

**Skae Power Solutions, LLC v Rae Corp.**

2011 NY Slip Op 32856(U)

September 14, 2011

Supreme Court, New York County

Docket Number: 116310/10

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

SKAE POWER SOLUTIONS, LLC,

INDEX No. 116310/10

Plaintiff,

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

-v-

MOTION SEQ. No. 001

RAE CORPORATION, TECHNICAL SYSTEMS, INC.,  
and GIL-BAR INDUSTRIES, INC.,  
Defendants.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_.

PAPERS NUMBERED

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

1 + 5

Answering Affidavits- Exhibits \_\_\_\_\_

2 + 3

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

4

CROSS-MOTION: \_\_\_\_\_ YES  NO

**FILED**  
SEP 19 2011

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/12/11

Donna M. Mills  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION  
**DONNA M. MILLS, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
SKAE POWER SOLUTIONS, LLC,

Plaintiff,

Index No. 116310/10

-against-

RAE CORPORATION, TECHNICAL SYSTEMS, INC.,  
and GIL-BAR INDUSTRIES, INC.,

Defendants.

**FILED**

SEP 19 2011

-----X  
**Mills, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence 001, defendants RAE Corporation (RAE) and Technical Systems, Inc. (TSI) move, pursuant to CPLR 3211 (a) (8), to dismiss the complaint against them for lack of jurisdiction, or in the alternative, to stay this action, pursuant to CPLR 2201, and dismiss the first cause of action against RAE and TSI, pursuant to CPLR 3211 (a) (7), and dismiss the complaint in its entirety against TSI, pursuant to CPLR 3211 (a) (7). In motion sequence 002, defendant Gil-Bar Industries, Inc. (Gil-Bar) moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint in its entirety.

**Background**

Plaintiff Skae Power Solutions, LLC (Skae) is a New York company that provides mission-critical systems infrastructure and power-system design, installation, service, and support for its

clients. Defendant RAE is an Oklahoma-based manufacturing company. TSI is a subsidiary of RAE, which specializes in the production of engineered cooling systems. Defendant Gil-Bar is the local New York sales representative for RAE and TSI, selling custom cooling systems manufactured by RAE and TSI.

In June 2009, Skae contacted Gil-Bar seeking to purchase a commercial custom cooling system for installation at the SHA Data Center (the Data Center) in Briarcliff Manor, New York, a data center owned by one of Skae's clients. Skae provided Gil-Bar with a set of specifications for the custom cooling system needed for the Data Center (the Specifications). On July 5, 2009, Gil-Bar provided a proposal to Skae for the sale of two TSI Custom Air Cooled Chillers (the Chiller). The proposal outlined the critical requirements, performance and selection data, and scope of provisions of the Chiller, as well as a partial list of contractor responsibilities, including providing a technician to perform start-up of the Chiller (the July 5<sup>th</sup> Proposal). The July 5<sup>th</sup> Proposal quoted a price of \$830,000, which included the cost of the Chiller, the F.O.B. destination freight to the riggers yard, an extended compressor warranty, and the start-up supervision by factory personnel for 5 days on-site.

On July 13, 2009, TSI allegedly sent a proposal to Gil-Bar, which included critical requirements, performance and selection data, and scope of provisions of the Chiller, as well as a

partial list of contractor responsibilities, identical to those contained in the July 5<sup>th</sup> Proposal (July 13<sup>th</sup> Proposal). It also listed the net prices for the Chiller, an extended 3-year warranty on compressors, start-up supervision by factory personnel for 5 days on-site, and destination freight costs. Skae alleges that it did not receive a copy of the July 13<sup>th</sup> Proposal from any of the defendants.

On July 14, 2009, Skae submitted a purchase order for the "Air Cooler Chiller Package and Accessories for the SHA Data Center per the [Specifications] and [the July 5<sup>th</sup> Proposal] for the amount of \$775,000" (Purchase Order). On July 21, 2009, RAE allegedly sent Skae a letter stating that RAE could not negotiate the terms of every sales contract and products for sale were per RAE's standard terms and conditions stated in its quotation. Skae alleges that it did not receive this letter. On July 23, 2009, Gil-Bar provided Skae with a submission relating to the Purchase Order, indicating that TSI could not comply with some of the Specifications. After receiving the submission, Skae allegedly agreed to purchase the Chiller per the terms of the Specifications, subject to the technical exceptions and/or changes noted in the submission.

In December 2009, the Chiller was installed at the Data Center. A RAE/TSI representative was present during this start-up. Skae alleges that the Chiller started experiencing problems

immediately after installation, and that during the start-up, the RAE/TSI representative on-site diagnosed that a controller was defective. RAE/TSI sent a replacement controller, which was installed by a RAE/TSI employee.

In early January 2010, the Chiller was allegedly still experiencing problems. Specifically, it is alleged that the Chiller had start/stop issues, could not be automatically restarted after a power loss, and was experiencing low pressure alarms. On January 13, 2010, two RAE/TSI employees allegedly returned to the Data Center to assess and repair these problems. The problems allegedly continued with the Chiller. To assist in troubleshooting and repair, RAE/TSI employees allegedly made approximately nine more trips to the Data Center from February 2010 through July 2010.

On December 17, 2010, Skae commenced this action seeking damages for breach of express warranty and breach of contract. On March 7, 2011, RAE filed suit against Skae in the District Court of Oklahoma seeking to recover monies for unpaid parts order by Skae to repair the Chiller.

### **Analysis**

#### Motion Sequence 001

Defendants RAE and TSI argue that Skae cannot exert personal jurisdiction over them, because they are not domiciled here and are not subject to New York's long-arm jurisdiction. RAE and TSI

assert that they are not registered to do business in New York, have no employees, agents, addresses, telephone numbers, bank accounts, and post office boxes in New York, and their New York contracts specify that equipment is sold "F.O.B. Oklahoma," meaning that the equipment is delivered at RAE's loading dock in Pryor, Oklahoma.

CPLR 302 (a) (1) provides that a court may exercise personal jurisdiction over a non-domiciliary that "transacts any business within the state or contracts anywhere to supply goods or services in the state." This is a "single act statute," meaning that proof of one transaction in New York is sufficient to invoke jurisdiction as long as the defendant's activities in New York "were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). Further, in addition to satisfying the statutory requirements, to satisfy the Due Process Clause of the United States Constitution, the "basis of the exercise of long-arm jurisdiction must be a defendant's minimum contacts with the state and must comport with traditional notions of fair play and substantial justice." *Liberatore v Calvino*, 293 AD2d 217, 220 (1<sup>st</sup> Dept 2002) (internal quotations and citations omitted).

Skae has made a prima facie showing that personal jurisdiction exists. See *Opticare Acquisition Corp. v Castillo*,

obligation to do so. *Id.* Therefore, RAE and TSI's motion to dismiss for lack of jurisdiction is denied.

In the alternative, RAE and TSI move to stay this proceeding, and to dismiss the first cause of action against RAE and the complaint in its entirety against TSI.

The motion to stay this action is denied. The action pending in Oklahoma, while involving some of the same parties, does not involve the same claims. The Oklahoma action was commenced by RAE against Skae seeking to recover monies for unpaid parts ordered by Skae to repair the Chiller. It does not involve the contract and express warranty at issue in this action. Any findings in the Oklahoma action as to whether Skae owed money for parts ordered outside of the contract at issue here would not pose a risk of inconsistent rulings, nor are there overlapping issues and common questions of fact. See *American Intl. Group, Inc. v Greenberg*, 60 AD3d 483, 484 (1<sup>st</sup> Dept 2009); *Belopolsky v Renew Data Corp.*, 41 AD3d 322, 322-323 (1<sup>st</sup> Dept 2007).

RAE and TSI also argue that the first cause of action for breach of express warranty must be dismissed for failure to state a claim. To state a claim for breach of express warranty, plaintiff must allege that "(1) plaintiff and defendant entered into a contract; (2) containing an express warranty by the defendant with respect to a material fact; (3) which warranty was

part of the basis of the bargain; and (4) the express warranty was breached by defendant." *LaSalle Bank Natl. Assn. v Merrill Lynch Mtge. Lending, Inc.*, 2007 WL 2324052, at \*8, 2007 US Dist LEXIS 59303, \*23 (SD NY 2007) (internal quotations and citation omitted).

Here, Skae has alleged that (1) there was a contract between it and RAE and TSI; (2) the contract contained an express warranty that the Chiller sold shall be free of defects in material and workmanship; (3) that the warranty was part of the basis of the bargain and relied on by Skae; and (4) the express warranty was breached because the Chiller was not free from defects.

RAE and TSI argue that Skae simply alleging the broad term "defects" is not sufficient. However, when deciding whether to grant a motion to dismiss pursuant to CPLR 3211, a court must not only accept the allegations asserted within the complaint as true, but also accord the plaintiff the benefit of every possible inference. *Samiento v World Yacht Inc.*, 10 NY3d 70, 79 (2008). The court need only determine whether the facts as alleged fit within any cognizable legal theory. *Id.* Here, while the complaint does not detail the specific defects, it, at this juncture, sufficiently alleges each element of this cause of action to survive a motion to dismiss pursuant to CPLR 3211 (a) (7).

TSI also moves to dismiss the second cause of action for breach of contract on the ground that it is not a party to the contract on which Skae has sued. TSI argues that the contract was between RAE and Skae. Reviewing the complaint on its face, Skae has alleged that the contract was between it and all the defendants, and from the documentary evidence submitted with this motion, it is not clear whether TSI is a party to the contract. While part of the alleged contract identified RAE as the seller, the July 5<sup>th</sup> Proposal, which is alleged to be part of the contract, was from TSI. In fact, the July 13<sup>th</sup> Proposal that RAE and TSI allege was sent to Skae was from TSI on TSI letterhead. Further, in the Oklahoma action, RAE alleges in its complaint that on July 21, 2009, Skae entered into a contract to purchase the Chiller from TSI. Thus, by its own admission in its pleading, it appears TSI is a party to the contract. Therefore, at this early stage, the court denies TSI's motion to dismiss the complaint against it.

Motion Sequence 002

Defendant Gil-Bar asserts that the complaint must be dismissed in its entirety against it, because Gil-Bar is not a party to the contract for the Chiller, and, thus, cannot be liable for breach of contract and breach of express warranty. Once again, reviewing the complaint on its face, Skae has alleged that the contract was between it and all the defendants,

including Gil-Bar. Just as it was not clear whether TSI is a party to the contract, from the documentary evidence submitted with this motion, it is not clear whether Gil-Bar is a party to the contract.

The July 5<sup>th</sup> Proposal, sent from Gil-Bar to Skae, lists the terms and agreements of sale (Terms and Agreements). The Terms and Agreements specifically states that if an order is awarded to Gil-Bar as a result of the proposal, it will be accepted based on the Terms and Conditions, as well as those of the undefined equipment manufacturer, implying that the buyer would be agreeing to Terms and Conditions set forth by Gil-Bar. The Terms and Conditions also provides an express warranty from Gil-Bar and the equipment manufacturer, and that the purchaser cannot cancel the contract without prior written consent from Gil-Bar and/or the manufacturer. These Terms and Conditions evidence that Gil-Bar may, in fact, be a party to the contract and included an express warranty in that contract.

Although Gil-Bar argues that, after the proposals were made, the transaction became a direct purchase from the manufacturer and not Gil-Bar, this allegation is not enough to dismiss the complaint. Accepting the allegations asserted by Skae as true, and according it the benefit of every possible inference (*Samiento v World Yacht Inc.*, 10 NY3d at 79 [2008]), the court denies Gil-Bar's motion to dismiss the complaint against it.

Accordingly it is

ORDERED that defendants RAE Corporation and Technical Systems, Inc.'s motion to dismiss (seq. no. 001) is denied; and it is further

ORDERED that defendant Gil-Bar Industries, Inc.'s motion (seq. no. 002) to dismiss is denied.

Dated: September 14, 2011

ENTER:



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J.S.C.

DONNA M. MILLS, J.S.C.

**FILED**

SEP 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE