

Mileski v MSC Indus. Direct Co., Inc.

2015 NY Slip Op 30315(U)

March 3, 2015

Supreme Court, Suffolk County

Docket Number: 09-10391

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10/15/14
ADJ. DATE 10/21/14
Mot. Seq. #011 - MotD; RRH

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DRENA MILESKE, Individually and as
Administratrix of the Goods, Chattels and Credits
of RONALD P. MILESKE, Deceased,

Plaintiff,

LIEB AT LAW, P.C.
Attorney for Plaintiff
376A Main Street
Center Moriches, New York 11934

- against -

WILSON, ELSER, MOSKOWITZ, EDELMAN &
DICKER LLP
Attorney for Defendant/Third-Party Plaintiff
1133 Westchester Avenue
White Plains, New York 10604

MSC INDUSTRIAL DIRECT CO., INC., SID
TOOL CO., INC., ENCO MANUFACTURING
COMPANY, INC., BURNS REAL ESTATE,
LLC, NIJON TOOL CO., INC., ISLAND
MACHINE SUPPLY CORP., and JOHN
RAYMOND BURNS,

Defendants.

CRUSER, MITCHELL & NOVITZ, LLP
Attorney for Defendants Burns Real Estate, Nijon
Tool Co., Island Mach. Supply Corp. & John
Raymond Burns
341 Conklin Street, 2nd Floor
Farmingdale, New York 11735

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MSC INDUSTRIAL DIRECT CO., INC.,

Third-Party Plaintiff,

FARBER BROCKS & ZANE L.L.P.
Attorney for Third-Party Defendant Buffalo
Machinery Co.
400 Garden City Plaza, Suite 100
Garden City, New York 11530

- against -

BUFFALO MACHINERY CO. LTD. and DEER
PARK HYDRAULICS & PACKING CO., INC.,

Third-Party Defendants.

BEE READY FISHBEIN HATTER &
DONOVAN, LLP
Attorney for Third-Party Defendant Deer Park
Hydraulics & Packing Co.
170 Old Country Road, Suite 200
Mineola, New York 11501

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by third-party defendant Buffalo Machinery Co. Ltd., dated September 25, 2014, and supporting papers (including Memorandum of Law); (2) Affirmation in

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Opposition by the third-party plaintiff, dated October 7, 2014, and supporting papers (including Memorandum of Law); (3) Affirmation in Opposition by the plaintiff, dated October 9, 2014, and supporting papers; and (4) Reply Affirmation by third-party defendant Buffalo Machinery Co. Ltd., dated October 20, 2014, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by third-party defendant Buffalo Machinery Co. Ltd. for an order (i) pursuant to CPLR 3212 and Taiwanese law, granting summary judgment dismissing the third-party complaint against it for failure to effect proper service of process, and (ii) pursuant to CPLR 3212 and Taiwanese law, granting summary judgment dismissing the third-party complaint against it for lack of personal jurisdiction, is granted to the extent of directing all interested parties and their attorneys to appear for a traverse hearing on a date and time to be determined by the Court and the parties after conference, and is otherwise denied, without prejudice to renewal (except for the “improper service” branch of the motion) upon the completion of discovery on the issue of whether personal jurisdiction may be established over Buffalo Machinery Co. Ltd.

In this action, which was commenced on March 23, 2009, the plaintiff seeks to recover damages for the pain, suffering, and wrongful death of the plaintiff’s decedent, Ronald Mileski. The plaintiff alleges, in part, that sometime prior to July 16, 2007, MSC Industrial Direct Co., Inc. (“MSC”) manufactured, designed, assembled, sold, distributed, and delivered a Microcut Lathe machine to Deer Park Hydraulics & Packing Co., Inc., the decedent’s employer; that while operating the machine on July 16, 2007, the decedent was “caused to be caught” in the machine due to the absence of adequate safeguards; and that, as a result, he sustained severe injuries from which he died on September 7, 2007.

On May 3, 2010, following joinder of issue, MSC filed a third-party summons and complaint, alleging, in part, that Buffalo Machinery Co. Ltd. (“Buffalo Machinery”) manufactured, assembled, fabricated, sold, and distributed the machine and its component parts. On or about August 16, 2010, prior to the expiration of the 120-day time limit for serving process (*see* CPLR 306-b), MSC moved for the issuance of letters rogatory to allow service of process on Buffalo Machinery, a Taiwanese company, in Taiwan. By order dated December 20, 2010, the motion was granted. MSC subsequently moved the court on June 2, 2011 to amend the December 20, 2010 order to provide for an extension of time to serve the third-party summons and complaint on Buffalo Machinery. By order dated September 19, 2011, the court granted the motion, extending the time to serve process until January 31, 2012. By order dated November 1, 2011, the court granted a subsequent letter request by MSC, further extending the time to serve process until October 1, 2012.

It appears from a copy of a “Certificate of Service of Taiwan Taichung District Court” provided to the court that service of the third-party summons and complaint was effected on March 19, 2012 at Buffalo Machinery’s Taichung City address by giving the documents to an employee “who is able to distinguish affairs.” Buffalo Machinery, for its part, contends that it was not aware service had been effected (or even attempted) until after July 2013, when it received a facsimile from MSC’s attorney representing that service had been made; its subsequent search revealed a copy of the pleadings in a

cabinet of a former sales employee. According to Gus Chang, its vice general manager, Buffalo Machinery does not know how the pleadings came to be in the cabinet, whether any person affiliated with the company placed them there, or who, if anyone, was given the pleadings by a process server.

On September 27, 2013, Buffalo Machinery served its answer to the third-party complaint, asserting numerous affirmative defenses, including improper service and lack of personal jurisdiction. On November 26, 2013, within 60 days after serving its answer (*see* CPLR 3211 [e]), Buffalo Machinery moved to dismiss the third-party complaint (i) for failure to effect service of process within the 120-day period prescribed by CPLR 306-b, (ii) for failure to effect and establish proper service of process, and (iii) for lack of personal jurisdiction. The plaintiff subsequently cross-moved for leave to amend her pleadings to assert direct claims against Buffalo Machinery. By order dated January 22, 2014, the court denied, without prejudice and with leave to renew, both the motion and the cross motion for failure to comply with the rules of this Part requiring, *inter alia*, the scheduling of a pre-motion conference. Subsequently, the parties having demonstrated their compliance with the applicable rules, Buffalo Machinery renewed its motion to dismiss the third-party complaint, the plaintiff renewed her cross motion for leave to amend the pleadings, and MSC separately cross-moved for conditional relief relating to its service of the third-party summons and complaint. By order dated September 11, 2014, the court denied the parties' respective applications except to the extent of converting so much of Buffalo Machinery's motion to dismiss the third-party complaint as was premised on improper service and lack of personal jurisdiction to a motion for summary judgment, granting the parties an additional three weeks to make an appropriate record by the service and filing of additional affidavits and other supporting papers, and directing that the motion be re-noticed for hearing upon the expiration of the three-week period. As to the plaintiff's renewed cross motion, it was denied without prejudice to timely renewal in the event that the court should subsequently determine that it may properly exercise personal jurisdiction over Buffalo Machinery.

Now before the court, properly re-noticed, is Buffalo Machinery's (converted) motion for summary judgment. The court notes, with some curiosity, the parties' collective failure to supplement the record with any additional evidentiary proof.

Addressing first the question of whether Buffalo Machinery was properly served with a copy of the third-party summons, the court finds that an evidentiary hearing is necessary. A sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and requires the plaintiff to establish jurisdiction by a preponderance of evidence at a hearing (*Skyline Agency v Coppotelli, Inc.*, 117 AD2d 135, 502 NYS2d 479 [1986]), although no hearing is required where the defendant fails to swear to "specific facts to rebut the statements in the process server's affidavits" (*Simonds v Grobman*, 277 AD2d 369, 370, 716 NYS2d 692, 693 [2000]). Here, Buffalo Machinery does not deny proper service so much as deny knowledge as to how service was effected. The court might find such a showing insufficient to rebut proper service but for the fact that the certificate of service does not identify the person alleged to have received service on Buffalo Machinery's behalf. Accordingly, there remain questions, apart from the recipient's identity, whether that person was capable of exercising proper discretion and was otherwise authorized to receive such service under Taiwanese law, which questions should be resolved only after a hearing at which MSC will have the burden of proof regarding the propriety of service. Whether, as Buffalo Machinery claims,

the affidavit of service is facially defective for failure not only to identify the person alleged to have received service but also to name the director or chairman of the company as required under Taiwanese law, does not merit dismissal in and of itself; such defects go to form, not to jurisdiction, and may be cured (*Mendez v Kyung Yoo*, 23 AD3d 354, 806 NYS2d 67 [2005]). “An improperly executed affidavit of service is a mere irregularity and not a jurisdictional defect * * *. The crucial question is whether or not [the] defendant was in fact served with process” (*id.* at 355-356, 806 NYS2d at 69 [citations and internal quotation marks omitted]).

As to whether the court may properly exercise personal jurisdiction over Buffalo Machinery, the court finds the evidence presented, while sparse, sufficient to avoid dismissal at this juncture. As the party seeking to assert personal jurisdiction, MSC bears the ultimate burden of proof on this issue (*Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 990 NYS2d 561 [2014]). However, to withstand a motion to dismiss or a motion for summary judgment based on lack of personal jurisdiction, a plaintiff need not make a prima facie showing of jurisdiction, but instead must only set forth “a sufficient start” and show its position not to be frivolous (*Lettieri v Cushing*, 80 AD3d 574, 575, 914 NYS2d 312, 313 [2011], quoting *Peterson v Spartan Indus.*, 33 NY2d 463, 354 NYS2d 905 [1974]); that is, a plaintiff “need only demonstrate that facts ‘may exist’ to exercise personal jurisdiction over the defendant (*Ying Jun Chen v Lei Shi*, 19 AD3d 407, 408, 796 NYS2d 126, 127 [2005], quoting *Peterson v Spartan Indus.*, *supra*; see also CPLR 3211 [d]; 3212 [f]). Here, in opposition to Buffalo Machinery’s motion, MSC submitted sufficient facts to demonstrate that Buffalo Machinery engaged in activities which made it at least foreseeable that its products would be marketed and found in New York, thereby possibly subjecting it to personal jurisdiction under CPLR 302 (a) (3) (ii).

The conferral of jurisdiction under this provision rests on five elements: First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce.


(*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214, 713 NYS2d 304, 307 [2000]). “Once those elements are met, an assessment must then be made as to whether a finding of personal jurisdiction satisfies due process” (*Waggaman v Arauzo*, 117 AD3d 724, 725, 985 NYS2d 281, 283, *lv denied* 24 NY3d 903, 995 NYS2d 711 [2014]). Buffalo Machinery, in response, contests only the fifth element, *i.e.*, that it does not derive substantial revenue from interstate or international commerce. The court finds, however, the evidence produced by MSC of (i) the printout of a webpage of Windsor Machine Tools Inc., an Ontario-based machine tool distributor, referring to Buffalo Machinery’s “Microcut” line of metal-working machines among the tools and accessories it provides to its customers and stating that in 2007, Buffalo Machinery “had a total of 166 employees taking in USD\$ 80,000,000 in revenue sales,” as well as (ii) Gus Chang’s own sworn statement that Buffalo Machinery “uses a network of distributors to sell its products * * * primarily located in Europe [but also] in Africa, Asia, Australia, South America and North America,” sufficient to establish that facts may exist to support the exercise of jurisdiction with respect to the fifth element and to warrant relevant jurisdictional discovery (see *Lettieri v Cushing*, *supra*; *Castillo v Star Leasing Co.*, 69 AD3d 551, 893 NYS2d 123 [2010]). Contrary to Buffalo

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Machinery's assertions, a plaintiff is not required to allege in the complaint a basis for personal jurisdiction (*Fishman v Pocono Ski Rental*, 82 AD2d 906, 440 NYS2d 700 [1981]), nor does *Teplin v Manafort* (81 AD2d 531, 438 NYS2d 84 [1981]) purport to bar the use of affidavits and other relevant documents to establish jurisdictional facts (accord *Fischbarg v Doucet*, 9 NY3d 375, 381 n 5, 849 NYS2d 501, 506 [2007]).

The parties' attorneys are reminded to insure the attendance of their prospective witnesses at the traverse hearing.

Dated: March 3, 2015



PETER H. MAYER, J.S.C.