

Cruz v Komatsu Am. Corp.

2023 NY Slip Op 30659(U)

March 6, 2023

Supreme Court, New York County

Docket Number: 151438/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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ANGEL CRUZ,

Plaintiff,

- v -

KOMATSU AMERICA CORP., KOMATSU LTD., MILLER
UK LTD., MILLER INTERNATIONAL LTD., MILLER
INTERNATIONAL HOLDINGS LIMITED, ESCO
CORPORATION, ESCO GROUP LLC, THE WEIR GROUP
PLC, HYDRAFORCE INC., HYDRAFORCE HYDRAULIC
SYSTEMS (CHANGZHOU) CO., LTD., F AND M
EQUIPMENT, LTD.

Defendant.

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INDEX NO. 151438/2021

MOTION DATE 01/07/2022

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 205, 206, 207

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument, which took place on January 10, 2023, where Daniel B. Linson, Esq. appeared for Plaintiff Angel Cruz (“Plaintiff”) and Stacy L. Malinow, Esq. appeared for Defendant the Weir Group PLC (“Weir”), Weir’s motion to dismiss pursuant to CPLR §3211(a)(1) and for sanctions pursuant to CPLR § 8303-a and 22 NYCRR §§ 130-1.1(c) is granted in part and denied in part.

I. Factual and Procedural Background

This action arises out of Plaintiff’s alleged injuries while working at LaGuardia Airport (NYSCEF Doc. 1). Plaintiff was allegedly injured when a bucket detached from a Komatsu mobile excavator (*id.* at ¶ 1). The injury occurred on March 6, 2018 (*id.*). Plaintiff alleges that Weir designed, manufactured, distributed, marketed, sold, repaired, or serviced a product that was defective (*id.* at ¶ 46). It is also alleged that Weir acquired an “Esco entity” which, along with co-

defendants Miller UK Ltd. and Miller International Holdings Limited, and Miller International Ltd., agreed to design, manufacture, distribute, market, and/or sell a coupler which was involved in the injury of Plaintiff (*id.* at ¶¶ 109-116).

Weir made a prior motion to dismiss on April 26, 2021 (NYSCEF Doc. 94 or “Mot. Seq. 003). That motion to dismiss was also pursuant to CPLR §3211(a)(1) and was supported by an affidavit from Wes Wadle (“Wadle”), litigation counsel for Weir (NYSCEF Doc. 105). However, that motion did not include the merger agreements as does the present motion. As such, Mot. Seq. 003 was denied without prejudice by Justice Alexander Tisch on November 18, 2021 (NYSCEF Doc. 161). Weir made this second motion to dismiss on December 27, 2021 (NYSCEF Doc. 172).

The instant motion to dismiss is supported again by the affidavit of Wadle, but also contains the merger documents (NYSCEF Docs. 175-176). The merger agreements provide history and detail regarding the relationship between the multiple corporate entities and named defendants, including Weir and multiple Esco entities (NYSCEF Doc. 176). Weir was the parent company to two subsidiaries: Ranger Eureka Merger Sub I LLC (“Merger I”) and Ranger Eureka Merger Sub II LLC (“Merger II”) (*id.*). According to the merger agreement, ESCO Corporation was a wholly independent and separate corporation (*id.*). The merger agreement defines Esco Corporation as the “Company” (*id.*). The merger agreements detail two mergers described as “The Merger” and “The Subsequent Merger” (*id.* at §§ 1.1-1.2). In The Merger, Merger I was merged with ESCO Corporation or the “Company” (*id.* at § 1.1). Merger I ceased to exist, and ESCO Corporation or the “Company” became known as the “Initial Surviving Company” (*id.*). In the Subsequent Merger, the Initial Surviving Company (i.e., Merger I and Esco Corporation) merged “with and into” Merger II (*id.* at § 1.2). The agreement states that the Initial Surviving Company ceased to exist and Merger II was the surviving company. Therefore, after the mergers were complete,

Merger II, the wholly owned subsidiary of Weir, was the surviving corporate entity. Closing took place on July 2, 2018 (*id.* at § 1.2). Wadle testifies in his affidavit that Merger II changed its name to Esco Group LLC, which alongside Esco Corporation, is a named defendant in this action (NYSCEF Doc. 175 at ¶ 9)

Section 1.6 of the merger agreements states that in the Merger, the liabilities and duties of Merger I and Esco Corporation or the “Company” will become the liabilities of the “Initial Surviving Company”. Section 1.8 of the Merger agreements states that in the Subsequent Merger, the debts, liabilities and duties of the “Surviving Company” will become the debts, liabilities and duties of Merger II. In other words, the debts, liabilities, and duties of Merger I and Esco Corporation became the debts, liabilities and duties of Merger II, a subsidiary of Weir.

Weir argues that it never acquired the liabilities of any Esco entity and therefore the action against it is improper. In fact, in a parallel action, Weir has obtained multiple stipulations of discontinuance from other parties based on the merger agreements (NYSCEF Docs. 180-181). Weir’s motion is only opposed by Plaintiff, who provides a ten-paragraph affirmation in opposition (NYSCEF Doc. 205). Plaintiff argues that (1) Wadle’s affidavit does not constitute documentary evidence; (2) Weir’s motion is really an improper motion to renew/reargue; (3) the merger agreement shouldn’t be considered because certain portions are redacted, and (4) sanctions are inappropriate (*id.*).

II. Discussion

A. Standard

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co.*

of *New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). An unambiguous written agreement can constitute documentary evidence (*Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538 [1st Dept 2019]).

B. Weir's Motion to Dismiss

Although Plaintiff argues that Weir's second motion to dismiss is improper and should be categorized as a motion to renew/reargue, the Court disagrees. Pursuant to CPLR § 3211(e), usually only one motion to dismiss shall be permitted (*see also Simon v FrancInvest, S.A.*, 192 AD3d 565, 566-567 [1st Dept 2021]). However, a second motion to dismiss may be permitted "where the movant takes its cue from the court's earlier decision to supply evidence that was found lacking on the first motion" (*id.* citing *Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86, 88 [1st Dept 1993]). Here, the record shows Weir's first motion to dismiss was dismissed without prejudice (NYSCEF Doc. 161). Weir has made a second motion to dismiss with prior evidence that was lacking, namely the merger agreements, which details the relationships between Weir, Esco Group LLC, and Esco Corporation. Because Weir was following a cue from the prior judge's earlier decision, the Court finds the motion to dismiss is proper.

The only remotely non-conclusory allegations against Weir are that it acquired an Esco entity which designed, manufactured, distributed, marketed, and/or sold a coupler in an excavator which allegedly injured Plaintiff (NYSCEF Doc. 1 at ¶¶ 109 and 112). There is no factual allegation that Weir manufactured, distributed, marketed, and/or sold the coupler. Instead, it is

alleged that Miller International Ltd. or Miller International Holdings Limited partnered with Esco Group LLC or Esco Corporation to manufacture, distribute, market, and/or sell the coupler (*id.* at ¶¶ 110-111 and 113-114). However, as held by the Court of Appeals, in a products liability action, a parent company cannot be held derivatively liable for the actions of its subsidiary unless the parent company disregarded the separate identity of the subsidiary and involved itself directly in the subsidiary's affairs (*Finerty v Abex Corp.*, 27 NY3d 236, 242-243 [2016]). The merger agreement establishes that the Esco Corporation was merged into Esco Group LLC, which is a subsidiary of Weir, and that Weir did not assume any Esco entities' liability, therefore, absent allegations that Weir improperly disregarded the separate entity of any subsidiary, it cannot be liable for the actions of its subsidiary. A review of the Complaint yields no allegations which even remotely state a claim for piercing the corporate veil or alter-ego liability (*Meshel v Resorts Intern. of New York, Inc.*, 160 AD2d 211, 212-213 [1st Dept 1990] ["In the absence of a clear indication of dominion and control, parent subsidiary or affiliated corporations are treated separately and independently for purposes of assigning legal responsibility"]; *cf. Rich v J.A. Madison, LLC*, 211 AD3d 652, 653 [1st Dept 2022] [denying summary judgment dismissing complaint against parent company for subsidiary's breach of lease where alter ego liability and issues of domination and control were raised]).

Therefore, the clear, unambiguous, and uncontroverted merger agreement establishes that Weir is the parent company of Esco Group LLC, a wholly owned subsidiary that assumed the liabilities of Esco Corporation. Weir never assumed the liabilities of either Esco Group LLC or Esco Corporation, and absent an allegation it improperly disregarded the corporate form of its subsidiaries, it cannot be held derivatively liable for the acts of its subsidiaries.

The only non-conclusory allegation involving Weir is that Weir acquired an Esco entity. This allegation alone is not enough to attach liability to Weir for allegedly defective products placed into the stream of commerce by Weir's subsidiaries. This holds especially true where the merger documents establish that Weir never assumed any liability for any Esco entity. Although Plaintiff argues that the merger agreement is "heavily redacted", the Court finds the redacted portions hide stock arrangements and purchase prices rather than the material elements of Weir's defense that it is not liable for the actions of an Esco entity. Therefore, dismissal as to Weir is appropriate.

C. Weir's Motion Seeking Sanctions

The imposition of sanctions pursuant to 22 NYCRR § 130-1.1 is within the discretion of this Court (*Pickens v Castro*, 55 AD3d 443 [1st Dept 2008]). Pursuant to 22 NYCRR § 130-1.1(c), this Court may award sanctions for an attorney's frivolous conduct. Frivolous conduct, as defined by 22 NYCRR § 130-1.1(c) is "completely without merit in law and cannot be supported by a reasonable argument..." or "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" or "asserts material factual statements that are false." The Court is directed by 22 NYCRR § 130-1.1(c) to take into consideration "the circumstances under which the conduct took place, the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent." Weir also seeks sanctions under CPLR § 8303-a, which allows for costs upon frivolous claims and counterclaims in actions for personal injury.

Although Plaintiff was provided the merger agreements prior to Weir's motion to dismiss, he still refused to discontinue its action against Weir, even though multiple other parties discontinued their claims against Weir in other actions upon being presented the same evidence.

This Court declines to impose sanctions against Plaintiff. Far from being a simple personal injury action, this case involves a complex web of corporations located across the globe who each allegedly played some role in manufacturing, supplying, and/or distributing the multiple components of the Komatsu excavator which allegedly injured Plaintiff. As such, the Court does not find Plaintiff's actions or claims as frivolous; if Plaintiff included allegations or moved to amend to allege a theory of alter-ego liability, this motion to dismiss may have been denied. Sanctions are a punitive measure and are to be applied only in clear cut cases of frivolity. Such clear-cut frivolousness does not exist here, especially where a prior motion to dismiss was denied for failure to provide adequate documentary evidence. The Court finds granting Weir's motion to dismiss provides it the adequate relief it seeks.

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Accordingly, it is hereby,

ORDERED that Defendant The Weir Group PLC's motion to dismiss Plaintiff Angel Cruz's Complaint is granted, and Plaintiff Angel Cruz's Complaint is dismissed as to the Weir Group PLC's; and it is further

ORDERED that Defendant The Weir Group PLC's motion for sanctions against Plaintiff Angel Cruz is denied; and it is further

ORDERED that within ten days of entry, counsel for Defendant The Weir Group PLC shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

3/6/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, 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