

Matter of Jones v 260-261 Madison Ave. LLC

2018 NY Slip Op 32413(U)

September 26, 2018

Supreme Court, New York County

Docket Number: 155495/15

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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IN RE: 260 MADISON AVENUE HVAC UNIT
COLLAPSE
-----X

DECISION/ORDER

This Decision/Order Relates To:

Jones v. 260-261 Madison Ave. LLC *et al.*

Ind. No. 155495/15
Mot Seq. No. 004

-and-

Admiral Indemnity Co. v. 260-261 Madison Ave. LLC *et al.*

Ind. No. 162167/15
Mot Seq. No. 002

-and-

McGann v. Skylift *et al.*

Ind. No. 451751/16
Mot Seq. No. ~~002~~ 001

-and-

Beck v. 260-261 Madison Ave. LLC. *et al.*

Ind. No. 152458/17
Mot Seq. No. 001

-and-

260-261 Mad. Ave LLC. v. Penguin Air Cond. Corp. *et al.*

Ind. No. 157898/17
Mot Seq. No. 002

Present:
Hon. Lynn R. Kotler,
J.S.C.

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These coordinated actions arise from a crane accident which occurred on May 31, 2015 at 261 Madison Avenue, New York, New York, when an HVAC chiller unit fell while being hoisted by the crane to the 30th floor of the subject premises. Its alleged that one of the straps on a sling was used to secure the HVAC unit snapped while it was being hoisted which caused property damage and personal injuries.

In each of these motions, third-party defendants/second third-party defendants Marine & Industrial Supply Company, Inc. sometimes d/b/a Marine & Industrial Testing Solutions and

Marine Industrial Testing Solutions (collectively "Marine") move to dismiss all claims against them on the grounds that the court lacks personal jurisdiction over them. Defendants/third-party plaintiffs Skylift Contractor Corp. and sometimes also Skylift Master Riggers Corp. (collectively "Skylift") oppose each motion, as does defendants/second third-party plaintiffs 260-261 Madison Avenue LLC and sometimes also ASRR Construction LLC (collectively "260-261 Madison"). The motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

The relevant facts are as follows. 260-261 Madison owned the subject premises on the date of the accident and the crane was being operated by Skylift at that time. Marine manufactured the sling which allegedly snapped and Paul's Wire Rope & Sling ("Pauls") was the retailer who sold the sling.

Based upon the sworn affidavit of Thomas F. Fenton, Marine's president argues that it cannot be subject to personal jurisdiction in this action because Marine is an Alabama Company with a principal place of business in Mobile Alabama. Fenton further maintains that all negotiations for sale of the sling took place in Alabama and Connecticut, where Pauls is located. Marine argues that since it did not have any contact with New York, and because it did not solicit any business in New York, it is not subject to New York jurisdiction.

Skylift and 260-261 Madison first argue that Marine is subject to general *in personam* jurisdiction in New York pursuant to CPLR § 301 because Marine solicited business through its website and advertised that it would be at an expo. Alternatively, they argue that Marine is subject to long-arm jurisdiction pursuant to CPLR § 302(a)(3)(i) and (ii). At a minimum, Skylift and 260-261 Madison contend that they have made a sufficient showing to warrant limited discovery on the issue of whether the exercise of jurisdiction is justified (CPLR § 3211 [d]). Skylift and 260-261 Madison also argue that Marine's motion is untimely.

Discussion

At the outset, the court finds that Marine's motion is not untimely. The court notes that Marine's answer to the original third-party complaint asserted as an affirmative defense that the court lacks personal jurisdiction over it. Moreover, CPLR § 3211[e] provides only that a defense based upon lack of personal jurisdiction is only waived if the party asserting said defense moves on any grounds set forth under CPLR § 3211[a] without raising such objection, or if not having made a motion to dismiss, the party fails to assert lack of personal jurisdiction in their responsive pleading. Since the procedural posture of these actions do not fall within the foregoing bar, the court rejects Skylift and 260-261 Madison's timeliness argument.

On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of proof (*O'Brien v. Hackensack University Medical Center*, 305 AD2d 199 [1st Dept 2003]). Pursuant to CPLR § 301, "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." "Solicitation of business alone will not justify a finding of corporate presence in New York with respect to a foreign manufacturer or purveyor of services" (*Laufer v. Ostrow*, 55 NY2d 305 [1982]). A website that is merely accessible to potential customers in New York does not, standing alone, confer general jurisdiction (see i.e. *Parson v. Kal Kan Food, Inc.*, 68 AD3d 1501 [3d Dept 2009]). However, an interactive website may satisfy the standard (see i.e. *Chestnut Ridge Air, Ltd. v. 12601269 Ontario, Inc.*, 13 Misc3d 807 [Sup Ct Ny Co 2006]).

Skylift and 260-261 Madison argue, without any proof, that Marine's website is interactive. This unsubstantiated argument is unavailing. The parties' contention that Marine's website advertises to a national and international markets merely establishes that the website is passive. A passive website does not demonstrate the type of contacts required to warrant the exercise of general personal jurisdiction. Indeed, Marine's website must do more than merely communicate information and advertise Marine's goods and services to New York customers

(see i.e. *Holey Soles Holdings Ltd. v. Foam Creations Inc.*, 2006 WL 1147963 [SDNY 2006]).

Skylift and 260-261 Madison next contend that Marine's advertisement on Facebook that on June 22, 2017 it would be present at an Exposition for Hoisting, Rigging and Crane Using, in Buffalo, New York is sufficient to confer jurisdiction. A copy of this posting has been provided to the court. The court disagrees. A single appearance at an expo in New York does not establish the "activities of substance" required to hold Marine subject to New York jurisdiction.

The fact remains that Marine, a non-domiciliary, conducted business with another non-domiciliary. Absent any proof of solicitation together with activities that are of sufficient permanence and continuity to establish the defendant's presence in New York, plaintiff has failed to demonstrate that this court can properly exercise general personal jurisdiction over Marine (*Parson v. Kal Kan Food, supra*). Accordingly, the court finds that Marine is not subject to jurisdiction pursuant to CPLR § 301.

The issue then is whether Marine can rightly be subject to long-arm jurisdiction in New York. To determine whether a non-domiciliary may be sued in New York, the court must first determine whether New York's long-arm statute, CPLR § 302, confers jurisdiction over it in light of its contacts with New York (*LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d 210 [2000]). If any of the provisions of CPLR § 302 apply, then the court must determine whether the exercise of jurisdiction comports with due process (*id*). The purpose of CPLR § 302 is to extend New York jurisdiction to nonresidents who have engaged in some purposeful activity in New York in connection with the cause of action asserted (*Parke-Bernet Galleries Inc. v. Franklyn*, 26 NY2d 13 [1970]).

CPLR 302 (a) (3) provides in relevant part as follows:

a court may exercise personal jurisdiction over any non-domiciliary . . .
who in person or through an agent . . .

(3) 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

(i) 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, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

The Court agrees with Skylift and 260-261 Madison that they have made a "sufficient start" to showing that "facts may exist" to justify the exercise of jurisdiction pursuant to CPLR § 302 (CPLR § 3211[d]; see i.e. *Doe v. McCormack*, 100 AD3d 684 [2d Dept 2012]). On this record, the third-party plaintiffs have shown that Marine held itself out as a national vendor, derived revenue from interstate commerce, has offices in more than one state and conducted business in New York through its attendance at the Buffalo, New York expo. Further, the third-party plaintiffs have provided proof that Marine is registered as an interstate carrier with the United States Department of Transportation. This showing is sufficient to establish that the exercise of personal jurisdiction over Marine by this court is not a frivolous argument. Therefore, Marine's motions to dismiss for lack of personal jurisdiction is denied without prejudice to renew upon the completion of limited discovery on the issue of personal jurisdiction.

Such discovery shall be scheduled on or before the next conference date.

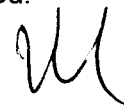
Conclusion

In accordance herewith, it is hereby

ORDERED that the Marine's motions to dismiss for lack of personal jurisdiction are denied without prejudice to renew upon the completion of limited discovery.

Dated: New York, New York
September 26, 2018

So Ordered:



Hon. Lynn R. Kotler, J.S.C.