SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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AIG PROPERTY CASUALTY COMPANY, formerly known as Chartis Property Casualty Company, as subrogee of Martin Franklin and all other named insureds,

Plaintiff

v

TEMP AIR COMPANY, INC., and DESERT AIRE

Defendants.

[And a Third-Party Action]

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Index No. 153728/14

DECISION AND ORDER

MOT SEQ 001

NANCY M. BANNON, J.:

I. INTRODUCTION

In this subrogation action to recover benefits paid by the plaintiff to its insured for injury to property under a casualty insurance policy, the defendant Desert Aire moves pursuant to CPLR 3211(a)(8) to dismiss the amended complaint and third-party complaint as against it for lack of personal jurisdiction and pursuant to CPLR 3212 for summary judgment dismissing the complaint, cross claims, and third-party claims against it on the ground that the claims are time-barred. The motion is granted to the extent that the third, fourth, fifth, and sixth causes of action in the amended complaint are dismissed as against it, those branches of the motion which are for summary judgment dismissing, as time-barred, the cross claims and third-party claims against it are permitted to be withdrawn, and the motion

is otherwise denied.

II. BACKGROUND

Desert Aire manufactured, and the defendant Temp Air Company, Inc. (TAC), installed, a dehumidifying unit (the unit) in a house owned by Martin Franklin in Harrison, New York. Sometime in October 2012, the unit allegedly malfunctioned. In response to Franklin's request to repair the unit, TAC disassembled it, but left it in a disassembled state, allegedly generating condensation, runoff, and consequently mildew, which caused water and mold damage to Franklin's real and personal property in the sum of approximately $1.4 million. Franklin made claim upon his casualty insurer, the plaintiff AIG Casualty Company, formerly known as Chartis Property Casualty Company (AIG), which paid the claim.

On April 17, 2014, AIG commenced this subrogation action against TAC, seeking to recover under theories of negligence and breach of a service contract with Franklin. On February 10, 2016, TAC commenced a third-party action against Desert Aire, seeking recovery for contribution based on a theory of negligent design and common-law negligence, breach of an express warranty of fitness for a particular use, breach of implied warranties of merchantability and fitness for a particular use, and the launching of an inherently dangerous product into the stream of

commerce. TAC caused process to be served upon Desert Aire on March 7, 2016. On April 26, 2016, Desert Aire answered the third-party complaint and counterclaimed against TAC.

Also on April 26, 2016, AIG served a supplemental summons and amended complaint adding Desert Aire as a direct defendant. On April 29, 2016, Desert Aire answered the amended complaint. As relevant here, it asserted, as its twentieth affirmative defense, that the action was time-barred, and, as its twenty-second affirmative defense, that the court lacked personal jurisdiction over it. On May 12, 2016, TAC answered the amended complaint, and asserted a cross claim for contribution against Desert Aire based on a theory of common-law negligence. Rather than answering the cross claim, Desert Aire moved to dismiss the amended complaint, third-party complaint, and cross claim, alleging that New York lacks jurisdiction over it, and simultaneously moved for summary judgment dismissing, as time-barred, the complaint, cross-claims, and third-party claims.

III. DISCUSSION

A. STATUTE OF LIMITATIONS

1. THIRD-PARTY COMPLAINT and CROSS CLAIMS

On their face, Desert Aire's moving papers seek summary judgment dismissing, as time-barred, the third-party causes of action and cross claim asserted against it by TAC. It contends

in reply papers, however, that it did not intend to seek dismissal of the third-party causes of action or cross claims on that ground, since it effectively concedes that they were timely interposed. See CPLR 1401; Bay Ridge Air Rights v State of New York, 44 NY2d 49 (1978); Vidal v Claremont 99 Wall, LLC, 124 AD3d 767 (2nd Dept. 2015); Ruiz v Griffin, 50 AD3d 1007 (2nd Dept. 2008).

Therefore, the court permits Desert Aire to withdraw those branches of its motion which are for summary judgment dismissing, as time-barred, the third-party complaint and cross claims against it.

2. AMENDED COMPLAINT

Desert Aire established that the causes of action asserted against it by AIG in the amended complaint are time-barred. Where, as here, the third-party summons and complaint are properly filed and served, the plaintiff's claims against a newly added defendant such as Desert Aire, as asserted in the amended complaint, relate back for statute of limitation purposes to the date of service of the third-party complaint. See Duffy v Horton Mem. Hosp., 66 NY2d 473 (1985); Bevilacqua v Bloomberg, L.P., 70 AD3d 411 (1st Dept. 2010). The third-party complaint here, in which the third, fourth, fifth, and sixth causes of action are asserted against Desert Aire, was served on March 7, 2016.

The third and sixth causes of action, which respectively allege negligent product design and the placement of a defective product in the stream of commerce, are subject to the three-year limitations period of CPLR 214(4), and accrued when the injury to the plaintiff's property was first sustained in 2012. See Miniero v City of New York, 65 AD3d 861 (1st Dept. 2009). Desert Aire thus demonstrated, prima facie, that these causes of action were time-barred as of March 7, 2016. In opposition, the plaintiff's submissions failed to raise a triable issue of fact as to whether the injury occurred later, or whether any exception to the accrual rule was applicable.

The fourth and fifth causes of action, which respectively allege breach of an express warranty of fitness and implied warranties of merchantability and fitness (see UCC 2-315, 2-315) are subject to a four-year limitations period, which began to run when delivery of the unit was made. See UCC 2-725(1), (2); McCormick v Favreau, 82 AD3d 1537 (3rd Dept. 2011); Koss v Leach Co., 6 AD3d 665 (2nd Dept. 2004). Desert Aire demonstrated, through the affidavit of its president, Keith Coursin, and its submission of the relevant invoice, that the unit was sold and delivered on March 17, 2006. It thus established, prima facie, that the limitations period for breach-of-warranty claims had expired on March 17, 2010, and thus long before March 7, 2016, rendering the fourth and sixth causes of action time-barred. In

opposition, the plaintiff's submissions did not refute the evidence establishing the delivery date and, hence, failed to raise a triable issue of fact.

B. LONG-ARM JURISDICTION

CPLR 301 and 302(a) essentially codify, with additional protections for a non-domiciliary, the constitutional requirement that a non-domiciliary have minimum contacts with the forum state before it may be subject to the jurisdiction of its courts. See Pramer S.C.A. v Abaplus Intl. Corp., 76 AD3d 89 (1st Dept. 2010). Coursin's affidavit establishes that Desert Aire does not maintain a permanent presence within the state (see CPLR 301; Hopeman v Hopeman, 128 AD3d 488 [1st Dept. 2015]), did not transact business within the state or contract to supply goods or services in the state (CPLR 302[a][1]), and did not commit a tortious act within the state (CPLR 302[a][1]). Coursin further shows that Desert Aire does not derive substantial revenue from interstate or international commerce (see CPLR 302[a][3][ii]; Carpino v National Store Fixtures, 275 AD2d 580 [3rd Dept. 2000]), and does not own, use, or possess real property situated within the state. See CPLR 302(a)(4).

Nonetheless, Desert Aire failed to establish that New York lacks long-arm jurisdiction over it pursuant to CPLR 302(a)(3)(i). That subsection provides that a non-domiciliary may be

subject to jurisdiction in New York where it "commits a tortious act without the state causing injury to person or property within the state . . . if he [or she] . . . regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state" (emphasis added).

There is no dispute that the amended complaint asserts that Desert Aire negligently manufactured the unit, and Coursin does not even address the issue of whether Desert Aire committed a tort without the state that caused injury to property within the state. In addition, Desert Aire failed to establish that it does not derive substantial revenue from goods used or consumed in the state. Although Desert Aire made a showing that it does not regularly do or solicit business in the state, or engage in any other similar persistent course of conduct, TAC raises an issue of fact as to whether Desert Aire's designation of an authorized sales representative and several service providers in the state constitutes the regular solicitation of business in New York.

1. SUBSTANTIAL REVENUE FROM GOODS USED IN NEW YORK

Coursin asserts that "[r]evenue from products sold to New York entities amounted to $776,348 and accounted for 5.3% of [Desert Aire's] gross sales in the year 2015." Thus, Desert Aire did not establish that its revenue from New York was

insubstantial. See Tonns v Spiegels, 90 AD2d 548 (2nd Dept. 1982); Gonzales v Harris Calorific Co., 35 AD2d 720 (2nd Dept. 1970), affg 64 Misc 2d 287 (Sup. Ct. Queens County 1970); cf. Murdock v Arenson Intl USA, 157 AD2d 110 (1st Dept. 1990) (where .05% of defendant's total sales were generated in New York, and amount to only $9,000, the revenue generated in New York was not substantial). "[I]f the defendant's New York income is substantial in either an absolute sense (i.e., a large sum of money) or in a relative sense (i.e., a large proportion of its revenues), it should be sufficient to support long-arm jurisdiction." McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:23, at 111; see Allen v Canadian General Electric Co., 65 AD2d 39 (3rd Dept. 1978), affd 50 NY2d 935 (1980); Gillmore v J. S. Inskip, Inc., 54 Misc 2d 218 (Sup Ct. Nassau County 1967) (Meyer, J.). "What constitutes 'substantial revenue' under CPLR 302 . . . is not defined in the statute. The phrase should be construed to require comparison between" revenue derived from "interstate or international commerce" or generated "in the state," as applicable, and gross revenue. Allen v Auto Specialties Mfg. Co., 45 AD2d 331, 333 (1st Dept. 1974). It also requires comparison between profit generated from "interstate or international commerce" or derived "in the state," as applicable, and total net profit. See id.

"District courts in th[e Second] Circuit agree that where a

foreign corporation derives less than five percent of its overall revenue from sales in New York, such sales are not substantial enough to force a foreign defendant to litigate in New York." Copterline Oy v Sikorsky Aircraft Corp., 649 F Supp 2d 5, 16-17 (ED NY 2007) (citing cases). Even if this court were to adopt that metric in determining whether a non-domiciliary derived substantial revenue from New York, Coursin's affidavit effectively reveals that such revenue was substantial, since he avers that Desert Aire's New York revenue was greater than five percent of gross sales.

Moreover, Coursin does not provide a comparison of Desert Aire's net profit derived from goods used in New York and total net profit. Nor does Coursin explain how New York-generated revenues of more than $775,000 annually are insubstantial.

2. REGULAR SOLICITATION OF BUSINESS WITHIN THE STATE

"'The activities of a representative of a nondomiciliary in New York may be attributed to it . . . if it requested the performance of those activities and the activities benefit it.'" America/International 1994 Venture v Mau, 146 AD3d 40, 54 (2nd Dept. 2016), quoting Barbarotto Intl. Sales Corp. v Tullar, 188 AD2d 503, 504 (2nd Dept. 1992) (some internal quotation marks omitted); see Kreutter v McFadden Oil Corp., 71 NY2d 460 (1988); Parke-Bernet Galleries v Franklyn, 26 NY2d 13 (1970). "The

critical factor is the degree of control the defendant principal exercises over the agent." Barbarotto Intl. Sales Corp. v Tullar, supra, at 504.

The activities of authorized sales representatives may be attributed to the non-domiciliary defendant for purpose of conferring jurisdiction where the defendant requested the sales representatives to solicit sales of its equipment by virtue of an agency agreement, the sales representatives did in fact solicit such business in New York, and the defendant exercised control over the sales representatives by retaining the right to accept or reject any sales of equipment. See Barbarotto Intl. Sales Corp. v Tullar, supra; see also America/International 1994 Venture v Mau, supra.

Coursin's affidavit established, prima facie, that Desert Aire does not regularly do or solicit business in New York, or engage in some other, similar persistent course of conduct. In opposition, however, TAC raised a question of fact as to whether Desert Aire regularly solicited business in New York by submitting a printout of the contents of Desert Aire's web site, which identifies R.L. Kistler, Inc., of Rochester, New York, as Desert Aire's authorized sales representative, and six other New York companies as authorized Desert Aire service providers. In addition, TAC submitted a Desert Aire press release from 2008, which advertised the fact that Desert Aire had secured a booth at

the Jacob Javits Convention Center in Manhattan for an industry convention in order to market its dehumidifying systems. In reply, Desert Aire did not address these issues, and thus did not attempt to explain whether or not it requested its New York sales and service representatives to solicit business on its behalf, or the extent of control, if any, that it had over them.

Desert Aire has thus not established its entitlement to dismissal based on lack of personal jurisdiction.

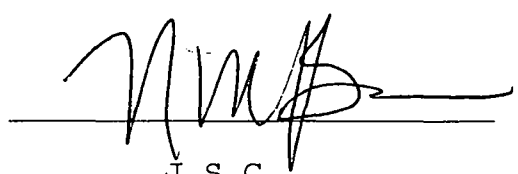
IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of Desert Aire is granted to the extent that the third, fourth, fifth, and sixth causes of action in the amended complaint are dismissed as time-barred, those branches of the motion which are for summary judgment dismissing the third-party causes of action and cross claims as time-barred are permitted to be withdrawn, and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: May 31, 2017 ENTER:



J.S.C.
HON. NANCY M. BANNON