Roseto v Ground Servs. Intl. Inc.
2015 NY Slip Op 31926(U)
September 28, 2015
Supreme Court, Suffolk County
Docket Number: 28776/2013
Judge: James C. Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

COPY

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x--x
DOMENIC ROSETO,

Plaintiff,

- against -

GROUND SERVICES INTERNATIONAL INCORPORATED and ASN, INC.,

Defendants.

x--x

ASN, INC.,

Third-Party Plaintiff,

- against -

TG INDUSTRIES, INC.,

Third-Party Defendant.

x--x

INDEX NO.:28776/2013

SEQ. NO.:001-MG

PHILLIPS WEINER ARTURA & COX
Attorney for Plaintiff
165 S. Wellwood Avenue
Lindenhurst, NY 11757

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
Attorney for Ground Services International
105 Maxess Road, Suite 303
Melville, NY 11747

STEWART H. FRIEDMAN, ESQ.
Attorney for Defendants/Third-Party Plaintiff ASN, Inc.
100 William Street, 9th Floor
New York, NY 10038

KISSEL HIRSCH & WILMER LLP
Attorney for Third-Party Defendant TG Industries, Inc.
580 White Plains Road, Fifth Floor
Tarrytown, NY 10591

Upon the following papers numbered 1 to 26read on this motion for Summary Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 17-21; Replying Affidavits and supporting papers 0; Other Supplemental Affirmation in Opposition 22-24, Memorandum of Law 16, 25-26; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the third-party Defendant TG Industries, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint against it for lack of personal jurisdiction is granted.

This is an action to recover for personal injuries allegedly sustained by Plaintiff on or about October 27, 2010 while working in a cargo area at the JFK International Airport in Jamaica, New York. In his complaint, Plaintiff alleges that he was employed as a truck driver with UPS Cartage Service when his arm was pulled into a loading/unloading mechanical system managed and operated by Defendant Ground Services International Incorporated ("GSI"). Plaintiff further alleges that he was wearing a "break-away reflective safety vest," manufactured and distributed by Defendant ASN, Inc. ("ASN"), which became caught in said system and "failed to break away," resulting in his injuries.

This action was commenced by the service of a summons and complaint dated October 14, 2013. On or about November 13, 2013, ASN served its answer, asserting a cross claim against GSI for indemnification. On or about May 14, 2014, GSI served its answer, asserting a cross claim against ASN for contribution. By service of a third-party summons and complaint dated July 21, 2014, ASN asserts six causes of action against that the third-party defendant TG Industries, Inc. ("TGI") based upon its purchase of the subject vest from TGI. In its first four causes of action, ASN alleges that it is entitled to common-law indemnification from TGI on claims sounding in negligence, strict products liability, breach of warranty, and failure to warn respectively. In its fifth and sixth causes of action, GSI alleges that it is entitled to contractual indemnification, and to recover based on TGI's failure to procure insurance for its benefit. Issue was joined by TGI relative to the third-party action by service of a third-party answer and counterclaim dated October 21, 2014. In its third-party answer, TGI sets forth thirteen affirmative defenses, including its fourth affirmative defense that there is a lack of in personam jurisdiction over TGI as there is an absence of "minimum contacts among this state, this action, and TGI."

TGI now moves for summary judgment dismissing the third-party complaint against it for lack of personal jurisdiction. In support of its motion, TGI submits, among other things, the pleadings, the affidavit of its president, and documents regarding ASN's purchase of safety vests. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see, **Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In his affidavit, Thompson Chu (Chu) swears that he is the president of TGI, that TGI is incorporated under the laws of the province of British Columbia in Canada, and that its principal place of business is in Vancouver, British Columbia. He states that TGI's main business is selling promotional and merchandising products, helping clients design such products, and arranging for said products to be "manufactured in China and shipped from there." He indicates that he visited ASN's offices in Alpharetta, Georgia to inquire about possible business in April 2010, that ASN issued a purchase order in June 2010 and a revised purchase order on July 21, 2010 for "50,000 safety vests," and that all communications regarding the order for the safety vests were by e-mail or by telephone between TGI at its offices in Canada, and ASN at its offices in Georgia. Chu further swears that TGI did not manufacture the subject safety vests, that it imported the vests from a company in China, China YiJian Reflecting Material Manufacturing Company, Ltd. (China YiJian), and that the vests were shipped to ASN in Georgia. He states that there was no indication that the vests "were destined for New York," and that TGI had no knowledge as to whom ASN intended to sell the vests, or where they would ultimately be used. He indicates that, for the five year period of 2010 to 2014, TGI had approximately $21,000,000 in total revenue, that only $48,435 in revenue, or less than one quarter of one per cent (.227%), was from New York State, and that $48,000 of that revenue was from the sale of baseball hats to its sole customer in New York. Chu further swears that he made two trips to New York, one in 2011 to meet with its sole customer and 11 "contacts," and one in 2012 to meet with seven "contacts." He states that TGI did not make any telephone calls to solicit business in New York other than calls to schedule the appointments for his two visits, and that TGI's web site is not specific to New York and merely provides information about the company. Chu further swears that TGI does not have any offices, bank accounts, or other property in New York, that it does not have any sales agent, employees, or phone listings in New York, and that TGI does not have any distribution or agency agreement with any person or company in New York.

In its third-party complaint, ASN sets forth allegations that would indicate that TGI is subject to personal jurisdiction in New York pursuant to CPLR 301 governing general jurisdiction, and pursuant to CPLR 302, New York's long-arm statute. A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted (*see,* ***Landoil Resources Corp. v Alexander & Alexander Servs.***, 77 NY2d 28, 563 NYS2d 739 [1990]; ***Laufer v Ostrow***, 55 NY2d 305, 449 NYS2d 456 [1982]; ***Farahmand v Dalhousie Univ.***, 96 AD3d 618, 947 NYS2d 459 [1st Dept 2012]). Here, TGI's submission establishes prima facie that it is a Canadian corporation, that it has not performed work or done business in New York, and that it does not have any offices, employees, bank accounts or property in New York.

However, a Court may also obtain personal jurisdiction over a foreign corporation under New York's long-arm statute, CPLR 302(a). Said statute provides:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or

his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(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;

Pursuant to CPLR 302 (a) (1) a nondomiciliary is subject to the jurisdiction of a New York court if it has purposefully transacted business within the state, and there is a "substantial relationship" between this activity and Plaintiff's cause of action (*see,* ***Kreutter v McFadden Oil Corp.***, 71 NY2d 460, 527 NYS2d 195 [1988]; ***Paolucci v Kamas***, 84 AD3d 766, 922 NYS2d 792 [2d Dept 2011]; ***Arroyo v Mountain School***, 68 AD3d 603, 892 NYS2d 74 [1st Dept 2009]; ***Bogal v Finger***, 59 AD3d 653, 874 NYS2d 217 [2d Dept 2009]). Here, TGI has established prima facie that the instant action does not involve any allegation that TGI business activities in the state bears any relationship to this action or that TGI committed a tortious act within the state making it subject to jurisdiction pursuant to CPLR 302 (a) (2).

With respect to CPLR 302 (a) (3) (i), it has been held that this subsection "necessitates some ongoing activity within New York State" and that "a regular course of conduct in the state is required" (***Ingraham v Carroll***, 90 NY2d 592, 665 NYS2d 10 [1997]). TGI's president swears that his corporation does not conduct or regularly solicit business in New York, nor does it derive substantial revenue within the State of New York. It is determined that two visits to New York, and three sales to a New York customer in five years does not constitute ongoing activity or a regular course of conduct in this state. In addition, revenue of $48,000 amounting to less that one-quarter of one per cent of total revenue in that five-year period does not amount to substantial revenue under the statute (*see e.g.,* ***Murdock v Arenson Intl. USA***, 157 AD2d 110, 554 NYS2d 887 [1st Dept 1990]). TGI has established prima facie that it is not subject to jurisdiction in New York pursuant to CPLR 302 (a) (3) (i).

The conferral of jurisdiction pursuant to CPLR 302 (a) (3) (ii) involves five elements, that is, whether: (1) Defendant committed a tortious act outside the State; (2) the cause of action arises from that act; (3) the act caused injury to a person or property within the State; (4) Defendant expected or should reasonably have expected the act to have consequences in the State; and (5) Defendant derived substantial revenue from interstate or international commerce (***LaMarca v Pak-Mor Mfg. Co.***, 95 NY2d 210, 713 NYS2d 304 [2000]). The establishment of long-arm jurisdiction in connection with a New York injury under CPLR 302 (a)(3) (ii) does not implicate constitutional due process concerns inasmuch as said provision was not designed to go to the full limits of permissible jurisdiction (***Ingraham v Carroll***, 90 NY2d at 597, 665 NYS2d at 12 [1997]).

The instant motion concedes that the first three elements of the test set forth in *LaMarca* are met herein, and only addresses the fourth and fifth elements of CPLR 302(a)(3)(ii). The fourth element is intended to ensure some link between a defendant and New York State to make it reasonable to require a defendant to come to the State to answer for tortious conduct committed elsewhere (***Ingraham v Carroll***, *supra*). The fifth element, in turn, is designed to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but whose business operations are of a local character (***LaMarca v Pak-Mor Mfg. Co.***, *supra*). Here, TGI's submission fails to establish prima facie that it does not derive substantial revenue from interstate or international commerce, and that its business operations are of a local character.

Thus, the issue is whether TGI expected its sale of the subject vests to have direct consequences in the state (***LaMarca v Pak-Mor Mfg. Co.***, *supra*; ***Ingraham v Carroll***, *supra*). In his affidavit, Chu swears that TGI did not have knowledge that ASN intended to ship the vests to New York, and that his company would "affirmatively refrain from

attempting to acquire such information," because it would not want ASN to think that TGI was going to compete with ASN to sell safety vests to ASN's customers. The documentation regarding the sale of the vests to ASN, including the purchase orders issued by ASN and the invoices issued by TGI, indicate that the vests are to be shipped to ASN in Georgia. TGI has established prima facie that it was not informed, neither did it know, who was the ultimate purchaser or purchasers of the subject vests or where ASN intended to sell and deliver the vests. Therefore, it is determined that TGI has established its prima facie entitlement to summary judgment that CPLR 301 and CPLR 302 (a) do not confer jurisdiction herein.

In opposition to the motion, ASN submits the affirmation of its attorney, and print-outs from three web sites. In his affirmation, counsel for ASN contends, among other things, that Chu's affidavit is not admissible, that the "correct standard of review" to be applied in deciding TGI's motion "should be for a motion to dismiss," and that TGI is subject to jurisdiction herein pursuant to CPLR 302 (a) (3). In his affirmation, counsel argues that TGI's motion should be denied because Chu's affidavit is not admissible because it was notarized in Canada, and it does not contain a "certificate of conformity" as required by CPLR 2309 (c). However, the acknowledgment appended to the affidavit conforms to that required under RPL 309-b and constitutes a certificate of conformity (***Midfirst Bank v Agho***, 121 AD3d 343 [2d Dept. 2014]). In addition, said affidavit contains the statement required by CPLR 2106 to permit a court to consider the sworn affirmation of a person who is physically located outside the United States of America. Moreover, counsel's contention that TGI has "moved under the incorrect standard of review" is without merit. A motion made after joinder of issue on the ground that the court lacks personal jurisdiction over Defendant is properly designated a motion for summary judgment (***Fishman v Pocono Ski Rental***, 82 AD2d 906, 440 NYS2d 700 [2d Dept 1981]; *see also*, ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS.2d 1 [1982]; ***Elie v Levlex Enters.***, 294 AD2d 534, 742 NYS2d 869 [2d Dept 2002]).

ASN does not address the issue whether TGI is subject to jurisdiction pursuant to CPLR 301, CPLR 302(a)(1) or CPLR 302(a)(2). New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see*, ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]).

In addressing the issue whether TGI is subject to jurisdiction pursuant to CPLR 302(a)(3), ASN contends that Chu's visit to New York in 2011 whereupon he met with 15 business contacts establishes that TGI was soliciting business in New York, and that ASN should not be subjected to Chu's self-serving statements that there were no trips to New York in 2010, 2013 and 2014, and that no such trips are planned in 2015. In regard to the latter issue, ASN contends that it should be entitled to depose Chu "to probe into the time period

prior to and after" Plaintiff's accident. Nonetheless, the issue before the undersigned is whether TGI "regularly does or solicits" business in New York. ASN does not suggest how evidence of TGI's activities in 2009 would change the determination herein. More importantly, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of discovery is an insufficient basis for denying the motion (*see generally*, ***Lauriello v Gallotta,*** 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; ***Kimyagarov v Nixon Taxi Corp.*** 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]).

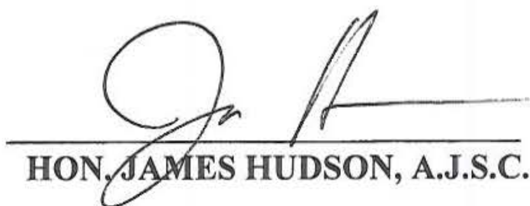
In addition, ASN contends that it should be allowed to depose another TGI employee to determine if she "discussed with ASN's principals as to where the vests were going to be shipped." Here, ASN not only hopes and speculates that some evidence to defeat summary judgment will be uncovered, it ignores the obvious fact that the information which would support its contention, and its opposition to the motion, lies within the knowledge of its own employees. Moreover, the submission by ASN of the print-outs of the web sites for TGI, TGI's sole customer in New York, and a compilation of information on Canadian corporations, does not raise an issue of fact bearing on the determination herein.

Finally, the undersigned will consider the supplemental affirmation submitted by ASN after service of its opposition to the motion as TGI has had the opportunity to respond to it in its reply papers (*see,* ***Bayly v Broomfield***, 93 AD3d 909, 939 NYS2d 634 [3d Dept 2012]). In said affirmation, counsel for ASN states that he "just received evidence after additional searches were performed by ASN," and he contends that an email from an employee of TGI raises a question whether TGI has a closer relationship to China YiJian than TGI has indicated previously. Regardless, said email does not raise an issue of fact as to the activities and course of conduct of TGI in the state, its expectation that its sale of the vests would have consequences in the state, or on the amount of its revenue, relative to all sales as well as those to its New York client, during the subject time period.

In opposition to TGI's motion, ASN has submitted no documents or any other evidence to raise an issue of fact herein. Accordingly, TGI's motion is granted and the third-party complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

DATED: SEPTEMBER 28, 2015
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION