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SHORT FORM ORDER

INDEX # 36069-09
RETURN DATE: 1-8-09
MOT. SEQ. # 001

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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CRAIG E. FANTINE,

Plaintiff,

-against-

GALT DISPLAY RACK COMPANY, LTD. and STEEL CITY EQUIPMENT CORP.,

Defendants.

----------x

CALENDAR DATE: May 12, 2010
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:

Campbell & Miller
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Smithtown, NY 11787

DEFT'S/RESP ATTORNEY:

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Melville, NY 11747
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Attys for Steel City
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Upon the following papers numbered 1 to 24 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1-12 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 13-20 ; Replying Affidavits and supporting papers 21-24 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, Steel City Equipment Corp., to dismiss the plaintiff's action in a pre-answer motion to dismiss pursuant to CPLR §3211 (a)(8) and (a)(7) because it is not subject to New York jurisdiction, the service of the summons and complaint is jurisdictionally defective and for failure to state a cause of action is, upon due consideration, denied in its entirety.

The plaintiff is an employee of Marshalls Home Goods, Inc. (hereinafter Marshalls), located at 2200 Nesconset Highway, in Stony Brook, Suffolk County on Long Island, New York and was injured while working at the store on February 2, 2009 when an "electric rug gallery" malfunctioned causing two (2) rugs and their supporting arms to fall on him. The plaintiff thereafter commenced this action for personal injuries against Galt Display Rack Company, LTD (hereinafter Galt), the manufacturer and distributor of the machine, and Steel City Equipment Corp., (hereinafter Steel City) who is alleged to be responsible for performing the maintenance and repairs on Galt machines and is alleged to have conducted such maintenance and repairs twice in 2008 on this particular machine.

Steel City, in a pre-answer motion, now moves to dismiss the plaintiff's complaint as against it on jurisdictional grounds that (1) service was improper on it pursuant to CPLR §3211 (a)(8) because the plaintiff served the summons and complaint at its last known business address (i.e. its present address where service occurred) in Pennsylvania

and not at the registered office address in its 1994 incorporation documents filed with the Pennsylvania Secretary of State. Steel City argues that the address served at 130 Curry Hollow Road in West Mifflin, Pennsylvania is its present business address and not the address (of 4th Street and Border Street in West Elizabeth, Pennsylvania) submitted with its 1994 filing.

Steel City also contests jurisdiction claiming it does not do business in New York, does not have a systemic and continuous presence in New York and did not perform any maintenance and repair to the Galt machine but contracted the work out to JF Mechanical, Inc., an alleged independent service provider. The plaintiff disputes this claim arguing that Steel City either committed a tortious act in New York or contracted with Marshalls to supply "goods and services" in New York, billed Marshalls for the service and includes in its advertisements "a nationwide network of experienced technicians" to provide repairs and maintenance. Steel City also moves for dismissal under CPLR §3211 (a)(7) claiming a failure to state a cause of action.

For the following reasons, Steel City's motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a)(8) on jurisdictional grounds and §3211 (a)(7) for failure to state a cause of action is denied in its entirety.

Steel City's claims that jurisdiction is improper because plaintiff obtained service at its present location and address at 130 Curry Hollow Road in West Mifflin, Pennsylvania whereas when it initially registered as a business in 1994 it provided the Pennsylvania Secretary of State a registered business address of 4th Street and Border Street in West Elizabeth, Pennsylvania is both specious and legally unwarranted. Galt provided the plaintiff with Steel City's address and Steel City does not argue that its 1994 business address is still a viable address for Steel City business. Since 1994, Steel City has moved its base of operations to 130 Curry Hollow Road in West Mifflin, Pennsylvania and it does not deny that it was served with a summons and verified complaint at that address. Steel City's failure to contest the service at its present address and to argue for the need for attempted service at a now stale address merely because that address is listed in its 1994 incorporation documents is not legally compelling so as to deny the service herein or to find the service of process at its present headquarters invalid. See, ***Volt Viewtech, Inc. v. Bomzer***, 41 AD3d 326, 837 NYS2d 566 (1st Dept 2007); cf. ***J & S Construction of NY, Inc. v. Bowery, LLC***, 39 AD3d 391, 835 NYS2d 65 (1st Dept. 2007). See also, ***Labozzetta v. Fabbro***, 22 AD3d 644, 804 NYS2d 353 (2nd Dept. 2006).

CPLR §302 states the basis for establishing personal jurisdiction by acts of non-domiciliaries. The plaintiff submits as the basis for New York jurisdiction CPLR §302 subd. (A)(1) which states ... "transacts any business within the state or **contracts anywhere to supply goods or services in the state**;" (emphasis added). The Court finds that Steel City has transacted business within New York and/or has supplied a service in the state and therefore the plaintiff has shown an "articulable nexus between the business transacted and the cause of action sued upon" in New York. See, ***McGowan v. Smith***, 52 NY2d 268, 272, 437 NYS2d 643 (2000); ***Opticare Aquisition Corp. v. Castillo***, 25 AD3d 238, 804 NYS2d 84 (2nd Dept. 2005). The plaintiff was injured on a machine on which Steel City rendered

maintenance and repairs in New York, albeit by a subcontracted service provider, and thus there is arguably an "articulable nexus" with New York. In ***LaMarca v. Pak-Mor Mfg. Co.***, 95 NY2d 210, 713 NYS2d 304 (2000) the New York Court of Appeals noted:

> "In ***International Shoe Co. v. State of Wash.*** (325 US 310), the United States Supreme Court held that a state may constitutionally exercise jurisdiction over non-domiciliary defendants, provided they had 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" '... 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 reasonable anticipate being haled into court there."

In order to defeat Steel City's motion to dismiss on jurisdictional grounds under CPLR §302(a) the plaintiff is required to show that Steel City transacted business within the state or had a substantial relationship with some purposeful activity conducted within the state. In support of his position, the plaintiff submits that Steel City is Galt's named authorized servicer of its equipment and Steel City's attempts to distance itself from New York jurisdiction by claiming that it hired independent contractors to service its work is belied by the fact that it billed for the work performed in New York and hired the contractor responsible for the maintenance and service on the Galt machine, i.e. J.F. Mechanical Inc.

There is nothing contained with Steel City's papers to support the proposition that it remains outside of the jurisdiction of the New York courts. In fact, it admits that it is the authorized service representative of Galt and handles service calls about Galt equipment as "Field Installation Specialists" and the mere fact that it out sources the work to in-state service callers does not insulate it from New York jurisdiction. The plaintiff alleges that TJX, Marshalls owner, which purchased the Galt product has been advised that Steel City is the authorized representative to service such products and that then Steel City assigns a servicer. Whether Steel City calls its servicer an independent contractor or authorized servicer not related to Steel City is of little consequence, since it is Steel City who makes the ultimate decision as to whom to call or to whom to assign the service call. The designation of a service call responder, the repair representative sent and when, is all within the authority of Steel City. The fact that two (2) service calls were made on the machine which caused the plaintiff's injury and those service calls were initiated by Steel City assignments clearly puts Steel City within the statutory scheme of "**contracts anywhere to supply goods and services in the state**" (emphasis added) sufficient to confer jurisdiction. See, ***Liberatore v. Calvino***, 293 AD2d 217, 742 NYS2d 291 (1st Dept. 2002).

In ***Rabizzadeh v. Nagel Auktionen Gmbh & Co. KG***, decided July 6, 2010 [NYLJ, 7-15-2010, p.28, my distinguished colleague, Justice Marber, Supreme Court, Nassau County, recently noted

> "The totality of the nonresident defendant's activities within the forum state are considered in order to determine whether its contacts satisfy the

> 'transacting business' requirement. See, ***Longines-Wittnauer Watch Co. v. Barnes & Reinecke***, 15 NY2d 443 (1965). 'Purposeful activities are those with which a defendant through volitional acts, avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.' ***Fischbarg v. Doucet***, 9 NY3d 275 (2007), quoting ***McKee Elec. Co. v. Raulaund-Borg Co.***, 20 NY2d 377 (1967)."

Justice Marber reached a contrary result involving the purchase of an artifact over the internet from a German company. However, in this case, Steel City is not only the authorized Galt servicer as reported by Galt, but is the country wide authorized representative for Galt products requiring service and maintenance.

Finally, Steel City moves for dismissal under CPLR §3211 (a)(7) arguing that the plaintiff has failed to state a cause of action against Steel City because it is merely a middle man between the manufacturer and the repair service technician. On a motion to dismiss a complaint for legal insufficiency, the test is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action known to our law can be discerned from its averments. ***Frank v. DaimlerChrysler Corp.***, 292 AD2d 118, 741 NYS2d 9 (1st Dept. 2002); ***Gruen v. County of Suffolk***, 187 AD2d 560, 590 NYS2d 217 (2nd Dept. 1992); ***Moore v. Johnson***, 147 AD2d 621, 538 NYS2d 28 (2nd Dept. 1989); ***Conroy v. Cadillac Fairview Shopping Center Properties***, 143 AD2d 726, 533 NYS2d 446 (2nd Dept. 1988). Further, the complaint should be liberally construed in plaintiff's favor and the facts alleged in the complaint should be assumed to be true. ***P.T. Bank Central Asai v. ABN Amro Bank N.V.***, 301 AD2d 373, 754 NYS2d 245 (1st Dept. 2003); ***Palazzolo v. Herrick, Feinstein, LLP***, 298 AD2d 372, 751 NYS2d 401 (2nd Dept. 2002); ***Holly v. Pennysaver Corp.***, 98 AD2d 570, 471 NYS2d 611 (2nd Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. ***McGill v. Parker***, 179 AD2d 98, 582 NYS2d 91 (1st Dept. 1992); ***Marini v. D'Atolito***, 162 AD2d 391, 557 NYS2d 45 (1st Dept. 1990).

As noted by the Court in ***Pace v. Perk***, 81 AD2d 444, 440 NYS2d 710 (2nd Dept. 1981) with regard to a motion to dismiss pursuant to CPLR §3211,

> " Upon such a motion to dismiss a complaint for legal insufficiency, the court must assume that the allegations are true (***Denihan Enterprises v. O'Dwyer***, 302 NY 451, 458, 99 NE2d 235), and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein (***Condon v. Associated Hosp. Service of New York***, 287 NY 411, 40 NE2d 230). In making its analysis, the court is not bound by the constructions and theories of the parties (see, Siegel,

> Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:24). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action know to our law can be discerned from its averments (CPLR 3013; ***Foley v. D'Agostino***, 21 AD2d 60, 62-65, 248 NYS2d 121; ***Guggenheimer v. Ginzberg***, 43 NY2d 268, 274-275, 401 NYS2d 182, 372 NE2d 17). Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint (***Rovello v. Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314, 357 NE2d 970)."

On a motion to dismiss pursuant to CPLR §3211 (a)(7), the Court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 401 NYS2d 182 (1978); ***One Acre Inc. V. Town of Hempstead***, 215 AD2d 359, 626 NYS2d 226 (2nd Dept. 1995). While the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if the plaintiff does so, they "may be used freely to preserve inartfully pleaded, but potentially meritorious claims" (***Rovello v. Orofino Realty Co.***, supra, 635, 389 NYS2d 314, 316).

With these general principles in mind, the Court upon review of the plaintiff's complaint as alleged against Steel City, finds within the complaint a stated cause of action for negligence. While Steel City claims it is not responsible for the actions of the repair technician it sent to repair the Galt machine, the plaintiff claims otherwise and argues that Steel City is responsible for the repair technician it sends to service Galt equipment especially when it is serviced in a negligent manner causing injury. The Court need not look behind the arguments made by the plaintiff and Steel City for and against liability because the Court must only determine whether a cause of action has been pleaded, not whether it has been proven. As the Court in ***Scott v. Cooper***, 215 AD2d 368, 625 NYS2d 661 (2nd Dept. 1995) app. dis. 86 NY2d 812, 632 NYS2d 497, aptly noted:

> " The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see, ***Stukuls v. State of New York***, 42 NY2d 272, 275; ***Detmer v. Acampora***, 207 AD2d 475; ***Greenview Trading Co. V. Hershman & Leicher***, 108 AD2d 468, 470)."

Accordingly, Steel City's motion to dismiss the plaintiff's complaint in a pre-answer motion to dismiss pursuant to CPLR §3211 (a)(8) and (a)(7) is, upon due consideration, denied in its entirety. Steel City is directed to serve an answer to the summons

and verified complaint within twenty (20) days of service of a copy of this order with notice of entry thereon. Upon service of an answer, any party may seek a pre trial discovery conference with the Court by contacting the Court's Calendar Clerk and scheduling a discovery conference with the Court.

The foregoing constitutes the decision of the Court.

Dated: August 18, 2010

Ron Ferdan
J.S.C.