Veneer One v. Paone Woodworking Corp.

19 Misc.3d 1117(A) (2008) | Cited 0 times | New York Supreme Court | April 11, 2008

The Plaintiff brings this action seeking to recover $2,992.53, plus interest, based upon the Defendant's alleged breach of an agreement for goods and services, an account stated, conversion and the Defendant's failure to pay. The action was commenced by the filing of a Summons and Complaint on July 26, 2007. Service was allegedly made upon the Defendant on August 6, 2007, in Philadelphia, Pennsylvania. Issue was joined on August 24, 2007. The Defendant's Answer contains general and specific denials, as well as, inter alia, an affirmative defense alleging the lack of personal jurisdiction, and a counterclaim alleging the Plaintiff's breach of the same agreement which forms the basis of the Plaintiff's action. The Defendant now moves, pursuant to CPLR § 3211(a)(8), to dismiss the Complaint, alleging that this court lacks personal jurisdiction over the Defendant. The Plaintiff opposes the motion.

The Defendant, through its Vice President, Michael Paone, alleges that it is a Pennsylvania corporation doing business primarily in Pennsylvania and New Jersey. According to the Defendant, it has no offices in Nassau County or New York State and has had only three (3) direct contacts with New York State. The first was a delivery made by the Defendant in Nanuet, New York, in Rockland County, three (3) to four (4) years ago. The second was a delivery made by the Defendant in Westbury, New York, in Nassau County, also three (3) to four (4) years ago. The third was an anticipated delivery to be made in October 2007 to Yonkers, New York, in Westchester County.

The Defendant acknowledges having entered into an agreement with the Plaintiff, calling for the Plaintiff to supply veneer doors for one of the Defendant's projects being performed exclusively in New Jersey. The Defendant further alleges that the Plaintiff contacted the Defendant about doing business with the Defendant and that the agreement with the Plaintiff was negotiated exclusively in Pennsylvania. The Defendant denies ever reaching out to the Plaintiff in New York.

The Plaintiff, through its President, Victor Giaime, alleges, that the Defendant "solicited bids from various companies providing goods and services such as that provided by plaintiff which solicitation reached plaintiff's place of business in Nassau County." (Giaime Affidavit 3/13/08) The Plaintiff alleges that it did not seek out the Defendant, but that the Defendant sought the Plaintiff. According to the Plaintiff, as a result of the Defendant's solicitation, the Plaintiff bid on and obtained a project to supply goods and services to the Defendant. The Plaintiff alleges that all of the subject goods were

manufactured and supplied from Plaintiff's place of business, in Nassau County. The Plaintiff acknowledges that goods were delivered to a job site designated by the Defendant outside of Nassau County and New York State.

UDCA § 403 mandates that, "Service of summons ... shall be made only within the county unless service beyond the county be authorized by this act or by such other provision of law, other than the CPLR, as expressly applies to courts of limited jurisdiction or to all courts of the state." UDCA § 404(a), the District Court's equivalent of the long arm statute set forth in CPLR § 302, Siegel, Uniform District Court Act § 404, Practice Commentary (McKinney's 1989 Main Volume); 146-150 West Sunrise Highway Corp. v. Lee's Hobby Speedway of New Hyde Park, Inc., 54 Misc 2d 913, 283 NYS2d 790 (Dist.Ct. Nassau Co. 1967); Henry Sash & Door Co. v. Medi-Complex Limited, 69 Misc 2d 269, 329 NYS2d 892 (Dist.Ct. Suffolk Co. 1972); provides:

(a) Acts which are the basis of jurisdiction. The court may exercise personal jurisdiction over any non-resident of the county, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state and a resident of the county, if, in person or through an agent, he:

1. transacts any business within a district of the court in the county; or

2. commits a tortious act within a district of the court in the county, except as to a cause of action for defamation of character arising from the act; or

3. owns, uses or possesses any real property situated within a district of the court in the county.

The Plaintiff's allegations make clear that it does not rely on subparagraphs 2 or 3 in opposing the Defendant's motion. Having alleged that the Defendant transacted business in Nassau County, the Plaintiff relies exclusively on subparagraph 1. The Defendant succinctly posits the issue now before this court as "whether [Defendant] transacted business in Nassau County. If it did, then this Court does not have jurisdiction and the case against [Defendant] must be dismissed." (Defendant's Reply Brief 3/20/08, p. 1)

In determining the issue presented, the court must not only be satisfied that the requirements of UDCA § 404(a)(1) have been met, but must also be satisfied that the exercise of personal jurisdiction over the Defendant in this case comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. LaMarca v. Pak-Mor Manufacturing. Co., 95 NY2d 210, 713 NYS2d 304 (2000); Opticare Acquisition Corp. v. Castillo, 25 AD3d 238, 806 NYS2d 84 (2nd Dept. 2005) "The law is clear that, under the circumstances disclosed herein, the burden of proving jurisdiction is upon the party who asserts it[,]" here the Plaintiff. Lamarr v. Klein, 35 AD2d 248, 250, 315 NYS2d 695, 696 (1st Dept. 1970) aff'd 30 NY2d 757, 333 NYS2d 421 (1972); see also: Saratoga Harness Racing Association, Inc. v. Moss, 26 AD2d 486, 275 NYS2d 888 (3rd Dept. 1966), aff'd 20

NY2d 733, 283 NYS2d 55 (1967); Carte v. Parkoff, 152 AD2d 615, 543 NYS2d 718 (2nd Dept.,1989); Zipperman v. Frontier Hotel of Las Vegas, 50 AD2d 581, 374 NYS2d 697 (2nd Dept. 1975)

Before adoption of the Fourteenth Amendment to the Constitution of the United States, "an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity[.]" Hanson v. Denckla, 357 U.S. 235, 248 78 S.Ct. 1228, 1237 (1958) Even thereafter, a party's presence within the territorial jurisdiction of the court was a prerequisite to the rendition of a judgment which would be binding against such party. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877) Not quite three-quarters (3/4;) of a century later the United States Supreme Court, in International Shoe Co. v. State of Washington, Office of Unemployment, 326 U.S. 310, 66 S.Ct. 154 (1945), recognized:

But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have a certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 132 A.L.R. 1357.

The court in International Shoe Co., supra . at 319, 66 S.Ct. at 159 noted that a determination of which activities will subject a non-resident of the forum State to suit in that State "cannot be simply mechanical or quantitative." see also: Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569 (1977) The degree of contact necessary to satisfy constitutional due process requirements "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. International Shoe Co. v. State of Washington, Office of Unemployment, supra . at 319, 66 S.Ct. at 160 The court found that, to the extent a party avails itself of the privileges and protections of conducting activities within a state, see: Ehrenfeld v. Mahfouz, 9 NY3d 501, 851 NYS2d 381 (2007); Cooperstein v. Pan-Oceanic Marine, Inc., 124 AD2d 632, 507 NYS2d 893 (2nd Dept.1986), so too must that party subject itself to obligations within that State, to the extent that said obligations arise out of or are connected to the in State activities, including the obligation to be subject to suit in that State.

Noting the increase in the flow of commerce between the States, brought about by technological progress, along with improved communication and transportation systems making the defense of suits in a foreign court less onerous, the court's decision in International Shoe Co., supra . has been seen as a necessary relaxation of the previously rigid requirements for the exercise of personal jurisdiction over non-resident defendants. Hanson v. Denckla, supra . "But [as the court points out] it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. (citation omitted) Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." Id. at 251, 78 S.Ct. at 1238 The court reiterated and reaffirmed

that "[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts' with that State that are a prerequisite to its exercise of power over him." Id. at 251, 78 S.Ct. 1238; See also: World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 100 S.Ct. 559 (1980); Kreutter v. McFadden Oil Corp., 71 NY2d 460, 527 NYS2d 195 (1988); Paradise Products Corp. v. Allmark Equipment Co., Inc., 138 AD2d 470, 526 NYS2d 119 (2nd Dept.1988)

In determining whether such "minimal contacts" exist before a State may exercise jurisdiction over a non-resident defendant the court must be concerned with "the relationship among the defendant, the forum and the litigation." Shaffer v. Heitner, supra . at 204, 97 S.Ct. at 2580; see also: Rush v. Savchuk, 444 U.S. 320, 100 S.Ct. 571 (1980). "The relationship between the defendant and the forum must be such that it is reasonable ... to require the [defendant] to defend the particular suit which is brought there.' (citation omitted)." World-Wide Volkswagen Corporation v. Woodson, supra . at 292, 100 S.Ct. at 564 This consideration must be weighed against such factors as the forum State's interest in adjudicating the dispute, the Plaintiff's interest in obtaining convenient and effective relief, the interest of all States in obtaining the most efficient resolution of controversies and fostering fundamental substantive social policies. Nevertheless, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." World-Wide Volkswagen Corporation v. Woodson, supra . at 294, 100 S.Ct. At 565.

At the end of the day, while "[a] State generally has a manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors[] ... the constitutional touchstone remains whether the defendant purposefully established minimum contacts' in the forum (citation omitted)." Burger King Corporation v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174 (1985) We are specifically concerned with such contacts which "proximately result from actions by the defendant himself that create a substantial connection' with the forum State[,]" (emphasis in original) Id, at 475, 105 S.Ct. at 2184, from which the defendant "should reasonably anticipate being haled into court there[,]" World-Wide Volkswagen Corporation v. Woodson, supra . at 297, 100 S.Ct. at 567; see also: LaMarca v. Pak-Mor Manufacturing. Co., supra .; Martinez v. American Standard, 91 AD2d 652, 457 NYS2d 97 (2nd Dept.1982), as opposed to " random,' fortuitous,' or attenuated' contacts Keeton v. Hustler Magazine, Inc., 465 U.S., at 774, 104 S.Ct., at 1478; World-Wide Volkswagen Corp. v. Woodson, supra , 444 U.S., at 299, 100 S.Ct., at 568, or of the unilateral activity of another party or a third person,' Helicopteros Nacionales de Colombia, S.A. v. Hall, supra , 466 U.S., at 417, 104 S.Ct., at 1873." Burger King Corporation v. Rudzewicz, supra . at 475, 105 S.Ct. at 2183; see also: Landoil Resources Corp. v. Alexander & Alexander Services, Inc., 77 NY2d 28, 563 NYS2d 739 (1990): "The court must be able to say from the facts that the corporation is present' in the State not occasionally or casually, but with a fair measure of permanence and continuity' (Tauza v. Susquehanna Coal Co., 220 NY 259, 267, 115 N.E. 915; see also, Laufer v. Ostrow, 55 NY2d 305, 310, 449 NYS2d 456, 434 NE2d

692, supra)."

Preliminarily, there is no merit to the Defendant's argument that the Complaint is deficient, in that it fails to plead sufficient facts to establish long-arm jurisdiction over the Defendant. The Appellate Division, Second Department, has made it clear that:

[t]here is no requirement, in New York pleading practice, that the complaint allege the basis for personal jurisdiction (see Siegel, Practice Commentaries, McKinney's Cons.Laws of NY, Book 7B, CPLR C3013:20, p. 624; Siegel, New York Practice, p. 254; 1 Weinstein-Korn-Miller, NY Civ. Prac., par. 301.08). Rather, lack of personal jurisdiction is an affirmative defense, which must be asserted by the defendant either in a CPLR 3211 motion, or in the answer (CPLR 3211, subd. [e]).

Fishman v. Pocono Ski Rental Inc., 82 AD2d 906, 440 NYS2d 700 (2nd Dept. 1981); see also: Cadle Co. v. Ayala, 47 AD3d 919, 850 NYS2d 563 (2 Dept. 2008)

Turning to the parties' allegations sub judice, they must be viewed in a light most favorable to the Plaintiff. Glassman v. Hyder, 23 NY2d 354, 296 NYS2d 783 (1968); Armouth International, Inc. v. Haband Company, Inc., 277 AD2d 189, 715 NYS2d 438 (2nd Dept. 2000); Brandt v. Toraby, 273 AD2d 429, 710 NYS2d 115 (2nd Dept. 2000)

In an effort to establish jurisdiction, the Plaintiff first points to the Defendant's three (3) prior contacts with New York State. It should first be noted that the Defendant's prior contacts in Rockland and Westchester Counties are irrelevant, as UDCA § 404(a)(1) requires the transaction of business in Nassau County before jurisdiction can be found here. This notwithstanding, none of these three (3) transactions demonstrate " a substantial relationship' ... between [the] defendant's transactions in New York and [the] plaintiff's cause of action" Johnson v. Ward, 4 NY3d 516, 519, 797 NYS2d 33, 34 (2005), sufficient to sustain jurisdiction. see also: Frummer v. Hilton Hotels International, Inc., 19 NY2d 533, 281 NYS2d 41 (1967); McGowan v. Smith, 52 NY2d 268, 437 NYS2d 643 (1981) The court's focus then is limited to the lone transaction between the Plaintiff and the Defendant.

"[P]roof of one transaction in New York is sufficient to invoke jurisdiction, 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 (citations omitted)." Kreutter v. McFadden Oil Corp., supra . at 467, 572 NYS2d at 198; see also: Kimco Exchange Place Corp. v. Thomas Benz, Inc., 34 AD3d 433, 824 NYS2d 353 (2nd Dept. 2006), app. den. 9 NY3d 803, 840 NYS2d 762 (2007); Opticare Acquisition Corp. v. Castillo, 25 AD3d 238, 806 NYS2d 84 (2nd Dept. 2005) As noted, the Defendant's lack of a physical presence in Nassau County, alone, is not an impediment to this court's exercise of jurisdiction over the Defendant. Parke Bernet Galleries, Inc. v. Franklyn, 26 NY2d 13, 308 NYS2d 337 (1970); Lewin v. Block Laundry Machine Co., 16 NY2d 1070, 266 NYS2d 391 (1965)

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Defendant's absence from Nassau County notwithstanding, the Plaintiff claims that the Defendant solicited bids from various vendors and inserted itself into the county. Even if this court were to overlook the Plaintiff's failure to provide any proof or to indicate how these various vendors were solicited, as noted in O'Brien v. Hackensack University Medical Center, 305 AD2d 199, 760 NYS2d 425 (1st Dept. 2003):

"mere solicitation of business within the [county] does not constitute the transaction of business within the [county], unless the solicitation in [Nassau County] is supplemented by business transactions occurring in the [county] (citation omitted), or the solicitation is accompanied by a fair measure of the defendant's permanence and continuity in [Nassau County] which establishes a [Nassau County] presence (citation omitted)."

see also: Carte v. Parkoff, supra . [solicitation by telephone listing with a New York address does not confer jurisdiction]; J. E. T. Advertising Associates, Inc. v. Lawn King, Inc., 84 AD2d 744, 443 NYS2d 745 (2nd Dept.1981) [solicitation through telephone listing in New York which forwarded calls directly to defendant in New Jersey insufficient to establish jurisdiction]; Zipperman v. Frontier Hotel of Las Vegas, supra . [solicitation by listing toll-free direct-line telephone number in the local telephone directory does not constitute transaction of business within the State]; Ring Sales Co. v. Wakefield Engineering, Inc., 90 AD2d 496, 454 NYS2d 745 (2nd Dept. 1982) [in State solicitation of business by individuals or entities not shown to be agents or subsidiaries of foreign corporation does not confer jurisdiction] "This solicitation-plus' standard requires that there be activities of substance in addition to solicitation to support a finding of presence within the State ...." Sedig v. Okemo Mountain, 204 AD2d 709, 710, 612 NYS2d 643, 644 (2nd Dept.1994)

In an effort to get over this hurdle, although not alleged by the Plaintiff's Vice-President, Plaintiff's counsel alleges that the Defendant initiated contact with the Plaintiff in Nassau County and that the agreement between the parties was then negotiated by telephone from the Plaintiff's place of business in Nassau County. Ignoring the fact that counsel's allegations are without probative value, "where a defendant merely telephones a single order from outside the State ... our courts would not have such jurisdiction." Parke Bernet Galleries, Inc. v. Franklyn, 26 NY2d 13, 308 NYS2d 337 (1970); see: L. F. Rothschild, Unterberg, Towbin v. McTamney, 89 AD2d 540, 452 NYS2d 630 (1st Dept.1982), aff'd 59 NY2d 651, 463 NYS2d 197 (1983); M. Katz & Son Billiard Products, Inc. v. G. Correale & Sons, Inc., 26 AD2d 52, 270 NYS2d 672 (1st Dept. 1966), aff'd 20 NY2d 903, 285 NYS2d 871 (1967); Dulman v. Potomac Baking Co., Inc., 85 AD2d 676, 445 NYS2d 509 (2nd Dept.1981) Contrast: Deutsche Bank Securities, Inc. v. Montana Board of Investments, 7 NY3d 65, 818 NYS2d 164 (2006) [jurisdiction sustained where out of State defendant, a sophisticated international trader, negotiated approximately nine (9) securities transactions with the plaintiff totaling approximately $471 million dollars]; Fischbarg v. Doucet, 9 NY3d 375, 849 NYS2d 501 (2007) [jurisdiction found where the out of State defendant not only telephoned into New York to retain the plaintiff, but repeatedly communicated with the plaintiff by telephone over the course of nine (9) months, sent at least thirty-three (33) e-mails and faxes into the State, and mailed documents to the plaintiff in New York];

Parke Bernet Galleries, Inc. v. Franklyn, supra . [the defendant's active participation in an ongoing auction over an open telephone line, assisted by an individual present in New York, far exceeded the placing of an order over the telephone]

That the Plaintiff manufactured the subject goods in Nassau County and shipped them from within the county cannot foist jurisdiction upon the Defendant. J. E. T. Advertising Associates, Inc. v. Lawn King, Inc., supra .; Aero-Bocker Knitting Mills, Inc. v. Allied Fabrics Corporation, 54 AD2d 647, 387 NYS2d 635 (1st Dept. 1976); Success Marketing Electronics, Inc. v. Titan Security, Inc., 204 AD2d 711, 612 NYS2d 451 (2nd Dept.1994) Similarly, counsel's representation that "[t]he contract requires action from defendant in the nature of payment by defendant to plaintiff at its offices in Nassau County for the goods sold" (Chefec Affirmation 3/10/08, ¶ 4) does not create jurisdiction over the Defendant. Stengel v. Black, 28 AD3d 401, 813 NYS2d 428 (1st Dept. 2006); Success Marketing Electronics, Inc. v. Titan Security, Inc., supra .

Finally, the Defendant's insertion of a counterclaim relating to the same transaction which serves as the basis for the Plaintiff's Complaint does not subject the Defendant to the jurisdiction of this court. Textile Technology Exchange, Inc. v. Davis, 81 NY2d 56, 595 NYS2d 729 (1993); Williams v. Uptown Collision, Inc., 243 AD2d 467, 663 NYS2d 88 (2nd Dept.1997); N.A.S. Holdings, Inc. v. Pafundi, 12 AD3d 751, 784 NYS2d 218 (3rd Dept. 2004)

Accordingly, the Defendant's motion to dismiss the Complaint is granted.

This constitutes the decision and order of this court.