

<b>Ortiz v Food Mach. of Am., Inc.</b>
2014 NY Slip Op 31868(U)
May 20, 2014
Supreme Court, Bronx County
Docket Number: 3041656/13
Judge: Wilma Guzman
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PART 07

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

-----X  
**ORTIZ, RAFAEL GALVEZ**

Index No. **0501656/2013**

-against-

Hon. **WILMA GUZMAN**,

**FOOD MACHINERY OF AMERICA**  
-----X

Justice.

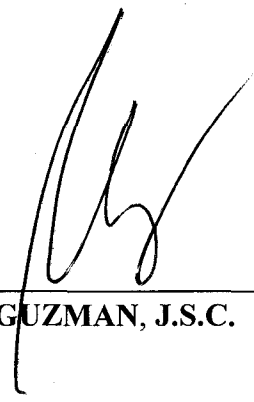
The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **DISMISSAL**  
Noticed on **September 19 2013** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *Motion is decided in accordance with the attached decision and order.*

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 5/20/14

Hon.   
**WILMA GUZMAN, J.S.C.**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IAS 7**

Index No.301656/13  
Motion Calendar No.15  
Motion Sequence No 3/10/14

\_\_\_\_\_  
RAFAEL GALVEZ ORTIZ,

Plaintiff,

-against-

FOOD MACHINERY OF AMERICA, INC.,

Defendant.

**DECISION/ ORDER**

**Present:**

**Hon. Wilma Guzman**

Justice Supreme Court

\_\_\_\_\_  
FOOD MACHINERY OF AMERICA, INC.,

Third Party Plaintiff,

-against-

UNION SQUARE RESTAURANT GROUP, LLC.  
d/b/a MAOZ VEGETARIAN RESTAURANT,  
MAOZ VEGETARIAN U.S.A., INC., LA MINERVA  
OMEGA GROUP SRL, and MARK'S  
RESTAURANT EQUIPMENT, CORP.,

Third Party Defendants.

\_\_\_\_\_  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to Dismiss  
Complaint

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed .....</b>	
<b>Order to Show Cause and Affidavits Annexed .....</b>	
<b>Answering Affidavits and Cross Motion.....</b>	
<b>Replying Affidavits .....</b>	

*Upon the foregoing papers, and after due deliberation, following oral argument, the  
Decision/Order on this Motion is as follows:*

Third party defendant LA MINERVA OMEGA GROUP SRL, (hereinafter referred to as  
“Minerva”) moves this Court pursuant to C.P.L.R. § 3211(a)(8) for an Order dismissing the third-  
party plaintiff, FOOD MACHINERY OF AMERICA, INC. (hereinafter referred to as “FMA”)’s  
complaint on basis of lack of jurisdiction. Plaintiff ORTIZ, third-party plaintiff FMA, third-party  
defendants UNION SQUARE RESTAURANT GROUP, LLC d/b/a MAOZ VEGETARIAN

RESTAURANT (hereinafter referred to as "Maoz") and MARK'S RESTAURANT EQUIPMENT CORP.,(hereinafter referred to as "Mark's") submitted written opposition.

This products liability case arises from an accident that occurred on or about July 22, 2012 at Maoz Vegetarian Restaurant in the City and State of New York, when plaintiff Ortiz allegedly injured himself while operating a meat grinder. The subject meat grinder, serial number 06.0270, was allegedly sold and shipped on or about June 23, 2006 by third-party defendant Minerva, a restaurant equipment manufacturer in Bologna, Italy, to Omcan Manufacturing & Distributing company ("OMCAN"), a restaurant equipment distributor located in Ontario, Canada. OMCAN allegedly sold and redistributed the meat grinder to defendant and third-party plaintiff FMA, located in Niagara Falls, New York. FMA then subsequently sold the subject grinder to Mark's restaurant supply, located in New York City, New York, after which it was then allegedly bought by plaintiff Ortiz's employer, Maoz restaurant franchise located in New York City, New York.

The action for the recovery of damages was commenced by the plaintiff by filing of a Summons and Verified Complaint with the County Clerk on or about March 11, 2013. Third-party plaintiff FMA commenced action against third-party defendants on or about March 20, 2013.

In support for the motion to dismiss claims against it, third-party defendant Minerva submits inter alia, copies of all pleadings, affidavit of merit by Minerva board member Daniele Salati Chiodini accompanied with Italian translation of the said document, and a copy of an invoice describing the sale and shipment of the subject meat grinder from Minerva to OMCAN.

Minerva alleges that this Court lacks in personam jurisdiction over it in this third-party action pursuant to C.P.L.R. §301 and 302. In his affidavit sworn on August 23, 2013, Daniele Salati Chiodini states that Minerva is an Italian restaurant equipment manufacturer located and registered to do business in Bologna, Italy. According to his affidavit and the copy of the transaction invoice #1.429, Minerva sold the subject meat grinder to OMCAN, Canada and took delivery of the product on or about June 23, 2006. Mr. Chiodini further alleges that Minerva had no knowledge of OMCAN's marketing outreach or intentions to transport the product. Furthermore, Minerva does not conduct business in New York, has had no contact with FMA/OMCAN's office in Niagara Falls, New York, does not transact business in New York, sell its products directly nor with knowledge that they may end up in New York, does not have or never maintained an office and/or business address in New York, is not registered, authorized or qualified to do business in New York, has no

employees or agents in New York, has nor has ever maintained a bank account in New York, and does not derive revenue from New York. Furthermore, Mr. Chiodini alleges that Minerva's interactive website, [www.laminerva.it](http://www.laminerva.it), is not directed at either the United States or the State of New York, and Minerva did not and has not implemented any marketing or sales campaigns in New York or directed towards New York.

In opposition to Minerva's motion to dismiss, plaintiff Ortiz, third-party plaintiff and defendant FMA, defendants Maoz and Mark's submitted written opposition.

Plaintiff Ortiz submits inter alia, a copy of an invoice from OMCAN/FMA Niagara Falls, New York to Mark's Restaurant Supply (Mark's) dated April 13, 2007 describing the sale of the subject meat grinder, screenshot images of OMCAN's and its subsidiary company FMA's websites, copies of images of Minerva's website, and plaintiff's Bill of Particulars.

Plaintiff Ortiz alleges that New York has personal jurisdiction over Minerva under C.P.L.R. §§302(a)(1), 302(a)(3)(i) and 302(a)(3)(ii). Plaintiff establishes in their opposition that OMCAN had two companies conducting business in two locations; one in Canada and a subsidiary company (FMA) in Niagara Falls, NY, and that both companies bought and sold restaurant equipment. Plaintiff also establishes that OMCAN/FMA (Niagara Falls, New York) sold the subject meat grinder to Mark's restaurant. Furthermore, plaintiff claims that Minerva should have known and reasonably expected that the subject meat grinder that was sold to OMCAN in Canada could end up in New York's stream of commerce and/or have consequences in New York. Plaintiff also alleges that they had no sufficient amount of time to obtain full and complete details of Minerva's business activities in the State of New York due to incomplete discovery.

Third-party plaintiff FMA submits inter alia, affidavit of Tarcisio Nella, the president of FMA, copy of the service for the complaint upon Minerva with English language translation and translator's affidavit.

FMA asserts in their opposition that New York State has jurisdiction for Minerva pursuant to C.P.L.R. §§302(a)(1) and 302(a)(3)(ii), and that 1) Minerva's motion to dismiss is untimely pursuant to C.P.L.R. §3211(a); and 2) Minerva's board member Mr. Chiodini's affidavit is inadmissible due to it lacking statutorily-required translator affidavit pursuant to C.P.L.R. §2101(b).

Mr. Nella states in his affidavit sworn on September 12, 2013, that he has been employed as the president of FMA since 1984, and that the FMA is owned by Nella family. FMA's principal

place of business is in Niagara Falls, New York. According to his testimony, FMA had been conducting business directly with Minerva from 1984 until 1992, when OMCAN was established in Ontario, Canada. Mr. Nella states that since 1992, FMA began purchasing products through OMCAN, Canada, and he had informed Minerva that their products would still end up in New York. Furthermore, Mr. Nella claims that he had personally met and talked via telephone with Minerva's owners and representatives about sales and service relating to New York State. Starting in 2012, FMA started doing business under the name 'OMCAN' in the United States.

Third-party plaintiff FMA further alleges that the mere existence of Minerva's interactive website where customers can contact the company's representatives and place orders rises to the level of transacting business under C.P.L.R. §302(a)(1) irrespective of whether or not the website targets any specific audience and in this case, New York State.

Defendants Maoz and Mark's adopt third-party plaintiff FMA's arguments in their opposition. In addition, Mark's submits an affidavit of merit by Mark Nourieli, the president and owner of Mark's accompanied with a copy of invoice of the sale of the subject meat grinder.

Mr. Nourieli asserts in his affidavit sworn on February 26, 2014 that Mark's had purchased the subject meat grinder from FMA in 2007, and then sold it to plaintiff Ortiz's employer, Maoz. The said purchase was paid to FMA to its New York address.

As plaintiff Ortiz, third-party plaintiff FMA, and defendants Maoz and Mark's assert that Minerva is subject to personal jurisdiction pursuant to C.P.L.R. §§302(a)(1), 302(a)(3)(i) and 302(a)(3)(ii), this Court will not consider §301 of the statute. Furthermore, Minerva's motion to dismiss is considered as timely based upon evidence provided by the movant of an agreement to extent the time to answer and/or plead between FMA's counsel and Minerva's counsel on or about July 30, 2013. In addition, this Court notes that C.P.L.R §2101(b) is inapplicable in this case, as the affidavit of Mr. Chiodini was provided to him in English language.

To subject a non-resident defendant to a judgment in personam in New York State, due process requires that the Courts apply the "minimum contacts" test to show that the defendant has certain minimum contacts with the forum state to make it reasonable and just to subject them to suit under the long-arm statute in New York. *see, Murdock v. Arenson Intern. USA, Inc.*, 157 A.D.2d 110, 554 N.Y.S.2d 887 (1 Dept. 1990). In order to satisfy the "minimum contacts" test, there must be some act, sometimes even a single transaction, by the defendant, through which he purposefully

avails himself to the protections and benefits of New York law. *see*, Cortlandt Racquet Club, Inc. V. Oy Saunatec, Ltd., 978 F.Supp. 520 (S.D.N.Y., 1997); Muse Collections, Inc. v. Carissima Bijoux, Inc., 86 A.D.3d 631, 927 N.Y.S.2d 389 (2 Dept. 2001).

C.P.L.R. §302(a)(1) states that New York Courts can exercise personal jurisdiction over any non-domiciliary ... who in person or through agent “transacts any business within the state or contracts anywhere to supply goods or services in the state”. Under §302(a)(1), the cause of action must arise from the specific New York business transaction upon which the plaintiff (in this case FMA) seeks to base personal jurisdiction, requiring substantial nexus between the transaction and the claim asserted. *see*, Rescuecom Corp. v. Hyams, 477 F.Supp.2d 522 (N.D.N.Y. 2006). Here, Minerva established that it did not conduct business in New York, but in Canada. The subject meat grinder was sold and paid in Italy, and shipped to a Canadian company (OMCAN) operating in Ontario, Canada. Once the question of personal jurisdiction is raised, the burden then shifts to the opposing party to prove that jurisdiction exists. *see*, Roldan v. Dexter Folder Co., 178 A.D.2d 589, 577 N.Y.S.2d 483 (2 Dept. 1991).

FMA and plaintiff Ortiz claim that Minerva’s interactive website where customers can inquire about products and contact representatives for sales falls under “transacting business” and avails it to be subject to New York jurisdiction under §302(a)(1). However, having an interactive website, without targeting any specific audience is not an act purposefully directed toward the forum state and in this case New York. *see*, Paterno v. Laser Spine Institute, 112 A.D.3d 34, 973 N.Y.S.2d 681 (2 Dept. 2013); Grimaldi v. Guinn, 72 A.D.3d 37, 895 N.Y.S.2d 156 (2 Dept. 2010), where sales were made via website in New York by the injured: Rescuecom Corp. v. Hyams, 477 F.Supp.2d 522 (N.D.N.Y.2006); Isi Brands, Inc. V. KCC Int’l, Inc., 458 F. Supp. 2d 81, 87 (E.D.N.Y. 2006). Here, it is established that Minerva sold the subject product to OMCAN, Canada without any direct connection to New York via its website.

§302(a)(3)states that in personam jurisdiction applies over Minerva if it

- (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.”

None of the opposing parties successfully establish that Minerva conducted business in New York nor derived substantial revenue from New York pursuant to subsection (i). Merely, FMA and

plaintiff Ortiz claim that by selling fifty meat grinders to Canada, of which two were sold by OMCAN to FMA, New York, Minerva engages in business in New York and derives substantial revenue from New York. Without further evidence, these claims lack merit.

Furthermore, all of the opposing parties collectively claim that Minerva should have reasonably expected its products being sold in New York pursuant to subsection (ii) based upon the fact that OMCAN, Canada has a subsidiary distributor in New York, and therefore, Minerva's products could have consequences in New York. However, to serve as a basis for jurisdiction, foreseeability must be coupled with a purposeful act of invoking the benefits and protections of New York law. *see, Murdock v. Arenson Intern. USA, Inc.*, 157 A.D.2d 110, 554 N.Y.S.2d 887 (1 Dept. 1990); *Paterno v. Laser Spine Institute*, 112 A.D.3d 34, 973 N.Y.S.2d 681 (2 Dept. 2013). The mere likelihood that a product will find its way into the forum state is insufficient to support jurisdiction under 302(a)(3)(ii) in New York State. *see, Cortlandt Racquet Club, Inc. v. Oy Saunatec, Ltd.*, 978 F.Supp. 520 (S.D.N.Y., 1997).

Here, Mr. Nella claims in his affidavit that he had informed Minerva in 1992 when Minerva started conducting business exclusively with OMCAN, Canada, that their products may still end up in New York. However, it is notable that Mr. Nella does not provide any specific information nor his counsel further evidence in admissible form regarding the time and context of the alleged business relations and discussions between Minerva and FMA. Furthermore, Mr. Nella states that FMA conducted business directly with Minerva prior to the year of 1992. This claim however, does not show that Minerva directed and purposefully targeted activity and derived substantial revenue in New York fourteen years later, in 2006, when the subject meat grinder was sold to Canada. As such, third-party defendant FMA and remaining opposing parties fail to prove subsection (ii) of §302(a)(3).

New York Courts have generally held that defendants as a rule, should be subject to suit where they are normally found or where they conduct "substantial" general business activities, and only in rare cases should they be compelled to answer a suit in a jurisdiction in which they have the barest contacts. *see, Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 522 N.E.2d 1027 (N.Y. 1988); *Banco Ambrosiano, S.P.A v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 464 N.E.2d 432 (N.Y. 1984). Therefore, and for the reasons set forth above, this Court finds that the opposing parties failed to prove that in personam jurisdiction over Minerva exists.

Based upon the foregoing, this Court grants Minerva's motion to dismiss the third-party complaint against it.

Accordingly, it is

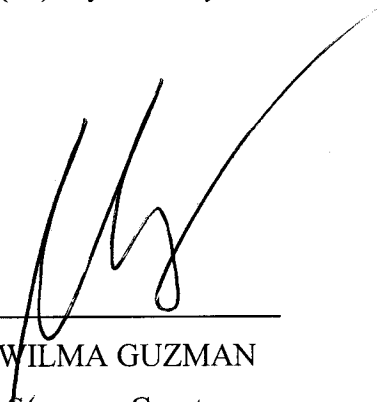
ORDERED that third-party defendant LA MINERVA OMEGA GROUP SRL's motion to dismiss claims against it in this action is granted. It is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of third-party defendant LA MINERVA OMEGA GROUP SRL, and against third-party plaintiff FOOD MACHINERY OF AMERICA, INC. It is further

ORDERED that third-party defendant LA MINERVA OMEGA GROUP SRL shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

5/20/14  
DATE

  
\_\_\_\_\_  
HON. WILMA GUZMAN  
Justice Supreme Court