SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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SOS CAPITAL,

Plaintiff,

- v -

RECYCLING PAPER PARTNERS OF PENNSYLVANIA, LLC,STUART POLSKY, SCOTT POLSKY

Defendants.

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INDEX NO. 159698/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for VACATE - DECISION.

The motion by defendants to vacate the default judgment against them and to dismiss this case is denied.

Background

In this action concerning the purchase of KN95 masks by plaintiff from the corporate defendant (Recycling Partners of Pennsylvania, LLC), defendants move to vacate the default judgment entered against them. They allege that plaintiff committed misconduct and that the Court should dismiss this case for lack of jurisdiction.

With respect to the two individual defendants, movants claim that defendant Stuart Polsky lives in Florida and Scott Polsky lives in Pennsylvania. They claim that this court lacks jurisdiction over these defendants based on their out-of-state residences. Defendants also point out that the corporate defendant is domiciled in Pennsylvania and, therefore, there is no subject matter jurisdiction over this defendant. They argue that plaintiffs' assertion that the contract was

to be performed in New York County is "an outright falsehood." Defendants also argue that there is no personal jurisdiction over defendants because no defendant engaged in meaningful activity in the state of New York.

Defendants maintain that plaintiff committed "misconduct" by not serving the pleadings on defendants by mail or by email or through their attorney once plaintiff was on notice that defendants were represented by counsel. They also point to neglect and a meritorious defense as an additional ground for vacatur. Defendants insist that the individual defendants were not parties to the contract at issue and that the contract never mentioned anything about FDA approval for the masks (the basis of plaintiff's claims for breach of contract). Defendants also seek restitution.

In opposition, plaintiff claims that it agreed to purchase 1 million FDA-approved KN95 masks from defendants for $2.14 million and that the masks did not bear the FDA-approved depicted on the image sent by defendants. Plaintiff maintains that it intended to then sell these masks to a third party. Plaintiff insists that there is subject matter jurisdiction because the corporate defendant contracted to sell goods to plaintiff in New York. It claims there is personal jurisdiction because each defendant transacted business in New York and committed torts in this state. Plaintiff also argues that defendants failed to raise a reasonable excuse for their default or a meritorious defense.

Discussion

"To vacate a default, a party must demonstrate both a reasonable excuse and the existence of a meritorious defense" (*Terrapin Indus., LLC v Bank of New York*, 137 AD3d 569, 570, 27 NYS3d 153 [1st Dept 2016]).

Defendants contend that this Court lacks both subject matter and personal jurisdiction over them. This Court disagrees. As an initial matter, the Court sees no reason why plaintiff was not permitted to bring its claims in this Court. Plaintiff is a New York-based entity that claims the masks to be sent to New York did not meet the specifications advertised by defendants. While plaintiff could have theoretically brought this case in federal court (possibly in Pennsylvania as suggested by defendants), there is no *requirement* that plaintiff commence this action in such a forum as defendants appear to argue. Of course, if defendants had timely appeared in this action, then they could have potentially removed the instant action to federal court under the principle of diversity jurisdiction. But plaintiff was entitled to pick the forum in the first instance. In other words, this Court has subject matter jurisdiction over this case.

"[A] New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process. If either the statutory or constitutional prerequisite is lacking, the action may not proceed. Due process requires that a nondomiciliary have 'certain minimum contacts' with the forum and that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Thus, this constitutional mandate likewise encompasses two requirements and jurisdiction may not be exercised unless both are present. With respect to due process, a non-domiciliary tortfeasor has minimum contacts with the forum State . . . if it purposefully avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of [the forum state's] laws" (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019] [internal quotations and citations omitted]).

"The constitutional inquiry focuses on the relationship among the defendant, the forum, and the litigation. Significantly, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction. Thus, the United States Supreme Court has upheld the assertion of jurisdiction over defendants who have purposefully reach[ed] out beyond their State and into another, while clarifying that the relationship between defendant and the forum state must arise out of defendant's own contacts with the forum and not contacts between the plaintiff (or third parties) and the forum State" (*id*. at 529 [internal quotations and citations omitted]).

Here, there is no dispute that defendants are all domiciled in states other than New York. But plaintiff alleges that defendants agreed to send masks to New York and that defendants, including the individual defendants, made fraudulent misrepresentations about the nature of those masks. Defendants cannot agree to send over a million masks to New York and then assert that they cannot be sued in New York. The Court observes that the agreement itself specifies that the masks were to be FDA-approved (NYSCEF Doc. No. 6).

That the sales order was signed by the corporate defendant in Pennsylvania or that neither defendant was physically present in New York is of no moment (*Fischbarg v Doucet*, 9 NY3d 375, 381-82, 849 NYS2d 501 [2007]). Plaintiff is in New York and contends it thought it was buying FDA-approved masks to be sent to New York (for over $2 million) and upon further investigation, the masks purportedly lacked FDA-approval. Plaintiff's CEO claims defendants Scott and Stuart Polsky sent an image to plaintiff of the masks that had the FDA logo but the masks that defendants attempted to deliver did not have this logo (NYSCEF Doc. No. 53 at 2-3). According to plaintiff, the lack of FDA approval reduces the value of the masks and it would not

have agreed to the instant transaction if the masks were not FDA-approved. It's also not what plaintiff contracted to purchase.

Having found that defendants' jurisdiction arguments are without merit, the Court observes that defendants do not state a reasonable excuse for their default. In opposition, defendants do not deny receiving service. Instead, they make the bizarre claim "that although service is not being contested at this juncture, it is important to note that after alleged service, no pleadings were served on Defendants by mail or by email or through their attorney once Plaintiff was on notice that Defendants were represented by counsel" (NYSCEF Doc. No. 49 at 11). Of course, service via email is not an acceptable form of service for the summons and complaint without prior Court approval. Nor is serving the pleadings upon counsel for defendants. While parties can reach a separate agreement to accept service via a method not proscribed under the CPLR, plaintiff cannot be faulted for serving pursuant to the CPLR.

The fact is that a review of the affidavits of service (NYSCEF Doc. Nos. 9, 10 and 11) reveals that service was properly effectuated on each defendant. And defendants did not raise an issue of fact in opposition that could raise a material question about service. Even if the Court could consider the "affidavits" of defendants (which the Court cannot because they were not notarized nor did they contain a certificate of conformity), they do not adequately contest service or raise a reasonable excuse for defendants' default.

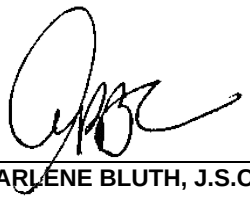
That the parties were trying to settle the case does not permit a defendant to ignore its obligation to answer the summons and complaint (or oppose a default motion). The Court is unaware of what defendants mean when they claim in opposition that they "put counsel for SOS Capital on notice that this court lacked subject matter jurisdiction over the matter, lacked personal jurisdiction over the parties, that the defendants had various meritorious defenses, and

requested a response within thirty (30) days" (NYSCEF Doc. No. 51, ¶ 36). That is not a basis to ignore this case. Especially now, with efiling, it is so easy to keep track of a case.

Without a reasonable excuse for their failure to timely answer or otherwise respond, this Court has no choice but to deny the motion to vacate. The Court need not consider whether defendants have a meritorious defense under these circumstances.

Accordingly, it is hereby

ORDERED that the motion by defendants to vacate the judgment entered against them is denied.



11/16/2021
DATE

ARLENE BLUTH, J.S.C.

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