

Cruz v Komatsu Am. Corp.

2023 NY Slip Op 30660(U)

March 6, 2023

Supreme Court, New York County

Docket Number: Index No. 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 11/30/2021
MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 155, 156, 157, 158, 159, 164, 188, 191, 192, 193, 194, 195, 196, 204, 208

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 the Plaintiff, Angel Cruz (“Plaintiff”), Peter S. Read, Esq. appeared for Defendants Komatsu America Corp. (“KAC”) and Komatsu Ltd. (“KLTD”), and Defendants F and M Equipment, Ltd. (“F & M”), Defendant KTLTD’s motion to dismiss based on lack of personal jurisdiction is denied without prejudice to allow for jurisdictional discovery to take place.

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). Plaintiff alleges that Komatsu Ltd. is a foreign corporation in the State of New York, derives substantial revenue from business conducted in New York, purposefully

availed itself of the benefits of conducting business in New York, has engaged in a continuous course of business in New York, and designed, manufactured, distributed, marketed, and sold the product which caused Plaintiff's injuries (*id.* at ¶¶ 10-15). KLTD filed the instant motion to dismiss for lack of personal jurisdiction on November 16, 2021 (NYSCEF Doc. 155).

In support of its motion to dismiss, KLTD submitted the affidavit of Anthony N. Olivieri, ("Olivieri") who states he is a general manager of product support employed by KLTD's co-defendant, KAC (NYSCEF Doc. 159 at ¶ 1). Although Olivieri does not state that he is an employee of KLTD, he testifies that the statements contained in his affidavit are accurate based on either personal knowledge or based on records maintained by KAC (*id.* at ¶ 2). Olivieri states that KLTD sells its products to KAC and does not sell "construction products" to any other entity or person within the United States (*id.* at ¶ 4). Olivieri admits that KAC is a wholly owned subsidiary of KLTD, but asserts each is a separate and distinct corporate entity with its own sets of officers and directors (*id.* at ¶ 6). Olivieri claims that KLTD and KAC each maintain their own corporate records and function independently of one another (*id.*). However, despite annexing many records related to the allegedly defective product, there is no documentation or other testimony which substantiates Olivieri's rather conclusory statements regarding the corporate governance of KLTD and KAC.

Further, Olivieri admits that KLTD designed and manufactured the allegedly defective product (*id.* at ¶ 10). While Olivieri states the allegedly defective product was shipped to Texas from Japan, the affidavit reads that it "arrived by ship (in Texas?)"* which casts substantial doubt as to the accuracy of Olivieri's statement (*id.* at ¶ 11). A review of the documents annexed to Olivieri's affidavit contains no showing that the allegedly defective product arrived by ship to Texas.

Opposition to KLTD's motion was submitted by Plaintiff and KLTD's co-defendants, Hydraforce Inc., Hydraforce Hydraulic Systems (Changzhou) Co., Ltd., and Hydraforce Hydraulits Ltd. (collectively the "Hydraforce").

The Hydraforce Defendants attack the admissibility and credibility of Olivieri's affidavit and the accompanying exhibits (NYSCEF Doc. 188). The Hydraforce Defendants correctly point out that Olivieri is not an employee of KLTD but rather an employee of KAC, and that no officer of KLTD who would have personal knowledge of KLTD's operations has submitted an affidavit in support of the motion. Moreover, Hydraforce argues Olivieri's testimony is defective because he does not state how he has personal knowledge of the numerous assertions he makes. Hydraforce further argues because of the defects in Olivieri's affidavit, KLTD has not established that it has no "continuous and systematic" affiliations with New York for purposes of conferring general jurisdiction. Hydraforce's argument is buttressed by the fact that KAC, KLTD's wholly owned subsidiary, maintained a regular and systematic business relationship with Edward Ehrbar, Inc., a KAC distributor, and by apparently regularly servicing the allegedly defective product, while it was in New York, via "Komatsu Oil & Wear Analyses" (NYSCEF Doc. 159 at pages 38-48).

Hydraforce also argues issues raised on a specific jurisdiction analysis warrant jurisdictional discovery. Hydraforce argues that Court of Appeals precedent has made clear that the sale and distribution of goods in New York, even through a third-party vendor, may form the basis for personal jurisdiction. Hydraforce further argues exercise of long arm jurisdiction comports with due process as KLTD is a large multinational corporation whose products are regularly distributed to New York and around the world. Therefore, it does not offend traditional notions of fair play and substantial justice for KLTD to defend a lawsuit regarding one of its allegedly defective products in New York.

Plaintiff argues that because KAC is a wholly owned subsidiary of KLTD, and sufficient proof has not been presented that the two entities maintain corporate formalities, the jurisdictional contacts of KAC are imputed to KLTD thereby conferring personal jurisdiction (NYSCEF Doc. 191). Plaintiff joins Hydraforce's assertion that at a minimum, jurisdictional discovery should be allowed to establish KLTD's revenue derived from New York, specific sales which occurred in New York, trade shows in New York, the corporate relationship between KLTD and KAC, marketing efforts directed towards New York, and servicing of equipment sent to customers in New York.

In reply, KLTD argues that Olivieri has knowledge of the statements made as he was a general manager of product support for KAC. KLTD further argues that no party has offered any facts or evidence to contradict Olivieri's statements.

II. Discussion

A. Standard

A Court may exercise personal jurisdiction over a Defendant if there exists general jurisdiction or specific jurisdiction. The ultimate burden is on the plaintiff to demonstrate, through affidavits and relevant documents, that personal jurisdiction exists (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). However, to successfully oppose a motion to dismiss for lack of personal jurisdiction, a plaintiff must only make a prima facie showing that a defendant is subject to personal jurisdiction (*Sacco v Reel-O-Matic, Inc.*, 183 AD3d 567, 568 [2d Dept 2020]).

General jurisdiction permits a court to exercise jurisdiction over a defendant in connection with a suit arising from events occurring anywhere in the world (*Aybar v Aybar*, 37 NY3d 274, 288 [2021]). General jurisdiction exists over a foreign corporation when its contacts are so

‘continuous and systematic’ to render the foreign corporation “at home” in the forum state (*id.* at 289 citing *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011]). The Court of Appeals has adopted the United States Supreme Court’s rule that the paradigm basis for general jurisdiction is where a corporation maintains its place of incorporation and principal place of business (*id.* citing *Daimler AG v Bauman*, 571 US 117, 137 [2014]).

Specific jurisdiction exists where a lawsuit arises out of a defendant’s contacts with the forum state (*Al Rushaid v Pictet & Cie*, 28 NY3d 316 [2016]). Specific jurisdiction requires a two-pronged inquiry: first, whether a defendant conducted sufficient activities within the state; and second, whether a plaintiff’s claims have an articulable nexus to a defendant’s transactions within the state (*English v Avon Products, Inc.*, 206 AD3d 404, 406 [1st Dept 2022]). If specific jurisdiction exists, the Court still must determine whether the exercise of jurisdiction comports with due process (*Williams v Beemiller, Inc.*, 33 NY3d 523, 529 [2019]). The due process inquiry requires the Court to determine whether the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice” (*J. McIntyre Machinery, Ltd. v Nicastro*, 564 US 873 [2011]). This is a fact dependent inquiry. As stated by Justice Anthony Kennedy, this inquiry “requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.” (*Id.* at 884).

The Court of Appeals has held that even where physical presence is lacking, jurisdiction may still be proper if the defendant projects itself into New York to engage in a sustained and substantial transaction of business (*Fischbarg v Doucet*, 9 NY3d 375, 381-382 [2007]). A non-resident corporation’s close relationship with an affiliated corporation doing business in New York

has been held sufficient to raise an issue as to whether the non-resident corporation purposely tries to forge ties with New York thereby precluding dismissal based on personal jurisdiction (*Hessel v Goldman, Sachs & Co.*, 281 AD2d 247 [1st Dept 2001]).

Regarding parent companies and wholly owned subsidiaries, the First Department has held that the mere existence of jurisdiction over a subsidiary does not automatically grant jurisdiction over the parent company (*FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 493 [1st Dept 2017]). To impute jurisdiction over a subsidiary to its parent company, a plaintiff must show various factors, including common ownership, control of finances, selection and assignment of executive personnel, and failure to observe corporate formalities (*FIMBank P.L.C. v Woori Finance Holdings Co. Ltd.*, 104 AD3d 602, 603 [1st Dept 2013]). In other words, the control must be so complete that the subsidiary is “merely a department” of the parent company (*Delagi v Wolswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 431 [1972]).

To grant jurisdictional discovery, a Plaintiff’s pleadings, affidavits, and accompanying documentation must show a “sufficient start” to warrant discovery on the issue of personal jurisdiction (*American BankNote Corp. v Daniele*, 45 AD3d 338, 350 [1st Dept 2007]). Jurisdictional discovery has been held appropriate to allow a plaintiff to learn whether “the complex corporate relationships involves the parents’ exercise of control over their subsidiaries.” (*HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665, 666 [1st Dept 2011]; *Edelman v Taittinger, S.A.*, 298 AD2d 301, 302 [1st Dept 2002]).

B. General Jurisdiction

It is not seriously contended that New York may exercise jurisdiction over KLTD, which is a company that is incorporated and has its principal place of business in Japan. Nor has Plaintiff

provided any documents which would support this Court's exercise of general jurisdiction over KLTD. Therefore, this Court may only exercise jurisdiction if specific jurisdiction exists.

C. Specific Jurisdiction

Plaintiff asserts that KLTD's conduct confers personal jurisdiction pursuant to CPLR § 302(a)(3). In pertinent part, CPLR § 302(a)(3) provides:

“a court may exercise personal jurisdiction over any non-domiciliary...[who] 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”.

Pursuant to the Court of Appeals, jurisdiction under CPLR § 302(a)(3) requires five elements: (1) the Defendant committed a tortious act outside the state; (2) the cause of action arises from that act; (3) the act caused injury to a person within the State; (4) defendant expected or should reasonably have expected the act to have consequences in the State; and (5) defendant derived substantial revenue from interstate or international commerce” (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]; *see also Nowelle B. v Hamilton Medical, Inc.*, 175 AD3d 1008, 1009 [4th Dept 2019]).

Plaintiff alleges that KLTD manufactured the defective excavator that injured Plaintiff (NYSCEF Doc. 1 at ¶¶ 10-15). KLTD, through Olivieri's affidavit, while not admitting the excavator was defective, admits to manufacturing the excavator that allegedly injured Plaintiff (NYSCEF Doc. 159 at ¶ 10). Therefore, the first, second, and third elements under CPLR § 302(a)(3) has been met – namely that a non-domiciliary committed a tortious act (manufacturing an allegedly defective product) which caused injury to a person within the state (i.e., Plaintiff while working at LaGuardia airport).

The fifth element regarding deriving substantial revenue from interstate or international commerce is also met. Plaintiff has provided in opposition to KLTD's motion KLTD's 2021 report which indicates it generated 451.07 billion yen in North America in 2020¹ (NYSCEF Doc.

However, there remain questions as to the fourth element of jurisdiction under CPLR § 302(a)(3) which requires a showing that defendant should have expected or reasonably expected the act to have consequences in the State. It is uncontroverted that KLTD exclusively distributes its products in North America through its wholly owned subsidiary, KAC (*id.* at ¶ 1). KLTD, through Olivieri's affidavit, admits to selling the excavator to KAC (*id.* at ¶ 11). According to Olivieri, KLTD shipped the excavator to Texas after it was purchased by KAC, however there is no evidence supporting this assertion, and Olivieri's affidavit itself contains a question mark after that statement making its accuracy ambiguous at best (*id.*). Olivieri claims KAC delivered the excavator to Edward Ehrbar, Inc. in February of 2007, one of KAC's "independent distributors" (*id.*). Annexed documents to Olivieri's affidavit indicate Edward Ehrbar, Inc. received the excavator in New York. While Olivieri claims that KLTD does not receive "direct" revenue from the New York market, he notably omits a denial of whether KLTD receives any revenue from the New York market.

Based on the papers submitted, there remain numerous questions as to whether or not specific jurisdiction exists. As a preliminary matter, the Court notes that there is no officer from KLTD who has provided any information in support of KLTD's motion. Further, there are no documents which substantiate Olivieri's conclusory statements regarding corporate governance.

¹ Using the exchange rate as of March 3, 2023, that equates to roughly \$3.3 billion. The Court notes that the Yen has dropped in value substantially compared to the United State Dollar since 2021, and therefore KLTD made far in excess of \$3.3 billion at the time of the 2021 report.

Therefore, it is a question for discovery to determine whether jurisdiction can be imputed to KLTD through KAC.

Likewise, there are questions as to what revenue, if any, KLTD derives from the New York market. Moreover, jurisdictional discovery is appropriate to ascertain whether KLTD knew or directed KAC to target the New York market (*see Darrow v Deutschland*, 119 AD3d 1142 [3d Dept 2014]). It is a question to be uncovered in discovery whether the allegedly defective excavator fortuitously made its way to New York, or whether KLTD had a pattern of utilizing KAC and Edward Ehrbar, Inc. to target and distribute its goods in the New York market.

Based on these questions, the showing made by Plaintiff in opposition to KLTD's motion, and the ambiguity of the evidence provided in support of KLTD's motion, the Court finds jurisdictional discovery pursuant to CPLR 3211(d) is appropriate (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665, 666 [1st Dept 2011]). Indeed, Plaintiff has made a sufficient start to demonstrate that KLTD was doing business in New York through its direct subsidiary KAC, or through "independent" distributor Edward Ehrbar, Inc. Nor has KLTD produced any evidence that expressly negates these allegations aside from a conclusory and self-serving affidavit from an officer of KAC (*cf. Cruz v City of New York*, 210 AD3d 523 [1st Dept 2022 ["All of the information that defendants claim jurisdictional discovery could reveal to support exercising jurisdiction over the Miller parties either is expressly negated by the affirmations from Miller UK's chief financial officer and the Miller International director"]]).

As KLTD's relationship and agreements with KAC and Edward Ehrbar, Inc. may directly determine the issue of whether or not KLTD's excavator made it into New York through a pattern of concerted efforts or mere "fortuitous circumstance" jurisdictional discovery is appropriate. Because Hydraforce and Plaintiff, in their opposition, have shown that facts 'may exist' which

would defeat KLTD’s motion, the Court denies KLTD’s motion, without prejudice, and directs the parties to conduct jurisdictional discovery pursuant to CPLR § 3211(d) (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *Universal Inv. Advisory SA v Bakrie Telecom PTE, Ltd.*, 154 AD3d 171, 178-179 [1st Dept 2017]; *Darrow v Deutschland*, 119 AD3d 1142 [3d Dept 2014]; *Zafarani v Salton/Maxim Housewares, Inc.*, 18 AD3d 651 [2d Dept 2005]; *Edelman v Taittinger, S.A.*, 298 AD2d 301 [1st Dept 2002]).

Accordingly, it is hereby,

ORDERED that Defendant Komatsu Ltd.’s motion to dismiss for lack of personal jurisdiction is denied without prejudice; and it is further

ORDERED that on or before March 24, 2023, the parties are directed to submit a proposed discovery schedule to complete the necessary jurisdictional discovery, via e-mail to the part clerk; and it is further

ORDERED that within 10 days of entry, counsel for Plaintiff 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			Mary V Rosado		
DATE			HON. MARY V. ROSADO, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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