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United States District Court, S D New York

RUTGERSWERKE AG and Frendo S p A , Plaintiffs,
v
ABEX CORPORATION, **Pneumo Abex** Corporation and **Whitman** Corporation, Defendants

No 93 CIV. 2914 (JFK).

Oct 25, 1995

Baker & McKenzie (Robert L Berner, Jr , Richard M Franklin, David P Hackett, Chicago, IL, David Zaslowsky, of counsel), New York City, for Plaintiff

Katten Muchin & Zavis (Donald E Egan, Kirk T Hartley, Sara E Elder, Chicago, IL, Eugene Allen Meyer, of counsel), New York City, for defendant Whitman Corporation

AMENDED OPINION and ORDER

KEENAN, District Judge

*1 Before the Court is the motion of defendant Whitman Corporation ("IC Industries/Whitman") to dismiss plaintiffs' Complaint for lack of personal jurisdiction, pursuant to Fed R Civ P 12(b)(2) Plaintiffs oppose the motion For the reasons set forth below, the motion to dismiss the claims against defendant IC Industries/Whitman for lack of personal jurisdiction is denied

BACKGROUND

Defendant IC Industries/Whitman [FN1] is a holding corporation organized under the laws of Delaware with its principal place of business in Illinois

Defendant Pneumo Abex f/k/a PA Holdings ("PA Holdings/Pneumo Abex") [FN2] is a corporation organized under the laws of Delaware with its principal place of business in New Hampshire

Defendant Abex Corporation ("Abex") was a corporation organized and existing under the laws of Delaware with its principal place of business in New York

Plaintiff Rutgerswerke AG ("Rutgerswerke") is a German stock corporation with its principal place of business in Germany Plaintiff Frendo S p A , a wholly owned subsidiary of Rutgerswerke, is an Italian stock corporation with its principal place of business in Italy

On April 28, 1988, IC Industries/Whitman and PA Holdings/Pneumo Abex entered into a Stock Purchase Agreement ("the 1988 Stock Purchase Agreement") whereby IC Industries/Whitman would sell certain subsidiaries to PA Holdings/Pneumo Abex First Amended Complaint ¶¶ 4, 5, 25 The 1988 Stock Purchase Agreement was the result of multiple rounds of negotiations conducted by several different means of communication face-to-face negotiations conducted in New York between IC Industries/Whitman and PA Holdings/Pneumo Abex, negotiations conducted between the New York law offices retained by IC Industries/Whitman and PA Holdings/Pneumo Abex, and negotiations conducted by telephone between IC Industries/Whitman in Chicago and PA Holdings/Pneumo Abex's representative in New York, where IC Industries/Whitman initiated the calls Whitman Memorandum at 4-5 Once a final agreement was reached, the contract was flown to Chicago to obtain the signature of IC Industries/Whitman's Board of Directors *Id* at 5 Pursuant to section 2(a) of the 1988 Stock Purchase Agreement, the closing of the purchase and sale was held at the New York law office retained by IC Industries/Whitman First Amended Complaint, Ex E, ¶ 2 Additionally, the 1988 Stock Purchase Agreement is governed by New York Law *Id* ¶ 27

On August 29, 1988, IC Industries/Whitman and PA Holdings/Pneumo Abex amended the 1988 Stock Purchase Agreement ("Amendment to the 1988 Stock Purchase Agreement") *Id* ¶ 25 Pursuant to the 1988 Stock Purchase Agreement, as amended, IC Industries/Whitman agreed to sell to PA Holdings/Pneumo Abex certain subsidiaries including Abex, which in turn owned 99 99% of the issued and outstanding shares of Abex S p A , an Italian stock company *Id* At the time of the stock transfer, Abex S p A owned and operated a manufacturing site located in Orzinuovi, Italy ("the Orzinuovi site") *Id* The 1988 Stock Purchase Agreement provided, in relevant part, that IC Industries/Whitman agreed to

> *2 indemnify [PA Holdings/Pneumo Abex] and its affiliates (including the Sold Subsidiaries) against

and hold them harmless from, any loss, liability, claim, damage, or expanse incurred by [PA Holdings/Pneumo Abex] or its affiliates for or on account of or arising from or in connection with any violation of any statute, law, ordinance, rule or regulation of any governmental authority or instrumentality, domestic or foreign relating to environmental matters

First Amended Complaint, Ex E, ¶ 12(a)

On October 28, 1988, Abex S p A changed from a stock corporation to a limited liability corporation, and assumed the corporate name Abex S r L First Amended Complaint ¶ 29 On January 31, 1989, Frendo S r L, a wholly-owned subsidiary of Rutgerswerke, purchased Abex S r L *Id* On May 5-6, 1989, Frendo S r L merged with Abex S r L and yet another company, Abex Finanziaria S r L *Id* The surviving entity assumed the corporate name of Frendo S r L *Id* On January 31, 1991, Frendo S r L changed its corporate form from a limited liability company to a stock corporation, and assumed the name Frendo S p A -- one of the two named Plaintiffs in this action *Id* As noted earlier, Frendo S p A is a wholly owned subsidiary of Plaintiff Rutgerswerke

On September 23, 1991, IC Industries/Whitman and PA Holdings/Pneumo Abex amended the 1988 Stock Purchase Agreement ("Second Amendment") pursuant to a settlement agreement ("1991 Settlement Agreement") that resolved certain separate litigation between them, and provided a procedure for the future administration of their rights and liabilities and the resolution of any future disputes *Id* ¶ 31

Shortly after purchasing Abex S r L from PA Holdings/Pneumo Abex, Rutgerswerke and Frendo S p A discovered that the Orzinuovi Site contained underground waste sites with hazardous concentrations of various toxic substances *Id* ¶ 30 Plaintiffs allege that these underground waste dumps, used between 1971 and 1986, contaminated the soil and aquifers in and around the Orzinuovi Site *Id* Plaintiff Frendo S p A now seeks indemnification by IC Industries/Whitman for all fines, penalties, and expenses arising from Abex S p A 's violation of Italian Law relating to the Orzinuovi underground waste sites *Id* ¶ 18 Plaintiffs claim that Frendo S p A is the successor-in- interest to all warranty obligations extending to Abex S p A under the 1988 Stock Purchase Agreement, as amended, between IC Industries/Whitman and PA Holdings/Pneumo Abex *Id* ¶ 29

Plaintiffs brought this claim based on diversity of citizenship pursuant to 28 U S C § 1332 *Id* ¶ 6

IC Industries/Whitman asserts that Frendo S p A 's claim does not arise from the 1988 Stock Purchase Agreement, but, in fact, is based on the 1991 Settlement Agreement and the Second Amendment to the 1988 Stock Purchase Agreement Whitman Memorandum at 4 Accordingly, IC Industries/Whitman argues that Frendo S p A has no indemnification rights against IC Industries/Whitman under the 1991 Settlement or the Second Amendment to the 1988 Stock Purchase Agreement *Id* In the alternative, IC Industries/Whitman argues that even if Frendo S p A 's claim does arise from the 1988 Stock Purchase Agreement, there is insufficient grounds for this Court to establish either specific or general jurisdiction *Id* at 7-17 For these reasons, IC Industries/Whitman argues that this Court lacks jurisdiction over it

DISCUSSION

*3 Defendant, IC Industries/Whitman, moves to dismiss Frendo S p A 's claim against it on the ground that this Court lacks personal jurisdiction over it, pursuant to Fed R Civ P 12(b)(2)

I *Successor-in-interest*

Preliminary to determining the issue of jurisdiction, this Court is urged to determine whether the action arises from the 1988 Stock Purchase Agreement, the Second Amendment, or the 1991 Settlement Agreement The parties maintain that this initial determination is required in order to establish that Plaintiff Frendo S p A may properly assert the rights of PA Holdings/Pneumo Abex (and the purchased subsidiary Abex) under the 1988 Stock Purchase Agreement If Plaintiff Frendo S p A is the proper successor to those rights, it may have enforceable rights over IC Industries/Whitman provided that personal jurisdiction can be established If Frendo S p A does not inherit those rights, it may not have enforceable rights IC Industries/Whitman asserts that the claims are based on provisions of the Second Amendment and the 1991 Settlement Agreement, both of which were completed after Abex S p A had been sold to Rutgerswerke and Frendo S p A Whitman Memorandum at 4 IC Industries/Whitman further contends that the 1988 Stock Purchase Agreement could not serve as the grounds for Frendo S p A 's claim, because Frendo S p A did not exist when IC Industries/Whitman and PA Holdings/Pneumo Abex entered into the agreement *Id* at 12

The Court finds that this determination is wholly inappropriate and unnecessary to this motion to dismiss for lack of jursiction In *Calder v Jones*, 465 U S 783, **790 (1984)**, the Supreme Court establshed that "[e]ach defendant's contacts with the forum State must be assessed individually " This general jurisdictional principle requires that substantive legal precepts of successor liability should be disregarded in an assessment of personal jurisdiction *See, e g , Witt v Scully*, 539 F 2d 950, 951-52 (3d Cir 1976) (holding that the "district court erred by confusing substantive legal precepts with jurisdictional ones The law which must be applied to the issue before us is not the aggregate of legal precepts which substantively may impose liability on a defendant ")

The successor-in-interest liability theory has nothing to do with whether this Court can exercise personal jurisdiction over IC Industries/Whitman This Court will therefore not reach that factual issue and will instead determine whether the conduct of IC Industries/Whitman brings it within this Court's jurisdiction The potential liability of IC Industries/Whitman to Frendo S p A under a successor-in-interest liability theory is immaterial to that determination

II *Personal Jurisdiction Over IC Industries/Whitman*

A Standards under Fed R Civ P 12(b)(2)

In reviewing a motion to dismiss for lack of personal jurisdiction, the Court must view all pleadings and affidavits in a light most favorable to the plaintiffs, resolving any doubt in the plaintiffs' favor *See Hoffritz for Cutlery, Inc v Amajac Ltd.*, 763 F 2d 55,57 (2d Cir 1985) Prior to discovery, plaintiffs need only establish a *prima facie* case of personal jurisdiction, *see Beacon Enterprises, Inc v Menzies*, 715 F 2d 757, 768 (2d Cir 1983), *Marine Midland Bank, N A v Miller*, 664 F 2d 899, 904 (2d Cir 1981), *Visual Sciences, Inc v Integrated Communications, Inc* , 660 F 2d 56, 58 (2d Cir 1981) Given that this Court's subject matter jurisdiction is premised upon diversity, the Court must apply New York law in resolving this personal jurisdiction dispute *See Arrowsmith v United Press Int'l*, 320 F 2d 219, 223 (2d Cir 1963) (en banc)

*4 In order to obtain personal jurisdiction over a defendant under New York law, plaintiffs must show that New York law authorizes personal jurisdiction pursuant to either section 301 or section 302 of the New York Civil Practice Law and Rules ("NYCPLR") [FN3] Plaintiffs must also satisfy the constitutional requirements of due process, as set forth in *International Shoe Co v Washington*, 326 U S 310 (1945), and its progeny *See id* at 316 (holding that courts gain personal jurisdiction over a non-domiciliary only if that person has "certain minimum contacts [within the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice '" (quoting *Milliken v Meyer*, 311 U S 457, 463 (1940))), *Hanson v Denckla*, 357 U S 235, 253 (1958) (holding that "minimum contacts" arise where a person acts to avail himself purposefully of the privileges of conducting business within a state, thereby gaining the benefits and protections of its laws)

B Doing Business in New York--NYCPLR 302

In this action, Plaintiff Frendo S p A contends that Whitman is subject to *in personam* jurisdiction because it "transacted business" in New York As codified in NYCPLR section 302(a)(1), "transacting business" is one of the traditional bases for obtaining personal jurisdiction over a defendant To establish that a defendant has "transacted business" in New York, Plaintiff Frendo S p A must show that Defendant IC Industries/Whitman purposefully availed itself of the benefits and protections of the laws of New York *See Liquid Carriers Corp v American Marine Co* , 375 F 2d 951, 955-56 (2d Cir 1967), *Feldmuehle North-America v West End Converters, Inc* , 1992 WL 77578, *1 (S D N Y March 23, 1992), *Nee v HHM Financial Services, Inc* , 661 F Supp 1180, 1184 (S D N Y 1987), *Bastille Properties, Inc v Hometels of America, Inc* , 476 F Supp 175, 177 (S D N Y 1979), *Longines- Wittnauer Watch Co v Barnes & Reinecke*, 15 N Y 2d 443, 261 N Y S 2d 8, 209 N E 2d 68 (1965) Four factors are of chief significance in determining whether a defendant has engaged in "purposeful" activity "1) the physical presence of the defendant in New York, 2) the defendant's execution of a contract in New York, 3) the risk of loss as it affects the New York transaction, and 4) the performance of the contract in New York " *Feldmuehle North-America*, 1992 WL 77578, *1 (citing *Berk v Nemetz*, 646 F Supp 1080, 1084 (S D N Y 1986)) Contractual provisions that call for the application of New York law are also influential when determining whether a defendant purposefully availed itself of the benefits and protections of New York law *Feldmuehle North-America*, 1992 WL 77578, *3 Telephone calls made to and from New York that are used to conduct negotiations must also be considered when they significantly advance the making of the contract in question *Catsimatidis v Innovative Travel Group, Inc* , 650 F Supp 748 (S D N Y. 1986) Additionally, there must be a direct link between the defendant's business activity in the state and the claim being sued upon *A I Trade Finance v Petra Bank*, 1991 WL 33296, *2 (S D N Y March 7, 1991), *rev'd on other grounds*, 989 F 2d 76 (2d Cir 1983) (citing *Beacon Enterprises*, 715 F 2d at 764)

C Analysis

*5 Based on the above well-settled principles, this Court must make the following series of determinations to ascertain whether it can exercise jurisdiction over IC Industries/Whitman 1) did IC Industries/Whitman transact business in New York within the meaning of NYCPLR 302, and 2) did IC Industries/Whitman have the necessary minimum contacts with New York to satisfy constitutional due process requirements?

1 *Transacting Business*

The question for the Court is whether this Court can obtain personal jurisdiction over IC Industries/Whitman in that IC Industries/Whitman "transacted business" pursuant to NYCPLR 302(a)(1) by participating in the 1988 Stock Purchase Agreement

IC Industries/Whitman asserts that its activity leading to the successful negotiation and performance of the 1988 Stock Purchase Agreement did not constitute a purposeful availment of the laws of New York In its motion, IC Industries/Whitman maintains that because the face-to-face negotiations conducted in New York "could just as easily have occurred" in Chicago, they represent "an accommodation" that is of little significance Whitman Memorandum at 13 IC Industries/Whitman also contends that no weight should be attributed to the provision calling for the application of New York law because "it is inevitable that New York lawyers call for the application of law they are licensed to practice " *Id* Furthermore, IC Industries/Whitman characterizes its other contact with New York as so isolated and remote that it fails to satisfy the requisite grounds for establishing personal jurisdiction *Id* at 10 However, this Court finds that IC Industries/Whitman's activity, viewed in totality, constitutes the purposeful availment of New York law, and thereby satisfies the "transacted business" element of NYCPLR 302(a)(1) Consequently, this Court finds that it has personal jurisdiction over IC Industries/Whitman

IC Industries/Whitman's attempt to minimize the significance of its physical presence in New York for all the face-to-face negotiations of the 1988 Stock Purchase Agreement is unpersuasive in the absence of any evidence that PA Holdings/Pneumo Abex requested the accommodation of holding the negotiations in New York rather than Chicago In addition, IC Industries/Whitman's agents, the New York law office of Cravath, Swaine & Moore, transacted business in New York during the entire process of negotiating the 1988 Stock Purchase agreement *Id*, Ex B, ¶ 8

Although IC Industries/Whitman dismisses the choice of New York law provision as merely the expression of a New York law firm's affinity for New York law, this Court recognizes that provision a factor to be considered when applying NYCPLR section 302(a) Similarly, IC Industries/Whitman's telephone calls from Chicago to New York must be considered because they both initiated and significantly advanced the negotiation of the 1988 Stock Purchase Agreement

Further, IC Industries/Whitman performed the closing of the 1988 Stock Purchase Agreement in the offices of their New York law firm, pursuant to section 2(a) of the 1988 Stock Purchase Agreement What is this, if not transacting business in New York?

*6 IC Industries/Whitman purposefully availed itself of the laws of New York by conducting face-to-face negotiations in New York, negotiating through the agency of its New York law firm, negotiating by telephone from Chicago to New York, including a New York choice of law provision, and by performing the contract in the office of its New York law firm This purposeful activity clearly satisfies the "transacted business" element of NYCPLR 302(a)

2 *Minimum Contacts*

IC Industries/Whitman's purposeful activity in New York also satisfies the "minimum contacts" due process requirement necessary to subject IC Industries/Whitman to the jurisdiction of New York courts Specifically, IC Industries/Whitman, as noted above, purposefully availed itself of the laws of New York by conducting face-to-face negotiations in New York, negotiating through the agency of its New York law firm, negotiating by telephone from chicago to New York, including a New York choice of law provision, and by performing the contract in the office of its New York law firm Accordingly, as IC Industries/Whitman has transacted business within New York within the meaning of the NYCPLR, and the constitutional requirement of minimum contacts has been satisfied, this Court has personal jurisdiction over IC Industries/Whitman

CONCLUSION

The motion to dismiss the claims against defendant IC Industries/Whitman for lack of personal jurisdiction is denied As Magistrate Judge Lee has scheduled the completion of expert discovery for March 1, 1996, the Court schedules a pre-trial conference is scheduled for March 4, 1996 at 10 00 a m

SO ORDERED

FN1 Whitman is the sucessor-in-interest to IC Industries First Amended Complaint ¶ 23

FN2 Pneumo Abex is the sucessor-in-interest to the assets and liabilities of PA Holdings First Amended Complaint ¶ 24

FN3 In this action, jurisdiction is alleged solely pursuant to NYCPLR section 302

1995 WL 625701 (S D N Y)

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