

781 Metro. Ave JV LLC v Nett Project LLC
2022 NY Slip Op 32001(U)
June 28, 2022
Supreme Court, New York County
Docket Number: Index No. 154232/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 154232/2021

781 METROPOLITAN AVE JV LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

NETT PROJECT LLC and ASAS RESCARA INT,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number

were read on this motion to/for DISMISSAL.

Plaintiff 781 METROPOLITAN AVE JV LLC (“MAJV”) commenced¹ this negligence action against Nett Project LLC (“Nett”), a New York limited liability company, as well as against a defendant it named as Asas Rescara Int (“ASAS”). Doc. 2. Nett answered the complaint and, insofar as is relevant on the motion, cross-claims against ASAS for indemnification. Doc. 6. ASAS moves, pursuant to CPLR 3211(a)(8), to dismiss the complaint and cross complaint due to lack of personal jurisdiction. Doc. 15. Plaintiff opposes² the motion and cross-moves, pursuant to CPLR 3211(d), for an order allowing it to conduct jurisdictional discovery or, in the alternative, to deny ASAS’s motion without prejudice to allow it to assert lack of personal jurisdiction in its answer. Doc. 25. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion and cross motion are decided as follows.

¹ Plaintiff’s counsel commenced another action, *Bedford Joint Venture LLC v Nett Project LLC*, Index No. 153462/2021, against ASAS on behalf of a different New York limited liability company. Both parties admit that the allegations in both actions are substantially identical. Doc. 16 at par. 8; Doc. 26 at par. 35. By Court Order, pursuant to stipulation by all parties, this action was consolidated with that one for purposes of discovery only. Doc. 53.

² Nett has not responded to the motion.

Factual and Procedural Background

Plaintiff is the owner and developer of a multi-family building located at 781 Metropolitan Avenue, Brooklyn, New York (the “Metropolitan Project”). Doc. 2 at par. 6. Plaintiff retained nonparty Danya Cebus Construction, LLC (“DCC”) as general contractor on the Metropolitan Project, and DCC retained Nett as a subcontractor. Doc. 2 at pars. 8-9. Nett submitted a proposal to DCC concerning the scope of work to be performed (“the Nett proposal”), in which it indicated that it intended to purchase metal panel systems, windows, louvers, and window wall systems window systems (“window systems”) from ASAS for the Metropolitan Project. Doc. 27 at pars. 7-8, 10; Doc. 41. According to plaintiff, Nett purchased approximately 266 of window systems from ASAS and installed them as part of the Metropolitan Project. Doc. 27 at pars. 13-14; Doc. 2 at par. 13. Additionally, plaintiff claims that Nett made these purchases directly from ASAS, without the use of a distributor or intermediary. Doc. 27 at pars. 10-11; Doc. 26 at pars. 7, 20-23.

In its complaint against Nett and ASAS, filed April 30, 2021, plaintiff alleged that, in or about early 2018, after the Metropolitan Project had nearly been completed, severe water leaks began to occur from the window systems installed by Nett. Doc. 2 at par. 15. Plaintiff claimed that the leaks resulted in substantial damage to the Metropolitan Project, causing it to incur substantial repair expenses and ongoing lost rental revenue. Doc. 2 at pars. 16-18. Plaintiff further alleged that the water leaks and resulting damage were caused by the improper design, fabrication, and/or installation of the window systems. Doc. 2 at par. 19. According to plaintiff, the Nett proposal reflected that ASAS’s address was as follows: ASAS IS Merkezi 34810,

Kavacik-Beykoz, Istanbul. Doc. 26 at par. 7; Doc. 41. On May 19, 2021, pursuant to the Hague Convention, plaintiff transmitted a request for service on ASAS to the Republic of Turkey's Minister of Justice's Directorate General for Foreign Relations and EU Affairs (the "Directorate General"). Doc. 8 at pars. 13-14. Plaintiff notified this Court on February 3, 2022, that it received confirmation from the Directorate General that ASAS was served with the summons and complaint on August 31, 2021. Docs. 49-50.

On October 15, 2021, a company which identified itself as ASAS ALUMINYUM SAN. VE TIC. A.S. ("Asas Group") and claimed to be located at Rüzgarlibahçe Mah, Asaş İş Merkezi, Kumlu Sk No: 2, Beykoz, Istanbul, filed the instant motion to dismiss the complaint against ASAS pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Doc. 15; Doc. 17 at par. 4.

In support of the motion, Asas Group denies that a "legal corporate entity known as Asas Rescara Int." exists. Doc. 17 at par. 3. Next, Asas Group argues that, if window systems manufactured by Asas Group were used by Nett, it did not sell those systems or any other products to Nett, DCC, or to plaintiff; it had no interaction with any of those entities, and has no information as to how the window systems might have ended up at the Metropolitan Project. Doc. 17 at pars. 16-19. Asas Group further claims that it is a company based solely in the Republic of Turkey which has no regular interaction with, or presence in, New York. Doc. 17 at pars. 4-14. Last, Asas Group argues that, if its window systems were somehow installed at the Metropolitan Project, it had no knowledge or expectation that those product(s) would be used in New York. Doc. 17 at par. 20. Therefore, Asas Group urges that the complaint against ASAS must be dismissed since there is no personal jurisdiction over the latter entity in New York. Doc. 15.

In opposition to the motion, plaintiff argues that, based on internet research it performed, ASAS appears to be related to Asas Group. Doc. 26 at par. 19. Plaintiff claims that, after performing an internet search for Asas Rescara Int, it discovered a website which it claims belongs to ASAS. Doc. 26 at par. 8. Plaintiff further claims that a document on that website refers to the company by a variety of names, including ASAS ALUMINYUM SAN. VE TIC. A.S., the name by which Asas Group refers to itself in its motion papers. Doc. 26 at par. 16. Plaintiff also claims that the contact page for the website lists its address as Ruzgarlibahce, Asas Is Merkezi 34810 Kavacik-Beykoz, Istanbul. Doc. 26 at par. 8. Plaintiff argues that this address appears to be similar or identical to the address listed on the Nett proposal.³ Doc. 26 at par. 8.

Plaintiff also claims that Asas Group (or entities with similar names) have engaged in other business activity in the U.S. and New York. Doc. 26 at pars. 26-37. Based on the foregoing, plaintiff argues that personal jurisdiction can be asserted over Asas Group pursuant to CPLR 302(a)(1) and CPLR 302(a)(3). Doc. 45 at 5-8. Plaintiff further argues that, even if this Court determines that plaintiff has failed to establish personal jurisdiction over Asas Group, plaintiff has made a sufficient start indicating that such jurisdiction may exist. Doc. 45 at 8-11. Therefore, plaintiff cross-moves for an order denying ASAS's motion to dismiss, or, in the alternative, pursuant to CPLR 3211(d), holding said motion in abeyance pending jurisdictional discovery.

Legal Standards

The plaintiff bears the burden of proving jurisdiction (*Lamarr v Klein*, 35 AD2d 248 [1st Dept 1970]). However, on a motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), “plaintiff need only make a prima facie showing” that personal jurisdiction exists

³ This address is similar to that at which Asas Group claims to be located.

(*Blue Seabreeze LLC v Allied Telesis Holdings*, 2019 NY Slip Op 33592[U], *3 [NY Sup Ct, NY County 2019]; *Lang v Wycoff Hgts. Med. Ctr.*, 55 AD3d 793, 794 [2d Dept 2008]; see *Copp v Ramirez*, 62 AD3d 23, 28-29 [1st Dept 2009]). On a motion to dismiss pursuant to CPLR 3211(a), the court “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001] [citations omitted]; see *Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013] [applying this standard to a motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211(a)(8)]).

To obtain jurisdictional discovery pursuant to CPLR 3211(d), a plaintiff only needs to show a “sufficient start” that personal jurisdiction may exist (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]; *Avilon Auto. Group v Leontiev*, 168 AD3d 78, 89 [1st Dept 2019]).

Discussion

Under CPLR 302(a)(1), New York may exercise jurisdiction over a non-domiciliary in connection with a cause of action arising from its acts when it “transacts any business within the state or contracts anywhere to supply goods or services in the state.” The Nett proposal and other motion papers, viewed in the light most favorable to the plaintiff, indicate that a certain entity manufactured and sold window systems directly to Nett for the Metropolitan Project. The entity transacted business with a New York company and, thus, personal jurisdiction would appear to exist over this entity pursuant to CPLR 302(a)(1). However, this Court cannot discern from the motion which entity this was, or what its relationship, if any, was to Asas Group. The possibilities are as follows:

- (1) The entity was correctly named as ASAS, and
 - (a) ASAS is affiliated with or is otherwise related to Asas Group, or
 - (b) ASAS is not related to Asas Group.

Alternatively,

- (2) The entity was incorrectly named as ASAS, and
 - (a) The entity is actually Asas Group, or
 - (b) The entity is a different entity from ASAS and Asas Group, and
 - (i) The entity is affiliated with, or is otherwise related to Asas Group, or
 - (ii) The entity is not related to Asas Group.

If the entity was correctly named as ASAS, and ASAS is related to Asas Group, or, if the entity was incorrectly named as ASAS, but the entity is actually Asas Group or a different entity related to it, plaintiff could make a *prima facie* showing of personal jurisdiction over Asas Group under CPLR 302(1)(a).

If the entity was correctly named as ASAS but ASAS is unrelated to Asas Group, or, if the entity was incorrectly named as ASAS, and the entity is not actually Asas Group or a different entity related to it, plaintiff could not show a sufficient start that personal jurisdiction may exist over Asas Group under CPLR 302(1)(a). This is because plaintiff has failed to allege that any other transaction conducted by Asas Group in New York relates to its claims arising from the Metropolitan Project.

Plaintiff has also failed to show a sufficient start that personal jurisdiction may exist over Asas Group under CPLR 302(a)(3). Under CPLR 302(a)(3), New York may exercise jurisdiction over a non-domiciliary in connection with a cause of action arising from its acts when it:

commits a tortious act without the state causing injury to person or property within the state . . . if [it] (i) regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Plaintiff does not claim that Asas Group regularly does business in New York, as required by CPLR 302(a)(3)(i). Other than the transaction for window systems referenced by the Nett proposal and discussed above, plaintiff does not claim that any other acts of the Asas Group committed in New York relate to plaintiff's cause of action or the Metropolitan Project, as required by CPLR 302 generally. Nor does plaintiff claim that any other actions by Asas Group related to the Metropolitan Project, or that Asas Group expected, or should have reasonably expected, that those actions would have consequences in New York, as required by CPLR 302(a)(3)(ii).

As stated above, the motion papers do not allow this Court to ascertain the relationship, if any, between Asas Rescara Int and ASAS ALUMINYUM SAN.VE TIC. A.S. Plaintiff's only allegation relevant to the issue of personal jurisdiction is the transaction referenced by the Nett proposal. Plaintiff has shown a sufficient start that the entity referenced by the Nett proposal may be Asas Group or an entity related to it. Plaintiff is therefore entitled to discovery on the issue of the correct identity of the entity referenced by the Nett proposal, and its relationship, if any, to Asas Group. Since there are no other claims involving the Metropolitan Project, plaintiff is not entitled to discovery on the issue of other possible bases for personal jurisdiction over Asas Group in New York (*see Aviron*, 168 AD3d at 89).

Finally, the branch of ASAS' motion seeking dismissal of Nett's cross claim is granted as unopposed (*See Lexington Ins. v 281 Broadway Holdings*, 2013 WL 2155593, n. 1 [Sup Ct New York County 2013]).

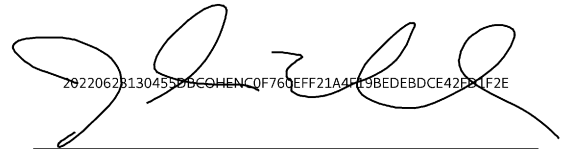
Accordingly, it is hereby:

ORDERED that plaintiff's cross motion to conduct jurisdictional discovery is granted to the extent that it is entitled to obtain information regarding the correct identity and address of the

entity referenced on the Nett proposal and its relationship, if any, to ASAS ALUMINYUM SAN.VE TIC. A.S.; and it is further

ORDERED that the branch of the motion by defendant ASAS seeking dismissal of Nett’s cross claim is granted as unopposed, and said cross claim is severed and dismissed; and it is further

ORDERED that the motion by defendant ASAS seeking dismissal of the complaint, pursuant to CPLR 3211(a)(8), based on lack of personal jurisdiction, is denied without prejudice to renew at the conclusion of jurisdictional discovery.



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6/28/2022

DATE

DAVID B. COHEN, 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