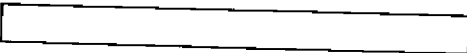


Brembo, SPA v Taw Performance LLC
2020 NY Slip Op 31451(U)
April 23, 2020
Supreme Court, New York County
Docket Number: 654931/2017
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ

PART: IAS 47

BREMBO, SPA.

Index No. 654931/2017

Plaintiff,

Motion Seq. Nos. 011, 012

-against-

TAW PERFORMANCE LLC,

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 264-283, 290, 300-324, 327; (Motion 012) 284-289, 325-336 were read on these motions to dismiss.

Plaintiff Brembo SPA, an Italian manufacturer of motor vehicle and motorcycle parts commenced this action to recover sums allegedly due and owing under the parties' exclusive distribution agreement dated July 1, 2014. In response, defendant TAW asserted various counterclaims against plaintiff Brembo and also commenced a third-party action against third-party defendants OmniaRacing Srl and Carpimoto Srl based on their alleged sale of Brembo products in North America. By order dated July 2, 2018, this court dismissed all of TAW counterclaims against Brembo except its second counterclaim based on Brembo's alleged breach of the parties' exclusive distribution agreement. In the same order, the court also dismissed TAW's third-party complaint against the third-party defendants based on lack of personal jurisdiction. Upon TAW's motion to reargue, by decision and order dated November 30, 2018, the court, granted reargument, vacated that part of the July 2, 2018 order dismissing the third-party

complaint, reinstated the third-party complaint, and permitted jurisdictional discovery and upon completion of jurisdictional discovery, allowed the third-party defendants to renew their motions to dismiss. Third-party defendants now renew their motion to dismiss the third-party complaint pursuant to CPLR 3211 based on lack of personal jurisdiction and failure to state a claim, and to dismiss the third-party complaint pursuant to CPLR 327 based on forum non conveniens.

With respect to the issue of personal jurisdiction, TAW alleges generally that this court has jurisdiction over Omnia and Carpinoto under CPLR 302 because both companies operate interactive websites that allow customers, including customers from New York, to purchase their products from Italy. As discussed at length in the court's prior decisions, the third-party defendants' interactive websites alone were insufficient to confer personal jurisdiction over these parties under CPLR 302(a)(1) without direct solicitation or sales of products to customers in New York. *See Citigroup, Inc. v. City Holding Co.*, 97 F.Supp.2d 549, 565 (S.D.N.Y. 2000). However, jurisdictional discovery has revealed that the third-party defendants did in fact sell Brembo products to New York residents, including during the period that the exclusive distribution agreement was in place. Affirmation of Michael C. Barrows dated November 7, 2019, Exhs. E, F, G. These sales, coupled with the third-party defendants' interactive websites, are sufficient to confer personal jurisdiction under CPLR 302(a)(1). *See Hsin Tin Enter. USA v. Clark Enters.*, 138 F.Supp.2d 449, 456 (S.D.N.Y. 2000).

Nevertheless, third-party defendants argue that the court cannot exercise personal jurisdiction under CPLR 302(a)(1) because TAW's causes of action against the third-

party defendants do not arise from the third-party defendants' contacts with New York. In order for there to be personal jurisdiction under CPLR 302(a)(1), the causes of action must have a "substantial relationship" with the business transaction conducted in New York. *D&R Global Selections v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 298-99 (2017). This inquiry is relatively permissive and a substantial relationship exists where at least one element of a cause of action arises from the New York contacts. *Id.* at 299.

Here, in the third-party complaint, TAW asserts two causes of action against the third-party defendants for tortious interference with contract and tortious interference with existing business relationships. Both of the causes of action appear to be based on the allegations, as supplemented by the affidavit of Richard Martin managing member of TAW, that the third-party defendants interfered with TAW's exclusive distribution agreement with Brembo by both selling Brembo products in North America, including in New York, and by interfering with Brembo's efforts to enforce the exclusivity provisions in the agreement. Third-party Complaint, para. 75, 79, 126, 129; Affidavit of Richard Martin, paras. 19-22. Consequently, TAW's claims against the third-party defendants are based, in large part, on the third-party defendants' sales in North America, including in New York, and thus there is a "substantial relationship" between the causes of action and the third-party defendants' contacts with this State. *D&R Global Selections*, 29 N.Y.3d at 299. Accordingly, the court may exercise personal jurisdiction over the third-party defendants under CPLR 302(a)(1).

The third-party defendants also argue that the third-party complaint should be dismissed under CPLR 3211(a)(7) for failure to state a claim. With respect to the first cause of

action for tortious interference with contract, the third-party defendants argue that the claim should be dismissed because TAW has not plead, with sufficient particularity, how the third-party defendants “induced” Brembo to breach its contract with TAW. In order to state a cause of action for tortious interference with contract, a party must show the existence of a valid contract with a third-party, defendants’ knowledge of that contract, defendants’ intentional and improper procuring of a breach of that contract, and damages. *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). Here, TAW has sufficiently plead all of these elements. First, as discussed in the court’s prior decision on Brembo’s motion to dismiss TAW’s counterclaims, TAW has stated a claim for breach of contract against Brembo based on Brembo’s alleged failure to enforce the exclusivity provisions in the parties’ exclusive distribution agreement, including assisting TAW with processing requests to remove the offending competitors products from eBay. TAW alleges that the third-party defendants had knowledge of this contract and intentionally induced Brembo to breach this contract by not only selling Brembo products in North America during the period of the exclusive distribution agreement, but also by persuading Brembo to not remove the allegedly infringing items from eBay. *See Martin Aff.*, paras. 19-22. To the extent the third-party defendants argue that they had no relationship with Brembo and that they were merely retailers who purchased their Brembo products from non-party Motorquality, these are factual issues which cannot be resolved on this motion to dismiss. Accordingly, TAW’s cause of action for tortious interference with contract against the third-party defendants will not be dismissed.

TAW's second cause of action in the third-party complaint is for "tortious interference with existing business relationships." Third-party complaint, paras. 128-132. This cause of action appears to be based on the same allegations as the first cause of action for tortious interference with contract. Indeed, TAW alleges, in sum, that the third-party defendants interfered with its business relationship with Brembo, including the exclusivity provisions in its contract, by selling Brembo products in North America. Third-party complaint, para. 129. Thus, this cause of action will be dismissed as redundant. To the extent that TAW seeks to assert this cause of action based on alleged interference with prospective business relationships, it has failed to plead a specific relationship with an identified third-party that has been breached. *Mehrhof v. Monroe-Woodbury Central School District*, 168 A.D.3d 713, 714 (2d Dep't 2019).

Finally, the third-party defendants' argument that the third-party complaint should be dismissed under CPLR 327 based on forum non conveniens lacks merit. First, the third-party defendants' argument is based entirely on conclusory statements by their attorneys in the moving papers that the dispute has no relationship to New York. This is insufficient to meet the moving parties' heavy burden of showing that New York is an inconvenient forum and that another jurisdiction is a more appropriate forum. *Bank Hapoalim (Switzerland) Ltd. V. Banca Intesa SPA*, 26 A.D.3d 286 (1st Dep't 2006). Moreover, the third-party defendants did not raise this issue in their prior motion to dismiss and waited for over two years after the third-party complaint was filed to seek dismissal based on forum non conveniens. The third-party defendants' delay in raising this issue constitutes a waiver of their right to make a motion to dismiss on this

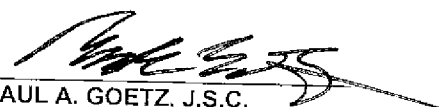
basis. *Todtman Young Tunick Nachamie Hendler Spizz & Drogin PC v. Richardson*,
231 A.D.2d 1 (1st Dep't 1997).

Accordingly, it is

ORDERED that the motions are granted to the extent that the second cause of action in
the third-party complaint is dismissed, and is otherwise denied; and it is further

ORDERED that the third-party defendants shall file their answers to the third-party
complaint within ten days of service of notice of entry of this order.

4/23/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE