SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 33
NASSAU COUNTY

ECONOMY PREMIER ASSURANCE COMANY, as subrogee of HARVEY AND MARILYN GESSIN,

Plaintiff,

-against-

MIFLEX 2 S.p.A.,

Defendant.

Index No.: 615113/18
Motion Seq. Nos.: 02, 03
Motion Dates: 09/25/19
11/15/19

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion (Seq. No. 03) and in Further Support of Motion (Seq. No. 02), Affidavit and Exhibits	3
Reply Affirmation to Cross-Motion (Seq. No. 03) and Exhibit	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 02), pursuant to CPLR § 3215, for an order granting a default judgment.

Defendant opposes the motion (Seq. No. 02) and cross-moves (Seq. No. 03), pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiff's Complaint. Plaintiff opposes the cross-motion (Seq, No. 02).

In support of the motion (Seq. No. 02), counsel for plaintiff submits, in pertinent part, that, "[t]his action was commenced pursuant (*sic*) CPLR § 304 on November 8, 2018 by the filing of a Summons and Complaint.... This action arose from damages caused by a ruptured supply line manufactured by the defendant, MIFLEX 2 S.p.A. (Hereinafter 'defendant'). The

incident occurred at the home of plaintiff subrogors, Harvey and Evelyn Gessin (hereinafter 'subrogors'), on November 2, 2017, at 5 Cow Lane, Kings Point, New York 11024 (hereinafter the 'loss location'). Based on an engineering report that will be detailed further herein, the rupture was caused by (*sic*) manufacturer's defect in material selection and/or inferior product design. Pursuant to an insurance policy in force and effect at the time of loss, Economy reimbursed subrogors in the amount of $121,562.68, including the applicable deductible. Defendant is an entity conducting business in Italy and, upon information and belief, was established under the laws of that country.... As exhibited by an internet search, defendant's products are readily available for purchase in the United States.... Pursuant to CPLR § 302(a)(1), this court has jurisdiction over the defendant, as it transacts business within the State of New York and/or contracts to supply goods within the State of New York.... A search of the Department of State corporation and business entity database records did not reveal the existence of a registered agent (*sic*) process of service on the defendant in New York.... Additionally, no registered agent of the defendant could be located within the United States, and consequently, plaintiff effectuated foreign service. Foreign service on the defendant was completed pursuant to the provisions of the Hague Service Convention on January 18, 2019.... Defendant has failed to move, Answer, or otherwise respond to plaintiff's Summons and Complaint. The time permitted for defendant to do so has expired." *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 02) Exhibits A-H.

In further support of the motion (Seq. No. 02), plaintiff submits the Donan Component Testing Lab engineer's report by Professional Engineer Donald E. Mikel, Jr. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 02) Exhibit I.

In opposition to the motion (Seq. No. 02) and in support of the cross-motion (Seq. No. 03), counsel for defendant submits, in pertinent part, that, "MIFLEX 2 S.p.A. is an Italian Company with absolutely no relation to the United States, or more specifically New York, and therefore cannot be subject to personal jurisdiction. Plaintiff concedes in their moving papers that MIFLEX 2 S.p.A. is a business entity established and operating pursuant to the laws of Italy. In an attempt to maintain an untenable position, plaintiff relies on a two-page copy of an unauthenticated website and claims that the products are available for purchase on the internet. This is simply not sufficient to establish general or specific jurisdiction against MIFLEX 2 S.p.A. Furthermore, Milflex products are not available for purchase directly through the website."

Counsel for defendant further asserts, in pertinent part, that, "[t]here are no factual grounds upon which a New York court could properly exercise personal jurisdiction over Milflex.... There is no contract, business relationship, purchase agreement, or documents linking Milflex and Harvey or Marilyn Gessin.... Harvey and Marilyn Gessin are not customers of Milflex.... Furthermore, Milflex does not transact any business in the state of New York.... All of the products manufactured by Milflex and distributed to customers are deemed 'Ex Works' meaning the point of sale and delivery of the products will be at the Milflex facility, and the customers are charged with accepting and transporting products away from the facility.... The supply line which plaintiff claims to have ruptured as a result of a manufacturing defect is allegedly manufactured by Milflex. There is absolutely no evidence establishing that the subject supply line was ever even directly distributed to the United States by Milflex."

In support of the cross-motion (Seq. No. 03), defendant submits the Affidavit of Mauro Mazzo ("Mazzo"), managing director of defendant company. *See* Defendant's Affirmation in

Opposition to Motion (Seq. No. 02) and in Support of Cross-Motion (Seq. No. 03) Exhibit C. Mazzo asserts, in pertinent part, that, "Milflex is primarily engaged in the business of manufacturing flexible hoses for domestic, electronic appliances and other equipment. Generally, all sales and deliveries of producers manufactured by Milflex to customers occur at the Milflex facility in Italy. Milflex has no manufacturing or distribution facilities in the United States, including the State of New York. Milflex never ship (*sic*) supply line hoses directly to the State of New York. Milflex supply line hoses are not available for purchase directly by US consumers. Milflex products are not for sale through the website.... Milflex does not transact or conduct any business in the State of New York.... Milflex does not maintain, nor has it ever maintained, an office in the State of New York.... Milflex does not own, rent, lease, or use any real property in the State of New York.... Milflex does not have any employees, agents or any other physical presence in the State of New York.... Milflex is not registered to conduct any business in the State of New York and has never conducted any business in the State of New York." *See id.*

Counsel for defendant argues, in pertinent part, that, "[t]here is no question that general jurisdiction does not exist here. Milflex is neither incorporated in New York nor does it have its principal place of business there.... It is not 'at home' in New York. This cannot be controverted. It is an Italian company with its principal place of business in Italy.... Furthermore, pursuant to the affidavit of Mauro Mazzo, there simply are no 'continuous' or 'systematic' business activity of Milflex in New York.... For specific jurisdiction to exist, the lawsuit must arise out of, or be related to, the defendant's contacts with the forum. More simply put, the foreign entity's contacts must be 'purposeful' and there must be 'a substantial relationship between the transaction and the claim asserted.' [citations omitted].... Milflex obviously has not purposefully established

contacts within New York, meaning that Plaintiffs' (*sic*) cause of action cannot possibly arise out of or bear any relation to such contacts. Milflex does not control, design, manage, maintain or pay for the distribution of its product after it had been purchased. Furthermore, plaintiff's reliance on the website is severely misplaced. These hoses are nor sold for independent purchase on the referenced website, it is merely just in the English language.... Plaintiff cannot meet his (*sic*) burden of establishing specific jurisdiction over Milflex simply because products allegedly designed and manufactured by Milflex ultimately reached New York." *See id.*

In opposition to the cross-motion (Seq. No.03) and in further support of the motion (Seq. No. 02), counsel for plaintiff submits, in pertinent part, that, "[s]ervice of process on Milflex was completed on January 18, 2019, in excess of 9 months ago.... Milflex's time to move, Answer or otherwise respond in this Action has long since expired. CPLR §§ 320 and 3012 require that a responsive pleading be received within, twenty (20) days or thirty (30) days. [citation omitted]. Even using the longer thirty-day time period for filing an Answer allowed by CPLR §§ 320 and 3012, the Answer must have been filed no later than February 18, 2019. Milflex does not contest that service was accomplished on the date specified in the proof of service, nor does Milflex reserve any objection to the sufficiency of such service. Since Milflex's motion was not made within the time period in which Milflex was required to serve an Answer … and since no extension of time to make the motion was requested by Milflex or granted by the Court [citations omitted], the motion must be deemed untimely. [citations omitted]…. Milflex does not object to or deny receipt of service of plaintiff's Summons and Complaint. Milflex provides no excuse or its delay in filing its motion or responding to plaintiff's Summons and Complaint, nor does Milflex seek Court permission to file the late motion."

Counsel for plaintiff further contends, in pertinent part, that, "[t]his Court has jurisdiction pursuant to CPLR § 302(a)(1).... As established in the Donan report..., the loss sustained at the Gessin home was caused by a Milflex supply line that ruptured. As established in the accompanying Affidavit by Donald E. Mikel Jr. (hereinafter 'Mikel Affidavit'), Milflex products are routinely used in various appliances sold or distributed throughout the United States, including in the State of New York.... Thus, there can be no doubt that the failure of a Milflex product was the cause of the damages sustained by plaintiff's subrogor, or that Milfex products routinely enter New York." *See* Plaintiff's Affirmation in Opposition to Cross-Motion (Seq. No. 03) and in Further Support of Motion (Seq. No. 02) Exhibit A; Plaintiff's Affidavit in Opposition to Cross-Motion (Seq. No. 03) and in Further Support of Motion (Seq. No. 02).

In reply to plaintiff's opposition to the cross-motion (Seq. No.03), counsel for defendant asserts, in pertinent part, that, "[i]n an attempt to support and (*sic*) untenable position, plaintiff's primary argument is that since the summons and complaint was (*sic*) allegedly erroneously served on Milflex in January of 2019, the time to answer had expired and the instant cross-motion is untimely. When a party is not subject to personal jurisdiction under the long-arm statute, service of process upon him is wholly invalid. [citations omitted]. CPLR § 313 explicitly states '**a person domiciled in the state or subject to the jurisdiction of the courts of the state** under section 301 or section 302...' (emphasis added). It is undisputed that Milflex is not domiciled within the state of New York and bases upon the showing in the instant motion practice, Milflex is not subject to the jurisdiction of the Courts in New York State. As a result, service cannot be proper, and the instant motion is timely made.... In this case, where jurisdiction is contested, and personal jurisdiction does not exist over Milflex, service cannot be considered

proper. [citation omitted]. Furthermore, since service is improper on a defendant not subject to jurisdiction in the instant Court, the time to answer the complaint never began to run, and the motion is once again timely."

At any time before service of the responsive pleading is required, a party may move on one or more of the statutory grounds for a motion to dismiss. *See* CPLR § 3211(e). In the instant matter, defendant failed to file its Answer in the statutory time allowed. *See* CPLR § 3012. Therefore, defendant's cross-motion to dismiss (Seq. No. 03) was untimely filed. *See Clinkscale v. Sampson*, 74 A.D.3d 721, 904 N.Y.S.2d 447 (2d Dept. 2010). In the case cited by defendant, *Hopstein v. Cohen,* 143 A.D.3d 859, 40 N.Y.S3d 436 (2d Dept. 2016), the defendant had raised the defense of lack of jurisdiction in his Answer.

Consequently, defendant's cross-motion (Seq. No. 03), pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiff's Verified Complaint, is hereby **DENIED**.

With respect to plaintiff's motion for a default judgment (Seq, No. 02), on a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the Summons and Verified Complaint, proof of the facts constituting its claim and proof of the defaulting party's default in answering or appearing. In the instant matter, plaintiff's complaint is not verified, and the Court finds that the alleged proof of the facts constituting its claims is an insufficient basis upon which the Court should grant a default judgment.

The Court additionally notes that justice disfavors defaults and prefers that issues be resolved on the merits. *See Ahmad v. Aniolowisk*, 28 A.D.3d 692, 814 N.Y.S.2d 666 (2d Dept. 2006); *Moore v. Day*, 55 A.D.3d 803, 866 N.Y.S.2d 303 (2d Dept. 2008); *Toll Brothers, Inc. v. Dorsch*, 91 A.D.3d 755, 936 N.Y.S.2d 576 (2d Dept. 2012).

Therefore, based upon the all of the above, plaintiff's motion (Seq. No. 02), pursuant to CPLR § 3215, for an order granting a default judgment, is hereby **DENIED**.

The parties shall appear for a Preliminary Conference on June 15, 2020, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

_____/S/_____
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 15, 2020