

<b>BPPC, LLC v Drunker Co. Ltd.</b>
2020 NY Slip Op 34042(U)
December 7, 2020
Supreme Court, Kings County
Docket Number: 524439/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BPPC, LLC d/b/a GREAT EASTERN ENERGY,  
Plaintiff, Decision and order

- against - Index No. 524439/19

THE DRUKER COMPANY LTD.,  
Defendant/Third Party Plaintiff,

- against -

SPARK ENERGY LLC,  
Third Party Defendant, December 7, 2020

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PRESENT: HON. LEON RUCHELSMAN

The third party defendant has moved pursuant to CPLR §3211 seeking to dismiss the third party complaint on the grounds it fails to state any cause of action. The defendant/third party plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On June 21, 2017 Spark Energy an energy supplier in various markets in the United States entered into a contract with the Druker Company where it was agreed Spark would be the energy supplier for nine Druker entities in Boston Massachusetts. Although Spark began supplying energy in November Druker's previous supplier, the plaintiff BPPC (also known as GEE), was also still supplying energy to Druker and continued to do so through March 2018. Thus, Spark paid Druker an additional \$70,000 to offset Druker's payments to BCCP. Thereafter BCCP notified Druker that a mistake in calculating the rates had been

made and Druker owed them an additional \$372,581.03. Druker refused to pay precipitating this lawsuit. Druker then sued Spark seeking indemnification.

Spark has now filed the instant motion seeking dismissal of the third party complaint on the grounds the court has no jurisdiction over the parties and for other reasons. Druker opposes the motion.

#### Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

In Johnson v. Ward, 4 NY3d 516, 797 NYS2d 33 [2005] the court held that "long-arm jurisdiction over a nondomiciliary exists where (i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business. If either prong of the statute is not met, jurisdiction

cannot be conferred under CPLR 302(a)(1)" (id). In Agency Rent A Car System Inc., v. Grand Rent A Car Corp., 98 F3d 25 [2d Cir. 1996] the court explained that "the question of whether an out-of-state defendant transacts business in New York is determined by considering a variety of factors, including: (i) whether the defendant has an on-going contractual relationship with a New York corporation...(ii) whether the contract was negotiated or executed in New York, and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship...(iii) what the choice-of-law clause is in any such contract...and (iv) whether the contract requires franchisees to send notices and payments into the forum state or subjects them to supervision by the corporation in the forum state...Although all are relevant, no one factor is dispositive. Other factors may also be considered, and the ultimate determination is based on the totality of the circumstances" (id). Thus, a non-domiciliary may be subject to the jurisdiction of New York courts where that individual "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR §302(a)). "Although it is impossible to precisely fix those acts that constitute a transaction of business" case law has established that "it is the quality of the defendants' New York contacts that is the primary consideration" (see, Fischbarg

v. Doucet, 9 NY3d 375, 849 NYS2d 501 [2007]).

Druker argues that Spark entered into a contract whereby it promised to indemnify and guaranty any further payments owed to BBPC. Since any such indemnification would take place in New York thus Spark availed itself of jurisdiction in New York. Specifically, Druker contends that Spark promised "to make the customer whole" and that "making Druker whole required Spark to, among other things, either pay GEE in New York for the charges that were owed or defend Druker in New York against the inevitable lawsuit" (see, Opposition to Motion to Dismiss, pages 2,3). Further, Druker argues that Spark agreed to "(i) communicate with GEE in New York; (ii) pay GEE in New York for amounts owed; and (iii) defend Druker in New York against the inevitable lawsuit if Spark did not pay GEE" (see, id at page 5). This contract, upon which Druker bases its entire jurisdiction argument, consists of an email sent from Natalie Alonso, a manager of Spark to Thomas Kilbride of Devaney Energy, Druker's broker. The e-mail states in its entirety: "Hi Tom, Sorry for the delay, I've researched each account and there was a delay with enrollment on our end. I am trying to gather all the invoices and work on a true up for this customer. Here is a list of the effective dates for the accounts that I found. Once all the invoices are gathered, which I should be able to pull from

the utility portal. I will send to our billing team and they will generate a refund. I apologize for this one, it's unacceptable and we will make the customer whole. Natalie" (see, Email dated February 7, 2018 at 12:53 PM included as Exhibit B of the Third Party Complaint).

First, the mere fact Spark may have been at fault for failing to un-enroll BBPC as Druker's energy supplier does not confer jurisdiction upon Spark. Spark had no relationship with BBPC, hence the third party complaint. Jurisdiction cannot be conferred upon a third party without an independent basis the third party has contacts with New York (see, Turbana Corp., v. M/V Summer Meadows et. al., 2003 WL 22852742 [S.D.N.Y. 2003]).

Concerning the e-mail sent by Stark to Druker's broker, there is scant evidence the email can be considered an indemnification agreement. The email does state that Spark will "make the customer whole" and that language is used to denote indemnification, however, there is no indication that meant Spark would pay BBPC and thereby subject itself to New York courts. Further, the email does not state that Spark would communicate with BBPC, pay BBPC or defend Druker in any lawsuit with BBPC as urged by Druker. Moreover, none of those obligations can be inferred or implied by the simple statement that Spark would make Druker whole. To the extent that email obligated Spark in any

way the obligation necessarily meant Spark would simply pay Druker for any of Spark's failures. This necessity is borne from the past dealing whereby Spark paid Druker directly for Spark's mistake and the additional fact the email was directed to Druker's representative and not BBPC. There is no basis to interpret the email as a promise to engage with a third party that is not a party to the email at all. Further, the email clearly states that upon review of all the invoices and delays of enrollment caused by Spark such matter would be forwarded to "the billing team" who "would generate a refund" (see, email, supra). That unmistakably means that Spark would pay back to Druker any funds they have already erroneously paid to BBPC and not that Spark would indemnify and defend Druker in a New York lawsuit. Thus, Spark did not enter into any indemnification agreement concerning New York.

Therefore, based on the foregoing, New York courts maintain no jurisdiction over Spark. Consequently, Spark's motion seeking to dismiss the third party complaint is granted.

So ordered.

ENTER:

DATED: December 20, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC