

Neira v Strippit, Inc.

2009 NY Slip Op 30989(U)

April 28, 2009

Supreme Court, Queens County

Docket Number: 12309/2008

Judge: James J. Golia

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

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CARLOS NEIRA		Number <u>12309</u> 2008
		Motion
-against-		Date <u>January 22,</u> 2009
		Motion
STRIPPIT, INC., et al.		Cal. Numbers <u>17, 14, 15 & 16</u>
		Motion Seq. Nos. <u>2, 3, 4 & 5</u>
	x	

The following papers numbered 1 to 44 read on this motion by plaintiff to declare that service of process on defendants was timely and proper or, in the alternative, to grant an extension of time to serve defendants; and on this separate notice of motion by defendant Amada S.A. to dismiss the complaint pursuant to CPLR 3211 or, alternatively, CPLR 3212, on the grounds of improper service of process, statute of limitations, failure to state a cause of action, and lack of personal jurisdiction; and on this separate notice of motion by defendants Amada Company Limited and Amada Co., Ltd. (ACL) on similar grounds; and on this separate notice of motion by defendant Amada America, Inc. (AAI) to dismiss the complaint pursuant to CPLR 3211 or, alternatively, CPLR 3212, for failure to state a cause of action and statute of limitations.

	<u>Papers</u>
	<u>Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-16
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Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff while operating a metal shearing machine on May 16, 2005. On May 16, 2008, plaintiff commenced the

within action against defendants, alleging negligence, strict products liability, and breach of warranty.

The plaintiff bears the burden of proving by a preponderance of the evidence that jurisdiction over a defendant was obtained by proper service of process (see Bankers Trust Co. of Cal., N.A. v Tsoukas, 303 AD2d 343 [2003]; Frankel v Schilling, 149 AD2d 657, 659 [1989]). Plaintiff herein met his burden with respect to defendants Metz Machinery, Inc., Metz Machinery Moving, LVD Company, Strippit Promecam, LVD Strippit, Reliance Metal Fabricators, Inc., Strippit, Inc., AAI, and Walsh-Atkinson Company, Inc. In his motion, plaintiff alleges that defendants Metz Machinery, Inc., Metz Machinery Moving, LVD Company, Strippit Promecam, LVD Strippit, and Reliance Metal Fabricators, Inc. were personally served with process pursuant to CPLR 311. The process servers' affidavits state that these corporate defendants were personally served on September 10, 2008 by delivering a copy of the summonses and complaints to their respective designated agents, which constitute prima facie evidence of proper service pursuant to CPLR 311 (see McIntyre v Emanuel Church of God in Christ, Inc., 37 AD3d 562 [2007]). Notably, said defendants did not submit any opposition to plaintiff's motion by rebutting the allegations contained in the affidavits of service and, therefore, they are deemed to have been properly served with process (cf. Kingsland Group, Inc. v Pose, 296 AD2d 440 [2002]). In addition, plaintiff submitted affidavits of service showing that he served process on Strippit, Inc. and Walsh-Atkinson Company, Inc. on June 20, 2008 and AAI on September 10, 2008 via the Secretary of State pursuant to BCL § 306(b)(1). Although Strippit, Inc. timely filed an answer and AAI timely filed a pre-answer motion to dismiss, neither defendant challenged personal jurisdiction and, thus, waived that defense (CPLR 3211[e]). Walsh-Atkinson Company, Inc. neither appeared in the action nor submitted any opposition to plaintiff's motion. As such, proper service of process was effectuated upon Strippit, Inc., AAI, and Walsh-Atkinson Company, Inc.

With respect to defendants Amada Promecam, S.A., Promecam Sisson Lehman, Promecam, ACL, and Amada S.A., plaintiff claims that he properly served process upon them by certified, registered international mail pursuant to Article 10(a) of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention). While defendants Amada Promecam, S.A., Promecam Sisson Lehman, and Promecam did not oppose plaintiff's motion, defendants ACL and Amada S.A. separately moved to dismiss the complaint asserting, inter alia, that service of process was improper. The Hague Convention applies to all cases "where there is occasion to

transmit a judicial or extrajudicial document for service abroad" (see Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 UST 361, TIAS No. 6638, art 1 [1969]; Volkswagenwerk Aktiengesellschaft v Schlunk, 486 US 694, 699 [1988]). In this case, the Hague Convention applies since plaintiff is a resident of the United States, ACL is a Japanese corporation with its principal place of business in Japan, and Amada S.A., Amada Promecam, S.A., Promecam Sisson Lehman, and Promecam are French corporations with their principal places of business in France.

Article 10 of the Hague Convention allows judicial documents to be transmitted without resort to a central authority, provided that the signatory state consents. Specifically, Article 10 states, in pertinent part, "[p]rovided the State of destination does not object, the present Convention shall not interfere with: (a) the freedom to send judicial documents, by postal channels, directly to persons abroad . . ." It is undisputed that Japan and France did not object to Article 10(a) (see Bankston v Toyota Motor Corp., 889 F2d 172, 173-174 [8th Cir 1989]; Cupp v Alberto-Culver USA, Inc., 308 F Supp 2d 873, 879-880 [WD Tenn 2004]). However, there is a clear split of authority as to whether service abroad via postal channels is permissible under Article 10(a) of the Hague Convention. Plaintiff and defendants ACL and Amada S.A. plant themselves squarely on opposite sides of this split. Plaintiff takes the position that the term "send" in Article 10(a) is intended to mean "service," and, consequently, that provision permits service abroad by registered mail. Conversely, ACL and Amada S.A. assert that Article 10(a) is not intended to provide a method of serving process on a foreign defendant but, rather, authorizes a means to send subsequent documents after service has been effected through the proper central authority. After careful review, this court adopts the view that Article 10(a) does not permit service of process upon a foreign defendant by registered mail (see Bankston, 889 F2d at 174; Charas v Sand Tech. Sys. Intl., Inc., 1992 WL 296406, 1992 US Dist LEXIS 15227 [SD NY 1992]; Zwerling v Zwerling, 167 Misc 2d 782 [Sup Ct, Queens County 1995]). Article 10(a), unlike Articles 10(b) and (c), refers to *sending* judicial documents abroad and does not encompass effecting legal service of judicial documents (emphasis added). This distinction is particularly evident by the fact that the word "service" is used in every section of the treaty that prescribes approved methods of service, with the exception of Article 10(a) (see Reynolds v Woosup Koh, 109 AD2d 97 [3d Dept 1985]; Zwerling, 167 Misc 2d at 788; Ordmandy v Lynn, 122 Misc 2d 954 [Sup Ct, Delaware County 1984]). Therefore, service of process on ACL, Amada S.A., Amada Promecam, S.A., Promecam Sisson Lehman, and

Promecam was defective under the requirements of the Hague Convention.

Plaintiff, however, has demonstrated that an extension of time to serve process on ACL, Amada S.A., Amada Promecam, S.A., Promecam Sisson Lehman, and Promecam is warranted in the interest of justice (see Citron v Schlossberg, 282 AD2d 642 [2001]). If proper service is not made upon a defendant within the prescribed 120-day period, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (CPLR 306-b). Where an extension in the interest of justice is requested, the court may consider all of the relevant factors, including due diligence, expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiff's request for the extension of time, and prejudice to the defendant (see Rosenzweig v 600 N. St., LLC, 35 AD3d 705, 705-706 [2006]). The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties (see Leader v Maroney, 97 NY2d 95 [2001]). An extension of time for service is a matter within the court's discretion (id. at 101). Although plaintiff's attempt to serve process on ACL and Amada S.A. was defective, it was made within the requisite 120-day period (see Earle v Valente, 302 AD2d 353, 354 [2003]), and plaintiff promptly moved for an extension of time to serve less than one month after the improper service. In addition, the statute of limitations expired between the time that the summons and complaint was filed and the time that it was served on defendants (see Abu-Aglein v El-Jamal, 44 AD3d 884, 885 [2007]). ACL and Amada S.A. also failed to show any prejudice if the extension is granted since they had actual notice of the action (see Chiaro v D'Angelo, 7 AD3d 746 [2004]). As such, plaintiff is permitted an extension of time to serve ACL, Amada S.A., Amada Promecam, S.A., Promecam Sisson Lehman, and Promecam by serving process on the central authority of their respective nations. In light of the above discussion, the court will not consider the remaining grounds of ACL and Amada S.A.'s motions.

The court next turns to the branch of the motion by AAI to dismiss plaintiff's complaint on the grounds that the statute of limitations expired on the second cause of action for breach of warranty. The statute of limitations applicable to a breach of warranty claim, whether express or implied, begins to run at the time the product is placed in the stream of commerce or at the time of sale by the manufacturer (see UCC 2-275; Schrader v Sunnyside Corp., 297 AD2d 369 [2002]). In this case, AAI failed to present admissible evidence demonstrating the date of the sale of

the subject metal shearing machine. In support of its motion, AAI submitted a document written in French purporting to show that the machine was sold by Promecam to Strippit, Inc. on June 2, 1986. However, the document is not accompanied by an English translation and an affidavit by a translator (CPLR 2101[b]). Therefore, the court will not consider the purported document concerning the sale of the metal shearing machine. The branch of AAI's motion to dismiss on statute of limitations grounds is, thus, denied.

The court will now address that branch of AAI's motion to dismiss plaintiff's complaint for failure to state a cause of action for negligence, breach of warranty, and strict products liability against AAI. On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see Arnav Indus. v Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 NY2d 300, 303 [2001]). Additionally, the court may consider affidavits and other evidentiary material submitted by the plaintiff to remedy any defects in the complaint (see Simmons v Edelstein, 32 AD3d 464, 465 [2006]). Liability may not be imposed for breach of warranty or strict products liability upon a party that is outside the manufacturing, selling, or distribution chain (see Park v Bay Crane, Inc., 49 AD3d 617, 618 [2008]). In support of its motion, AAI submitted an affidavit by David Kherli, the Chief Compliance Officer of AAI, stating that AAI did not manufacture, sell, or distribute the subject metal shearing machine (see Smith v New York, 133 AD2d 818, 819 [1987]). However, plaintiff argues that he has not been provided with any material discovery to determine AAI's corporate relationship with ACL, Amada S.A., or Promecam Sisson Lehman. Plaintiff's only proof that AAI is within the distributive chain of the subject shearing machine is a website printout detailing the corporate history of Amada. Since essential facts concerning AAI's corporate structure and relationship to Promecam and the other Amada defendants may exist which are within the exclusive knowledge of AAI, dismissal of the complaint against AAI would be premature at this juncture (CPLR 3211[d]; Morris v Hochman, 296 AD2d 481, 482 [2002]).

With respect to the cause of action for negligence, it is well-established that it must be shown that the defendant owes a duty to the plaintiff before a defendant may be held liable for negligence (see Spallholtz v Hampton C.F. Corp., 294 AD2d 424 [2002]). Further discovery is necessary to determine whether AAI owed a duty to the injured plaintiff with respect to the subject metal shearing machine (see Smith, 133 AD2d at 819-820).

Accordingly, that branch of plaintiff's motion to declare that service of process on defendants was timely and proper is granted only with respect to defendants Metz Machinery, Inc., Metz Machinery Moving, LVD Company, Stripplit Promecam, LVD Stripplit, Reliance Metal Fabricators, Inc., Stripplit, Inc., AAI, and Walsh-Atkinson Company, Inc. That branch of plaintiff's motion requesting an extension of time to serve process is granted as to defendants Amada Promecam, S.A., Promecam Sisson Lehman, Promecam, ACL, and Amada S.A. Plaintiff is directed to serve these defendants by serving process on the central authority of their respective nations within 60 days of the date of this order. In light of the above determination, the branches of Amada S.A. and ACL's motions to dismiss plaintiff's complaint on the ground of improper service are denied. In addition, given that plaintiff has not obtained jurisdiction over Amada Promecam, S.A., Promecam Sisson Lehman, Promecam, ACL, and Amada S.A. at this time, the branches of the motions by ACL and Amada S.A. to dismiss the complaint on grounds of statute of limitations and failure to state a cause of action are denied without prejudice. The motion to dismiss the complaint by AAI is denied in its entirety.

Dated: April 28, 2009

J.S.C.