Bailen v Air & Liquid Sys. Corp.
2014 NY Slip Op 32079(U)
August 5, 2014
Sup Ct, NY County
Docket Number: 190318/12
Judge: Sherry Klein Heitler

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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EDDIE HOWARD BAILEN and RENA NORENE ASH BAILEN,

Index No. 190318/12
Motion Seq. 015

Plaintiffs,

DECISION & ORDER

-against-

AIR & LIQUID SYSTEMS CORPORATION, as Successor by Merger to Buffalo Pumps, Inc., et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.:

On September 24, 2014 defendant Union Pacific Railroad Company ("Union Pacific") moved pursuant to CPLR 301 and 302 to dismiss plaintiffs' complaint against it for lack of personal jurisdiction on the grounds that it had no continuous and systematic contacts with New York, did not transact business in New York, did not commit a tortious act in New York, did not commit a tortious act outside of New York causing injury in New York, and did not have sufficient minimum contacts with New York to satisfy due process. By order dated April 1, 2013 this court denied Union Pacific's motion, holding that it consented to jurisdiction in New York by its voluntary authorization to do business here and its designation of New York agents for service of process ("Order").[1]

Union Pacific now moves pursuant to CPLR 2221(e) for leave to renew its dismissal motion.[2] As more fully set forth below, Union Pacific's motion for leave to renew is granted,

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[1] *See Rich Prods. Corp. v Bluemke*, 13-CV-030S, 2013 US Dist. LEXIS 68532, *6-7 (WDNY May 14, 2013) and *Flame S.A. v Worldlink Int'l Holding*, 107 AD3d 436, 437 (1st Dept 2013), decided May and June of 2013, respectively, which are consistent with this court's analysis.

[2] The Order is incorporated herein by reference and made a part hereof

and upon such renewal the court adheres to its original determination.

Plaintiffs Eddie and Rena Bailen commenced this asbestos personal injury action on August 1, 2012, claiming among other things that Mr. Bailen was exposed to asbestos while working for Union Pacific in Omaha, Nebraska during the late 1950's. Union Pacific is a Delaware corporation with its principal place of business in Omaha, Nebraska.[3] It has no offices, employees, railroad tracks, or real property in New York. It does not regularly conduct or solicit business in New York nor does it derive substantial revenue from goods used or consumed or services rendered in New York.[4] In 1998, however, Union Pacific voluntarily became authorized to do business in New York as a foreign corporation pursuant to Business Corporation Law § 1304 by virtue of its merger with the Southern Pacific Transportation Company.[5] Upon its registration with the New York Department of State it designated the New York Secretary of State and CT Corporation as its agents for service of process in New York.

CPLR 2221(e) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. . ." Union Pacific seeks renewal in light of two recent United States Supreme Court decisions, *Walden v Fiore*, 134 S. Ct. 1115 (Feb. 24, 2014) and *Daimler AG v Bauman*, 134 S. Ct. 746 (Jan. 14,

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3 See Affidavit of Maureen Fong Hinners, sworn to September 21, 2012 ("Hinners Affidavit"), defendant's exhibit B, ¶ 3 .

4 Hinners Affidavit ¶¶ 4-6, 9-10.

5 Union Pacific has never revoked its voluntary authorization to do business on file with the New York Department of State and to this day designates the New York Secretary of State as well as CT Corporation as its agents for service of process

2014), which the defendant asserts pronounce that a corporation's authorization to do business in New York, without any other connection to this State, does not form a sufficient basis for the exercise of personal jurisdiction.

In *Walden*, a deputized Drug Enforcement Administration ("DEA") agent working at a Georgia airport searched and seized a large amount of cash in the form of casino winnings from two travelers en route from Puerto Rico to Nevada where they resided. The travelers alleged that upon returning to their residence the DEA agent drafted a false probable cause affidavit in support of the funds' forfeiture. While the funds were eventually returned, the travelers filed suit against the DEA agent in the Federal District Court in Nevada. The District Court dismissed the travelers' suit on the ground that the Georgia search and seizure did not establish a basis for jurisdiction in Nevada. The Ninth Circuit reversed, reasoning that the agent knew that his probable cause affidavit would affect persons with Nevada connections. The United States Supreme Court agreed with the District Court, finding that it lacked personal jurisdiction over the agent (*Id.* at 1121, 1124):

> This case addresses the "minimum contacts'" necessary to create specific jurisdiction. . . . The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant "focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977)). For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State.
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> Applying the foregoing principles, we conclude that petitioner lacks the "minimal contacts" with Nevada that are a prerequisite to the exercise of jurisdiction over him . . . . It is undisputed that no part of petitioner's course of conduct occurred in Nevada. Petitioner approached, questioned, and searched respondents, and seized the cash at issue, in the Atlanta airport. It is alleged that petitioner later helped draft a "false probable cause affidavit" in Georgia and forwarded that affidavit to a United States Attorney's Office in Georgia to support a potential action for forfeiture of the seized

> funds. . . . Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens — whether the *defendant's* actions connect him to the *forum* — petitioner formed no jurisdictionally relevant contacts with Nevada.

The *Walden* court spoke to specific personal jurisdiction which is governed in New York by CPLR 302. It did not address jurisdiction based on consent, which, as this court stated in its Order, is rooted in general personal jurisdiction, governed in New York by CPLR 301. *See Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173, 175 (3d Dept 1983); *see also Doubet v The Trustees of Columbia Univ. in the City of New York,* 99 AD3d 433, 434-435 (1st Dept 2013). Accordingly, *Walden* does not impact any of the legal doctrines relevant to the motion at bar.

The United States Supreme Court revisited its position on general personal jurisdiction analysis in *Daimler*. In that case a group of Argentinian plaintiffs brought suit in California against Daimler AG ("Daimler") for alleged human rights violations committed in Argentina. While plaintiffs conceded that Daimler's contacts with California were "too sporadic to justify the exercise of general jurisdiction", they argued that California could exercise personal jurisdiction over Daimler based on the California contacts of Mercedes-Benz USA, LLC ("MBUSA"), a Daimler subsidiary. MBUSA, which is incorporated in Delaware and has its principal place of business in New Jersey, distributes automobiles to dealerships throughout the United States, including, with a fair degree of continuity, California.

In granting Daimler's motion to dismiss, the United States Supreme Court held that even if MBUSA's contacts could be imputed to Daimler, the exercise of general jurisdiction over it in California was unacceptable (*Daimler, supra*, at 760-61, 761-62, internal citations omitted):

> [*Goodyear Dunlop Tires Operations, S.A., v Brown*, 131 S. Ct. 2846 (2011)] made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there . . . With respect to a corporation, the place of incorporation and principal place of business are "paradig[m] . . . bases for general jurisdiction." . . . Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." . . . That formulation, we hold, is unacceptably grasping.
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> Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." . . . .

Thus, except in an "exceptional case"[6], a corporation is "at home"[7] for general jurisdiction purposes only in its state of incorporation and in the state where its principal place of business is located.

Although *Daimler* clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities,[8] it does not change the law with respect to personal jurisdiction based on consent. This important distinction is notably acknowledged by United States District Court Judge Kevin P. Castel in his recent analysis of the issue in *Beach v Citigroup Alternative Invs. LLC*, 12-CV-7717 (PKC), 2014 US Dist. LEXIS 30032, at *17-18 (SDNY Mar. 7, 2014):

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6 *Daimler, supra*, at 761, n. 19.

7 *Id., passim.*

8 Patrick M. Connors, *Impact of U.S. Supreme Court Decisions on Practice*, New York Law Journal, July 21, 2014; Patrick M. Connors, *Impact of Supreme Court Decisions on New York Practice*, New York Law Journal, June 18, 2014; *see also Daimler, supra*, at n. 18 (stating that *Tauza v Susquehanna Coal Co.*, 220 NY 259 [1917] "should not attract heavy reliance today.")

> A nondomiciliary corporate defendant will only be deemed to be "doing business" in a forum when its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v Brown*, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011). The locations where a corporation is "at home" are, absent exceptional circumstances, limited to its principal place of business and place of incorporation. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761, 187 L. Ed. 2d 624 & n.19 (2014). The ultimate determination as to where a corporation is "at home" "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20. Notwithstanding these limitations, a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 170, 175, 60 S. Ct. 153, 84 L. Ed. 167 (1939); *Application of Amarnick*, 558 F.2d 110, 113 (2d Cir. 1977); *Rockefeller Univ. v. Ligand Pharms. Inc.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008).

In other words, a New York court may exercise general personal jurisdiction over a corporation, regardless of whether it is "at home" in New York, so long as it is registered to do business here as a foreign corporation and designates a local agent for service of process.

That is precisely the case here.

Accordingly, it is hereby

ORDERED that defendant Union Pacific Railroad Company's motion for leave to renew is granted, and upon renewal the court adheres to its April 1, 2013 decision and order denying Union Pacific's motion to dismiss.

This constitutes the decision and order of the court.

DATED: August 5, 2014

SHERRY KLEIN HEITLER, J.S.C