

Mileski v MSC Indus. Direct Co.

2014 NY Slip Op 33726(U)

September 11, 2014

Supreme Court, Suffolk County

Docket Number: 09-10391

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3/4/14 (#008 & #009)
MOTION DATE 3/25/14 (#010)
ADJ. DATE 4/15/14
Mot. Seq. #008 - XMD
Mot. Seq. #009 - MotD
Mot. Seq. #010 - XMD

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DRENA MILESKE, Individually and as
Administratrix of the Goods, Chattels and Credits
of RONALD P. MILESKE, Deceased,

Plaintiff,

- against -

MSC INDUSTRIAL DIRECT CO., INC., SID
TOOL CO., INC., ENCO MANUFACTURING
COMPANY, INC., BURNS REAL ESTATE,
LLC, NIJON TOOL CO., INC., ISLAND
MACHINE SUPPLY CORP., and JOHN
RAYMOND BURNS,

Defendants.

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DICKER, LLP
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CRUSER, MITCHELL & NOVITZ, LLP
Attorney for Defendants Burns Real Estate, Nijon
Tool Co., Island Mach. Supply Corp. & John
Raymond Burns
341 Conklin Street, 2nd Floor
Farmingdale, New York 11735

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MSC INDUSTRIAL DIRECT CO., INC.,
Third-Party Plaintiff,

- against -

BUFFALO MACHINERY CO. LTD. and DEER
PARK HYDRAULICS & PACKING CO., INC.,

Third-Party Defendants.

BEE READY FISHBEIN HATTER &
DONOVAN, LLP
Attorney for Third-Party Defendant Deer Park
Hydraulics & Packing Co.
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FARBER BROCKS & ZANE L.L.P.
Attorney for Third-Party Defendant Buffalo
Machinery Co.
400 Garden City Plaza, Suite 100
Garden City, New York 11530

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by third-party defendant Buffalo Machinery Co. Ltd., dated February 4, 2014, and supporting papers (including Memorandum of Law); (2) Notice of Cross Motion by the plaintiff, dated February 13, 2014, and supporting papers; (3) Notice of Cross Motion by the third-party plaintiff, dated March 17, 2014, and supporting papers (including Memorandum of Law); (4) Affirmation in Opposition by third-party defendant Buffalo Machinery Co. Ltd., dated April 14, 2014, and supporting papers (Mot. Seq. #008); (5) Affirmation in Opposition by third-party defendant Buffalo Machinery Co. Ltd., dated April 14, 2014, and supporting papers (Mot. Seq. #010); (6) Reply Affirmation by third-party defendant Buffalo Machinery Co. Ltd., dated April 14, 2014, and supporting papers; and (7) Reply Affirmation by the third-party plaintiff, dated April 21, 2014, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion and cross motions are decided as follows: it is

ORDERED that the renewed motion by third-party defendant Buffalo Machinery Co. Ltd. for an order (i) pursuant to CPLR 306-b, dismissing the third-party complaint against it based on the third-party plaintiff's failure to effect timely service of process, (ii) pursuant to CPLR 3211 (a) (8) and Taiwanese law, dismissing the third-party complaint against it based on the third-party plaintiff's failure to effect proper service of process, and (iii) pursuant to CPLR 3211 (a) (8) and Taiwanese law, dismissing the third-party complaint against it for lack of personal jurisdiction, is granted to the extent of converting so much of the motion as is for an order dismissing the third-party complaint pursuant to CPLR 3211 (a) (8) to a motion for summary judgment and adjourning those branches of the motion in accordance with the following decision, and is otherwise denied; and it is further

ORDERED that the renewed cross motion by the plaintiff for an order pursuant to CPLR 305 (c) and 3025 (b), granting leave to amend her pleadings to assert direct claims against third-party defendant Buffalo Machinery Co. Ltd., is denied without prejudice to timely renewal in the event that the court should subsequently determine that it may properly exercise personal jurisdiction over Buffalo Machinery Co. Ltd.; and it is further

ORDERED that the cross motion by the third-party plaintiff for an order (i) pursuant to CPLR 306-b, granting an extension of time within which to serve the third-party complaint on third-party defendant Buffalo Machinery Co. Ltd., if the court concludes that its September 19, 2011 order is invalid, and (ii) pursuant to CPLR 311 (b), permitting service by alternate means on the attorney for third-party defendant Buffalo Machinery Co. Ltd., if the court concludes that the certificate evidencing service of process on March 19, 2012 is invalid, is denied.

In this action, which was commenced on March 23, 2009, the plaintiff seeks to recover damages for the pain, suffering, and wrongful death of the plaintiff's decedent, Ronald Mileski. The plaintiff alleges, in part, that sometime prior to July 16, 2007, MSC Industrial Direct Co., Inc. ("MSC") manufactured, designed, assembled, sold, distributed, and delivered a Microcut Lathe machine to Deer Park Hydraulics & Packing Co., Inc., the decedent's employer; that while operating the machine on July 16, 2007, the decedent was "caused to be caught" in the machine due to the absence of adequate safeguards; and that, as a result, he sustained severe injuries from which he died on September 7, 2007.

On May 3, 2010, following joinder of issue, MSC filed a third-party summons and complaint, alleging, in part, that Buffalo Machinery Co. Ltd. ("Buffalo Machinery") manufactured, assembled,

fabricated, sold, and distributed the machine and its component parts. On or about August 16, 2010, prior to the expiration of the 120-day time limit for serving process (*see* CPLR 306-b), MSC moved for the issuance of letters rogatory to allow service of process on Buffalo Machinery, a Taiwanese company, in Taiwan. By order dated December 20, 2010, the motion was granted. MSC subsequently moved the court on June 2, 2011 to amend the December 20, 2010 order to provide for an extension of time to serve the third-party summons and complaint on Buffalo Machinery. By order dated September 19, 2011, the court granted the motion, extending the time to serve process until January 31, 2012. By order dated November 1, 2011, the court granted a subsequent letter request by MSC, further extending the time to serve process until October 1, 2012.

It appears from a copy of a "Certificate of Service of Taiwan Taichung District Court" provided to the court that service of the third-party summons and complaint was effected on March 19, 2012 at Buffalo Machinery's Taichung City address by giving the documents to an employee "who is able to distinguish affairs." Buffalo Machinery, for its part, contends that it was not aware service had been effected (or even attempted) until after July 2013, when it received a facsimile from MSC's attorney representing that service had been made; its subsequent search revealed a copy of the pleadings in a cabinet of a former sales employee. According to Gus Chang, its vice general manager, Buffalo Machinery does not know how the pleadings came to be in the cabinet, whether any person affiliated with the company placed them there, or who, if anyone, was given the pleadings by a process server.

On September 27, 2013, Buffalo Machinery served its answer to the third-party complaint, asserting numerous affirmative defenses, including improper service and lack of personal jurisdiction. On November 26, 2013, within 60 days after serving its answer (*see* CPLR 3211 [e]), Buffalo Machinery moved to dismiss the third-party complaint (i) for failure to effect service of process within the 120-day period prescribed by CPLR 306-b, (ii) for failure to effect and establish proper service of process, and (iii) for lack of personal jurisdiction. The plaintiff subsequently cross-moved for leave to amend her pleadings to assert direct claims against Buffalo Machinery. By order dated January 22, 2014, the court denied, without prejudice and with leave to renew, both the motion and the cross motion for failure to comply with the rules of this Part requiring, *inter alia*, the scheduling of a pre-motion conference.

Now, the parties having demonstrated their compliance with the applicable rules, Buffalo Machinery renews its motion to dismiss the third-party complaint, the plaintiff renews her cross motion for leave to amend the pleadings, and MSC separately cross-moves for conditional relief relating to its service of the third-party summons and complaint.

The motion by Buffalo Machinery is denied insofar as it is premised on the claim that MSC failed to effect timely service of process. In support of that claim, Buffalo Machinery argues solely that the court was without authority to "amplify" the December 20, 2010 order by extending MSC's time to serve the third-party complaint. The court finds this argument without merit. A plaintiff (or third-party plaintiff, as here) need not move for an extension pursuant to CPLR 306-b prior to the expiration of the statutory 120-day period for service, and may even cross-move for such relief in opposition to the defendant's (or third-party defendant's) motion to dismiss (Alexander, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C306-b:3). Whether such relief may technically

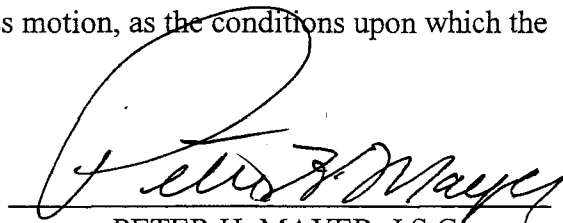
have been beyond the scope of a motion to resettle the December 20, 2010 order, as Buffalo Machinery contends, the court would have been well within its authority to consider the motion as one to amend that order by extending the time to serve process—or simply as one to extend the time to serve process—and grant it accordingly. The court finds no prejudice to Buffalo Machinery attributable to the procedure by which the extension was requested.

As to the remaining branches of Buffalo Machinery’s motion, which are premised on improper service and lack of personal jurisdiction, the court notes that the motion, having been made subsequent to service of Buffalo Machinery’s answer, erroneously seeks relief under CPLR 3211 (a) (8) and should have been brought under CPLR 3212. Whenever a court elects to treat such an erroneously labeled motion as a motion for summary judgment, it must provide “adequate notice” to the parties (CPLR 3211 [c]) unless it appears from the parties’ papers that they deliberately are charting a summary judgment course by laying bare their proof or that the issue raised is exclusively one of law (e.g. *Mihlovan v Grozavu*, 72 NY2d 506, 534 NYS2d 656 [1988]). Here, it cannot be said unequivocally that either of the recognized exceptions applies. Accordingly, the parties are hereby advised of the court’s intention to treat the motion as one for summary judgment. “By means of the notice, the court itself prevents any prejudice from appending to a party’s mistaken assumption that only a narrow CPLR 3211 ground is involved” (Siegel, McKinney’s Cons Laws of NY, Book 7B, CPLR C3212:20, at 30). The parties shall have an opportunity to make an appropriate record by the service and filing of additional affidavits and other supporting papers no later than three weeks after service of a copy of this order with notice of its entry. Upon the expiration of this three-week period, Buffalo Machinery may re-notice the motion for hearing on five days’ notice. Upon the service and filing of such notice, Buffalo Machinery shall also serve upon the clerk of the special term a copy of this order, and the clerk, upon receipt, shall assign the motion a new motion sequence number.

In the interest of judicial economy, the court deems it appropriate to postpone consideration of the plaintiff’s cross motion unless and until the foregoing issues relating to improper service and lack of personal jurisdiction are resolved in favor of MSC. Upon any renewal, the parties are requested specifically to brief the question whether a direct claim against Buffalo Machinery for wrongful death is barred by the statute of limitations.

Finally, the court is constrained to deny MSC’s cross motion, as the conditions upon which the requested relief is premised have not yet come to pass.

Dated: September 11, 2014


PETER H. MAYER, J.S.C.