's activities in the State such that it may be said to be present in the State not occasionally or casually, but with a fair measure of permanence and continuity and is the quality and nature of the corporation's contacts with the State sufficient to make it

> reasonable and just according to traditional notions of fair play and substantial justice that it be required to defend the action here"

(*Laufer v Ostrow*, 55 NY2d 305, 309-310 [1985] [citations omitted]). "The essential factual inquiry is whether the defendant has a permanent and continuous presence in the state as opposed to merely occasional or casual contact with the state" (*Holeness v Maritime Overseas Corp.*, 251, AD2d 220, 222 [1st Dept 1998] citing *Landoil Resources Corp v Alexander & Alexander Services*, 77 NY2d 28, 33 [1990]). Courts look to the aggregate of the corporation's in-state activities to find presence and will also seek to determine whether "the quality and nature of the corporation's contacts with the State [are] sufficient to make it reasonable and just according to 'traditional notions of fair play and substantial justice' that it be required to defend the action here" (*Laufer v Ostrow,* 55 NY2d at 310). Although solicitation alone is insufficient to find a corporation is present in New York, presence could be found based on solicitation and "activities of substance"(*id.*). Such activities include the presence of an office, employees, bank accounts, and property within New York (*see id.* at 310-311).

ArcelorMittal claims that Jermax is present in New York by virtue of: (1) regular and systematic conduct of business with ArcelorMittal for several years while ArcelorMittal was located in New York, and possibly continuing such business in New York, (2) a Jermax employee admitted to ArcelorMittal's vice president that "his business office is located in

his home in Brooklyn, New York," and (3) Jermax was using the services of a New York City bank to wire payment to ArcelorMittal as recently as July of 2007 and had a credit reference from a bank in New York City (*see* P Memo at 8-10).

Jermax refutes these claims through affidavits from its CEO and its counsel. Jermax claims that it would send the purchase orders to ArcelorMittal after meetings with ArcelorMittal employees in New Jersey (*see* Young Aff ¶7). Jermax further points out that when ArcelorMittal made any change to the orders, Jermax would confirm the changes from its office in New Jersey (*see* Young Aff ¶8). Jermax claims that it would often remit payment for the orders to ArcelorMittal at a New Jersey address (*see* Young Aff ¶9). It also maintains that the referenced Jermax employee merely lives in New York and is in no way authorized by Jermax to use his home as an office and that it does not compensate the employee in any way for his residential expenses (*see* Young Reply Aff ¶20). Jermax also submits that evidence of a 2001 credit reference allegedly showing that it had an account in a New York bank is not probative because nothing demonstrates that Jermax still maintains the account - eight years later.

Unlike the situation in *Laufer*, where defendant obtained $2 million in sales from New York accounts, ran clinics for customers in New York, followed up on New York client's issues and delivered materials to New York, Jermax's contacts with the state are not continuous and systematic. Here, Jermax's only connection to New York was that it placed

orders with ArcelorMittal while ArcelorMittal had an office in the state. Such solicitation alone is not enough to sustain a finding that Jermax is "doing business" in the state (*see Laufer v Ostrow*, 55 NY2d 305, 310 [1982]). ArcelorMittal's attempt to use a Jermax employee's home office as the basis of CPLR 301 jurisdiction is unavailing since Jermax proffered an affidavit from its CEO definitively refuting that Jermax in any way authorizes or pays for an office there (*see Peter Lisec Glastechnishe Industrie GmbH v Lenhardt Maschinenbau*, 173 AD2d 70, 72 [1st Dept 1991] [through an affidavit defendant refuted allegation that it owned property in New York]).

ArecelorMittal's argument that Jermax is "doing business" in New York by virtue of its use of a New York bank to remit payments similarly fails. There is no substantiation for the claim and no evidence that Jermax's payments to ArcelorMittal were drawn from a New York bank. ArcelorMittal has not proffered any affidavit that suggests that Jermax remitted any payment through the Bank of New York. It only relies on a memorandum of law which is insufficient to defeat a motion to dismiss (*see Roche v Hearst Corp*, 53 NY2d 767, 769 [1981] [affirmation of attorney without personal knowledge of the facts is not enough to defeat summary judgment motion]).

Thus, ArcelorMittal has not made a "sufficient start" in showing that general jurisdiction exists and that added discovery is warranted.

CPLR 302 "Transacting Business" in New York

Plaintiff also contends that this court has long-arm jurisdiction over Jermax based on CPLR 302(a)(1), which authorizes personal jurisdiction over an out-of-state defendant who "transacts any business within the state or contracts anywhere to supply goods or services in the state."

CPLR 302(a)(1) is a single-act statute. "[P]roof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, as long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Securities, Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 [2006] [quotations omitted]). "While electronic communications, telephone calls or letters, in and of themselves, are generally not enough to establish jurisdiction, they may be sufficient if used by the defendant deliberately to project itself into business transactions occurring within New York State" (*id.* [citations omitted]). A finding that an out-of-state defendant transacts business in New York will not offend due process if the defendant "avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there" (*Kreutter v Mc Fadden Oil Corp.*, 71 NY2d 460, 466 [1988] [citations omitted]). "The court will not find personal jurisdiction based on conclusory unsubstantiated assertions" (*Brown v Blum,* 1999 WL 1042904, *2 [Sup Ct, NY County 1999]).

Plaintiff relies heavily on *Deutsche Bank Securities, Inc. v Montana Bd. of Investments*, 21 AD3d 90 [1st Dept 2005] *affd* 7 NY3d 65 [2006] ("*Deutsche Bank*") for its contention that it has CPLR 302(a)(1) jurisdiction over Jermax. There, an out-of-state governmental entity initiated a sale of its bonds to Deutsche Bank, a New York bank, for $15 million 10 minutes after it had rejected the bank's offer to swap bonds. The out-of-state defendant and New York bank negotiated the terms of the multimillion-dollar transaction through a series of communications using the Bloomberg Messaging System.

The Court of Appeals held that there was jurisdiction, concluding that, the out-of-state defendant should have expected to defend its actions in New York since it is "a sophisticated trader that entered New York to transact business here by knowingly initiating and pursuing a negotiation with [plaintiff] in New York that culminated in the sale of $15 million in bonds" and since negotiating such transactions is a "major aspect of [defendant's] mission--'part of its principal reason for being'"(*Deutsche Bank Securities, Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71-72 [2006] [quotations omitted]). The Court of Appeals also explained that the eight bond transactions the parties had earlier consummated over the preceding 13 months, with a face value totaling over of $100 million, were sufficient contacts with New York to constitute purposeful availment by the out-of-state defendant to justify the exercise of New York jurisdiction (*see Deutsche Bank Securities, Inc. v Montana Bd. of Investments*, 7 NY3d 65, 72).

Though Jermax, a sophisticated party, initiated contact with ArcelorMittal, and the parties have had a history of transactions totaling a substantial amount, this case is readily distinguishable from *Deutsche Bank*. In *Deutsche Bank*, the defendant fully participated in actually shaping the nature of the deal -- whether there would be a sale or a swap or a combination. Here, in contrast, all Jermax did was send purchase orders to New York. Its New York actions are much more passive than that of the defendant in *Deutsche Bank*.

In fact, in Deutsche Bank, the Court of Appeals acknowledged that simply placing an order in New York from out of state may not be sufficient to confer personal jurisdiction. The Court cited a case in which a Pennsylvania resident had several phone conversations with plaintiff's account representative who was in New York that resulted in a purchase order for stock. "Except for a letter which [the Pennsylvania] defendant sent to plaintiff's office... defendant had no other contact with New York"(*LF Rothschild, Unterberg, Towbin v McTamney*, 89 AD2d 540, 540 [1st Dept 1982]).

There, like here, "there was not sufficient purposeful activity within this State so as to confer in personam jurisdiction over defendant" (*id.; see also Success Marketing Electronics, Inc. v Titan Sec., Inc.*, 204 AD2d 711, [2d Dept 1994] [no jurisdiction when "the contract was negotiated entirely by facsimile or mail, and all of the activities in New York relating to the contract were performed by plaintiff"]; *JET Advertising Associates, Inc. v Lawn King, Inc.*, 84 AD2d 744, 745 [2d Dept 1981] [no jurisdiction over out-of-state

defendant who contracted with New York plaintiff to create and place advertisements to promote defendant]; *M. Katz & Son Billiard Products, Inc., v G. Correale & Sons, Inc.*, 26 AD2d 52, [1st Dept 1996] *affd* 20 NY2d 903 [1967] [no jurisdiction over out-of-state defendant who telephonically ordered billiard cues from New York plaintiff over the course of many years and plaintiff delivered the cues from its factory in New York]; *Southern Industries of Clover, Ltd. v Tex-Cellence, Inc.*, 7 Misc3d 1007(A), *6 [Sup Ct, Bronx County 2005] ["defendants activities, which consist of merely ordering yarn from a New York merchant, negotiating the particulars of that order with the plaintiff via mail, telephone, and facsimile, and then attempting to have plaintiff rectify the situation by shipping plaintiff the very goods claimed to be defective are not activities sufficient to warrant long arm jurisdiction pursuant to CPLR 302(a)(1)"]; *Dulman v Potomac Baking Co., Inc.*, 85 AD2d 676, 677 [2d Dept 1981] ["An out-of-state buyer will not be held to have transacted business in New York by placing a telephone order to a New York seller who ships the goods FOB its factory in New York"]; *Rainbow Indus. Products v Haybuster Mfg., Inc.*, 419 F Supp 543, 546 [DCNY 1976] [Facts, taken as a whole, showed that defendant did not transact business in New York: "Purchase of chains was negotiated by letters, into and out of New York, by phone calls between North Dakota and New York and by face to face meetings in North Dakota. A purchase order was mailed by defendant from North Dakota to plaintiff in New York, and defendant mailed back its acceptance. Plaintiff arranged to have the chains

manufactured in Japan and shipped directly to North Dakota without ever passing through New York"]; *Glassman v Hyder*, 23 NY2d 354, 363 [1968] ["held that there is no transaction of business in New York where an offer placed outside the state by telephone is received and accepted in New York"]; *Success Marketing Electronics, Inc. v Titan Sec., Inc.*, 204 AD2d 711, 712 [2d Dept 1994] ["parties' contract was negotiated entirely by facsimile or mail, and all of the activities in New York relating to the contract were performed by the plaintiff. Thus it cannot be said that the defendant transacted business within New York"]).

ArcelorMittal has not demonstrated that substantial negotiations took place in New York or that there are contacts sufficient to satisfy CPLR 302(a)(1) because it has failed to show that "defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Securities, Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 [2006]), Jermax cannot be deemed to be transacting business within the meaning of CPLR 302(a)(1) sufficient enough to subject it to long arm jurisdiction.

To the extent that ArcelorMittal alleges that Jermax is qualified to do business in New York (Weitz Aff Ex. A¶4), ArcelorMittal failed to produce evidence to that effect and Jermax has positively refuted the argument.

In the end, the only connection with New York here is Jermax sending purchase orders from New Jersey to New York. Therefore, Jermax's motion to dismiss because of lack of personal jurisdiction must be granted.

In light of this disposition, the remaining issues are moot.

Accordingly, it is

ORDERED that defendants motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the clerk is directed to enter judgement accordingly.

This constitutes the Decision and Order of the Court

Dated: New York, New York
April 14, 2009

ENTER

Hon. Eileen Bransten