

Continental Cas. Co. v Naegele Inc. Bakery Sys.

2015 NY Slip Op 32627(U)

November 25, 2015

Supreme Court, Rockland County

Docket Number: 031362/2015

Judge: Margaret Garvey

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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CONTINENTAL CASUALTY COMPANY
a/s/o Caribbean Food Delights, Inc.,

Plaintiff,

-against-

NAEGELE INCORPORATED BAKERY SYSTEMS,

Defendant,

-----X

NAEGELE INCORPORATED BAKERY SYSTEMS,

Third-Party Plaintiff,

-against-

DFEMEINCKE, HAAS-MEINCKE A/S, and
FRANZ HAAS MACHINERY OF AMERICA, INC.,

Third-Party Defendants.

-----X

Margaret Garvey, J.S.C.

The following papers, numbered 1 to 4, were considered in connection with the Notice of Motion filed by Defendant seeking an Order, pursuant to Civil Practice Law and Rules §§ 3211(a)(8) dismissing the Complaint for lack of personal jurisdiction over the Defendant, together with such other and further relief as this Court deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF KAREN SCHNUR, ESQ. DATED JULY 30, 2015 IN SUPPORT OF MOTION TO DISMISS PURSUANT TO CPLR § 3211(A)(8)/EXHIBITS (A-M)/AFFIDAVIT OF FRANK MUNTZBERG DATED JULY 29, 2015	1
MEMORANDUM OF LAW	2
AFFIRMATION OF LOUIS E. VALVO, ESQ. DATED AUGUST 18, 2015 IN OPPOSITION/EXHIBITS (A-B)	3

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The main action was commenced with the filing of the Summons and Complaint through the NYSCEF system on April 1, 2015. Issue was joined in the main action as to Defendant NAEGELE INCORPORATED BAKERY SYSTEMS when said defendant filed an Answer through the NYSCEF system on April 15, 2015.

Defendant NAEGELE INCORPORATED BAKERY SYSTEMS commenced the Third-Party action with the filing of the Third-Party Summons and Complaint through the NYSCEF system on April 22, 2015, naming Third-Party Defendants DFEMEINCKE, HAAS-MEINCKE A/S and FRANZ HAAS MACHINERY OF AMERICA, INC..

Issue was joined as to Third-Party Defendant HAAS-MEINCKE A/S f/k/a DFE MEINCKE with the filing of a Verified Answer on behalf of said party through the NYSCEF system on June 1, 2015, and said Answer raised lack of personal jurisdiction and improper service as affirmative defenses.

Issue was joined as to Third-Party Defendant FRANZ HAAS MACHINERY OF AMERICA, INC. with the filing of a Verified Answer on behalf of said party through the NYSCEF system on June 4, 2015.

On July 30, 2015, Third-Party Defendant HAAS-MEINCKE A/S f/k/a DFE MEINCKE filed the instant motion to dismiss the Third-Party Complaint against said defendant, pursuant to Civil Practice Law and Rules § 3211(a)(8), on the grounds that jurisdiction has not been obtained over said defendant.

In support of said motion, the moving Third-Party Defendant refers to the following attempts at service:

- (1) May 1, 2015 - via mail through the US Postal Service at Tonsbakken 10, 2740

Skovlunde, Denmark

- (2) May 2, 2015 - via personal delivery on Jasmine Abrahamsen as an "authorized agent" at 310 Orchard Walk, Canton, Georgia 30114
- (3) May 5, 2015 - via the New York Secretary of State
- (4) May 6, 2015 - via mail through the US Postal Service at Tonsbakken 10, 2740 Skovlunde, Denmark
- (5) May 6, 2015 - via mail through the US Postal Service at 310 Orchard Walk, Canton, Georgia 30114
- (6) June 9, 2015 - via personal delivery on Michael Fleetwood as the "General Manager" at 6207 Settler Road, Richmond, Virginia 23231.

Counsel for the moving Third-Party Defendant argues that said party was not properly served in accordance with Civil Practice Law and Rules § 311(a)(1), Business Corporation Law § 307, and the Hague Convention. Specifically, counsel argues that Jasmin Abrahamsen and Michael Fleetwood are not agents authorized to receive service on behalf of the moving Third-Party Defendant.

Regarding Michael Fleetwood, counsel notes that the affidavit of service improperly identifies the moving Third-Party Defendant as a domestic corporation, and states that Mr. Fleetwood was served at 6207 Settler Road in Richmond, Virginia, which is the address for the co-Third-Party Defendant FRANZ HAAS MACHINERY OF AMERICA, INC.. Counsel further notes that Mr. Fleetwood is not an employee of the moving Third-Party Defendant and is not

authorized by appointment or by law to accept service on behalf of the moving Third-Party Defendant.

Regarding Jasmin Abrahamsen, counsel notes that the affidavit of service identifies her as an "authorized agent" for the moving Third-Party Defendant, but she has never been an authorized agent. In fact, counsel notes that Jasmin's father, Claus Abrahamsen, is not even an authorized agent to accept service and never has been.

Regarding the attempted service through the New York Secretary of State, counsel notes that the New York Secretary of State has never been an authorized agent to accept service. Further, counsel notes that even if the New York Secretary of State could accept service on behalf of the moving Third-Party Defendant as a foreign corporation not authorized to do business in New York, the purported service failed to comply with Business Corporation Law § 307.

The moving papers also contain an affidavit of Frank Muntzberg, the Director of moving Third-Party Defendant DFEMEINCKE, HAAS-MEINCKE A/S, who states that Claus Abrahamsen was not an authorized agent for service on May 2, 2015 or anytime before that. He further states that Jasmin Abrahamsen has never been an authorized agent for service. Finally, he states that Michael Fleetwood is not an employee and has never had authorization to accept service.

In opposition, counsel for the Third-Party Plaintiff NAEGELE INCORPORATED BAKERY SYSTEMS argue that the moving papers fail to provide evidence that Michael Fleetwood and Jasmin Abrahamsen were not agents authorized to receive service on behalf of the moving Third-Party Defendant. The opposition papers argue that even if Jasmin Abrahamsen is not an employee, her father is an employee. Further, counsel argues that there was compliance with Business Corporation Law § 307 because the papers were mailed to an agent of the moving Third-Party Defendant within the United States (Jasmin Abrahamsen), irrespective of the existence of the Hague Convention. Further, counsel notes that the fact that the affidavit of

service fails to attest to the fact that the mailings were made via registered mail is a slight irregularity that is not fatal to effective service.

Finally, counsel attaches two registered mail receipts from service upon the moving Third-Party Defendant in Denmark that include signatures indicating that the mailings were accepted by someone at the corporation. Counsel argues that in light of the fact that the corporation timely answered the complaint, service was clearly effectuated.

In the reply submission, the moving Third-Party Defendant clarified its position that Jasmin Abrahamsen is not and never has been an employee, and provides an affidavit of Ms. Abrahamsen to that effect.

Dealing first with the attempts at service by serving Jasmin Abrahamsen and Michael Fleetwood, the Court agrees with the moving Third-Party Defendant that such service is deficient as they are not authorized agents or designated agents, nor do they hold a position with the corporation enumerated in Civil Practice Law and Rules § 311(a)(1). The Court does not agree with the opposition that the moving papers fail to show that said individuals were not proper agents. In fact, the opposition papers fail to address the fact that Michael Fleetwood was served at the address for the co-Third Party Defendant, a separate corporate entity who has appeared in this action by another attorney. Further, while Jasmin Abrahamsen's father may be an employee of the moving Third-Party Defendant (not necessarily an authorized agent for service), there is no evidence in the record to sustain a finding that Jasmin Abrahamsen is an authorized agent for service, or a designated agent for service. The Third-Party Plaintiff has offered nothing to support the argument that she is a proper agent. Therefore, the attempts at service through those individuals, or by mailing papers to Jasmin Abrahamsen, are deficient.

Regarding the attempt at service through service on the New York Secretary of State, the Court agrees with the moving Third-Party Defendant that said service was deficient. In order to effectuate service pursuant to Business Corporation Law § 307, the Third-Party Plaintiff (NAEGELE INCORPORATED BAKERY SYSTEMS) was required to personally deliver the

papers to the Secretary of State along with the statutory fee AND, either

- (1) personally deliver the papers to the foreign corporation outside the state in the manner authorized to serve process by law of the jurisdiction in which service is made (in this case, Denmark) [BCL § 307(b)(1)]; or
- (2) send the papers to the foreign corporation by registered mail with return receipt requested [BCL § 307(b)(2) AND file an affidavit of compliance together with the process within 30 days after receipt of the return receipt signed by the foreign corporation, or other proof of delivery or of the original envelope mailed [BCL § 307(c)(2)].

The affidavits of service filed with the Court do not indicate that the papers were mailed to the foreign corporation by registered mail with return receipt requested, and to date, no affidavit of compliance together with process with the return receipts signed by the foreign corporation has been filed by the Third-Party Plaintiff (NAEGELE INCORPORATED BAKERY SYSTEMS). The first time any mention of a mailing by registered mail with return receipt requested was made by the Third-Party Plaintiff was in opposition to the instant motion when the return receipts were attached as an exhibit to the opposition. However, as noted previously, to date, no affidavit of compliance in accordance with Business Corporation Law § 307(c)(2) has been filed with the Court. Further, no cross-motion seeking any affirmative relief was made by the Third-Party Plaintiff regarding the attempts at service and the proof of service filed with the Court.

Further, it is well-settled that the mere fact that a party timely asserts an Answer, that properly raises an objection to personal jurisdiction, does not effectuate a waiver to that party's right to argue improper service and lack of jurisdiction.

Based on the circumstances as detailed above, the motion to dismiss for lack of personal jurisdiction is granted and the Third-Party Summons and Complaint is dismissed as against Third-Party Defendant DFEMEINCKE, HAAS-MEINCKE A/S.

Counsel for the remaining parties shall appear before the undersigned for a preliminary conference on **TUESDAY, DECEMBER 15, 2015 at 9:15 a.m.** Prior to that date, counsel for the remaining parties shall make every effort to complete paper discovery. The Court will issue a discovery schedule contained in a Preliminary Conference Order during the December 15, 2015 preliminary conference.

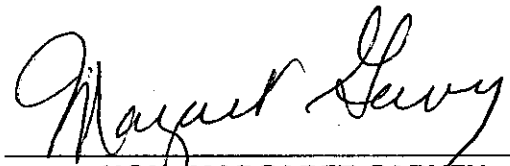
Accordingly, it is hereby

ORDERED that Notice of Motion filed by Third-Party Defendant DFEMEINCKE, HAAS-MEINCKE A/S on July 30, 2015 is granted and the Third-Party Summons and Complaint is dismissed as against said defendant; and it is further

ORDERED that counsel for the remaining parties shall appear at a preliminary conference before the undersigned on **TUESDAY, DECEMBER 15, 2015 at 9:15 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion # 2.

Dated: New City, New York
November 25, 2015



HON. MARGARET GARVEY
Justice of the Supreme Court

TO:
by e-filing -

COZEN O'CONNOR
Attorneys for Plaintiff CONTINENTAL CASUALTY COMPANY a/s/o Caribbean Food Delights, Inc.,

CALLAN KOSTER BRADY & NAGLER LLP
Attorneys for Defendant/Third-Party Plaintiff NAEGELE INCORPORATED BAKERY SYSTEMS
** Under the "Case Detail" tab and the "3rd Party Action" tab in the NYSCEF system, in the "Attorney Information" sections, the law firm is listed as "CALLAN KOSTER BRADY & BRENNAN LLP"

BIEDERMANN HOENIG SEMPREVIVO
Attorneys for Third-Party Defendant DFEMENCKE, HAAS-MEINCKE A/S

LAW OFFICE OF THOMAS K. MOORE
Attorneys for Third-Party Defendant FRANZ HAAS MACHINERY OF AMERICA, INC.
** While counsel e-filed an Answer through the NYSCEF system, counsel is not noted as appearing on behalf of said Third-Party Defendant in the "3rd Party Actions" tab in the NYSCEF system