Amoako v William Rudolph, Inc.
2011 NY Slip Op 33708(U)
May 9, 2011
Sup Ct, Bronx County
Docket Number: 304066/10
Judge: Mary Ann Brigantti-Hughes
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[* 1] FILED May 10 2011 Bronx County Clerk

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Briganti-Hughes

______________________________________X

FAUSTINA AMOAKO,

DECISION/ORDER

PLAINTIFF,

INDEX NO.:304066/10

OFFICE BRX MAY 10 2011

-against-

WILLIAM RUDOLPH, INC.

DEFENDANT.

______________________________________X

The following papers numbered 1 to 7 read on this motion to dismiss noticed on August 30th 2010 and cross motion for leave to conduct discovery noticed on November 5, 2010 on the motion calendar of November 17th, 2010 in Part IA-15:

Papers submitted	Numbered
Defendant's Notice of Motion, Affirmation, & Exhibits	1,2,3,
Plaintiff's Notice of Cross Motion, Affirmation & Exhibits	4,5,6,
Defendant's Reply Affirmation	7

Upon the foregoing papers, the defendant seeks an order pursuant to CPLR § 3211(a)(2) and CPLR § 3211(a)(8) dismissing the plaintiff's summons and complaint against the defendant because it is not subject to the jurisdiction of the Supreme Court of the State of New York. The plaintiff cross moves for leave to conduct discovery pursuant to CPLR § 3211(d) and opposing defendant's aforementioned motion.

I. Factual and Procedural History

The plaintiff, Faustina Amoako (hereinafter "Plaintiff") commenced the instant action to recover damages for personal injuries she allegedly sustained on March 26, 2010 from a one-car motor vehicle incident that allegedly occurred at or near the Cross Bronx Expressway and Jerome Avenue, Bronx, New York. Plaintiff purchased a 2003 Nissan Murano from Defendant, a used car dealer located in Little Ferry, New Jersey. Plaintiff alleges in her complaint that on or about March 4, 2010, March 15, 2010 and March 19, 2010 Plaintiff gave actual notice to Defendant that

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her vehicle, a 2003 Nissan Murano's service engine light was on. Plaintiff further alleges that on or about March 19, 2010 Defendant serviced or attempted to service the vehicle. In addition, Plaintiff alleges that between March 4, 2010 and March 26, 2010 defendant was negligent and careless in its maintenance, repair servicing and or inspection of the plaintiff 's vehicle thereby rendering plaintiff's vehicle as dangerous, hazardous, defective and unsafe and, therefore, due to defendant's alleged negligence and carelessness that left Plaintiff's vehicle allegedly dangerous, hazardous, defective and unsafe, she was caused to lose to control of her vehicle and impact a steel pole on the median that resulted in her injuries.

Plaintiff argues that the Court has jurisdiction over the defendant, by alleging in her summons and complaint by that Defendant, a non-domiciliary of New York, was doing business in the State of New York, and therefore was amenable to New York State jurisdiction pursuant to *CPLR* 301. In addition, she alleges in her summons and complaint that defendant, a non-domiciliary of New York, transacted business in the State of New York, and contracted to supply goods and services in the State of New York and the cause of action arose from such business transactions and contracts and therefore was amenable to New York State jurisdiction pursuant to *CPLR* 302(a)(1). In her cross-motion herein, Plaintiff argues that Defendant committed a tortious act outside the State of New York, that injured her within the state of New York and defendant expects or should reasonably expect the acts to have consequences in the State of New York.

Plaintiff submits her own affidavit , which states that she is a New York resident who purchased a 2003 Nissan Murano from Defendant's used car dealership located at 407 Route 46 East, Little Ferry, New Jersey on March 4, 2010. Plaintiff states in her affidavit that she became aware of the dealership through a friend of hers Kwabena Amponash (hereinafter "Amponash"), a New York resident, who purchased a motor vehicle from Defendant in 2006. Plaintiff states that Amponash took her to Defendant's dealership and noticed a service engine light lit on the dashboard of the vehicle and brought the problem to the attention of "Dan" an employee of defendant. According to Plaintiff's affidavit, "Dan" eventually told her that he would resolve the issue with the vehicle by replacing the faulty catalytic converter. Plaintiff states that she picked up the vehicle on March 15, 2010 and on or about March 19, 2010 she noticed that yet again the

service engine light lit back up on the dashboard. This time she states that she called "Dan" and he instructed her to bring the vehicle back to Defendant. Thereafter, she states that the accident occurred on March 26, 2007 and therefore was never able to bring the vehicle back to the defendant.

In addition, Plaintiff submits an affidavit from Amponash, who states that he is a New York State resident and was such a resident when he purchased a vehicle from Defendant in 2006. He also goes on to state that he accompanied a friend of his, Peter Bennet, in 2007 to defendant's dealership where Mr. Bennet a New York resident, had previously purchased a vehicle from Defendant.

Defendant makes the instant motion seeking an order pursuant to *CPLR* 3211 (a)(2) and *CPLR* 3211 (a)(8) dismissing plaintiff's summons and complaint alleging that it is not subject to the jurisdiction of the Supreme Court of the State of New York because it is a non domiciliary that does business in the State of New Jersey and does not do business nor have any presence in the state of New York. Plaintiff cross moves seeking an order pursuant to *CPLR* 3211(d) for leave to conduct discovery and opposing Defendant's aforementioned motion.

II. Analysis and Discussion

"To establish general jurisdiction over defendant, a foreign corporation not licensed to do business in New York (see Business Corporation Law § 304), *CPLR* 301 requires plaintiffs to show that defendant 'engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction'. *Benefits By Design Corp. v. Contractor Mgt. Servs., LLC*, 75 A.D.3d 826, 828 (3rd Dept. 2010) *citing Laufer v. Ostrow*, 55 N.Y.2d 305 (1982). In order to obtain jurisdiction over a non-domiciliary defendant, the plaintiff bears a burden to establish a basis for jurisdiction. *See Russeck Fine Art Group, Inc. v. Theodore B. Donson, Ltd.*, 20 Misc. 3d 1119A (Sup. Ct. New York County 2008) *citing Duffy v. Grand Circle Travel, Inc.*, 302 A.D.2d 324 (1st Dept. 2003).

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In the case at bar, Defendant submits an affidavit from Daniel Sangardari, general manager of Defendant. Mr. Sangardari states that William Rudolph, Inc.'s business is the sale of used cars and his personal responsibilities include managing the business and overseeing and scheduling vehicle repairs "only within the State of New Jersey". *See* Defendant's Exhibit B. Moreover, Mr. Sangardari states that William Rudolph, Inc. does not "own, operate or maintain any business presence in the State of New York" and "does not do business in the State of New York."

Plaintiff predicates her argument for jurisdiction under *CPLR* 302(a)(3)(ii). Pursuant to *CPLR* 302(a)(3)(i) and (ii), a court may exercise personal jurisdiction over non-domiciliaries if that domiciliary 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.

Here, Defendant argues that Plaintiff has failed to provide proof that a tortious act occurred at all. The burden is on plaintiff to show that facts "may exist" that a tortious act was committed by the defendant. *See Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317(1980). However, "plaintiff need not now prove a prima facie case in tort ...[he] need only establish that the out-of-state conduct attributable [the] defendant gives rise to a claim in tort." *City of New York v. Bob Moates' Sport Shop, Inc.* 253 F.R.D. 237 (E.D.N.Y. Feb.15, 2008)

A plaintiff relying on *CPLR* 302(a)(3)(ii) must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce. If these five elements are met, a court must then assess whether a finding of personal jurisdiction satisfies due process. *Penguin Group (USA) Inc. v. American Buddha* 2011 NY Slip Op 2079, citing *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210 (2000).

In this matter, Plaintiff alleges in her summons and complaint and affidavit that she informed Defendant at least three times that her service engine light was on. It is further alleged that Defendant twice serviced or attempted to service Plaintiff's vehicle. Consequently, Plaintiff alleges that Defendant's service or attempted service of plaintiff's vehicle was negligent and careless and thereby rendered plaintiff's vehicle dangerous, hazardous, defective and unsafe and, therefore, due to defendant's alleged negligence and carelessness plaintiff lost control of her vehicle that lead to an accident that caused her injuries. Thus, Plaintiff has been able to show some basis for considering the defendant's actions to be allegedly tortious and therefore satisfies the first requirement of the obtaining long-arm jurisdiction pursuant to *CPLR* § 302(a)(3)(ii).

Moreover, Plaintiff has been able to show her cause of action arose from the alleged tortious act (defendant's alleged negligence in repairing and servicing plaintiff's vehicle) and that alleged tortious act caused an injury to the plaintiff in New York (defendant's alleged negligence in repairing and servicing plaintiff's vehicle led to her accident on the Cross Bronx Expressway that in turn led to plaintiff's alleged injuries.)

The fourth requirement is that the defendant expected or should reasonably have expected the act to have consequences in New York. "The fourth element...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 direct consequences in New York"...the defendant need not foresee the specific event that produced the alleged injury...[he] need only reasonably foresee that any defect in its product would have direct consequences" in New York. *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 215 (2000). In the case at bar, plaintiff attaches as an exhibit in her cross motion the invoice regarding the purchase of plaintiff's vehicle. The invoice lists plaintiff's name and address as 2475 Southern Boulevard, Bronx, NY. *See* Plaintiff's Exhibit C. The purchase invoice showed that the defendant knew that plaintiff's vehicle was destined for use in New York. Therefore, defendant had reason to expect that any defects with the vehicle would have direct consequences in this State. *See id.*

"The fifth element--defendant's deriving substantial revenue from interstate or international commerce--is designed to narrow 'the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but

'whose business operations are of a local character' *See id.* [citations omitted]. The fifth element was intended to cover defendants with "extensive business activities on an interstate or international level" *Ingraham v. Carroll*, 90 N.Y.2d 592, 599 *quoting* 12th Ann Report of NY Jud Conf, at 342-343.

Here, Plaintiff alleges that Defendant's place of business is located on a major highway less than eight (8) miles from New York; that defendant sold its vehicles to at least three New York state residents and therefore, it is not a "local" business entity, but instead involved in interstate commerce. What the Plaintiff has not been able to prove is that the alleged revenue from interstate commerce is "substantial". To determine whether interstate commerce is substantial, "the courts look to whether or not a foreign corporation derives substantial revenue either as a percentage of gross income or as a gross amount" *Farahmand v Dalhousie Univ.*, 30 Misc. 3d 1210A *citing* Siegel, New York Practice § 88, at 159 [4th ed]; *Allen v. Canadian General Electric Co.*, 65 A.D.2d 39 (3rd Dept. 1978).

Plaintiff contends that the only way she may determine whether defendant derived substantial revenue from interstate commerce is through further discovery pursuant to *CPLR* 3211(d).

CPLR 3211(d) states:

> Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

As is the case in the instant matter, where plaintiff is trying to establish jurisdiction pursuant to *CPLR* 302, the Court of Appeals has held that:

> The practice under *CPLR* 3211 (subd. [d])...protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party. The opposing party need only demonstrate that facts "may exist" whereby to defeat the motion. It need not be

> demonstrated that they *do* exist. This obviously must await discovery.

Peterson v. Spartan Industries, Inc., 33 N.Y.2d 463, 466(1974) (emphasis added). A prima facie showing of jurisdiction pursuant to CPLR § 302 may impose undue obstacles on the plaintiff. *See id.* Thus, "[d]iscovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits." *Id.* In addition, opposing a motion to dismiss pursuant to CPLR 3211(a) (8) "on the ground that discovery on the issue of personal jurisdiction is necessary. plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth, a sufficient start, and show[ ] their position not to be frivolous". *Cerchia v. V.A. Mesa, Inc.*, 191 A.D.2d 377 (1st Dept. 1993), *see also Lettieri v Cushing*, 80 A.D.3d 574, 575 (2nd Dept. 2011) *citing Shore Pharm. Providers, Inc. v. Oakwood Care Ctr., Inc* 65 A.D.3d 623 (2nd Dept. 2009) *quoting Peterson v. Spartan Industries, Inc.*, *supra*. In addition, a "[c]ourt must view the jurisdictional allegations in a light most favorable to the plaintiff and resolve all doubts in its favor" *Arcelormittal-Stainless International USA, LLC v. Jermax Inc.,* (Sup. Ct. New York County 2009) *citing Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409 (2001).

In the case at bar, an inference can be drawn that defendants derive substantial revenue from interstate commerce because plaintiff attached two affidavits from herself and Mr. Amponash that alleges they purchased vehicles from the defendant. Furthermore, Mr. Amponash alleges a third party. who is also a New York resident purchased a vehicle from defendant. In addition, the very essence of a car dealership is the belief that the vehicles that leaves its lots will be used for interstate commerce. Consequently, Plaintiff has made a "sufficient start" by demonstrating that defendant, a used car dealership, may in fact, derive substantial revenue from interstate commerce, and thereby showed that their position was not "frivolous". Thus, Defendant's motion is denied without prejudice, with leave to renew upon the completion of limited discovery on the issue of whether or not the court has jurisdiction over Defendant.

III. Conclusion

Accordingly, it is hereby

ORDERED, that defendant, William Rudolph, Inc.'s motion to dismiss pursuant to *CPLR* 3211(a)(2) and (8) is hereby DENIED WITHOUT PREJUDICE, and it is further,

ORDERED, that defendant, William Rudolph, Inc., shall interpose responsive pleadings in this matter within thirty (30) days of entry of this Order by the Bronx County Clerk, and it is further,

ORDERED, that the plaintiff, Faustina Amoako's cross-motion for leave to conduct discovery pursuant to *CPLR* 3211(d) is hereby GRANTED, and it is further,

ORDERED, that defendant, William Rudolph, Inc., is hereby granted leave to renew the instant motion if necessary following discovery on the issue of in personam jurisdiction in this matter.

The above constitutes the Decision and Order of this Court.

Dated: May 9, 2011

Hon. Mary Ann Brigantti-Hughes, J.S.C.