

**Ceva Frgt. Mgt. Italia v American Emo  
Trans, Inc.**

2009 NY Slip Op 31121(U)

May 6, 2009

Supreme Court, New York County

Docket Number: 014352/08

Judge: Stephen A. Bucaria

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**AMENDED SHORT FORM ORDER**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

\_\_\_\_\_  
CEVA FREIGHT MANAGEMENT ITALIA, SRI  
d/b/a EGL, EAGLE GLOBAL LOGISTICS,

Plaintiff,

INDEX No. 014352/08

MOTION DATE: Feb. 9, 2009  
Motion Sequence # 001

-against-

AMERICAN EMO TRANS, INC.,

Defendant.  
\_\_\_\_\_

The following papers read on this motion:

Notice of Motion..... X  
Affirmation in Opposition..... X  
Reply Affirmation ..... X

This motion, by defendant, for an order pursuant to CPLR Rule 3211(a) (2, 8) to dismiss this action on the grounds that this Court lacks jurisdiction over the defendant and for such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

**FACTS**

Plaintiff CEVA Freight Management Italia, SRI d/b/a EGL, Eagle Global Logistics (hereafter "CEVA") commenced this action by filing the summons and complaint on August 4, 2008. The summons and complaint were delivered to the defendant in Charlotte, North Carolina. CEVA is an international freight forwarding company headquartered in Rodano, Italy and maintaining branch offices through affiliated entities around the world. Its primary office in the

US is in Lawrence, New York. American Emo is a full-service freight forwarder specializing in air and ocean freight importing and exporting, customs clearance, warehousing and trucking. It was incorporated under the laws of the State of North Carolina and has its principal place of business in Charlotte, North Carolina.

### **DEFENDANT'S CONTENTIONS**

American Emo argues that it does not transact any business in New York, is not authorized to transact business in New York by the New York State Division of Corporations, has never requested such authority, has no offices in New York and does not own any real property in New York. It asserts that it had never had any business relationship with CEVA, never entered into any contract with it, and has never received a bill, invoice or other claim from CEVA. It further asserts that the same is true for an entity called TNT Freight Management SRL, not designated as a plaintiff in this action, but mentioned in paragraph 3 of the complaint. American Emo contends that jurisdiction over it cannot be obtained under CPLR § 301 since it is a domiciliary corporation of North Carolina; and, similarly, attempts to obtain jurisdiction under CPLR § 302 must fail because American Emo does not transact business in new York, and the cause of action does not arise from any of the acts enumerated in CPLR § 302.

American Emo further asserts that nothing in the complaint indicates that CEVA claims to be successor in interest to Wilson or TNT; that the only website authorized by American Emo is [www.americanemotrans.com](http://www.americanemotrans.com); and the authority of any other entity to put information in about the company was not given. The defendant argues that examples of the transactions which the plaintiff argues involved shipments to, from or through New York by American Emo, are merely Wilson Logistics, Inc.'s (thereafter "Wilson") shipping advice documents for goods being shipped by Wilson in Italy, and the receipt portion (indicating New York as port of discharge) is blank. It asserts that Wilson was responsible for arranging delivery to the final destination which, in the case of each, was a location outside the state of New York; that plaintiff's attorney has not exhibited or produced any invoices between Wilson and the defendant, and it is unlikely that claims by Wilson for any charges due to it from the defendant would have survived more than a few months from their accrual under the terms of the agreement between Wilson and defendant. Several clauses provide that a dispute was to be resolved by the parties within 30 days through arbitration.

Finally, American Emo argues that plaintiff improperly served interrogatories because it failed to obtain a Court order permitting such service pursuant to CPLR § 3106.

### **PLAINTIFF'S CONTENTIONS**

The plaintiff contends that the defendant has sufficient New York presence to satisfy the

“doing business” basis for jurisdiction under CPLR § 301, at least some of the transactions between defendant American Emo and plaintiff’s corporate predecessors involved shipments to or from New York and thereby constitute a basis for exercising long-arm jurisdiction over defendant in New York under CPLR § 302. CEVA further argues that it would be improper to dismiss this action upon defendant’s self-serving averments of lack of New York presence prior to defendant’s having responded to plaintiff’s November 18, 2008 interrogatories, as to which defendant is in default, and which specifically targeted to disclose defendant’s New York contacts, and defendant has been disingenuous with the Court in arguing that it never had any dealings with CEVA when it knows that CEVA is the successor via merger and name changes to the Italian entities that American Emo did hundreds of transactions with over several years, including Wilson Logistics, Inc. and TNT.

CEVA asserts that in the course of dealing between plaintiff’s predecessors and defendant American Emo, plaintiff’s entities provided logistical services and advanced expenses in Italy and defendant provided comparable services in the US. Plaintiff’s lawsuit is based upon a running balance over several years and is substantiated by hundreds of invoices Wilson and TNT, all of which was provided to defense counsel. CEVA contends that defendant’s website lists New York as one of the locations it services, the fact that American Emo has not registered to do business in New York does not mean that it is not subject to being sued in New York, and plaintiff is at least entitled to discovery on that issue, and answers to its interrogatories before having to address this jurisdictional motion.

### DECISION

The application seeks, inter alia, “such other and further relief as this Court deems just and proper”, and in that context, while the defendant has not specifically moved for relief pursuant to CPLR § 3211 (a) (7), and plaintiff CEVA has insufficiently demonstrated its ability to bring this action, plaintiff does not state a cause of action with a documentary basis for CEVA to be a plaintiff in this action. There is no contract between the parties or any other documentation readily available to the plaintiff that supports plaintiff’s allegation that it is a successor of Wilson and TNT.

In considering a motion to dismiss a complaint for failure to state a cause of action the pleadings must be liberally construed. (See Sotomayor v. Kaufman, Malchman, Kirby & Squire, L.L.P., 252 A.D.2d 554, 675 N.Y.S.2d 894, 2<sup>nd</sup> Dept., 1998). The sole criteria is whether “from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (Guggenheimer v. Ginsburg, 43 N.Y.2d 268, 275, 1977; see also, Bovino v. Village of Wappingers Falls, 215 A.D.2d 619, 628 N.Y.2d 508, 2<sup>nd</sup> Dept., 1995). The facts pleaded are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly

contradicted by the record are not entitled to such consideration. (See Morone v. Morone, 50 N.Y.2d 481, 1980, and Gertler v. Goodgold, 107 A.D.2d 481, affd 66 N.Y.2d 946, 1<sup>st</sup> Dept., 1985).

Herein, as stated above, self-serving statements by plaintiff's attorney that CEVA is the successor via merger and name changes to Italian entities, Wilson and TNT, that American Emo did many transactions with over several years, are insufficient to demonstrate that CEVA has standing to bring a lawsuit against American Emo. While this Court is in receipt of an affidavit from the Credit Manager of the plaintiff, the factual statements averred by him are, conclusory, and unsupported by any documentation, describing a "change of name" and a merger by several entities.

"Whether a party seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when [properly] challenged, must be considered at the outset of any litigation.' Lack of standing is a legal impediment to bringing an action or, as more apropos to the instant case, a bar to having a court reach the merits of an action already commenced. It is essential, however, that a party raise the legal argument of lack of standing to sue in its answer to a complaint or in a preanswer motion to dismiss. The failure to do so is fatal in that it constitutes a waiver of this argument at all subsequent phases of the litigation."

(Gilman v. Abagnale, 235 A.D.2d 989, 990, 653 N.Y.S.2d 176, 3<sup>rd</sup> Dept., 1997) (citations omitted). Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request (See New York State Assn. Of Nurse Anesthetists v Novello, 2 N.Y.3d 207, (2004).

"The Court of Appeals has defined the standard by which standing is measured, explaining that a plaintiff, in order to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. Specifically, this ... two-part

test requires a plaintiff first to establish that he or she will actually be harmed by the challenged action, and that the injury is more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision or recognized common-law relationship pursuant to which a defendant has acted.”

(Carper v. Nussbaum, 36 A.D.3d 176, 182-183, 825 N.Y.S.2d 55, 2<sup>nd</sup> Dept., 2006).

Additionally, “[o]n CPLR § 3211 motion to dismiss, the court will ‘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.’ While affidavits may be considered, if the motion has not been converted to a CPLR § 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims.” (Nonnon v. City of New York, 9 N.Y.3d 825, 827, 2007) (citations omitted).

Herein, the relevant inquiry is whether CEVA’s status in relation to its asserted claim permits it to present the grievance for judicial review. First, the defendant has raised, in its answer as a fourth and fifth affirmative defenses, that plaintiff is not the proper party in this litigation and that plaintiff lacks the capacity to sue on the matters alleged. Therefore, it did not waive the issue of standing. Equally significant is the discussion, by the parties herein, of the standing and position of this plaintiff in this action, and proof of the plaintiff’s pedigree is lacking. Second, CEVA has failed to allege, with sufficient details, that it is a successor in interest to Wilson and TNT via merger pursuant to a certain agreement, where and when the agreement took place; and it did not submit any documents or affidavits in the support of its position. The invoices submitted by CEVA do not show the relationship between plaintiff and defendant; they merely demonstrate that there was a relationship between American Emo and Wilson, which the defendants admits as true.

Thus, the plaintiff failed to establish that it is a proper party to bring this action against the defendant inasmuch as it lacks standing and this motion is **granted**.

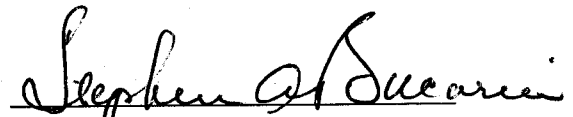
CEVA FREIGHT MANAGEMENT ITALIA, SRI

Index no. 014352/08

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated MAY 06 2009

  
XXXI J.S.C.

**ENTERED**  
MAY 08 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE