

Hamel v Park Ave. Armory

2019 NY Slip Op 31500(U)

May 28, 2019

Supreme Court, New York County

Docket Number: 450647/18

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 18

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VERONICA HAMEL,

Plaintiff,

Index No.
450647/18

- against -

Motion Seq.
003

PARK AVENUE ARMORY, SEVENTH REGIMENT ARMORY
CONSERVANCY, INC., THE CITY OF NEW YORK, OLD VIC
THEATRE, STEWART LAING, MIMI JORDAN SHERIN, MCLAREN
ENGINEERING GROUP, ELITE PRODUCTION CONSULT, THE
LIGHTING SYNDICATE LLC, KEVIN BRYNE ARCHITECTS, P.C.,
OLD VIC THEATRE COMPANY (THE CUT) LIMITED, and HUDSON
SCENIC STUDIO,

Defendants.
-----X

HON. ALEXANDER TISCH, J.S.C.

In motion sequence 003, defendant Old Vic Theatre Company (The Cut) Limited (OVTC) moves pursuant to CPLR 3211(a)(1), (7), and (8) to dismiss plaintiff Veronica Hamel's (Hamel) first cause of action for negligence in the amended complaint (Complaint) and the cross-claims asserted by defendants Hudson Scenic Studio (Hudson), McLaren Engineering Group (McLaren), Elite Production Consult (Elite), and Lighting Syndicate LLC (Lighting Syndicate, collectively the Cross-Claim Defendants).

Background

This action arises out of an injury Hamel suffered while attending a play, "The Hairy Ape" (the Play), at 643 Park Avenue in the County, City and State of New York, also known as defendant Park Avenue Armory (the Armory). The facts below are taken from the Complaint and the moving briefs.

On January 13, 2017, the Seventh Regiment Armory Conservancy (SRAC) and OVTC executed a licensing agreement wherein SRAC licensed the rights to produce the Play for up to 27 performances in New York (the Licensing Agreement) (Lee affirmation, exhibit 1). Pursuant to the Licensing Agreement, SRAC paid OVTC £20,000 for the right to produce the Play, for

certain physical elements, and the production book (*id.*). In addition, SRAC would receive all ticket sales from the New York performances of the Play and OVTC would be credited as a co-producer (*id.*).

On April 14, 2017, Hamel was attending the Play, when she allegedly fell on the Play's rotating stage platform (the Platform) and suffered injury (Complaint, ¶¶ 19, 20). Hamel alleges that the Platform was a dangerous condition and that defendants were negligent in their duty to ensure that the Armory was free from dangerous conditions. Hamel is seeking \$10,000,000 for the injury she suffered (*id.* at ¶¶ 29-31).

At the time of Hamel's injury, SRAC was the tenant occupying the Armory and the City of New York was the owner/landlord (Gottridge affirmation, exhibits G, H).

Hamel alleges defendants Hudson, McLaren, Elite, Kevin Byrne Architects, P.C., and Lighting Syndicate were involved in the design, construction, and installation of the Platform (*id.* ¶¶ 12, 15-18). Defendants Stewart Laing and Mimi Jordan Sherin were a designer and lighting designer, respectively (*id.* at ¶¶ 13,14).

Discussion

OVTC moves to dismiss the Complaint arguing that it is not subject to jurisdiction in New York as a nonresident with a principal place of business in London, United Kingdom. Furthermore, OVTC did not owe Hamel any duty of care because it did not own, occupy, or control the Armory.

Hamel argues that OVTC is subject to jurisdiction in New York and denial of the motion to dismiss is appropriate because OVTC derived income from the licensing of the Play and is a co-producer. Furthermore, OVTC provided certain "Physical Elements" for the Play to SRAC, which may have included the Platform, which was the cause of Hamel's injuries. As such, there is a clear nexus between Hamel's causes of action and the Licensing Agreement.

Moreover, Hamel argues that discovery is necessary to determine if OVTC provided the Platform, the extent of OVTC's involvement in the physical production of the Play, and the duty OVTC owed to Hamel as co-producer of the Play.

"Under CPLR 301 the authority of the New York courts to [exercise jurisdiction over a foreign corporation] is based solely upon the fact that the defendant is engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction" (*Laufer v Ostrow*, 55 NY2d 305, 309–10 [1982] [internal quotation marks and citations omitted]).

Based on the affirmation of Ben Lee (Lee)¹, OVTC's Finance Director, OVTC is a private company registered under the laws of England and Wales with its principle place of business in London, England (Lee affirmation, ¶ 4). In addition, OVTC is wholly owned by the Old Vic Theater Trust 2000, a charitable trust organized under the laws of England and Wales with its principle place of business in London, England (*id.* ¶ 5). As such, OVTC is not subject to jurisdiction under CPLR 301 since it is not incorporated in New York and its principal place of business is not located in New York (*Laufer* at 310).

CPLR § 302(a)(1) permits a court to exercise jurisdiction over a non-domiciliary that transacts business within the state if the asserted cause of action arises out of that transaction (*Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007]). Hamel must establish that OVTC's activities were purposeful and that a substantial relationship exists between the Licensing Agreement and her cause of action for negligence (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014]).

"Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.* [internal citations and quotations marks omitted]). "More than limited

¹ The document is titled an affirmation, but Lee does not appear to be counsel and it is not notarized (NYSCEF #103).

contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York” (*id.* [internal citation omitted]). “Thus, where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)” (*id.* at 377 [internal quotation marks and citation omitted]).

“In order to satisfy the overriding criterion necessary to establish a transaction of business within the meaning of CPLR 302(a)(1), a non-domiciliary must commit an act by which it purposefully avails itself of the privilege of conducting activities within New York” (*id.* [citations, brackets, and quotations marks omitted]).

This Court cannot determine at this early stage of the litigation if OVTC is subject to jurisdiction under CPLR § 302(a)(1).

It is undisputed that OVTC is the owner of the Play and licensed the production of the Play to SRAC pursuant to the Licensing Agreement (Lee affirmation, exhibit 1). Under the relevant terms of the Licensing Agreement: (1) OVTC was compensated for licensing the Play only and would not receive any income from the ticket sales of the performances, (2) the Play would run for a limited duration from March 13, 2017 to April 22, 2017, (3) OVTC would be credited as a co-producer in the marketing materials and billboard, (4) OVTC would provide production materials including a list of items defined as “Physical Elements”, and (5) New York was the chosen forum for resolving any disputes arising from the Licensing Agreement (*id.*). Although the Platform is not specifically listed in the Licensing Agreement, the Licensing Agreement does contemplate that there will be additional physical elements added to the list (*id.*, Appendix 1).

Neither party has submitted evidence that establishes the source of the Platform, the extent of OVTC’s involvement in the production of the Play, the extent of the negotiations, if any aspect of the transaction occurred in New York, and what obligations OVTC had with respect to the premises at issue, the Armory.

Lee's affirmation details the formation background and entity registration for OVTC, the deficiencies in Hamel's allegations, and recites the provisions of the Licensing Agreement, but fails to rebut any of Hamel's jurisdictional arguments. Lee does not state that: (1) OVTC never entered New York in connection with this transaction, (2) OVTC did not provide the Platform as a part of the physical elements, (3) OVTC had no involvement in the design, construction, installation of the Platform, (4) OVTC was not involved in the physical production of the Play, and (5) that OVTC had no obligations with respect to maintaining the Armory (NYSCEF #103). Those contentions are made in OVTC's moving briefs only.

Hamel's allegations combined with the fact that OVTC is a co-producer, and the lack of any credible denial from OVTC of key facts "constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous" (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004]).

In addition, OVTC's involvement or lack thereof is highly probative to Hamel's cause of action for negligence as it cannot be determined conclusively at this juncture that OVTC did not control the Armory (*Puzhayeva v City of New York*, 151 AD3d 988, 989 [2d Dept 2017] [internal quotations marks and citation omitted] ["liability for a dangerous or defective condition on property is...predicated upon ownership, occupancy, control or special use of the property"]).

Accordingly, it is ORDERED that defendant Old Vic Theater Company (The Cut) Limited's motion to dismiss is denied without prejudice and with leave to renew upon further discovery.


HON. ALEXANDER M. TISCH

5/28/2019
DATE

HON. ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: