

Savianeso v Aerco Intl., Inc.
2021 NY Slip Op 31851(U)
June 1, 2021
Supreme Court, New York County
Docket Number: 190040/2020
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13
Justice
INDEX NO. 190040/2020
MOTION DATE 10/07/2020
MOTION SEQ. NO. 001

JUNE SAVIANESO,

Plaintiff,

- v -

AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, BALLANTYN STRONG INC, BLODGETT CORPORATION, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BRIGGS & STRATTON CORP, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, COMPUTDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, DAVID FABRICATORS INC A/K/A DAVID ASBESTOS CORP, DEERE & CO, ECHO INCORPORATED, GENERAL ELECTRIC COMPANY, GOULD ELECTRONICS INC, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, KARNAK CORPORATION, LEVITON MANUFACTURING CO., INC, MORSE TEC LLC, PB HEAT LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO PEERLESS INDUSTRIES, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PULSAFEEDER, QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC, RHEEM MANUFACTURING COMPANY, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SIEMENS INDUSTRY, INC, SUCCESSOR IN INTEREST TO SIEMENS ENERGY & AUTOMATION, INC, SIGNIFY.COM, STIHL INC, STRAND LIGHTING, INC, STRONG LIGHTING, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO SUPER TROUPER, TECUMSEH POWER, TECUMSEH PRODUCTS COMPANY, THE TORO COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, BALLANTYNE OF OMAHA, INC. INDIVIDUALLY AND AS SUCCESSOR TO STRONG ELECTRIC CORP AND STRONG INTERNATIONAL, FEDDERS CORP, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO

DECISION + ORDER ON MOTION

PUMP & NORTHERN PUMP BUSINESSES, FORD MOTOR COMPANY, GOULDS PUMPS LLC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., KOHLER CO., LENNOX INDUSTRIES, INC., PK&P INVESTMENT CO. F/K/A MOLE RICHARDSON CO, TACO, INC., WOOLSULATE CORPORATION, STRAND LIGHTING LLC INDIVIDUALLY AND SUCCESSOR IN INTEREST TO RANK AMERICA INC., RANK INDUSTRIES INC., RANK INDUSTRIES AMERICA INC., CENTURY STRAND INC., STRAND ELECTRIC, INC., STRAND LIGHTING INC., SLI INC., STRAND CENTURY INC., AND DOE CORPORATION, SIGNIFY NORTH AMERICA CORPORATION F/K/A PHILLIPS LIGHTING, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO RANK AMERICA INC., RANK INDUSTRIES, INC., AND RANK INDUSTRIES AMERICA INC., CENTURY STRAND INC., STRAND ELECTRIC INC., STRAND LIGHTING, SLI INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 135, 136, 137, 138, 139, 144, 145, 146, 147, 148, 149, 150, 151

were read on this motion to/for DISMISS

After oral argument and upon the foregoing documents, it is ORDERED that defendant PK&P Investment Co. f/k/a Mole-Richardson Co.'s ("PK&P") motion to dismiss pursuant to CPLR 3211(a)(8) on the grounds that service on PK&P remains defective and pursuant to CPLR 306(b) on the grounds that plaintiff has failed to effect service on PK&P within 120 days of filing the Amended Complaint.

CPLR § 3211(a)(8) states in relevant part that, "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." Strict compliance with CPLR § 311 is required in order to obtain jurisdiction (*Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 351, 736 N.Y.S.2d 367 [1st Dept 2002]; *Monzon v Chiaramonte*, 140 A.D.3d 1126, 1129 ["The Supreme Court did not err in granting that branch of [defendant's] motion which was to dismiss the

complaint insofar as asserted against her pursuant to CPLR 3211(a)(8) based on defective service of process.... [Defendant] demonstrated that the plaintiff failed to establish that the [service requirements] were strictly complied with. Personal jurisdiction was therefore not acquired over [defendant]]” [internal citations omitted]). A Failure to file proof of service within 120 days after the filing of the Summons and Complaint is grounds for automatic dismissal pursuant to CPLR 306(b) (*Black v Gugliotta*, 237 AD2d 110 [1st Dept 1997]).

Here, defendant alleges that plaintiff has failed to establish that service requirements were complied with and that personal jurisdiction was not acquired over defendant. Defendant claims that it is entitled to dismissal because it was not served within 120 days after filing of the Amended Complaint. PK&P is located in California and incorporated under the laws of the State of California. (Maher Aff., Exh C). PK&P's Authorized Agent for Service of Process is Mr. David Lachoff in Los Angeles, California. (Maher Aff., Exh C and Exh D). Plaintiff filed an affidavit of service on May 13, 2020, indicating that “personal service” was made on PK&P through Kathryn Mannix at CSC Lawyers Incorporating Service (“CSC”). Defendant claims that service on CSC was defective as it is not agent for service.

Plaintiff filed an affidavit of service on June 10, 2020 which indicates that on June 3, 2020, service was made on Alice Smith as registered agent for PK&P, through ASA Inc. (“ASA”) in Carrollton, Texas (Maher Aff. Exh G). PK&P notes that while it is registered as a foreign corporation authorized to do business in Texas, PK&P's only registered agent for service in Texas is Paracorp Inc. (“Paracorp”) and not ASA (Maher Aff, Exh I). Plaintiff also filed affidavit of service on June 18, 2020, which indicates that on June 3, 2020 “substituted service at business” was made on PK&P through “Sergio Gutierrez-Admin” at 6100 Centre Dr., suite 950 in Los Angeles. CA. (Maher Aff, Exh H). Defendant claims that “substituted service at business” is

not an available method for service on a corporation and that Sergio Gutierrez is neither an employee of PK&P, nor an authorized corporate representative for receipt of service (Maher Aff. Exh D and K).

In opposition, plaintiff has demonstrated that it made personal service of the pleadings on Mr. Richard Umanoff, PK&P's designated agent for service, on October 13, 2020 (Aff in Op. Exh 1-2). Plaintiff notes that defendant's motion was raised while Executive Orders of the Governor have tolled the time limit of filing and service of any action through November 3, 2020. On March 20, 2020 Governor Cuomo issued Executive Order 202.8, which stated that the time limit for service was tolled until April 19, 2020 (Aff in Op, Exh 3). On October 4, 2020 Governor Cuomo issued Executive Order 202.67 which extended the tolling period to November 3, 2020.

As noted by defendant plaintiff made various attempts to serve defendant in May and June 2020. Further, plaintiff notes that on October 13, 2020, Brad Weekes, a registered process server in California, personally served Mr. Umanoff with the Supplemental Summons and Amended Verified Complaint (Aff in op, Exh 1). Plaintiff has demonstrated that they have already successfully effected personal service on defendant, within the tolling period, and thus defendant's motion to dismiss is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss pursuant to 3211(a)(8) and CPLR 306(b) on the grounds that plaintiff has failed to effect service on PK&P is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.



ADAM SILVERA, J.S.C.

6/01/2021

DATE

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