SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN _____ PART 63
Justice

Index Number : 150142/2012
WARNACO INC.
vs.
TRIALAND S.A.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/31/12

_____, J.S.C.
HON. ELLEN M. COIN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 63

---------- X

WARNACO INC., WARNER'S de MEXICO S.A. de C.V., and WARNACO ARGENTINA S.r.l.,

Plaintiffs

-against-

TRIALAND S.A.,

Defendant.

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Index Number 150142/2012
Submission Date March 29, 2012
Mot. Seq. No. 001
DECISION and ORDER

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Papers considered in review of this motion to dismiss:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Memo of Law in Supp	2
Plaintiff's Memo. of Law in Opp	3
Memo in Reply	4
Misc. Affid. and Decl	5

ELLEN M. COIN, J.:

Plaintiffs Warnaco Inc. (" Warnaco USA"), Warner's de Mexico S.A. de C.V. ("Warnaco Mexico") and Warnaco Argentina S.r.l. ("Warnaco Argentina") commenced this action by filing the summons with notice on February 1, 2012, seeking a declaration that it properly terminated an exclusive distributorship with defendant Trialand S.A. ("Trialand").[1] Warnaco USA holds exclusive

[1]During the pendency of this motion, plaintiffs filed and served a complaint in response to defendant's demand pursuant to CPLR 3012(b). This renders moot plaintiff's argument that the CPLR 3211(a) motion is premature when made in response to the summons with notice.

rights to advertise, produce and distribute a fashion product line of underwear, intimate apparel, sleepwear, loungewear, jeanswear and swimwear under the Calvin Klein and CK/Calvin Klein brands. Defendant Trialand S.A. ("Trialand") is a company organized under the laws of Oriental Republic of Uruguay, with its principal place of business located in Montevideo, Uruguay. Trialand now moves to dismiss this action pursuant to CPLR 3211 on the grounds of lack of personal jurisdiction, forum non conveniens and improper service of process.

In support of the motion, Trialand submits a declaration of its president, Alain Ferman.[2] According to Ferman, Trialand distributes goods of more than sixteen high-end name brands only to clients located in Latin America. (Fer. Decl., ¶ 6). Trialand does not distribute goods in New York or solicit any customers residing in New York. (Fer. Decl., ¶¶ 7-19). Trialand alleges that it does not have any physical presence in New York: it does not have any employees or corporate officers in this state; it does not maintain business records and does not pay taxes in New York; and it does not possess any financial or physical assets in New York. (Fer. Decl., ¶¶ 7-19)

Ferman claims that in 2005, Trialand decided to bring Calvin Klein brand products to duty free shops all over Latin America and to local shops in Uruguay. (Fer. Decl., ¶ 24). After an introductory meeting in New York, Warnaco representatives traveled to review Trialand's operations in Uruguay. (Fer. Decl., ¶ 26). Thereafter Trialand entered into an agreement with Warnaco Mexico, becoming exclusive representative and distributor of Calvin Klein Underwear at duty free and local shops in Uruguay and other Latin American countries. (Fer. Decl., ¶ 27). In its complaint, plaintiffs allege that Trialand was aware at all times that the sole decision maker

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[2]While Alain Ferman's declaration is not in the form of an affidavit, plaintiffs have not objected to its consideration by the Court. Further, plaintiffs do not dispute any factual allegations set forth in Ferman's declaration.

regarding grant of distributorship rights was Warnaco USA, with Warnaco Mexico and Warnaco Argentina being what amounts to wholly controlled subservient entities through which Trialand conducted business with Warnaco USA. (Compl., ¶ ¶ 6, 14, 16).

Ferman alleges that in 2007, Warnaco Mexico increased the range of Calvin Klein products that Trialand sold to include certain Calvin Klein Accessories, and Warnaco Argentina granted Trialand exclusive rights to distribute Calvin Klein Jeans in certain Latin American countries. (Fer. Decl., ¶ 29). As the distributorship relationship grew through 2009, Trialand communicated "almost" exclusively concerning the Calvin Klein merchandise business with Thomas Axmacher, managing director of Mexico and Latin America for Warnaco Mexico, and Javier Brandwain, Regional Director of Warnaco Argentina, who oversees Argentina, Chile, Paraguay, Peru and Uruguay operations. (Fer. Decl., ¶ 31). Trialand communicated with Javier Brandwain frequently, partly because he resided in Uruguay. (Fer. Decl., ¶ 32).

On April 23, 2010, Trialand, Warnaco Mexico and Warnaco Argentina entered into a two-year distribution agreement, renewable automatically, whereby Trialand was authorized to sell all Calvin Klein merchandise in all duty free shops in Uruguay, Argentina, Brazil, Paraguay, Chile, Peru, Ecuador and Mexico, and on the local market and duty-free shops in Uruguay and Paraguay. (Fer. Decl., ¶ 33). This agreement was evidenced by a letter signed by Thomas Axmacher, then managing director of Mexico and Latin America on behalf of Warnaco Mexico and Warnaco Argentina. (Fer. Decl., ¶ 33). Under this letter agreement, written in English, Trialand's rights were to continue "for a two years [sic] period, automatically renewable, or they can be interrupted with a previous advice of 6 months." (Fer. Decl., Ex. B).

Trialand claims that it never placed an order for Calvin Klein merchandise with, or received any shipment from, Warnaco USA. (Fer. Decl., ¶ 37). On occasion, Trialand representatives made trips to New York at the direction of Warnaco Mexico to view Calvin Klein merchandise. (Fer. Decl., ¶ 38). Between February 2010 and November 2011, Warnaco Mexico and Warnaco Argentina directed Trialand to view Calvin Klein merchandise at the showroom located in Milan, Italy, because they had decided that Trialand should distribute in Latin America the same line of fashion as that distributed in Europe. (Fer. Decl., ¶ 39). In November 2011, Warnaco Mexico directed Trialand to send a representative to New York to view Calvin Klein merchandise at the New York showroom. (Fer. Decl., ¶ 40).

In November 2011, Michel Ferman, Uriel Lapchik, a Trialand manager in charge of Mexico, and Alain Ferman traveled to Buenos Aires to discuss Latin American distribution strategy with Axmacher and Brandwain. (Fer. Decl., ¶ 42). What occurred at the meeting is in dispute. While plaintiffs allege that Trialand received an oral notice of termination, Ferman alleges that it was only mentioned as a possibility that Warnaco Mexico and Warnaco Argentina supplant Trialand as a distributor of Calvin Klein merchandise in Latin America. (Fer. Decl., ¶ 42; Compl., ¶¶ 24-26).

Thereafter Axmacher requested that Trialand send representatives to New York to meet with Warnaco USA representatives. (Fer. Decl., ¶ 44). The purpose of the meeting is in dispute. According to Ferman, he traveled to New York with Michel Ferman, Mercedes Jimenez de Arechaga (Trialand's outside counsel) and Rodrigo Robeiro of KPMG Uruguay, to discuss KPMG's analysis of Trialand's marketing projections in Latin America. (Fer. Decl., ¶ 43, 45-47). Warnaco USA, on the other hand, viewed the meeting in New York as an opportunity to arrange a transition of the remaining business, with the intention of replacing Trialand by directly marketing its products

through the same designated channels then handled by Trialand. (Compl., ¶ 31). The next day, on January 27, 2012, Stanley P. Silverstein, Warnaco USA's executive vice president for international strategy and business development, sent a letter to Trialand's headquarters in Montevideo purporting to terminate the distributorship agreement effective August 1, 2012. (Compl., Ex. B).

On January 30, 2012, Trialand sent Warnaco USA a letter rejecting the written notice of termination. (Compl., Ex C). In response, Warnaco USA confirmed by e-mail on February 2, 2012 its notice of termination effective August 1, 2012, attaching a copy of a summons with notice it had filed a day earlier. (Compl., Ex. D). On March 5, 2012, Sofia Requena, an attorney admitted to the practice of law in Uruguay, served the summons with notice on Trialand by personal delivery at its headquarters in Montevideo. As proof of service, plaintiff submitted Sofia Requena's affidavit, notarized by Romina Amaya Buffoni, notary public in Uruguay. (Faust Affid., Ex. A).

In support of the first part of its motion to dismiss--for lack of personal jurisdiction under CPLR 302(1)--Trialand argues that it did not have minimum contacts with, and did not transact business in, the State of New York, because (1) all of the underlying sales of Calvin Klein merchandise were arranged through Warnaco Mexico and Warnaco Argentina; (2) the April 23, 2010 letter agreement was signed and issued by Thomas Axmacher of Warnaco Mexico; and (3) Warnaco USA, which partly bases its invocation of this Court's jurisdiction on its status as a New York domiciliary, is not a party to any of the underlying sales of Calvin Klein merchandise or to the April 23, 2010 agreement.

Trialand bases its alternative *forum non conveniens* argument on the location of Trialand's witnesses in Montevideo, Uruguay, and on the attendant increased costs of either bringing the witnesses to New York to testify or paying attorneys to travel to Uruguay for depositions. Further,

Trialand argues that Uruguay has a strong local interest in resolving this dispute, as Trialand is one of Uruguay's leading companies with sustainable growth despite recessionary pressures.

Lastly, Trialand attacks the service of process by e-mail as ineffective under both New York and Uruguayan law. As to the personal delivery by Sofia Requena, Trialand argues that plaintiffs failed to comply with the Inter-American Convention on Letters Rogatory, because they did not deliver process to a central designated authority in Uruguay.

In opposition, plaintiffs argue that Trialand was fully aware that at all times the entity with which it transacted business was Warnaco USA. As proof, Warnaco USA points to the negotiations surrounding the renewal of the April 23, 2010 agreement. Warnaco USA also alleges in its complaint that during the failed attempts to negotiate a comprehensive agreement, each draft exchanged between the relevant parties contained a choice of forum clause providing for all disputes to be resolved in New York pursuant to New York law. The drafts also explicitly named Warnaco USA as Trialand's counter-party.

In the alternative, plaintiffs offer a separate basis for jurisdiction under CPLR 302(a)(3)(ii). Plaintiff point to Trialand's rejection of the January 27, 2012 notice of termination as a predicate tortious act. In addition, plaintiffs request to conduct jurisdictional discovery to determine the full contours of Trialand's contacts with New York.

With respect to the issue of sufficiency of service of process, plaintiffs cite *Morgenthau v Avion Resources, Ltd.* (11 NY3d 383 [2008]), in which the Court of Appeals ruled that the Inter-American Convention on Letters Rogatory provided a non-exclusive method of serving process and did not supplant all alternative methods, including the ones provided for in CPLR 311 and 313.

Plaintiffs also reject Trialand's *forum non conveniens* argument, because Warnaco USA is a New York domiciliary and the issues presented in this case concern only contract interpretation, not requiring extensive witness testimony.

Discussion

Long-Arm Jurisdiction

CPLR 302(a)(1) allows New York Courts to exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, "transacts any business within the state." The cause of action must also arise from the transaction of business. (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2nd Dept 2005](citations omitted)). "As the party seeking to assert personal jurisdiction, the plaintiff bears the burden of proof on that issue but . . . to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts exist to exercise personal jurisdiction over the defendant[s]." (*People v Frisco Marketing of NY LLC*, 93 AD3d 1352, 1353 [4th Dept 2012] (citations omitted); *D & R Global Selections, S.L. v Bodeaga Olegario Falcon Pinero*, 90 AD3d 403, 405 [1st Dept 2011]). "In this connection, the court interprets the pleadings and affidavits in the light most favorable to the plaintiffs." (*Central Sports Army Club v Arena Assocs., Inc*, 952 F Supp 181, 187 [SDNY 1997] (citations omitted)).

Finding a party to be transacting business in New York does not rest on a rigid mathematical formula consisting of physical presence, length of time spent in New York and frequency of contacts. (*See CPC Intl. Inc. v McKesson Corp.*, 120 AD2d 221, 233-34 [1st Dept 1986]). Rather it is the quality and nature of defendant's interactions inside the state by which defendant purposefully avails itself of the privilege of conducting activities within New York. (*CPC Intl. Inc*, 120 AD2d at 233-34). Proof of one transaction in New York may be sufficient to invoke jurisdiction, even though

defendant never enters New York, so long as defendant's activities here are purposeful and there is a substantial relationship between the transaction and the subject claims. (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2nd Dept 2005]).

In the context of contractual disputes, New York long-arm jurisdiction is not solely predicated on the location where the agreement was executed. It may be sufficient that the underlying negotiations in New York played such a crucial role in the eventual agreement on the major terms of the contract to justify New York court's exercise of personal jurisdiction over defendant. (*Central Sports Army Club,* 952 F Supp at 187 (finding jurisdiction where a Russian hockey player conducted negotiations and brokered the agreement with a Michigan hockey team through his sports agents located in New York, even though the contract was eventually executed in Michigan)).

The Warnaco plaintiffs allege sufficient facts in the summons with notice and complaint to establish *prima facie* long-arm jurisdiction over Trialand in New York under CPLR 302(a)(1). The heart of this action and the crux of the dispute between the Warnaco entities and Trialand is not the merchandise that Trialand distributed in South America, but the permission to sell it. The complaint alleges, and Trialand does not dispute, that the beneficial owner of all the rights to market and license merchandise under the Calvin Klein brand is Warnaco USA. It is also undisputed that it is Trialand that initiated the relationship with Warnaco USA when it attended "an introductory meeting in New York" some time in 2005 or 2006 to discuss distribution of Calvin Klein products. At Ferman's invitation, Warnaco USA's representative traveled from New York to Uruguay to review Trialand's assets and determine its ability to successfully market Calvin Klein merchandise. Ferman's unsolicited conduct constitutes the essence of the "purposeful activities" principle

underlying our long-arm jurisdiction jurisprudence.[3] (*See McGowan v Smith*, 52 NY2d 268, 272 [1981]).

Although later Trialand dealt directly with Warnaco Mexico and Warnaco Argentina in day-to-day affairs, Ferman concedes that both entities were wholly controlled by, and reported back to, Warnaco USA. Further, Trialand's argument that Warnaco USA, the only New York plaintiff, is not a party to the April 23, 2010 letter is unavailing. The April 23, 2010 letter did not specify the complete identity of the corporate party granting authorization, instead only referencing "WARNACO" generically. Moreover, Ferman knew that the authorization to sell Calvin Klein products contained in the letter could have been issued only with Warnaco USA's approval, as evidenced by his initial visit. Having sought and received permission to be a South American distributor of Warnaco USA's Calvin Klein brand, Trialand may not now argue that it should not have to litigate a dispute arising out of this relationship in New York courts. (*See Vacuum Instrument Corp. v EPM Co.*, 8 AD3d 661, 662 [2nd Dept 2004]).

Notably, when the November 2011 meeting in Buenos Aires did not end to Trialand's satisfaction, Ferman and Trialand representatives traveled to New York, where they met with Warnaco USA on January 26, 2012 in an effort to persuade Warnaco USA to renew the exclusive relationship along the lines of the April 23, 2010 letter. On January 27th, the day after the meeting, Warnaco USA sent a written notice of purported termination, which gave rise to this action for declaratory relief and damages.

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[3]While Trialand emphasizes that it has no physical or legal presence in New York and does not sell its merchandise to individuals located in New York, such facts are more relevant to the "doing business" analysis in New York under CPLR 301. Moreover, the location of Trialand's sales is not relevant to the claims in this action.

New York courts consider the acts of a defendant subsequent to the execution of a contract to be "ordinarily of jurisdictional consequence." (*Cutco Indus. v Naughton*, 806 F2d 361, 367 [2nd Cir. 1986] (finding a second trip to New York, while not solely for business, instrumental in decision to open additional franchises)). Accordingly, although the January 26th meeting occurred almost two years after the April 23, 2010 letter had been issued, it nonetheless has substantial jurisdictional significance. It concerned the attempted termination of the distributorship relationship, which forms the basis of this action. Therefore, plaintiffs' summons with notice and its complaint support the finding of long-arm jurisdiction in New York under CPLR 302(a)(1), because Trialand purposefully availed itself of the privilege of transacting business in New York, and the undisputed allegations of fact present a strong substantial nexus between Trialand's business activities in New York and this action.

Plaintiffs' alternative argument that long-arm jurisdiction is available under CPLR 302(a)(3)(ii) is without basis either in fact or in law, because Trialand's rejection of the January 27, 2012 notice does not fit any theory of tort presently cognizable in New York, and a breach of contract does not constitute a tortious act within the meaning of CPLR 302. (*Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 324 [1980]).

Service of Process

Trialand's reliance on the manner of service prescribed by the Inter-American Convention on Letters Rogatory is misplaced in light of the Court of Appeals' decision to the contrary in

Morgenthau v Avion Resources, Ltd. (11 NY3d 383 [2008]). Plaintiffs properly served Trialand at its headquarters in Montevideo, Uruguay pursuant to CPLR 313.[4]

Forum Non Conveniens

The common law doctrine of *forum non conveniens,* codified in CPLR 327(a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" for reasons of public interest, private convenience and substantial justice. (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 [1984]). In its assessment of the appropriateness of plaintiff's choice of forum, the court must weigh the following considerations: (1) the burden on New York courts; (2) the lack of an alternative forum; (3) the situs of the operative events giving rise to the claim; (4) the residency of the parties; (5) the location of a majority of the witnesses and (6) the potential hardship to the defendant. (*Pahlavi*, 62 NY2d at 479; *see also Sarfaty v Rainbow Helicopters, Inc.*, 221 AD2d 618, 619 [2nd Dept 1995]). No single factor is controlling, and the court must carefully consider the totality of the circumstances. (*Pahlavi*, 62 NY2d at 479).

Here the situs of the operative factual allegations are not all traceable to Uruguay. The distributorship relationship took form and disintegrated in equal measure in Uruguay and New York. Trialand's selective presentation of its own witnesses who may be inconvenienced does not adequately address the existence of apparently as many witnesses who will testify on behalf of

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[4]Since the Court finds that the delivery of process by Sofia Requena complied with CPLR 311, it need not reach the issue of the sufficiency of Warnaco USA's prior e-mailing of a copy of the summons with notice to Trialand.

Warnaco USA and its subsidiaries. Further, neither side submitted affidavits of witnesses regarding potential inconvenience.

It is also undisputed that all potential witnesses are officers or employees of the parties, and as such any imposition of hardship to litigate in New York is tempered by their prior history of continuous travel in and out of New York when seeking to establish and develop Trialand's business relationship with Warnaco USA. (*Kronengold v Hilton Hotels Corp.*, 166 AD2d 325, 326 [1st Dept 1990]). Despite the fact that Warnaco USA's financial resources would appear to be greater than those of Trialand, the imbalance is not so acute as to warrant sending this action to Trialand's home forum. (*See cf. Carvel Corp. v Ross Distr., Inc.*, 137 AD2d 578, 579 [2nd Dept 1988]). Considering that the courts generally refuse to dismiss cases where the cost burden would simply shift from one party to the other, granting Trialand's motion would not further the most efficient resolution of the matter, but merely provide Trialand with the forum of its choice. (*See e.g., Teevee Toons, Inc. v Gerhard Schubert Gmbh*, 2002 US Dist Lexis 5546, *23 [SDNY 2002]).

Also bearing on the Court's decision is that the eventual resolution of this action appears to entail the Court's application of the six-month notice of termination provision contained in the April 23, 2010 letter, which is drafted in English, and is unlikely to require substantial witness testimony. (*Arbor Commercial Mtge., LLC v Martinson*, 18 Misc 3d 178, 184 [Sup Ct, Nassau County 2007]). Any documentary evidence that may have to be exchanged between the parties is most likely already in electronic form and should not present unassailable challenges in production.

In accordance with the foregoing, it is hereby

ORDERED that the pre-answer motion by defendant Trialand S.A. to dismiss pursuant to CPLR 3211 and 327 is hereby denied in its entirety; and it is further

ORDERED that the parties shall appear for a preliminary conference scheduled in Room 311 at 71Thomas Street, New York, New York on June 27, 2012 at 2:00 p.m.

This constitutes the decision and order of the Court.

Date: May 31, 2012

ENTER:

Ellen M. Coin, A.S.C.J.