

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

2016 NY Slip Op 32472(U)

June 8, 2016

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

-----X
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 6, were considered in connection with the Notice of Motion (Motion #3) filed by third-party Defendant seeking an (1) Order pursuant to Civil Practice Law and Rules § 3211(a)(8) dismissing the Complaint for lack of personal jurisdiction over the Defendant, (2) an Order pursuant to Civil Practice Law and Rules §§ 3211(a)(1) and 501 dismissing the Complaint based on the forum selection clause in the Agency Agreement between NAGELE INCORPORATED BAKERY SYSTEMS and DFEMEINCKE, HAAS-MEINCKE A/S together with such other and further relief as this Court deems just and proper and also Plaintiff's Affirmation in Opposition seeking dismissal of the motion in it's entirety; also considered was the Notice of Motion of Cross-Motion (Motion #4) filed by third-party Plaintiff seeking and (1) Order pursuant to Civil Practice Law and Rules § 306-b extending

DECISION AND ORDER

Index No. 031362/2015

(Motion # 3 and #4)

the time to serve third-party Defendant DFEMEINCKE, HAAS-MEINCKE A/S with the Summons and Complaint, (2) an Order pursuant to Civil Practice Law and Rules § 2001 disregarding any mistakes, omissions, defects, or irregularities in the filing and service process of third-party Defendant DFEMEINCKE, HAAS-MEINCKE A/S, and (3) an Order pursuant to Civil Practice Law and Rules §§ 305-c and 306-b deeming the third-party summons and complaint amended/served *nunc pro tunc* and also third-party Defendant's Affirmation in Opposition to Plaintiff's Cross-Motion seeking denial of Plaintiff's Cross-Motion in its entirety:

PAPERS**NUMBERED**

NOTICE OF MOTION/AFFIRMATION OF KAREN SCHNUR, ESQ. DATED APRIL 8, 2016 IN SUPPORT OF MOTION TO DISMISS PURSUANT TO CPLR § 3211(A)(8)/EXHIBITS (A-G)/AFFIDAVIT OF FRANK MUNTZBERG DATED APRIL 8, 2016/EXHIBITS (1-3)	1
MEMORANDUM OF LAW	2
AFFIRMATION OF LOUIS E. VALVO, ESQ. DATED APRIL 28, 2016 IN OPPOSITION/EXHIBITS (A-B)	3
REPLY AFFIRMATION OF KAREN SCHNUR, ESQ. DATED MAY 5, 2016	4
NOTICE OF CROSS-MOTION/AFFIRMATION OF LOUIS E. VALVO, ESQ. IN SUPPORT OF CROSS-MOTION PURSUANT TO CPLR §§ 306-B, 2001, 305-C AND 306-B/EXHIBITS (A-E)	5
AFFIRMATION OF KAREN SCHNUR, ESQ. DATED MAY 3, 2016 IN OPPOSITION/ EXHIBIT A	6

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 (hereinafter NAEGELE) when said defendant filed an Answer through the NYSCEF system on April 15, 2015.

Defendant NAEGELE 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 (hereinafter DFEMEINCKE) and FRANZ HAAS MACHINERY OF AMERICA, INC..

Issue was joined as to third-party Defendant 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 DFE MEINCKE filed a motion to dismiss the Third-Party Complaint against said defendant, pursuant to Civil Practice Law and Rules § 3211(a)(8), on the grounds that there was no jurisdiction over DFE MEINCKE since the service of the Third-Party Complaint was improper under the Civil Practice Law and Rules, New York Business Law, and the Hague Convention. The undersigned issued a Decision and Order on November 25, 2015 granting the aforementioned motion and dismissing the Third-Party Complaint against DFEMEINCKE for lack of personal jurisdiction.

On March 11, 2016, third-party Defendant DFEMEINCKE was served with a Third-Party Summons and Complaint via the Hague Convention. The Third-Party Summons and Complaint served on DFE MEINCKE was the same Third-Party Summons and Complaint served on DFEMEINCKE on April 22, 2015.

On April 11, 2016, third-party Defendant DFEMEINCKE filed a motion to dismiss the Third-Party Complaint filed against said defendant on March 11, 2016 pursuant to Civil Practice Law and Rules § 3211(a)(8), on the grounds that there was no jurisdiction over DFEMEINCKE since Plaintiff never commenced a new third-party action with a new third-party complaint, and that the service of the third-party complaint on DFEMEINCKE was more than 120 days after the filing of the third-party summons and complaint on April 22, 2015. Additionally, third-party Defendant DFEMEINCKE is seeking an Order pursuant to

Civil Practice Law and Rules §§ 3211(a)(1) and 501 dismissing the Plaintiff's Third-Party Complaint based on a forum selection clause in the Agency Agreement between third-party Plaintiff NAEGELE and third-party Defendant DFEMEINCKE which provides that the laws of Denmark govern the agreement and the Søg og Handelsretten (The Maritime and Commercial Court) in Copenhagen is the Court of Jurisdiction for any action arising out of events in connection with the agreement.

In support of the motion to dismiss for a lack of personal jurisdiction, the moving third-party Defendant argues that the Third-Party Summons and Complaint served on DFEMEINCKE was dismissed by the undersigned on November 30, 2015¹ and therefore Plaintiff was required to commence a new Third-Party action against DFEMEINCKE. Additionally, third-party Defendant DFEMEINCKE argues that Plaintiff failed to seek an extension of time to serve the Third-Party Summons and Complaint on third-party Defendant DFEMEINCKE and therefore the service on March 11, 2016 was over the 120 day requirement for service of the complaint pursuant to the Civil Practice Law and Rules.

In support of Third-Party Defendant DFEMEINCKE's motion to dismiss pursuant to Civil Practice Law and Rules §§ 3211(a)(1) and 501, third-party Defendant argues that the parties signed an Agency Agreement in 2005, prior to the incident in April 2014, which the instant action addresses, and that Agency Agreement provides that the laws of Denmark apply to any dispute arising out of that agreement and that The Maritime and Commercial Court of Denmark is the Court of Jurisdiction for any action arising from a dispute regarding the Agency Agreement.

The moving papers also contain an affidavit of Frank Muntzberg, the Director of moving third-party Defendant DFEMEINCKE, who states that the Agency Agreement was

¹ The affirmation of Attorney Schnur states the Third-Party Summons and Complaint was dismissed by this Court on November 30, 2016. The dismissal date was November 30, 2015, and therefore this is a mere typographical mistake by the attorney for Third-Party Defendant HAAS-MEINCKE A/S f/k/a DFE MEINCKE.

signed between the parties in 2005 and at all times applied to the Tunnel Oven, which is the product that is the subject of the underlying action. Additionally, Muntzberg states that the paperwork for the sale of the Tunnel Oven in 2006 to Caribbean Foods no longer is in the possession of Third-Party Defendant DFEMEINCKE since Danish law requires DFEMEINCKE to retain documents for the current year and for five years thereafter. Muntzberg concedes that shipment of the Tunnel Oven would not have occurred without signed documents and therefore they are not disputing that Caribbean Foods received the Tunnel Oven in question and the existence of order supply paperwork.

Third-party Defendant DFEMEINCKE argues that the Order Confirmation contains a section entitled "general conditions" which states that DFE MEINCKE General Conditions for Supply and Installation apply to Caribbean Foods order of the Tunnel Oven in 2006. Additionally, third-party Defendant DFEMEINCKE avers that Section 29, which is entitled "Disputes and Arbitration: states that any dispute arising out of the Contract and "anything related" can be subject to the process of law in the country or state in which the seller is registered, which they argue is Denmark.

In opposition, counsel for the third-party Plaintiff NAEGELE argue that dismissal under Civil Practice Law and Rules § 3211(a)(1), a defense founded upon documentary evidence, is procedurally improper because third-party Defendant DFEMEINCKE previously waived this defense under Civil Practice Law and Rules § 3211(e), the "single motion rule." In support of this argument Third-Party Plaintiff cites two Second Department cases in which Defendant's initially moved pursuant to Civil Practice Law and Rules § 3211(a) to dismiss the complaints, and after the court's denial of those motions Defendants filed a second motion pursuant to § 3211, which was found to be procedurally barred due to the "single motion rule." Third-party Plaintiff NAEGELE concedes that the part of third-party Defendant DFEMEINCKE instant motion to dismiss pursuant to Civil Practice Law and Rules § 3211(a)(8) is not prevented by the "single motion rule," as an

additional motion may be made when the defendant possesses a new and different jurisdictional argument. Further, counsel for NAEGELE argues that third-party Defendant DFEMEINCKE had a full and fair opportunity to raise their argument for dismissal based on the Agency Agreement during their prior motion, as the agreement existed at the time of that motion.

Third-party Plaintiff NAEGELE additionally argues that the documentary evidence relied upon by third-party Defendant DFEMEINCKE is contrary to the evidence that exists in the record and therefore does not demonstrate conclusively the intent of the parties for the laws of Denmark to apply to any action sounding in products liability. In support of this argument, third-party Plaintiff NAEGELE provides a copy of the Order Confirmation between CARIBBEAN FOODS and the third-party Defendant DFEMEINCKE in relation to the Tunnel Oven purchased by Caribbean Foods in 2006. The Order Confirmation paperwork contains a paragraph #25 entitled "Liability for Damage or Injury caused by the Supply after Takeover (Product Liability)." Counsel for third-party Plaintiff NAEGELE argues that paragraph #25 and paragraph #29 contradict each other as to the application of the laws of Denmark and the requirement of any dispute being filed in The Maritime and Commercial Court of Denmark. Further, he argues that based on this contradiction, third-party Defendant DFEMEINCKE has failed to conclusively establish a defense as a matter of law under Civil Practice Law and Rules § 3211(a)(1).

Finally, counsel for third-party Plaintiff NAEGELE argues that a dismissal pursuant to Civil Practice Law and Rules § 3211(a)(8) should be denied because NAEGELE has good cause and it would be in the interest of justice to provide an extension of the 120 day time to serve required by Civil Practice Law and Rules § 306-b. In support of this argument, third-party Plaintiff NAEGELE has filed a cross-motion seeking an extension of time to serve third-party Defendant DFEMEINCKE and to disregard any mistakes, omissions, defects or irregularities in the filing of the service of process and finally to deem that the

Third-Party Summons and Complaint filed in March 2016 be amended and served nunc pro tunc.

Dealing first with motion to dismiss for failure to effect service on third-party Defendant DFEMEINCKE the Court agrees with the moving third-party Defendant that the service of the previously dismissed complaint and the failure of moving third-party Plaintiff to commence a new third party action renders the service deficient to secure personal jurisdiction over DFEMEINCKE. Third-party Plaintiff basically concedes that service was improper by filing a cross-motion seeking an extension of the 120 daytime frame to serve defendant with the Third-Party Summons and Complaint. The Court agrees with the moving third-party Defendant that the opposition has failed to demonstrate good cause as to the necessity to grant an extension to serve the Third-Party Summons and Complaint and to amend and deem them served nunc pro tunc.

This Court dismissed the Third-Party Summons and Complaint filed against DFEMEINCKE in November 2015 indicating that it was not properly served based on the Civil Practice Law and Rules, New York Business Law and the Hague Convention. Instead of commencing a new third party action, third-party Plaintiff NAEGELE hired an international company, at what they allege was a great expense, to re-serve a complaint this Court had already dismissed, and also failed to seek an extension of time to serve pursuant to Civil Practice Law and Rules § 306-b. These were mistakes that resulted in a failure to properly obtain personal jurisdiction in this matter against third-party Defendant DFEMEINCKE.

Civil Practice Law and Rules § 3211(a)(8) states: A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the court has no jurisdiction of the person of the defendant. Failure to properly serve a defendant pursuant to Civil Practice Law and Rules § 306-b has been determined to result in a lack of personal jurisdiction over a defendant requiring the granting of a motion to dismiss based on § 3211(a)(8). [Charles v. Long Island College Hospital, 47 Ad3d 665 (2d Dept

2008) (complaint was properly dismissed against a third-party plaintiff because the plaintiff failed to properly serve the third-party summons and complaint against the third-party plaintiff)].

A motion pursuant to Civil Practice Law and Rules § 3211(a)(8) must be made before service of a responsive pleading is filed. [Civil Practice Law and Rules § 3211(e)]. Additionally, only one motion to dismiss pursuant to § 3211(a) may be made by a party seeking dismissal. [Civil Practice Law and Rules § 3211(e)]. The plaintiff bears the ultimate burden of proving by a preponderance of evidence that personal jurisdiction has been obtained over a defendant. [Lexington Ins. Co. v. Schuyler Bumpers, Inc., 125 AD2d 554, 554-555 (2d Dept 1986)].

Civil Practice Law and Rules § 306-b states that the service of a summons and complaint, including a third-party summons and complaint shall be made within one hundred twenty (120) days of the commencement of the action. If service is not effected within that one hundred twenty (120) day time period, the court upon motion by a party shall dismiss the action without prejudice as to that defendant. [Civil Practice Law and Rules § 306-b]. However, upon good cause shown or in the interest of justice, the court may also extend the time for service. [Civil Practice Law and Rules § 306-b]. Additionally, a party seeking to extend the time of service cannot make that argument informally in opposition papers, and instead must request such affirmative relief in the form on a cross-motion. [DeLorenzo v. Gabbino Pizza Corp., 83 AD3d 992 (2d Dept 2011); Rinaldi v. Rochford, 77 AD3d 720 (2d Dept 2010)].

In a circumstance in which a judgment of dismissal has already been granted pursuant to Civil Practice Law and Rules § 306-b, a motion for an extension cannot be granted. [Dorst v. Eggers Partnership, 265 AD2d 294 (2d Dept 1999) (Plaintiff barred from moving *nunc pro tunc* to file proof of service where the summons and complaint had already been dismissed and there was no action upon which relief could be granted); Mohammed v.

Elassa, 226 AD2d 509 (2d Dept 1996) (an action was dismissed for failure to pay an index fee, and the plaintiff was thereafter barred from filing a motion pursuant to CPLR § 306-b to file because there was no action pending for which the filing *nun pro tunc* was allowed). In a circumstance in which a court has previously dismissed a summons and complaint, a subsequent motion or cross-motion by plaintiff seeking an extension of time to file a summons and complaint cannot be granted based on the fact that there is no longer an action upon which the court may extend the time to serve defendant.

If a third-party summons and complaint is dismissed without prejudice for failure to effectuate proper service and the statute of limitations has not expired, then the party must commence a new action and properly serve the third-party defendant.

In the instant action, the undersigned dismissed the third-party summons and complaint against third-party Defendant DFEMEINCKE in a Decision and Order dated November 30, 2015. Once that Decision and Order was issued and notice of entry filed, then there was no longer a pending action on which the third-party Plaintiff NAEGELE could seek a cross-motion to extend service pursuant to Civil Practice Law and Rules § 306-b. Additionally, once the aforementioned third-party summons and complaint were dismissed without prejudice, then they could not be merely re-served on third-party Defendant DFEMEINCKE through the requirements of the Hague Convention. Plaintiff NAEGELE was required to re-commence the action against third-party Defendant DFEMEINCKE and file a newly dated third-party summons and complaint. A mere regurgitation of the prior paperwork without changing the date and obtaining a new index number was not sufficient for this court to obtain personal jurisdiction over third-party Defendant DFEMEINCKE.

Third-party Defendant DFEMEINCKE concedes that the statute of limitations has not run on Plaintiff NAEGELE's claims of indemnification and contribution against them. Additionally, Defendant DFEMEINCKE admits Plaintiff NAEGELE is not barred from re-commencing the action against them as long as they are served with a new summons and

complaint under a new action. Plaintiff NAEGELE failed to commence a new action with a new summons and complaint, and only sought an extension of time to serve the third-party Defendant DFEMEINCKE through a cross-motion (Motion #4) upon the filing of a motion to dismiss by the Defendant DFEMEINCKE (Motion #3). This Court agrees with the moving third-party Defendant that they were not properly served on March 11, 2016 and this court lacks personal jurisdiction in this matter. The third-party summons and complaint served on the moving third-party Defendant was previously dismissed without pre-judice and therefore this Court cannot dismiss something again that was already dismissed.

Briefly addressing the third-party Plaintiff NAEGELE's cross-motion seeking an extension of time to serve the third-party Defendant with the third-party summons, the motion seeking the court disregard any mistakes, omissions, defects, or irregularities in the filing and service process of the third-party summons and complaint and also deeming the third-party summons and complaint amended and served *nunc pro tunc*, that application fails in its entirety. First, as previously stated this Court has already dismissed the third-party summons and complaint filed against the third-party Defendant DFEMEINCKE and there is no action pending before this Court for which the Court may extend service of process. Additionally, the Court is unwilling to disregard the failure of the third-party Plaintiff to commence a new action and file a new summons and complaint against the third-party Defendant DFEMEINCKE pursuant to Civil Practice Law and Rules § 2001. Finally, since the third-party complaint served on third-party Defendant DFEMEINCKE was dismissed by this Court in November 2015, the Court cannot deem the complaint amended/served *nunc pro tunc*, as there is no longer an action pending before this Court upon which an order *nunc pro tunc* could be granted.

Turning now to third-party Defendant DFEMEINCKE's motion seeking dismissal of the third-party complaint and summons based on documentary evidence, specifically a forum selection clause contained in an Agency Agreement between the parties

specifically a forum selection clause contained in an Agency Agreement between the parties signed in 2005, the Court need not address that argument since the service of the third-party Defendant DFEMEINCKE was insufficient and there is no action pending upon which this Court can grant relief. Further, the Court also need not address whether a forum selection clause would be sufficient documentary evidence to support a motion to dismiss pursuant to Civil Practice Law and Rules § 3211(a)(1).

Based on the circumstances as detailed above, the motion to dismiss (Motion #3) is granted in part as to the application pursuant to Civil Practice Law and Rules § 3211(a)(8) and the third-party Summons and Complaint, which was previously dismissed is again dismissed as against third-party Defendant DFEMEINCKE. The portion of Third-Party Defendant's motion to dismiss (Motion #3) pursuant to Civil Practice Law and Rules §§ 3211(a)(1) and 501 is denied. Additionally, based on the circumstances as detailed above, third-party Plaintiff NAEGELE's cross-motion (Motion #4) is denied in its entirety.

Counsel for the remaining parties shall appear before the undersigned for a preliminary conference on **THURSDAY JUNE 9, 2016 at 9:15 a.m.**

Accordingly, it is hereby

ORDERED that the Motion (Motion #3) filed by third-party Defendant DFEMEINCKE is granted as to the portion seeking relief pursuant to Civil Practice Law and Rules § 3211(a)(8) and the third-party Summons and Complaint that was previously dismissed is again dismissed as against said defendant; and it is further

ORDERED that the Motion (Motion #3) filed by third-party Defendant DFEMEINCKE is denied as to the portion seeking relief pursuant to Civil Practice Law and Rules §§ 3211(a)(1) and 501; and it is further

ORDERED that the Cross-Motion (Motion #4) filed by third-party Plaintiff NAEGELE is denied in its entirety; and it is further

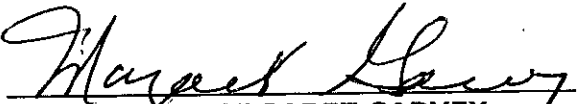
ORDERED that counsel for the remaining parties shall appear at a

preliminary conference before the undersigned on **THURSDAY JUNE 9, 2016 at 9:15**

a.m.

The foregoing constitutes the Decision and Order of this Court on Motions # 3
and 4.

Dated: New City, New York
June 8, 2016


HON. MARGARET GARVEY
Justice of the Supreme Court

TO:
by e-filing -

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** 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