Hayes v Anderson & Sheppard Ltd.
2023 NY Slip Op 30964(U)
March 23, 2023
Supreme Court, New York County
Docket Number: Index No. 651579/2022
Judge: Suzanne J. Adams

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SUZANNE J. ADAMS** **PART** **39TR**

Justice

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EDWARD W HAYES

Plaintiff,

- v -

ANDERSON & SHEPPARD LIMITED,

Defendant.

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INDEX NO. 651579/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that defendant's motion is granted in part, to the extent of striking certain portions of the Verified Complaint, and is otherwise denied. Defendant is a foreign business corporation with its principal offices located in London, England, and is in the business of custom tailoring. Plaintiff is a New York resident and the owner and registered holder of 32 shares (or 16%) of defendant's stock, issued in accordance with the "Companies Act of 2006," which is not defined in the Verified Complaint. Plaintiff commenced this action in April 2022, seeking an accounting of defendant's profit and loss and revenue. Defendant now moves to dismiss the Verified Complaint pursuant to CPLR 3211(a)(7) and (8), 3012(b), and CPLR 327, and pursuant to CPLR 3024(b) to strike scandalous and prejudicial matter from the Verified Complaint. Plaintiff opposes the motion.

The threshold issue on this motion is whether this court has jurisdiction over defendant. Jurisdiction over a non-domiciliary may be obtained under either CPLR § 301 ("general jurisdiction") or CPLR § 302 ("specific jurisdiction"). "Where jurisdiction is predicated upon the

provisions of CPLR 301, . . . the authority of the New York courts is based solely upon the fact that the defendant is 'engaged in such a continuous and systematic course of "doing business" here as to warrant a finding of its "presence" in this jurisdiction' [citations omitted]. Where the plaintiff's proof falls short of establishing such a 'systematic course of "doing business,"' however, our statutory scheme permits him to bring the foreign defendant within the power of the New York courts upon a lesser showing of some business contacts within the State only if he demonstrates that his cause of action arose out of those business contacts." *McGowan v. Smith*, 52 N.Y.2d 268, 272-73 (1981). Plaintiff herein alleges that defendant comes to New York four times a year to showcase its product (primarily bespoke suits), and that it is in New York that customers choose their suit material, get an initial measurement, pay a deposit, get an initial fitting, and then pay the balance upon receipt of the completed suit. It is also alleged that the New York market is defendant's largest source of income outside of England. In opposing the motion, defendant admits that its tailors visit New York for fittings and to allow customers to view cloth, but maintains that no sales are conducted in New York because defendant does not recognize sales until it determines the price of a commissioned suit in London. (*See, generally*, Supporting Affirmation of Anda Rowland)

Here, affording the Verified Complaint a "liberal construction," accepting the facts as true and according plaintiff "the benefit of every possible favorable inference" as required on a CPLR 3211 motion to dismiss (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)), the court finds that it has "long-arm" jurisdiction of defendant under § 302(a)(1). The seminal case of *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443 (1965), is on point. The opinion decided three cases on appeal regarding application of New York's long-arm statute, one of which was a breach of contract action between a New York purchaser of custom-made machines from the defendant

manufacturer, incorporated in Delaware and based in Chicago. *Longines*, 15 N.Y.2d at 455-58. The defendant maintained that the contract between the parties was not actually made in New York, so its activities in the state before and after the contract's execution – *e.g.*, the defendants' officers visiting New York to discuss the contract terms and participating in the machines' installation and testing on Long Island – did not amount to the transaction of "business" in the state. 15 N.Y.2d at 455-56. The Court of Appeals disagreed, holding that § 302 was intended to be interpreted broadly, to include the "transact[ion of] any business within the state," taking advantage of the opening provided by *International Shoe Co. v. State of Washington, et al.*, 326 U.S. 310 (1945), "where the nonresident defendant has engaged in some purposeful activity in this State in connection with the matter in suit." 15 N.Y.2d at 456-57. Plaintiff herein has alleged facts sufficient to establish that defendant transacts business in the state pursuant to the statute and interpretive case law. Further, the activities in question give rise to plaintiff's cause of action, as he alleges that sales of defendant's products in New York have resulted in substantial profits to defendant, but no distributions have been made to plaintiff as a shareholder during the time he has owned shares. Plaintiff also alleges that any tax liability that arises out of defendant's New York sales may affect the value of his shares. Defendant contends that plaintiff has no claim to inspect its business records because it owes no "fiduciary duty" to him as a shareholder. However, defendant cites no English authority on this issue, and cites case law that is not analogous. For example, the plaintiffs in *Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216 (1st Dep't 2005) were apparently cable television subscribers, not shareholders of the defendant corporation.

With respect to defendant's alternative grounds for dismissal based on forum *non conveniens*, as the *Longines* court noted, "[w]e need not determine whether any one of the foregoing activities would, in and of itself, suffice to meet the statutory standard; in combination

they more than meet that standard. *And merely to list the activities in which the appellant engaged in this State answers any constitutional objection which might be raised against requiring the appellant to make its defense in our courts* [emphasis supplied]." 15 N.Y.2d at 458. In addition, while plaintiff did not timely serve his Verified Complaint after demand per CPLR § 3012(b), the court in its discretion declines to dismiss on these grounds. *See* § 3012(d).

Finally, under CPLR 3024(b) "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." Defendant seeks to strike certain language in the Verified Complaint, in ¶ 7, which refers disparagingly to defendant's deceased prior owner. The court finds that said allegations may cast a poor light on defendant and are irrelevant to plaintiff's claims. As such, the last three sentences of ¶ 7 should be stricken from the Verified Complaint. *See Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dep't 2007).

Accordingly, it is hereby

ORDERED that defendant's motion is granted to the extent that the last three sentences of ¶ 7 of the Verified Complaint are hereby stricken; and it is further

ORDERED that the remainder of defendant's motion is denied.

This constitutes the decision and order of the court.

3/23/2023
DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE