

Finerty v Abex Corp.
2013 NY Slip Op 31077(U)
May 15, 2013
Supreme Court, New York County
Docket Number: 190187/10
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30

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RAYMOND FINERTY and MARY FINERTY,

Plaintiffs,

Index No. 190187/10
Motion Seq. 007, 008, 009, 010

-against-

DECISION AND ORDER

ABEX CORPORATION, et al.,

Defendants.

FILED

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SHERRY KLEIN HEITLER, J.:

MAY 17 2013

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence Nos. 007, 008, 009, and 010 are consolidated for disposition herein.

In motion sequences Nos. 008 and 009, defendants Henry Ford & Son, Ltd. ("Ford Ireland") and Ford Motor Company, Ltd. ("Ford England") (collectively, "Defendants") respectively move pursuant to CPLR 3211(a)(8) to dismiss the complaint against each of them for lack of personal jurisdiction. In motion sequence Nos. 007 and 010, Ford Ireland and Ford England respectively move pursuant to CPLR 3103(a) for a protective order staying all discovery as to each of them until their motions to dismiss are addressed.

Raymond Finerty was diagnosed with mesothelioma on December 30, 2009. He and his wife Mary Finerty ("Plaintiffs") commenced this action on April 22, 2012 to recover for personal injuries sustained in connection with his alleged asbestos exposure. Plaintiffs allege, among other things, that Defendants' asbestos containing products caused or contributed to Mr. Finerty's injuries.

Mr. Finerty was born in Ireland. He testified¹ that during the 1970's and early 1980's he worked as a mechanic and was exposed to asbestos containing products from cars, tractors and

¹ Mr. Finerty was deposed over the course of five days in June and August of 2010. His videotaped deposition was taken on May 26, 2011. The transcripts are submitted by the parties as part of their papers on this motion.

associated replacement parts. Mr. Finerty emigrated to the United States in 1985. He has lived in Queens, New York with his family for almost 30 years.

Defendants each argue that they are entitled to dismissal for lack of personal jurisdiction because neither conducts business or has a presence in New York and the only place where Mr. Finerty's alleged exposures to asbestos from their products occurred is Ireland. Thus, Defendants assert there lacks any nexus to New York sufficient for jurisdiction to attach. In opposition, Plaintiffs contend that Ford England is or was present and doing business in New York through a host of dealers and agents and that their independent investigation reveals that both Defendants are mere departments of Ford Motor Company ("Ford USA") and can be sued in New York because Ford USA is present and doing business here. Plaintiffs seek jurisdictional discovery pursuant to CPLR 3211(d).²

DISCUSSION

To oppose a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff must demonstrate a *prima facie* basis for the exercise of personal jurisdiction. *Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 325 (1980); *see also O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 (1st Dept 2003) ("[T]he burden rests on plaintiff as the party asserting jurisdiction. . .") This means the plaintiff must allege jurisdictional contacts that, if proven, would be sufficient to demonstrate that the exercise of personal jurisdiction would be proper under either New York's

² CPLR 3211(d), entitled "Facts unavailable to opposing party", provides:

"Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just."

general jurisdiction statute (CPLR 301) or New York's long-arm statute (CPLR 302), and that the exercise of jurisdiction comports with the constitutional limits of due process. *See LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210 (2000).

A *prima facie* showing of jurisdiction is not required on a CPLR 3211(a)(8) motion to dismiss, however, where essential jurisdictional facts in the exclusive control of the defendant may exist that are not yet known to the plaintiff. In this regard, the court will allow jurisdictional discovery if the plaintiff has made a "sufficient start" and "shown [its] position not to be frivolous." *Peterson v Spartan Indus.*, 33 NY2d 463, 467 (1974); *see* CPLR 3211(d). However, a "party's mere invocation of CPLR 3211(d) is not, by itself, enough to defeat" a CPLR 3211(a)(8) motion to dismiss. *Mandel v Busch Entertainment Corp.*, 215 AD2d 455, 455 (2d Dept 1995). The plaintiff must offer some tangible evidence to show that jurisdiction may exist.

I. Ford Ireland

Ford Ireland was founded in 1917 in Cork, Ireland by Henry, Clara, and Edsel Ford. According to former Managing Director Edwin J. Nolan³, the company was named Henry Ford & Son, Ltd. because founder Henry Ford wished to expand Ford USA to Europe but could not obtain approval from Ford USA's board of directors. He thus founded the company as a private venture for himself and his children. Ford Ireland's Cork plant initially manufactured tractors to be sold exclusively in Ireland. In 1922, tractor production ceased and the company's primary focus became the assembly of motor vehicles. The majority of these vehicles were sold in Ireland and the United Kingdom, except for a small number that were sold to Ford USA in the early 1960's. Ford Ireland ceased the production of motor vehicles at its Cork Plant in 1984 after 65 years of operation.

³ Mr. Nolan's affidavit, sworn to May 18, 2012, is submitted as exhibit B to Ford Ireland's moving papers.

Today, Ford Ireland continues to import and sell motor vehicles through its dealers in Ireland.

Mr. Nolan avers that Ford Ireland has never conducted business in New York State, has never made any sales in New York, has never been licensed to do business in New York, has no office, sales personnel, property, or banks accounts in New York, and does not have an agent for service of process here. Ford Ireland also submits an affidavit, sworn to September 23, 2010, by Corey MacGillivray,⁴ Counsel with Ford USA's Corporate Practice Group since 1995, to support its argument on this motion that Ford Ireland maintains its own books, records, financial statements, and bank accounts separate and apart from Ford USA. The two companies purportedly are managed by different boards of directors, without an overlap, and purportedly file separate public disclosure statements in Ireland and the United States, respectively.

That a parent corporation does business in New York does not automatically give rise to personal jurisdiction over its foreign subsidiaries. *Delagi v Volkswagenwerk AG of Wolfsburg*, 29 NY2d 426, 432 (1972); *see also FIMBank P.L.C. v Woori Fin. Holdings Co. LTD.*, 2013 N.Y. App. Div. LEXIS 1972 (1st Dept 2013). However, the relationship between a parent and its subsidiary may provide a basis for the exercise of such jurisdiction if the foreign corporation is shown to be an agent of the domestic corporation, (*see Frummer v Hilton Hotels Int'l, Inc.*, 19 NY2d 533, 537, *cert. den.* 389 US 923 [1967]),⁵ or where the parent's control over the subsidiary is so pervasive that the corporate separation is a mere formality, (*Taca Intl. Airlines v Rolls-Royce of England*, 15 NY2d 97,

⁴ Mr. MacGillivray's affidavit is submitted as exhibit A to Ford Ireland's reply brief.

⁵ In *Frummer*, the Court of Appeals held that Hilton Hotels Ltd., a British corporation, was "doing business" in New York because Hilton Reservation Service, a corporation with offices and a bank account in New York, was owned in common by Hilton Hotels Corp. and Hilton Hotels International, as to which Hilton Reservations Service was operated on a non-profit basis for the benefit of Hilton Hotels Ltd.

99-102 [1965]).⁶ Both theories “sound in corporate presence doctrine” and “examine the relationship between a New York entity and a non-New York entity over which personal jurisdiction is sought in order to determine whether the non-New York entity is doing business in New York.”

Arbeeny v Kennedy Exec. Search, Inc., 31 Misc. 3d 494, 497 (Sup. Ct. NY. Co. 2011, Bransten, J.)

Courts weigh several factors to determine whether a foreign subsidiary is a mere department of a domestic parent, to wit: (1) common ownership and the presence of an interlocking directorate and executive staff; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities; and (4) the degree of the parent’s control over the subsidiary’s marketing and operational policies. See *Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117, 120-122 (2d Cir. 1984).

Under *Taca, supra*, Plaintiffs argue that since Ford Ireland is a mere department of Ford USA, which does business in New York, Ford Ireland is “present” in New York for purposes of CPLR 301. In this regard, Plaintiffs submit a printout from a Ford USA information website © 2012 which describes Ford Ireland as a “division” of Ford USA (Plaintiffs’ exhibit 14). Plaintiffs also submit Ford USA’s 2010 Annual Report which includes sales and revenue from throughout Europe as part of Ford USA’s profit/loss statements (Plaintiffs’ exhibit 6) and Ford USA’s 2011 Annual Report which highlights its “One Ford”, “One Team”, “One Plan”, and “One Goal” as its global motto and operating philosophy. Under this “four point business plan”, the company

⁶ In *Taca*, the plaintiff successfully asserted personal jurisdiction in New York over Rolls-Royce, which manufactured aircraft engines in England, on the basis of the presence of its subsidiary in New York. The court found that the subsidiary and parent had common executive officers and directors, executives of both companies met frequently to discuss policy, employees were trained in England by the parent, marketing materials were prepared by the parent, warranties were extended directly to the ultimate customer by the parent, and the parent financed the subsidiary’s inventory.

“encourages . . . a single global approach . . . optimizing their collective strengths worldwide.” *Id.*

Ford Ireland contends these facts establish nothing more than a traditional parent-subsidary relationship and constitute only a threshold inquiry in the “mere department” analysis. To the contrary, I find that the facts implicate the first and fourth *Volkswagenwerk* factors, to wit, commonality of ownership and the degree to which Ford USA may control Ford Ireland’s marketing and operational policies. While there appears to be little factual basis for a determination on the remaining *Volkswagenwerk* factors, at this stage Ford Ireland’s own submissions that it is a wholly independent subsidiary are unpersuasive. The affidavits of Messrs. Nolan and MacGillivray recite broad based conclusory facts but no specific information with respect to Ford Ireland’s business, and contain no documentary support such as the company’s disclosure statements, independent annual financial reports, or advertising materials.

II. Ford England

Ford England was founded on December 7, 1928.⁷ Ford England alleges that it has never sold its products in New York, does not solicit business in New York, and has never been licensed to do business in New York. It purportedly does not maintain a business address or telephone in New York, and does not have any employees in New York.⁸

Plaintiffs argue that Ford England’s history involved an elaborate and comprehensive network of dealers selling its motor vehicles throughout New York State. In support Plaintiffs

⁷ According to Charles Clive Page, Ford England’s Company Secretary, Ford England is an English registered limited liability company that is wholly owned by Blue Oval Holdings, an English corporation. Mr. Page purports that Blue Oval Holdings is owned by Ford International Capital LLC, a Delaware limited liability company, which in turn is owned by Ford USA. (See Supplemental Affidavit of Clive Charles Page, sworn to January 30, 2013, submitted as exhibit A to Ford England’s Reply brief.)

⁸ See Affidavit of Charles Clive Page, Ford England’s Company Secretary, sworn to August 13, 2013, submitted as exhibit B to Ford England’s moving papers.

submit an undated advertisement entitled "Europe in Comfort", which shows that over 50% of Ford England's products were exported overseas, including to the United States. It further specifies that their cars were "shipped back to USA from England free of extra cost" and were "sold and serviced through selected dealers of Ford Motor Company, Dearborn, Mich." A second undated advertisement, captioned "they're new! . . . they're from Britain! . . . they're the best of the imports! . . . and best of all, each is a FORD product" shows that Ford England utilized at least 40 authorized dealers which sold and serviced their products throughout New York State.⁹

Plaintiffs have also raised questions concerning Ford England's presence in New York in light of its relationship with Ford USA. Plaintiffs show that Ford USA guaranteed Ford England's \$698 million loan from the British government to upgrade its English factories (Plaintiffs' exhibit 3, p. 58), and that in 1965 Henry Ford II, Chairman of the Board of Ford USA, established an Overseas Automotive Operations Division to which the Group Executive for Ford England was to directly report (plaintiff's exhibit 7). Ford USA's approval was required with respect to the appointment of directors and officers, and the appearance, design, and packaging of replacement parts for Ford England (Plaintiffs' exhibit 8). Also compelling is that Ford USA micro-managed Ford England's planned expansion of its facilities in Cork, Ireland; Plaintiffs' exhibit 10 shows that Ford USA not only commented on Ford England's plans but had to approve them before any construction could begin. Ford USA's architectural engineer was involved in all aspects of the planning process, including which engineering firms would be used, how the contract would be drafted, and the makeup and timetable of the construction schedule.

⁹ These two advertisements were submitted as attachments to Plaintiffs' sur-reply, dated March 1, 2013.

CONCLUSION

In light of the foregoing, I find that Plaintiffs have made a sufficient start to warrant jurisdictional discovery concerning the relationship between the Defendants and Ford USA, and the extent to which they may have done business in the United States, either directly or through agents. Accordingly, in the exercise of discretion, it is hereby

ORDERED that the issue of jurisdictional discovery is referred to the NYCAL Special Master, who shall schedule and oversee such discovery consistent with this decision and order; and it is further

ORDERED that motion sequences Nos. 008 and 009 by Ford Ireland and Ford England to dismiss for lack of personal jurisdiction are hereby marked off this court's motion calendar with leave to reinstate by letter upon 10 days' notice to the court and the parties following the completion of discovery as overseen by the Special Master; and it is further

ORDERED that motion sequence Nos. 007 and 010 by Ford Ireland and Ford England to stay discovery are hereby denied as moot; and it is further

ORDERED that the parties are directed to contact the Special Master with regard hereto no later than 10 days from the date of this decision and order.

This is the decision and order of the court.

DATED: 5.15.13

FILED
MAY 17 2013
NEW YORK
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SHERRY KLEIN HEITLER
J.S.C.