Hempstead v Hammer & Steel, Inc.
2019 NY Slip Op 30335(U)
February 11, 2019
Supreme Court, New York County
Docket Number: 156963/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7

TYRELL HEMPSTEAD,

Plaintiff,

-against-

HAMMER & STEEL, INC.,
STS-SCHELTZKE GMBH & CO. KG.,
9501 DITMARS BOULEVARD LLC,
ICS BUILDERS, INC., AND
ENTERPRISE HOLDINGS, INC.,

Defendants.

Index No.: 156963/2017
DECISION/ORDER
Motion Seq. No. 001

ICS BUILDERS, INC.,

Third-Party Plaintiff,

-against-

PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Third-Party Defendant.

HAMMER & STEEL, INC.,

Second Third-Party Plaintiff,

-against-

PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Second Third-Party Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant STS-Scheltzke GmbH & Co. KG.'s CPLR 3211 (a) (8) motion to dismiss.

Papers	**Numbered**
Defendant STS-Scheltzke GmbH & Co. KG.'s Notice of Motion to Dismiss Complaint	1
Defendant STS-Scheltzke GmbH & Co. KG.'s Affirmation in Support	2
Plaintiff's Affirmation in Opposition to Motion	3
Defendant Hammer & Steel, Inc.'s Affirmation in Opposition to Motion	4
Defendant STS-Scheltzke GmbH & Co. KG.'s Affirmation in Reply to Defendant Hammer & Steel, Inc.	5
Defendant STS-Scheltzke GmbH & Co. KG.'s Affirmation in Reply to Plaintiff	6

Kahn Gordon Timko & Rodrigues P.C., New York City, NY (Nicholas Ivan Timko), for plaintiff.
Law Offices of Michael E. Pressman, New York City, NY (Steven Cohen and Michael Pressman), for defendant Hammer & Steel, Inc.
Ahmuty Demers & McManus, New York City, NY (Michael Rabus), for defendant STS-Scheltzke GmbH & Co. KG.
Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP, White Plains, NY (Christopher R. Post & Danielle Salese), for defendants 9501 Ditmars Boulevard LLC, ICS Builders, Inc., and Enterprise Holdings, Inc., and third-party defendant Peterson Geotechnical Construction LLC.

Gerald Lebovits, J.

Plaintiff, domiciled in Cobleskill, New York (Plaintiff's Affirmation in Opposition, Exhibit 13, at ¶14), sued German corporation STS-Scheltzke GmbH & Co. Kg. (Scheltzke) alleging he was injured when a grout mixer, model MS 200-E-FB, designed and manufactured by Scheltzke fell on him while he was working at 95-10 Ditmars Blvd in Queens, New York.

Plaintiff asserts three causes of action against Scheltzke: (1) negligence, (2) breach of warranty, and (3) strict products liability. Under CPLR 3211 (a) (8), Scheltzke moves to dismiss plaintiff's claims arguing this court lacks personal jurisdiction over it.

Background

Scheltzke manufactures special civil-engineering machines. (Plaintiff's Affirmation in Opposition, Exhibit 2.) Scheltzke delivered an allegedly faulty mixer (Scheltzke's Notice of Motion, Exhibit C, at ¶ 3) to a Missourian corporation, Hammer & Steel, Inc. (Hammer), in Sparta, New Jersey. (Plaintiff's Affirmation in Opposition, Exhibit 11, Clause 5.) This mixer was then sold to Peterson Geotechnical Construction LLC (Peterson) and delivered in Skaneateles, New York. (Plaintiff's Affirmation in Opposition, Exhibit 12.) Scheltzke sent one of its employees to Skaneateles to train Peterson's employee to use the mixer. (Defendant Hammer's Affirmation in Opposition, at ¶ 3.) Approximately a year and a half later, plaintiff, who was Peterson's employee, was injured when the mixer toppled over and struck him while he worked in Queens, New York.

Scheltzke's CPLR 3211 (a) (8) Motion

Scheltzke moves under CPLR 3211 (a) (8) to dismiss plaintiff's causes of action asserting that this court lacks personal jurisdiction under New York's CPLR 302 (3) long-arm statute and the Federal Due Process Clause.

This court finds that exercising jurisdiction over Scheltzke is compatible with CPLR 302 and federal due process. A non-domiciliary may be sued in New York, if a court determines that CPLR 302 confers jurisdiction over the non-domiciliary in light of its contacts with New York. If the non-domiciliary's relationship with New York falls within the terms of CPLR 302, the court

must then determine whether the exercise of jurisdiction comports with due process. (*See LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000].)

I. New York long-arm statute

Under CPLR 302 (a) (3) (ii), a court may exercise personal jurisdiction over any non-domiciliary who

> "in person or through an agent . . . commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

The statute can be broken down into five elements:

> "First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce." (*LaMarca,* 95 NY2d at 214.)

A. First Three CPLR 302 (a) (3) (ii) Elements

The first three elements of CPLR 302 (a) (3) (ii) are met: (1) Scheltzke committed a purported tortious act outside New York by manufacturing and shipping an allegedly defective product to the United States; (2) that the causes of action — negligence, breach of warranty, and strict products liability — for the injuries plaintiff suffered arise from the delivery; and (3) that the act causing the injury to plaintiff occurred in Queens, that is, within New York.

B. Fourth CPLR 302 (a) (3) (ii) Element

The "in-State-consequences" requirement is met when "'[t]he nonresident tortfeasor . . . expect[s], or ha[s] reason to expect, that his or her tortious activity in another State will have . . . consequences in New York.'" (*LaMarca,* 95 NY2d at 214, quoting *Ingraham v Carroll,* 90 NY2d 592, 598 [1997].) A defendant "need not foresee the particular event that produced the alleged injury" but only "reasonably foresee that any defect in its product would have direct consequences within the State." (*LaMarca,* 95 NY2d at 215.)

Scheltzke argues that it has no contacts in New York, is not authorized to transact business in New York, and does not market or derive revenue from New York. On the contrary, Scheltzke argues, that because it exclusively transacts with a Missourian corporation, Scheltzke could not have expected that the delivery of the mixer in New Jersey would have consequences in New York.

In opposition, Hammer alleges that Scheltzke reasonably expected the sale of the mixer to have consequences in New York because Scheltzke's website: (a) "guarantee[d] worldwide customer service through [its] authorized partners and train[ing] staff on the different machines and devices," (Plaintiff's Affirmation in Opposition, Exhibit 3, at ¶ 2), and (b) displayed Hammer as the sole authorized partner to distribute Scheltzke's equipment in the United States. (Plaintiff's Affirmation in Opposition, Exhibit 4.) Hammer argues that Scheltzke expected consequences in New York: Scheltzke sent an employee to Skaneateles to train Peterson's employee. Further, Hammer contends that Scheltzke subjected itself to the benefits and laws of the mixer's end-user situs through clause 5 of purchase order 5420, which shows Scheltzke conceded to indemnify Hammer, subsequent buyers, and their employees for the damages arising from the mixer's delivery. (Plaintiff's Affirmation in Opposition, Exhibit 11, Clause 5.) Also, Hammer argues that it exclusively distributes Scheltzke's products throughout New York, among other states. Hammer asserts that as Scheltzke's exclusive distributor in the United States and in the five years before plaintiff's incident, $3,472,143.68 of the $5,312,223.98 of Hammer's gross revenue originated from Scheltzke's products sold in New York. (Defendant Hammer's Affirmation in Opposition, at ¶10.)

In reply, Scheltzke argues that sending an employee to New York was the result of Hammer's instructions and does not suggest that Scheltzke targeted the New York market. Scheltzke also contends that purchase order 5420 was not signed and therefore does not support the mixer's purchase. Scheltzke also contends that the gross revenue reported by Hammer only concerns Hammer's gross revenue and does not show that Scheltzke derived revenue from New York.

Under the fourth element of CPLR 302 (a) (3) (ii), Scheltzke reasonably foresaw that the allegedly defective mixer would have direct consequences in New York.

By virtue of purchase order 5420, the allegedly defective mixer was placed into New York stream of commerce and Scheltzke consented to indemnify purchasers and their employees. In this case, Peterson purchased the mixer and plaintiff, Peterson's employee, was injured while using it. And Scheltzke's website boasted worldwide customer service, training for the machinery usage and representation through "authorized partners," displaying Hammer as Scheltzke's exclusive dealer in the United States.

Thus, sending an employee to New York to train Hammer's client suggests that Scheltzke had notice that its machinery had been swept into New York and reasonably expected that a defect in the mixer would have direct consequences in New York. With this notice, Scheltzke should have expected that Clause 5 of Purchase Order 5420 would be enforced in New York, particularly for causes of action for negligence, breach of warranty, and strict products liability. (*See LaMarca,* 95 NY2d at 213 [holding that jurisdiction existed based on the offer of warranties to the ultimate purchasers of the defendant's products].)

C. Fifth CPLR 302 (a) (3) (ii) Element

The substantial revenue element is designed to narrow the "'long-arm reach to preclude the exercise of jurisdiction over non-domiciliaries who might cause direct, foreseeable injury within the State but 'whose business operations are of a local character.'" (*LaMarca,* 95 NY2d at 215, quoting *Ingraham,* 90 NY2d at 599.)

In *Ingraham,* the court found that a physician from Vermont who was treating patients in that State and providing a service that is inherently personal and local in nature, even though physician's patients crossed state lines to see him, cannot convert his local practice into an interstate business activity. (90 NY2d at 599-600.) In contrast, in *LaMarca* the court found that defendant, a Texas corporation, was inherently engaged in interstate commerce. (95 NY2d at 215.) The court reasoned that because defendant maintained facilities in Virginia, advertised in a national trade magazine, made sales of its products for distribution throughout the United States, had a distributor and district representative for New York and its annual revenue in the year of the accident was over 18 million dollars — roughly $500,000 of which was derived from New York — the substantial revenue component had been satisfied. (*Id.* at 213, 215-16.)

This fifth element assures that jurisdiction will not be asserted over tortfeasors whose out-of-state business activities are of a "local character." (*LaMarca,* 95 NY2d at 215.)

Scheltzke regularly transacts in the United States, including New York, through Hammer's representation as its exclusive distributor. Because Scheltzke's website offers worldwide customer service through authorized partners using Hammer as exclusive distributor in the United States, including New York, Scheltzke's revenue substantially derived from international commerce.

II. Due Process

The exercise of jurisdiction over Scheltzke does not violate due process. CPLR 302 and due process are "not coextensive," and although "'personal jurisdiction permitted under the long-arm statute may theoretically be prohibited under due analysis, [courts] would expect such cases to be rare.'" (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 299-300 [2017] citing *Rushaid v Pictet & Cie*, 28 NY3d 316, 331 [2016].)

A. Minimum Contacts

Federal due process requires that a defendant have "minimum contacts" with the forum state such that the defendant "'should reasonably anticipate being haled into court there'" (*LaMarca,* 95 NY2d at 216, quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]) and that the prospect of having to defend a suit in New York comports with "'traditional notions of fair play and substantial justice.'" (*LaMarca,* 95 NY2d at 216, quoting *Intl. Shoe Co. v Washington*, 326 US 310, 316 [1945].)

A non-domiciliary tortfeasor has "minimum contacts" with the forum State — and may thus reasonably foresee the prospect of defending a suit there — if it "'purposefully avails itself

of the privilege of conducting activities within the forum State.'" (*LaMarca,* 95 NY2d at 216, quoting *World-Wide Volkswagen,* 444 US at 297.)

Jurisdiction may not be imposed over a defendant when the sale of its product originated from an isolated occurrence. But if the sale "'arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.'" (*LaMarca,* 95 NY2d at 217, quoting *World-Wide Volkswagen* 444 US at 297 [finding that defendant — a car manufacturer — had forged ties with New York by taking purposeful action, motivated by the understandable wish to have its products sold there].)

Scheltzke argues that it had no contacts or purposeful affiliation in New York because it did not target or purposefully target New York commerce. Scheltzke also argues that sending one employee to train a buyer on one occasion under Hammer's instruction does not constitute sufficient contacts, especially because only two of the three mixers sold to Hammer were placed into New York stream of commerce. Scheltzke argues that even if it knew that the stream of commerce would sweep its product into New York, that knowledge would be insufficient to meet the "purposeful availment" and "foreseeability" requirements.

Placing an item in the stream of commerce by itself is not enough for personal jurisdiction. But, in the aggregate, Scheltzke indirectly targeted the United States market through its exclusive distributor, particularly forging ties with New York.

On its website, Scheltzke guaranteed to provide worldwide customer service by means of its authorized partners. Because Hammer's website is readily accessible, Scheltzke has notice that its products are marketed, among other places, in New York. (Defendant Hammer's Affirmation in Opposition, Exhibit 7-9.) Knowing that these products were marketed in New York is indicative of Scheltzke's purposeful availment. (*See Darrow v. Deutschland,* 119 AD3d 1142, 1145 [3d Dept 2014] [holding that due process was satisfied because defendant targeted New York consumers through a network of distributors that rendered it likely that its products would be sold in New York].)

Further, Scheltzke subjected itself to the benefits and laws of the end user's situs by consenting to clause 5 of purchase order 5420 and conceding to indemnify Hammer's subsequent buyers about any damages derived from the furnishing of the mixer at issue.

Scheltzke could have reasonably anticipated being brought to court in New York because the training provided to Hammer's customer was provisioned within New York, regardless whether the training was based on Hammer's instruction. (*See D&R Global Selections, S.L.*, 29 NY3d at 292 [finding that a defendant visiting New York to "find customers" was sufficient to consider minimum contacts].)

B. Fair Play and Substantial Justice

To determine whether the exercise of personal jurisdiction offends the "notions of fair play and substantial justice," the court must factor in and balance "'the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.'" (*Rushaid*, 28 NY3d at 331, quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 477 [1985].)

Although Scheltzke is a foreign corporation, the burden of litigation is reduced by "modern communication and transportation." (*Rushaid*, 28 NY3d at 331.) Also, plaintiff is domiciled in New York, further providing for a legitimate state interest to deliver redress for its residents. And although the court does not have a complete record of the transactions or revenue Scheltzke received from the use of its machinery in New York, Scheltzke engaged in a persistent course of business conduct in the United States, at least indirectly through its exclusive distributor with New York. Scheltzke must appear in court in New York to answer for the alleged tortious actions that caused injury here. Jurisdiction over Scheltzke in New York does not offend traditional notions of fair play and substantial justice. Jurisdiction is appropriate.

Accordingly, it is

ORDERED that defendant's motion to dismiss for lack of personal jurisdiction is denied; and it is further

ORDERED that the parties appear for a compliance conference on April 17, 2019, at 10:00 a.m. in Part 7, at 60 Centre Street, room 345.

2/11/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:		GRANTED	X DENIED		GRANTED IN PART		OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE