

Ess-Food v Ramtrade Worldwide, LLC

2011 NY Slip Op 32657(U)

October 10, 2011

Sup Ct, Nassau County

Docket Number: 19690/09

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 17

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ESS-FOOD,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 19690/09

RAMTRADE WORLDWIDE, LLC,

Motion Sequence No: 001
Original Return Date: 04-14-11

Defendant.

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P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 6 were submitted on this Notice of Motion on June 30, 2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmation and Affidavit in Support	1-3
Affirmation and Affidavit in Opposition	4-5
Affirmation in Reply	6

This motion by the defendant, RAMTRADE WORLDWIDE, LLC ("Ramtrade"), for an order pursuant to CPLR 327(a) dismissing the within action is decided as follows:

Defendant seeks to dismiss the within action pursuant to CPLR 327(a) on the grounds that the action is filed in an inconvenient forum. The statute provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." The doctrine of *forum non conveniens* permits a court to

dismiss an action when, although it may have jurisdiction over a claim, the court determines that “in the interest of substantial justice the action should be heard in another forum” [CPLR 327(a)]. (*National Bank & Trust Co. of North America, Ltd. v Banco De Vizcaya, S.A.*, 72 NY2d 1005, 1007). The doctrine is flexible, requiring the balancing of many factors in light of the facts and circumstances of the particular case (*Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65, 75; *Silver v Great Am. Ins. Co.*, 29 NY2d 256, 361; *National Bank & Trust Co. of North America, Ltd. v Banco De Vizcaya, S.A.*, *supra*) including, *inter alia*, “the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no one single factor controlling (citations omitted)” (*Wentzel v Allen Machinery, Inc.*, 227 AD2d 446, 447 [2nd Dept. 2000]; *see also, Sarfaty v Rainbow Helicopters, Inc.*, 221 AD2d 618, 619 [2nd Dept 1985]).

The burden is on a defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479; *Korea Exchange Bank v A.A. Trading Co.*, 8 AD3d 334, 345 [2nd Dept 2004]). “Moreover, where a plaintiff is a New York resident, a defendant bears the heavy burden of establishing that New York is an inappropriate forum before plaintiff’s choice of forum will be disturbed.” (*Homola v Longshore Transportation System*, 204 AD2d 1052 [4th Dept 1994]). The ultimate resolution “of this issue rests within the discretion of the trial court, [and] so long as the court has examined the relevant circumstances, its determination will not be disturbed” (*see, Sarfaty v Rainbow Helicopters, Inc.*, *supra*, at p. 619). (*Koutras v Lacorazza*, 248 AD2d 514 [2nd Dept 1998]).

It is undisputed that New York was not the situs of the underlying action. The following

facts set forth in the affidavit of Roland Finkleman, the managing member of defendant Ramtrade Worldwide, LLC, are not controverted by the plaintiff.

This litigation involves a dispute between the parties involving a Danish company and a broker located in Georgia on or about April, 2008, whereby Ramtrade . . . sold poultry products through the Georgian broker to the plaintiff (Danish company) from Argentina via Vietnam to Hong Kong and to South Africa on behalf of the plaintiff. No part of this dispute involved the supply of product, transportation, work . . . in New York. In fact, the goods in question are not even a product produced in the United States. The products were produced in Argentina for sale and delivery solely for outside the United States. In addition, the product was transported on vessels, which are foreign owned and registered outside the United States. (¶ 5 of Affidavit Roland Finkleman in Support).

The plaintiff is not a resident of New York. Plaintiff has submitted no documentary evidence to establish that it is registered as a corporation in New York, South Carolina or any other jurisdiction of the United States. The amount in controversy is \$55,380. *Cf.* CPLR 327(b).

Defendant argues that the only reason this action was commenced in this court is due to the use by the defendant of its mail drop in Lake Success. Defendant asserts and it is not refuted by the plaintiff that Ramtrade does not maintain offices at the Lake Success location, and has no employees or agents at that location. In short, defendant contends Ramtrade has no connection to Nassau County. (Affidavit in Support, Finkleman). In opposition to the motion, plaintiff submits copies of a "Wire Confirmation", a "Purchase Confirmation Order", a "Purchase Confirmation Order" and a "ProForma Invoice 0431-2008." Each of these documents lists the defendant's address as 1979 Marcus Avenue, Suite 210, Lake Success, New York. The court notes that the pro forma invoice has a Nassau County telephone number along with a Florida telephone number and a Florida fax number. Mr. Finkleman states that Ramtrade is a Delaware limited liability company with no

connection to the State of New York. Defendant's sales office is located in the state of Florida. Richard Hudson, the purchasing agent for plaintiff has submitted an affidavit in opposition with a *jurat* by a Notary Public in the County of Craven, State of North Carolina, which lends credence to defendant's assertion that the plaintiff has no contacts with this state. The summons lists "POB 14746 New Bern, N. CA" as the address of the plaintiff.

In further opposition to the motion to dismiss, plaintiff submits a copy of a Dunn & Bradstreet report in the name of the defendant dated January 14, 2009 that also lists the Lake Success address. However, what the plaintiff's attorney overlooks is the following statement on the Dunn & Bradstreet report: "A check of D&B's public records database indicates that no filings were found for Ramtrade Worldwide, LLC at 1979 Marcus Avenue, Suite 210, Lake Success, New York."

This court also notes that the Pro Forma Invoice 0431-2008 submitted by plaintiff in opposition to the motion states that "[a]ny disputes arising shall be arbitrated under the rules and regulations of the American Arbitration Association." Clearly, there are alternate forums available to litigate the issues i.e., including Florida or North Carolina. Plaintiff has not indicated any way in which removing the action from Nassau County would prejudice the plaintiff such as the calling of witnesses or employees who reside here. Defendant, on the other hand, states that it would be difficult to litigate here, as it must hire outside counsel, rather than its own in-house counsel and has no documents, employees or witnesses in Nassau County.

Finally, the Court has considered that the plaintiff wired a down payment (in the amount in controversy herein -- \$55,380) to the defendant's New York Bank of America account on December 9, 2008. While such action is significant in jurisdictional analysis, it is not determinative in *forum non* analysis. Of more significance are the affirmative defenses raised by the defendant -- i.e. that

there is an outstanding balance due the defendant from the plaintiff, contentions of fraud and alleged interference with defendant's "overseas supplier without consent". None of these defenses appear to have any significant contact with New York.

Weighing the relevant factors presented in light of the above-cited principles, the court concludes that the defendant has sustained its burden of demonstrating entitlement to relief pursuant to CPLR 327(a).

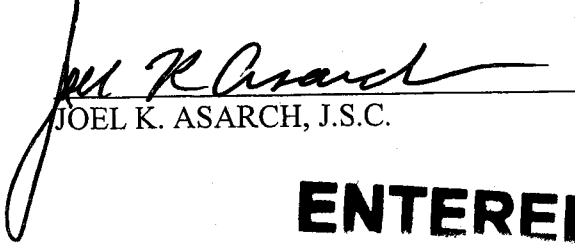
Accordingly, after due deliberation, it is

ORDERED, that the defendant's motion to dismiss is **granted**, on the condition that within ninety (90) days of service of this Order with notice of entry, the defendant, RAMTRADE WORLDWIDE, LLC, stipulates (1) to waive objection to service of process in and to submit to the jurisdiction of the courts in the State of Florida (the Court finding that by not moving to compel arbitration, the defendant has waived arbitration) and (2) that the defendant waives any defense of limitation of time, provided that such Florida action is brought within ninety (90) days from the date of service of defendant's stipulation upon counsel for the plaintiff. In the event that defendant fails to comply with the foregoing conditions, the motion is **denied**.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
October 10, 2011

ENTER:


JOEL K. ASARCH, J.S.C.

ENTERED
OCT 12 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Copies mailed to:

Myers, Saxon & Cole, P.C.
Attorneys for Plaintiff

Serlin & Serlin, Esqs.
Attorneys for Defendant