

Shkreli v Bodum USA, Inc.

2012 NY Slip Op 31955(U)

July 16, 2012

Supreme Court, New York County

Docket Number: 116789/2009

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 116789/2009
SHKRELI, ASIA
vs
BODUM
Sequence Number : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying memorandum decision.*

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

FILED
JUL 23 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/16/12

[Signature], J.S.C.
SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
ASIA SHKRELI, an infant by her mother and natural
guardian, JENNIFER JONES, and JENNIFER JONES,
individually,

Plaintiffs,

Index No.: 116789/2009
Submission Date: 6/8/2012

-against-

BODUM USA, INC. and BODUM AG,

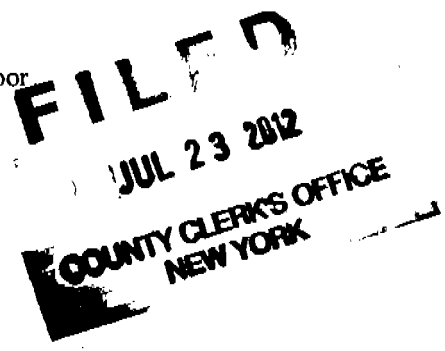
DECISION AND ORDER

Defendants.

-----X

For Plaintiffs:
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212-385-9300

For Defendant:
Robin, Harris, King & Fodera
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Papers considered in review of this motion to dismiss:

Notice of Motion	1
Mem of Law in Support of Motion	2

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, Asia Shkreli, an infant represented by her mother and natural guardian, Jennifer Jones, and Jennifer Jones, individually (collectively “plaintiffs”) move for a default judgment against defendant Bodum AG.

Plaintiffs filed the summons and complaint against defendant Bodum USA on November 29, 2009. Bodum USA subsequently answered the complaint on December 29, 2009. During discovery, plaintiffs identified Bodum AG as the manufacturer of the coffee maker at issue and on September 29, 2011 plaintiffs filed an amended summons and

complaint to include the additional defendant. Plaintiffs served the amended summons and complaint upon Martin Polsky (“Polsky”), Chief Financial Officer of Bodum USA, who plaintiffs argue is an authorized agent of both Bodum USA and Bodum AG. At the time of service, Polsky denied the ability to accept service on behalf of Bodum AG. To date, defendant Bodum AG has failed to answer the complaint.

Plaintiffs now move for default judgment pursuant to CPLR 3215 based on Bodum AG’s failure to answer the complaint. Plaintiffs argue that their affidavits of service are proper, and assert that service on Polsky is sufficient because Bodum USA is a representative of Bodum AG in New York City. Plaintiffs proffer several publications to illustrate the alleged relationship between Bodum USA and Bodum AG. Specifically, plaintiffs reference Bodum AG’s website listing the address for Bodum USA, a Wall Street Journal article referring to Bodum USA as a “unit of Bodum AG,” and a Business Week corporate profile listing various locations of Bodum AG’s businesses including the Bodum USA office in New York City.

Discussion

Under CPLR 3215 an application for default judgment must include proof of service of the summons, including a complaint or CPLR 305 (b) notice, proof of the claim and proof of the default. CPLR 3215(f); *see also* Siegel, New York Practice, sec. 295 (4th ed. 2005). While normally service on a foreign entity is governed by the international service procedure outlined in the Hague Convention, the Hague Convention

[* 4]
does not apply when service was made in this country under governing state laws.

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 694 (1988).

BCL § 307, which governs service on companies not authorized to do business in New York, requires that the summons and complaint must be made on the Secretary of State as an agent. *See Stewart v. Volkswagen of Am., Inc.*, 81 N.Y.2d 203, 208 (1993).

Pursuant to BCL § 307, a party must first serve the Secretary of State, and then either deliver personally a copy of the process to the foreign corporation or send a copy of the process by registered mail with return receipt or to corporation's last registered address. *Stewart*, 81 N.Y.2d at 205. However, where a "subsidiary corporation is so dominated by its parent corporation that it is acting as a 'mere department' of the parent, the subsidiary represents the parent for purposes of service of summons." *Low v. Bayerische Motoren Werke, A.G.*, 88 A.D.2d 504, 506 (1st Dept. 1982). Here, because plaintiffs have failed to serve the Secretary of State, service of process was improper regardless of whether Bodum USA is so dominated by Bodum AG that it may represent Bodum AG for purposes of service of process. BCL § 307 applies here because Bodum AG is a foreign corporation not included on New York State Department's list of corporations authorized to do business in New York.

In any case, plaintiffs have not shown that Bodum USA may accept service for Bodum USA. Plaintiffs have provided no conclusive evidence of the relationship between Bodum AG and Bodum USA to illustrate a necessary level of control or business interplay. The fact that the Bodum company website lists both locations and the Wall

[5]
Street Journal identifies Bodum USA as a "unit" of Bodum AG is insufficient. Further, plaintiffs have provided no specific details about the corporate ownership, distribution of responsibility, or levels of communication between the companies. *See Derso v. Volkswagen of America Inc.*, 159 A.D.2d 937-38 (3rd Dept. 1990).

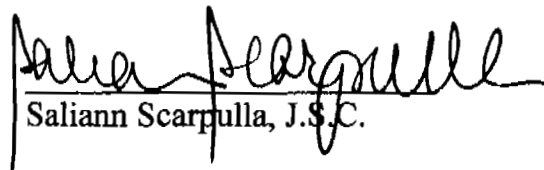
In accordance with the foregoing, it is

ORDERED that the motion by plaintiffs Asia Shkreli, an infant by her mother and natural guardian, Jennifer Jones, and Jennifer Jones, individually for default judgment against the defendant Bodum AG is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 16 2012

ENTER:


Saliann Scarpulla, J.S.C.

FILED
JUL 23 2012
COUNTY CLERK'S OFFICE
NEW YORK