

<b>Diallo v Mill Pen Corp.</b>
2009 NY Slip Op 31796(U)
August 4, 2009
Supreme Court, New York County
Docket Number: 114093/07
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 114093/2007

**DIALLO, AISSATOU**

vs.

**MILL PEN**

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion

PAPER NUMBERED

AUG 11 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 002, 003 and 004 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that Silamos-Sociedade Industrial de Louca Metalica Campos, S.A.'s motion (motion sequence number 004) for leave to amend its answer nunc pro tunc, in the proposed form annexed to the moving papers, is granted; and it is further

ORDERED that Silamos-Sociedade Industrial de Louca metalica Campos, S.A.'s motion (motion sequence number 003) to dismiss the complaint and the cross motions as against it is granted and the complaint is hereby severed and dismissed as against Silamos-Sociedade Industrial de Louca Metalica Campos, S.A., and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that Triunfo Food Import & Export Corp.'s and Triunfo Specialty Foods Corp.'s cross motion (motion sequence number 002) seeking an award of indemnification from Silamos-Sociedade Industrial de Louca Metalica Campos, S.A. is denied; and it is further

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

ORDERED that Mill Pen Corp. d/b/a Eastern Store Equipment Co.'s and Joseph Buser d/b/a Eastern Store Equipment Co.'s motion (motion sequence number 002) for summary judgment is granted only to the extent of awarding them conditional indemnification from Triunfo Foods Import & Export Corp. and Triunfo Specialty Foods Corp.; and it is further

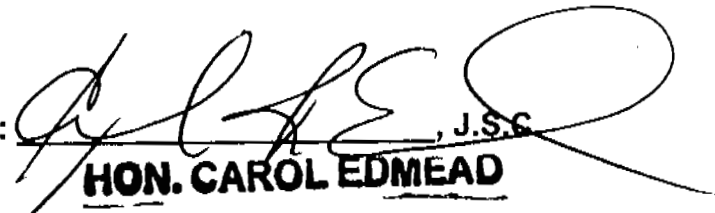
ORDERED that Mill Pen Corp. d/b/a Eastern Store Equipment Co.'s and Joseph Buser d/b/a Eastern Store Equipment Co.'s motion for summary judgment is in all other respects denied; and it is further

ORDERED that counsel for Silamos-Sociedade Industrial de Louca Metalica Campos, S.A. shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

ORDERED that the remainder of the action shall continue.

**FILED**  
AUG 11 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated 8/4/09

ENTER:  J.S.C.  
**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
AISSATOU DIALLO and IVAN ZACHARY  
BURROUGHS,

Plaintiffs,

Index No.: 114093/07

-against-

DECISION

MILL PEN CORP. d/b/a EASTERN STORE  
EQUIPMENT CO., JOSEPH BUSER d/b/a  
EASTERN STORE EQUIPMENT CO., TRIUNFO  
FOODS IMPORT & EXPORT CORP., TRIUNFO  
SPECIALTY FOODS CORP., SILAMPOS-  
SOCIEDADE INDUSTRIAL DE LOUCA METALICA  
CAMPOS, S.A.,

Defendants.

-----X  
CAROL ROBINSON EDMEAD, J.:

**FILED**  
AUG 11 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**FACTUAL BACKGROUND**

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In motion sequence number 002, defendants Mill Pen Corp. d/b/a Eastern Store Equipment Co. and Joseph Buser d/b/a Eastern Store Equipment Co. (collectively, Eastern Store) move, pursuant to CPLR 3212, for summary judgment awarding them common-law indemnification from Triunfo Foods Import & Export Corp., Triunfo Specialty Foods Corp. (collectively, Triunfo), and Silampos-Sociedade Industrial de Louca Metalica Campos, S.A. (Silampos). Triunfo cross-move for conditional summary judgment awarding them common-law indemnification from Silampos.

In motion sequence number 003, Silampos moves, pursuant to

CPLR 3212 and 302 (a) (3), to dismiss the complaint and all cross claims as against it.

In motion sequence number 004, Silamos moves for leave to amend its answer *nunc pro tunc*.

The action alleges that Aissatou Diallo (plaintiff) was injured on September 14, 2007, when food was ejected from a pressure cooker that was manufactured by Silamos, imported by Triunfo, and retailed by Eastern Store. Ivan Zachary Burroughs, plaintiff's husband, alleges a derivative cause of action for loss of consortium.

It is uncontroverted that plaintiff purchased the pressure cooker, manufactured by Silamos, a Portuguese manufacturer, from Eastern Store, a New York retailer, in April, 2007, and had used the pressure cooker four times without incident prior to the occurrence in question. Plaintiff is alleging a design or manufacturing defect in the product.

Triunfo, a New Jersey importer, received the pressure cookers from Silamos in closed boxes, which were then distributed to retailers in the same closed boxes. The closed boxes received from Silamos were never opened by Triunfo. Opp. Ex. A.

When the boxes were received by Eastern Store, Eastern Store opened some of the boxes to inspect the product. Some of the products thus inspected were placed on display. Plaintiff

testified that the pressure cooker that she purchased was a "floor model" that was on display in Eastern Store's window, and when she made the purchase, she requested the instructions and the box that the model had come in. Opp. Ex. C.

Silampos, the manufacturer, is a Portuguese company that asserts that, between the years 2005 to 2008, it never sold a pressure cooker to anyone in the state of New York. Triunfo, the importer to whom Silampos sold the pressure cookers, is a New Jersey company, the order was placed in New Jersey, and the pressure cookers were delivered to Triunfo in New Jersey. Triunfo subsequently sold the pressure cookers to Eastern Store, a New York retailer. Silampos maintains that, since it does no business in New York, does not own or rent any property in New York, and has no employees performing any work on its behalf in New York, New York lacks jurisdiction over it in this matter. Furthermore, total Silampos revenue derived from the entire United States represented 0.004% of its total sales in 2005, 0.02% of its total sales in 2006, and 0.009% of its total sales in 2007.<sup>1</sup>

In its answer to the complaint, Silampos admitted to two allegations in the complaint to the effect that it regularly conducts business in New York and that it derives substantial

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<sup>1</sup> The court instructed plaintiffs to file an action in New Jersey to avoid a potential statute of limitations problem, but, by letter dated July 21, 2009, plaintiffs advised the court that they have decided not to file such an action in New Jersey.

revenues from New York. However, Silampos also alleged a lack of jurisdiction as a defense to the action.

Silampos maintains that the admission to the two complaint allegations in its answer, in which it erroneously admitted rather than denied the allegations, was only brought to its attention in the opposition papers to its motion for summary judgment based on lack of personal jurisdiction. In response, Silampos has requested leave to amend its answer *nunc pro tunc* to rectify what it characterizes as a typographical error appearing in its answer.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

The initial issue that must be addressed is the jurisdiction of the New York court over Silampos.

CPLR 302 (a) (3) states that the New York courts may exercise long-arm jurisdiction over a non-domiciliary who:

"Commits a tortious act without the state causing injury to person or property within the state, except as a cause of action for defamation of character arising from the act, if he

(I) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

It is undisputed that plaintiff was injured in the state of New York, and so the court's inquiry must focus on the elements of subsections (I) or (ii) appearing above.

"The Legislature limited CPLR 302 (a) (3) (I) jurisdiction to extend only to those who have sufficient contacts with this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere [internal quotation marks omitted]."

*Ingraham v Carroll*, 90 NY2d 592, 597 (1997).

In the instant case, there is no showing that Silampos

"regularly does or solicits business ... in the state, or engages in any other persistent course of conduct ... in the state or derives substantial revenue from goods used or consumed or services rendered in the state [emphases in the original, internal quotation marks omitted]."

*Id.* at 597-598.

In opposition to Silampos' motion, the other parties argue

that, in its answer, Silamos admitted that it both regularly conducts business in the state and that it derives substantial revenue from the state. The opposing parties maintain that, because formal judicial admissions take the place of evidence, they constitute concessions for the purpose of litigation and cannot now be disputed. *Figueiredo v New Palace Painters Supply Co., Inc.*, 39 AD3d 363 (1<sup>st</sup> Dept 2007); *Falkowski v 81 and 3 of Watertown, Inc.*, 288 AD2d 890 (4<sup>th</sup> Dept 2001). However, Silamos asserts that the word "admits" was incorrectly typed in the answer in the place of the word "denies," and that this error is substantiated by all of the evidence gathered during the discovery process. For this reason, Silamos has moved for leave to amend its answer *nunc pro tunc* to change its responses to the two paragraphs that allege jurisdiction over it. Furthermore, Silamos points out that it did assert lack of jurisdiction in its answer as an affirmative defense.

It is not unprecedented for a court to permit a litigant leave to amend errors in its answer, withdrawing incorrect admissions, when such errors come to light during discovery. *Sumpter v 5825 Broadway LLC*, 19 AD3d 327 (1<sup>st</sup> Dept 2005). Nor is it improper for a litigant, who has preserved the defense in its answer, to assert a lack of jurisdiction after having participated in discovery and having defended the action. *Calloway v National Services Industries, Inc.*, 93 AD2d 734 (1<sup>st</sup>

Dept), *affd* 60 NY2d 906 (1983) (jurisdiction preserved in an answer allowed to be questioned six years after joinder of issue).

"If the objection is used as a defense in the answer instead of being taken by motion, it evinces the defendant's preference to defer determination of the objection until later, *perhaps until the trial itself. The plaintiff, however, may bring the issue to prompt adjudication by moving to dismiss the defense pursuant to CPLR 3211* [emphasis in the original, internal quotation marks and citations omitted]."

*Id.*

The opposing parties' objection to Silampos' motion for leave to amend its answer *nunc pro tunc* is based on a technical argument that is unsubstantiated by the facts. In fact, the opposing parties do not even attempt to challenge Silampos' assertions regarding its lack of presence in the state of New York. Not to allow Silampos to amend a clerical error in its answer under the situation here presented, thereby permitting the court to acquire jurisdiction over a non-domiciliary under circumstances not warranted by the facts of the case, would fly in the face of fair play and substantial justice, even though moved for at this late juncture in the proceedings.

Therefore, based on the foregoing, the court grants Silampos' motion for leave to amend its answer *nunc pro tunc* in the manner discussed above.

Having determined that Silampos does not meet the long-arm jurisdictional requirements of CPLR 302 (a) (3) (I), the court

must now determine whether it has acquired jurisdiction over Silampos by virtue of CPLR 302 (a) (3) (ii).

"Due process is not satisfied unless a non-domiciliary has 'minimum contacts' with the forum State. The test has come to rest on whether a defendant's conduct and connection with the forum state are such that it should reasonably anticipate being haled into court there [internal quotation marks omitted]."

*LaMarca v Pak-Mor Manufacturing Company*, 95 NY2d 210, 216 (2000).

No evidence has been submitted to indicate that Silampos had any reasonable expectation that the use of its product would have consequences in New York, and the parties do not even argue this point. Therefore, the court concludes that it lacks personal jurisdiction over non-domiciliary Silampos.

Based on the foregoing, Silampos' motion to dismiss the complaint as against it for lack of jurisdiction is granted.<sup>2</sup> As a consequence, Easter Store's motion, and Triunfo's cross motion, seeking an award of indemnification from Silampos are denied, based on the court's lack of jurisdiction over Silampos.

The last issue to be determined by the court is Eastern Store's motion for summary judgment to award them indemnification from Triunfo.

Even though there has yet to be an adjudication on the

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<sup>2</sup> The opposing parties argued that Silampos' motion should not be considered because it was not supported by an affidavit of an individual with personal knowledge, only by an attorney's affirmation. However, the attorney's affirmation was properly used to introduce supporting deposition testimony, and the motion did include the affidavit of an officer of Silampos who possessed personal knowledge of Silampos' books and accounts.

primary underlying action, the court may grant an award of conditional indemnification so that the party so indemnified may determine the extent to which it may be reimbursed. *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309 (1<sup>st</sup> Dept 2003).

It is well settled that a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product. *McDermott v City of New York*, 50 NY2d 211 (1980). However, in situations such as the one at bar, in which the court lacks jurisdiction over the manufacturer, "the party closest to the original producer [should] indemnify parties farther down the chain ... to shift the risk of loss to the most efficient accident avoider [quotation marks and citation omitted]" *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 62-63 (2d Dept 2003). Under this theory, the importer closest to the manufacturer, Triunfo, is considered to be at the top of the chain. *Id.*

Triunfo has argued that, because Eastern Store opened the closed boxes that they received from Triunfo for the purpose of inspection, and that they then placed the subject cooker on open display, a question of fact exists as to whether Eastern Store's inspection and display caused the problem with the product.

However, the underlying action is based on a theory of either a manufacturing or a design defect, and "[t]here is no evidence in the record as to any modification of the [pressure

cooker] by [Eastern Store], nor does [Triunfo] specifically assert such modification or that it resulted in the [plaintiff]'s injury." *Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 (1<sup>st</sup> Dept 2007). As a consequence, the court grants Eastern Store's motion awarding it conditional indemnification from Triunfo.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Silamos-Sociedade Industrial de Louca Metalica Campos, S.A.'s motion (motion sequence number 004) for leave to amend its answer nunc pro tunc, in the proposed form annexed to the moving papers, is granted; and it is further

ORDERED that Silamos-Sociedade Industrial de Louca metalica Campos, S.A.'s motion (motion sequence number 003) to dismiss the complaint and the cross motions as against it is granted and the complaint is hereby severed and dismissed as against Silamos-Sociedade Industrial de Louca Metalica Campos, S.A., and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that Triunfo Food Import & Export Corp.'s and Triunfo Specialty Foods Corp.'s cross motion (motion sequence number 002) seeking an award of indemnification from Silamos-Sociedade Industrial de Louca Metalica Campos, S.A. is denied; and it is further

ORDERED that Mill Pen Corp. d/b/a Eastern Store Equipment Co.'s and Joseph Buser d/b/a Eastern Store Equipment Co.'s motion (motion sequence number 002) for summary judgment is granted only to the extent of awarding them conditional indemnification from Triunfo Foods Import & Export Corp. and Triunfo Specialty Foods Corp.; and it is further

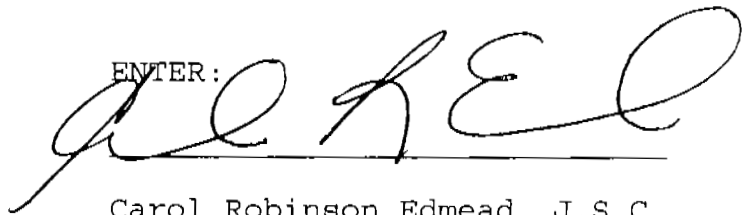
ORDERED that Mill Pen Corp. d/b/a Eastern Store Equipment Co.'s and Joseph Buser d/b/a Eastern Store Equipment Co.'s motion for summary judgment is in all other respects denied; and it is further

ORDERED that counsel for Silampos-Sociedade Industrial de Louca Metalica Campos, S.A. shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

ORDERED that the remainder of the action shall continue.

Dated: August 4, 2009

ENTER:



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

AUG 11 2009

COUNTY CLERK'S OFFICE  
NEW YORK