85 Unleashed LLC v Florida Detroit Diesel-Allison, Inc.
2013 NY Slip Op 30754(U)
April 3, 2013
Supreme Court, Suffolk County
Docket Number: 15893-2010
Judge: Emily Pines

[* 1]

SHORT FORM ORDER

INDEX NUMBER: 15893-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 03-08-2013
Motion Submit Date: 03-12-2013
Motion Sequence Nos.: 003 MD
004 MD

X

85 UNLEASHED LLC,

Plaintiff,

-against-

FLORIDA DETROIT DIESEL-ALLISON, INC., MTU DETROIT DIESEL, INC., and MARINE TECHNOLOGIES, LLC,

Defendants.

X

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ORDERED that the motion (003) by defendants Florida Detroit Diesel-Allison, Inc and MTU Detroit Diesel, Inc. for an order dismissing the action as asserted against them is denied; and it is further

ORDERED that the motion (004) by defendant Marine Technologies, LLC for an order dismissing the action as asserted against it is denied.

In this breach of contract and negligence action, the plaintiff, 85 Unleashed, LLC, a Delaware corporation, seeks to recover money damages in the amount of $5,000,000 (five million dollars) for the defendants' alleged failure to properly install a dynamic positioning system which would integrate with the primary control system

in its 85-foot custom sport yacht. The record reveals that in or about 2003, the plaintiff's principal, Ray Sidhom, decided to build the yacht and retained a non-party boat designer named Applied Concepts Unleashed, Inc., a Florida corporation, and two non-party boat builders named Tribute Performance Boats, Inc. ("Tribute") and Lost River Marine, Inc., Florida corporations. The yacht was built at the premises owned by Tribute in Paint Beach Gardens, Florida. The yacht engines were purchased from defendant MTU Detroit Diesel, Inc. ("MTU"), and delivered by defendant Florida Detroit Diesel-Allison, Inc. ("FDDA"), both of which were incorporated in Delaware. The engines were installed by defendant Marine Technologies, LLC ("MT"), a Louisiana limited liability company. The plaintiff also hired non-party Voyager Systems, Inc., a Florida corporation, to sell and install the dynamic positioning system on the yacht. The record reveals that upon the installation of the dynamic positioning system, there was no coordination with the primary control system.

The instant action was commenced on May 4, 2010. The complaint alleges that a custom configuration was needed to integrate the joy stick function on the dynamic positioning system as desired by the plaintiff. The complaint asserts seven causes of action as follows: breach of contract, breach of implied warranty, breach of express warranties, negligence, fraudulent inducement, quantum meruit, and unjust enrichment. Issue was joined on or about January 5, 2011.

Procedurally, by order dated November 23, 2010 (Pines, J.), this Court denied a motion by FDDA to dismiss the complaint on the ground that the Court lacked personal jurisdiction over it without prejudice until the close of discovery, and denied a motion by MTU to dismiss the complaint on the ground of inconvenient forum. FDDA now essentially renews its motion to dismiss the complaint on the ground that the Court has no personal jurisdiction over it. In addition, FDDA and MTU jointly move to dismiss the complaint pursuant to CPLR 3211 (a) (1) on the ground that their contract with the plaintiff contains a forum selection clause which provides that any disputes be litigated in the State of Florida. MT moves separately to dismiss the

complaint as asserted against it on the ground of inconvenient forum.

DISMISSAL UPON DOCUMENTARY EVIDENCE

Initially, the branch of the motion by FDDA and MTU to dismiss pursuant to CPLR 3211 (a) (1) is denied as it was never raised in the initial motion which those defendants now seek to renew. CPLR 2221 (e) provides, in part:

> (e) A motion for leave to renew:
> 1. * * *
> 2. 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; and
>
> 3. Shall contain reasonable justification for the failure to present such facts on the prior motion.

Here, the Court granted leave to renew a motion seeking dismissal on personal jurisdictional grounds in the prior order. There was no mention in such motion of dismissal based on documentary evidence, which is a totally separate ground. Therefore, the Court denies that branch of the motion inasmuch as the defendants raising such issue does state a basis for a motion to renew.

More importantly, the Court finds that such a defense which is based upon documentary evidence was not preserved in the answer pursuant to CPLR 3211 (e) and is therefore waived. *Wells Fargo Bank Minn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 (2d Dept 2007). CPLR 3211 (e) provides, *inter alia*,

> At any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading.

RENEWAL OF JURISDICTIONAL MOTION

The Court now turns to the branch of FDDA's motion to dismiss on the jurisdictional ground. Initially, when deciding a motion to dismiss, the Court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory. *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 (1992); *Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 (1977); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 389 NYS2d 314 (1976). For jurisdiction to attach under CPLR 302 (a) (1), there must be "some articulable nexus" between the business transacted in New York and the causes of action sued upon. *McGowan v Smith*, 52 NY2d 268, 272, 437 NYS2d 643 (1981). Long-arm jurisdiction is proper under CPLR 302(a)(1) "even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71, 818 NYS2d 164 (2006) quoting *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467, 527 NYS2d 195 (1988). An essential criterion in all cases is whether the quality and nature of the defendant's activity is such that it is reasonable and fair to require it to conduct its defense in the state. *Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 9 Misc 3d 1125(A), 862 NYS2d 808, aff'd 34 AD3d 433, 824 NYS2d 353 (2d Dept 2006). Once jurisdiction is challenged, the burden of proving jurisdiction lies with the plaintiff. *Green Point Savings Bank v Taylor*, 92 AD2d 910, 460 NYS2d 121 (2d Dept 1983). The plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction. *Rocha Toussier y Asociados, S.C. v Rivero*, 91 AD2d 137, 457 NYS2d 798 (1st Dept 1983).

In the instant action, FDDA claims that the court lacks jurisdiction pursuant to CPLR 301 or 302, since it does not reside in New York, maintain an office in New York, or do business in New York. In support of the motion, FDDA submits the affidavit of its principal, Donald F. Mann, who indicates that FDDA's principal place

of business is Miami, Florida, that FDDA does not transact any business in New York, does not own or lease property in New York, does not have any corporate officers or employees or agents in New York, and that FDDA does not advertise in any publications aimed specifically at New York residents or businesses. Mann states that FDDA is a distributor of MTU and its contract with MTU does not permit FDDA to sell products in areas other than Florida and the Bahamas. Mann also asserts that FDDA does not regularly solicit business within New York, does not engage in any persistent course of conduct in New York, and does not derive revenues from goods sold or serviced in New York. Mann alleges states that this was a Florida-based transaction inasmuch as in May 2005 FDDA sold the subject engines to Tribute in Jupiter, Florida. Mann states that if parts were sold to companies in New York, the number is negligible, as an accommodation to a customer. Mann further argues that FDDA was not involved in servicing or repairing the yacht in New York.

In opposition, the plaintiff has met its burden of proving that the Court has jurisdiction over FDDA. The plaintiff submits a portion of the deposition testimony of Donald Mann, who conceded that FDDA sold parts to companies in New York as an accommodation to customers or to distributors in New York who may not have had the parts in stock. The plaintiff also submits two documents, in the form of spreadsheets, obtained from FDDA during discovery. The first spreadsheet depicts sales by FDDA to MTU distributors in the Florida, Mexico, and Atlantic regions during the years 2009 and 2010. Sales in the Atlantic region, which encompasses New York, totaled $378,202 in 2009, and $233,478 in 2010. A further breakdown of sales in a second spreadsheet reveals inter-company sales to New York distributors ranging from $191,000 to $512,000 per year from 2006 through 2010.

Accordingly, the motion by FDDA and MTU to dismiss the complaint as asserted against them is denied.

INCONVENIENT FORUM

Turning to the motion by MT to dismiss the complaint on the ground of inconvenient forum, the Court, in its discretion, declines to provide such relief after having denied MTU's prior motion on the same ground. A motion to dismiss pursuant to CPLR 327 (a) on the ground of inconvenient forum is committed to the sound discretion of the trial court, and the resulting determination will not be set aside absent improvident exercise of that discretion or a failure by the court to consider relevant factors. *McGuire v W.R. Schmidt, LLC*, 75 AD3d 538, 903 NYS2d 918 (2d Dept 2010). Here, MT, a Louisiana limited liability company, has also failed to show that it and its witnesses would be any more inconvenienced by New York litigation than plaintiff's sole member and manager would be by Florida litigation. *O'Connor v Bonanza International, Inc.*, 129 AD2d 569, 514 NYS2d 67 (2d Dept 1987). In any event, consideration of this issue is barred by the doctrine of law of the case. *See* CPLR 5501 (a); *Aurora Loan Servs., LLC v Grant*, 88 AD3d 929, 931 NYS2d 523 (2d Dept 2011).

Accordingly, MT's motion to dismiss the complaint as asserted against it is denied.

Dated: April 3, 2013
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL