Thilman v Carolina Skiff LLC
2024 NY Slip Op 35709(U)
April 1, 2024
Supreme Court, Nassau County
Docket Number: Index No. 614055/23
Judge: Gary M. Carlton

SUPREME COURT OF THE STATE OF NEW YORK
NASSAU COUNTY

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JENNA D. THILMAN,

Plaintiff,

-against-

Sequence 2
INDEX NO. 614055/23
Hon. GARY M. CARLTON

DECISION AND ORDER

CAROLINA SKIFF LLC, CAROLINA SKIFF INC., RAYMARINE INC. INC., ALL ISLAND MARINE CORP. AND WEST MARINE,

Defendants.

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Notice of Motion/Supporting Exhibits..............................X
Affirmation in Opposition..X

Plaintiff moves to vacate default and for "reargument and renewal" the order dismissing the case against Defendant, TELEDYNE FLIR MARITIME US, INC. i/s/h/a "RAYMARINE INC. INC.", (hereafter "RAYMARINE") based upon CPLR 3211(a)(8), based upon the lack of jurisdiction. Said defendant opposes.

RAYMARINE argues that plaintiff has not shown a reasonable excuse for plaintiff's failure to oppose its dismissal motion or a meritorious cause of action, which is required as plaintiff really seeks to vacate a default, not reargue or renew.

The Court wishes to note that Defendant's original motion was originally filed on December 1, 2023, with a return date of January 8, 2024. Plaintiff does not allege either filing opposition or requesting an adjournment prior to January 8,

2024. Defense counsel affirms that plaintiff's counsel never contacted her to seek an adjournment.

The E-file notation made a part of plaintiff's affirmation indicates, "that on January 8, 2024 an appearance was held". There are many unanswered questions concerning plaintiff's excuse.

Even if this Court accepts plaintiff's excuse to vacate the default, RAYMARINE argues that plaintiff is required to demonstrate a meritorious case, Onewest Bank, FSB v. Singer, 153 A.D.3d 714 at 716 (2d Dept. 2017) and Wells Fargo Bank, N.A. v. Mazzara, 124 A.D.3d 875 (2d Dept. 2015).

Further arguing that "a party seeking to vacate an order entered upon his or her failure to oppose a motion is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion." U.S. Bank, N.A. v. Essaghof, 178 A.D.3d 876 at 877 (2d Dept. 2019).

Plaintiff has not presented evidence in admissible form as to a meritorious action. Even were we to consider the merits of plaintiff's opposition to RAYMARINE's motion to dismiss plaintiff's action against it, under CPLR 3211(a)(8), plaintiff's arguments have all been addressed, like this defendant sponsored a New York event in 2022. However the sale of the subject product took place in August of 2017.

Defense VP AMERICAS, Jameson Dery, also says that the above event, the Harlem Gateway Waterfront Initiative, was on one occasion, with "a 100% charitable donation of a few of its products for use on the Harlem Rocket." There was no other connection to the Harlem Rocket or to the Harlem Gateway Initiative.

The RAYMARINE defendant argues that to be subject to jurisdiction under New York's long arm statute, CPLR 302(a), it must be established that a non-domiciliary, in person or through an agent:

> 1. "Transacts any business within the state or contracts anywhere to supply goods or services in the state; or,
>
> 2. Commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. Commits a tortious act without the state causing injury to a person or property within the state, except as to a cause of action for defamation of character arising from the act, if he:
>
> (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; or

If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302(a)(1), Johnson v Ward, 4 N.Y.3d 516 (2005)

The RAYMARINE defendant claims it has not entered into a contract outside the State of New York which sends goods to New York, it did not conduct sufficient purposeful activities in New York, is a Delaware corporation, with its principal place of business in New Hampshire, is not licensed to do business in the State of New York, has no New York Bank accounts or a New York telephone number, does not advertise or solicit business in New York, has no New York employees, has no exclusive rights agreement with any New York Company, no New York subsidiary relationship and the Secretary of State is not authorized to accept service on behalf of this defendant.

The RAYMARINE defendant did not conduct sufficient purposeful activities in New York, which bore a substantial relationship to the subject matter of this action, so as to avail themselves of the benefits and protections of New York's law, Abad v Lorenzo, 163 A.D.3d 903, 905 (2d Dept. 2018).

If that corporation or entity does business here not occasionally or casually, but with a fair measure of permanence and continuity so as to warrant a finding of its presence in this jurisdiction, Daniel B. Katz & Assoc. Corp. v Midland Rushmore, LLC, 90 A.D.3d 977, 979 (2d 2011).

It was not forseeable that RAYMARINE's product would be involved in an accident in New York. Certainly not with a discernable effort to serve the New York market. The subject product was not sold directly or shipped to co-defendant WEST MARINE in New York.

At the time of commencement of this action none of RAYMARINE's products were available for sale on its website. Passive websites are generally insufficient to establish jurisdiction, see Royalty Network Inc. v Dishant.com, LLC, 638 F. Supp.2d 410 (S.D.N.Y. 2009).

A website which provides consumers with product information and locations of retailers who carry their products does not constitute a solicitation of business in New York because it is not targeted at New York, see In re Ski Train Fire, 230 F. Supp.2d 376, 383 (S.D.N.Y. 2002).

Website references to consumers about select dealers in New York which have access to RAYMARINE'S products only accounted for 1.5-2.3% of all of its sales in the United States from 2020-2023, see Dery supplemental affirmation.

Jurisdiction under CPLR 301 may be acquired over a foreign corporation only if that corporation does business here "not occasionally or casually, but with a fair measure of permanence and continuity" so as to warrant a finding of its "presence" in this jurisdiction, Sedig v. Okemo Mountain, 204 A.D.2d 709, 710 (2d Dept. 1994).

Where jurisdiction is contested, the ultimate burden of proof rests upon the plaintiff, Pichardo v Zayas, 122 A.D.3d 699, 700 (2d Dept. 2014), plaintiff has failed to do so, therefore it is,

ORDERED that plaintiff's motion is denied, it is further

ORDERED, that Defendant, TELEDYNE FLIR MARITIME US, INC. i/s/h/a "RAYMARINE INC. INC.", remains dismissed from the action, within 30 days its counsel shall serve this Order with Notice of Entry, and it is

ORDERED, that plaintiff Notice for a Preliminary Conference, within ten days and the parties are to return on April 29, 2024 at 9:00 A.M. in Part 29, for the purpose of entering into a Preliminary Conference Order, plaintiff to bring a Stipulation on April 29, 2024 for the remaining parties to sign, reflecting the new caption.

Dated: April 1, 2024

GARY M. CARLTON
SUPREME COURT JUSTICE

ENTERED
Apr 02 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE