Employers Mut. Cas. Co. v Tracked Lifts, Inc.
2014 NY Slip Op 32778(U)
October 21, 2014
Supreme Court, New York County
Docket Number: 651703/2013
Judge: Shlomo S. Hagler

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

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Employers Mutual Casualty Co.,

Plaintiff,

Index Number: 651703/2013

-against-

DECISION/ORDER

Tracked Lifts, Inc.,

Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Employers Mutual Casualty Co. ("plaintiff" or "EMCC") moves for summary judgment in lieu of complaint, pursuant to CPLR 3213, based upon a default judgment of the District Court of Scott County, Iowa dated January 17, 2012 (the "Iowa Judgment") in the amount of $41,315.00 together with costs, plus interest at the rate of 2% per annum. Defendant Tracked Lifts, Inc. ("defendant" or "Tracked Lifts") opposes the motion.

Underlying Facts

The Iowa Judgment arises out of an action filed by plaintiff in the Iowa District Court in and for Scott County, Index Number Law 118666, entitled *Employers Mutual Casualty Co., as subrogee of Advantage Tree Services, LLC v Tracked Lifts, Inc.* (the "Iowa Action") (Affidavit of Thomas M. Boes ["Boes"] sworn to on May 2, 2013 [the "Boes Affidavit"], ¶¶ 1-2).

Advantage Tree Services LLC ("Advantage") is a company in the business of tree trimming and removal and whose residence and principal place of business is in Scott County, Iowa (Iowa Action, complaint, ¶¶ 2-3). In December 2008, it purchased a used 2007 model year

Italmec brand aerial lift (the "Lift") from defendant for $50,000 for use in its business (*id.*, ¶¶ 8-9). The Lift was delivered by defendant to Advantage in Bettendorf, Iowa (*id.*, ¶ 11). Advantage had an insurance policy with plaintiff (*id.*, ¶ 16).

On or about June 10, 2009, Advantage was using the Lift to remove a tree when it tipped over and fell, resulting in such damage to the Lift that it could not be repaired (*id.*, ¶¶ 13-15). Plaintiff paid Advantage $55,000 for the loss under its policy and subsequently it recovered $13,685 by selling the Lift for salvage, making its loss $41,315 (*id.*, ¶¶ 16-17).

On or about July 11, 2011, plaintiff commenced the Iowa Action by filing a petition at law in the Iowa District Court in and for Scott County, seeking $41,315 for alleged breach of warranty as to the Lift's condition and negligence in inspection of and failure to provide adequate warnings of the Lift's condition and strict liability, all arising out the sale of the Lift to Advantage.

Plaintiff served defendant by serving the Iowa Secretary of State on or about July 27, 2011 (Boes Affidavit, ¶ 3). On or about August 9, 2011, it also served defendant by certified mail, return receipt requested and the certified mail was signed for on or about August 12, 2011 (*id.*, ¶¶ 4-5). There were discussions between plaintiff and defendant's insurance carrier, but ultimately no answer or motion to dismiss was interposed on defendant's behalf (*id.*, ¶¶ 5-6). On December 14, 2011, plaintiff then sought a default judgment against defendant and on January 17, 2012, the Iowa Judgment was entered (*id.*, ¶ 6; Affidavit of Boes sworn to on July 16, 2013 ["Boes Reply Affidavit"], ¶ 2).

Defendant is a New York corporation and it is in the business of selling and leasing new and used aerial lifts for tree removal, decoration of building exteriors, construction and building

maintenance (Hrycak affidavit, ¶ 3). After discussions with Advantage concerning the potential sale of a new aerial lift for $79,500 plus delivery costs, the parties ultimately reached an agreement for the sale of the Lift for $50,000 and that Advantage would pick up the Lift in New York (*id.*, ¶ 5). When Advantage's representative advised that they could not pick up the Lift in New York, defendant "did not want to lose that sale and agreed to have the [Lift] delivered to Advantage at no additional delivery cost [and it] was delivered to Iowa on January 2, 2009" (*id.*).

Defendant avers that it investigated the accident and that based upon discussions with the Lift's operator and examination of the accident site, it believes that the Lift tipped over and fell as a result of its improper use and placement on non-level ground (*id.*, ¶¶ 7-8).

Defendant states that it received the papers in the Iowa Action in early August 2011 and turned them over to its insurance broker and insurance carrier (*id.*, ¶ 9). It further states that it was unaware that its insurer had denied coverage and it was unaware of any default (id., ¶¶ 9-10). Defendant avers that this sale was its only transaction in Iowa, that it neither has real and personal property nor an office in Iowa (*id.*, ¶ 6). It also states that it did not receive notice of plaintiff's application for a default judgment (*id.*).

On or about May 10, 2013, plaintiff commenced this action by filing a summons and notice of motion for summary judgment in lieu of complaint. Defendant's opposition asserts that due to Iowa's lack of personal jurisdiction over it and the factual disputes as to the cause of the Lift's accident, plaintiff's motion should be denied and it should be permitted to litigate the merits of the claim.

At the oral argument defendant informed the court that it was moving in Iowa to vacate the Iowa Judgment, but that currently there was no decision on its application.

Arguments

Plaintiff claims that it is entitled to entry of a judgment in this action based on the underlying Iowa judgment. Defendant contends that plaintiff lacks personal jurisdiction due to Iowa's lack of the requisite minimum contacts and that it was not properly served under Iowa law. Defendant also argues that it should be permitted to defend this action on the underlying merits of the claim and that its insurer is a necessary party to this action. It, therefore, seeks denial of plaintiff's motion.

In reply, plaintiff has presented proof that on December 14, 2011, it sent written notice by first class mail of its application for a default to defendant at the same address it sent the original papers and which is defendant's currently listed business address (Boes Reply Affidavit, ¶¶ 2-3).

CPLR 3213

CLPR 3213 provides that a plaintiff may commence an action by serving with the summons "a notice of motion for summary judgment and the supporting papers in lieu of complaint . . . [w]hen an action is based . . . upon any judgment."

"As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations, . . . [However,] inquiry into the merits of the underlying dispute is foreclosed" (*Fiore v Oakwood Plaza Shopping Ctr.*, 78 NY2d 572, 577 [1991], *cert denied* 506 US 823 [1992]; *CPB Intl., Inc. v Federal Labs. Corp.*, 103 AD3d 1183, 1184 [4th Dept 2013]; *Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183, 183-184 [1st Dept 2007]).

Personal Jurisdiction

"Iowa Rule of Civil Procedure 1.306 provides . . . [that] [e]very corporation [or] individual . . . that shall have the necessary minimum contact with the state of Iowa shall be subject to the jurisdiction of the courts of the state of [Iowa and this] rule expands Iowa's jurisdictional reach to the widest due process parameters allowed by the United States Constitution" (*Hammond v Florida Asset Financing Corp.*, 695 NW2d 1, 5 [Iowa 2005]; *see also Capitol Promotions L.L.C. v Don King Productions, Inc.*, 756 NW2d 828, 833 [Iowa 2008]). "A defendant's 'minimum contacts' must show 'a sufficient connection between the defendant and the forum state so as to make it fair' and reasonable to require the defendant to come to the state and defend the action . . . Random or attenuated contacts with the forum state do not satisfy the minimum contacts test" (*Ostrem v Prideco Secure Loan Fund, LP*, 841 NW2d 882, 891 [Iowa 2014] [internal citation omitted]; *see also Shams v Hassan*, 829 NW2d 848, 854 [Iowa 2013]). Put another way, there should be a sufficient connection that "[a] defendant . . . 'should reasonably anticipate being haled into court' in the forum state" (*Ostrem*, 841 NW2d at 891, quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]; *Shams*, 829 NW2d at 855).

"Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State . . . [and a substantial connection] must come about by an action of the defendant purposefully directed toward the forum State" (*Asahi Metal Industry Co. Ltd. v Superior Court of California, Solano County*, 480 US 102, 109, 112 [1987] [internal citations and italics omitted]). However, "a

forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents [and] [a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors" (*Burger King Corp. v Rudzewicz*, 471 US 462, 473 [1985] [internal citation omitted]).

While New York's long-arm jurisdiction is more limited than Iowa's, "New York's long-arm [jurisdiction] statute, CPLR 302, ... authorizes the court to exercise jurisdiction over nondomiciliaries for tort and contract claims arising from a defendant's transaction of business in this State ... even though the defendant never enters New York, so long as the defendant's activities here 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]; *Kaprall v WE: Women's Entertainment, LLC*, 74 AD3d 1151, 1153 [2d Dept 2010]). "[T]o demonstrate that an individual is transacting business within the meaning of CPLR 302 [a] [1], 'there must have been some 'purposeful activities' within the State that would justify bringing the nondomiciliary defendant before the New York courts'" (*SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 404 [2012], *quoting McGowan v Smith*, 52 NY2d 268, 271 [1981]. "[U]nder CPLR 302 [a] [1], . . . the courts of this State [are permitted] to exercise personal jurisdiction over any non-domiciliary who, in person or through an agent, 'transacts any business within the state or contracts anywhere to supply goods or services in the state'" (*Torrioni v UNISUL, Inc.*, 176 AD2d 623, 624 [1st Dept 1991]).

Additionally, the particular notice provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to [defend the case]. . . . [Also,] [t]he notice procedure chosen need not eliminate all

risk that notice might not actually reach the affected party [but] [u]nquestionably, mailed notice may suffice" (*Matter of Beckman v Greentree Sec.*, 87 NY2d 566, 570 [1996] [internal citation omitted]; *see also Dusenberry v U.S.*, 534 US 161, 168 [2002]).

Iowa Default Procedures

Iowa permits an application for a default to be made to the clerk of the court upon ten (10) days written notice by ordinary mail to the defaulting party's last known address and "[t]he rule gives a party a ten-day period of time to respond to the notice and avoid default" (*Preferred Tooling, L.L.C. v Ahern*, 752 NW2d 34, 2008 WL 681130, * 2 [Iowa App 2008]). "The provision for entry of defaults by the clerk was obviously designed to expedite default-judgment entries, not to frustrate them. . . .[Since] [o]nly a few counties in [Iowa] have a judge of the District Court continuously present so that defaults can be promptly entered at all times [,]. . . it was necessary to provide some other method for entering defaults" (*Baltzley v Sullins*, 641 NW2d 791, 793 [Iowa 2002]). However, if the requirements for entry of a default judgment such as failure to give the ten-day notice are not met, the default must be vacated (*Halvorson v Bentley*, 829 NW2d 191, 2013 WL 530949, * 1 [Iowa App 2013]).

Interest

Interest on a foreign judgment is at New York's statutory postjudgment interest rate (*Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 AD3d 609, 613 [1st Dept 2014]; *Sung Hwan Co., Ltd. v Rite Aid Corp.*, 46 AD3d 288, 290 [1st Dept 2007]).

Discussion

Defendant contends that the damage to the Lift occurred as a result of the Lift operator's improper use of the Lift while he was engaged in the tree removal and/or the Lift's placement on

uneven ground, causing it to tip over and fall. However, this claim involves the merits of the case and "inquiry into the merits of the underlying dispute is foreclosed" (*Fiore*, 78 NY2d at 577; *Buckeye Retirement*, 41 AD3d at 183-184). Full faith and credit mandates that this court honor the Iowa Judgment and consideration of defendant's assertion relating to the merits of a defense is barred. The contention that defendant's insurer is a necessary party also fails, since it is neither a party to the Iowa Action nor the Iowa Judgment.

Defendant asserts that it did not receive the proper notice under Iowa law. However, it has not raised a factual assertion as to plaintiff's service of the papers in the Iowa Action. Plaintiff has presented proof that it properly served defendant by serving the Iowa Secretary of State and subsequently sending the papers to defendant by certified mail, return receipt requested and presented a copy of the signed receipt. Defendant has stated that it received these papers, but that it did not receive the ten-day notice for a default. However, plaintiff has presented a copy of the notice for a default that it mailed to defendant on December 14, 2011 and the Iowa Judgment was signed on January 17, 2012 (Boes Reply Affidavit, ¶ 2). Since defendant had the "ten-day period of time to respond to the notice and avoid default", plaintiff has satisfied requirement for a default judgment (*Preferred Tooling*, 2008 WL 681130 at * 2). "[M]ailed notice" is "reasonably calculated . . . to apprise [an interested party] of the pendency of [an] action" and, consequently, the notice that plaintiff supplied is sufficient to satisfy the due process mandate to provide notice to a party (*Matter of Beckman*, 87 NY2d at 570; *Dusenberry*, 534 US at 168).

Specific jurisdiction is proper when a controversy is related to or arises out of a defendant's contacts with the forum (Chloé v Queen Bee of Beverly Hills, LLC, 616 F3d 158, 166 [2d Cir 2010], quoting *Helicopteros Nacionales de Colombia, S.A. v Hall*, 466 US 408, 414

[1984]; *Kreuter*, 71 NY2d at 467). Whether a defendant has transacted business within the state is determined under the totality of the circumstances, and rests on whether the defendant, by some act or acts has purposefully availed itself of the privilege of conducting activities within the state (*MPG Assoc., Inc. v Roeske*, 112 AD3d 590, 591 [2d Dept 2013]; *New Media Holding Co., LLC v Kagalovsky*, 97 AD3d 463, 464 [1st Dept 2012]).

In this matter, defendant had conversations with Advantage concerning the sale of a new lift for $79,500 and ultimately agreed on the sale of the Lift for $50,000. When Advantage refused to make an arrangement for pick-up of the lift, in order not "to lose the sale", it agreed to deliver the Lift without an additional delivery charge to Advantage in Iowa and the delivery was made in Iowa to Advantage's pricipal place of business (Hrycak affidavit, ¶ 5). Viewing the totality of the circumstances, there was a sufficient connection between defendant's activities and the sale and delivery of the Lift in Iowa for defendant to "reasonably anticipate being haled into court [in the forum state]" (*World-Wide Volkswagen*, 444 US at 297; *see also Ostrem*, 841 NW2d at 891). Accordingly, there were adequate minimum contacts between Iowa and defendant to satisfy the requirements of due process (*Hammond*, 695 NW2d at 5).

Finally, although the Iowa Judgment provides for 2% interest, this Court must apply New York's statutory 9% postjudgment interest rate (*Abu Dhabi*, 117 AD3d at 613; *Sung Hwan*, 46 AD3d at 290). Consequently, plaintiff's motion for summary judgment in lieu of complaint is granted.

Conclusion

Accordingly, it is hereby:

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $41,315.00, together with interest at the rate of 9% per annum from January 17, 2012, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: October 21, 2014

ENTER:

Shlomo S. Hagler J.S.C.