

OPENING STATEMENT

In determining whether a foreign corporation is subject to personal jurisdiction in New York, limiting the scope of inquiry into the corporation's New York directed activities can set the table for a successful motion to dismiss based on lack of minimum contacts. Abrams, Gorelick has successfully challenged the jurisdiction of the United States District Court over one of its Canadian clients. The recent decision by the United States District Court for the Eastern District of New York applying New York's General Jurisdiction Statute, C.P.L.R. § 301, to the issue of federal jurisdiction is the subject of this issue's lead article.

Also in this issue, we are proud to discuss two favorable jury verdicts obtained by the firm. Leonard Kamlet obtained jury verdicts in favor of Abrams, Gorelick clients in two cases- one in a Kings County Labor Law case and the second in a New York County Jeweler's Block case.

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THE BUSINESS OF *DOING BUSINESS* IN NEW YORK

- An instructional case on New York's CPLR 301, general jurisdiction statute

By: Glenn A. Jacobson and James E. Kimmel

AGF&J has successfully challenged the jurisdiction of the United States District Court for the Eastern District of New York over its client, Fitter International, Inc., a Calgary, Canada distributor of exercise and therapeutic equipment, in a New York action stemming from injuries sustained by the plaintiff in New Jersey. In *Zipper v. Nichter*, et al., Mr. Zipper, a New Jersey resident, claims he was struck by a limousine, driven by a New York resident, at the Jet Blue Terminal at JFK International Airport, sustaining injuries to his knee. Following reconstructive knee surgery, the claimant came under the care of Healthsouth, a New Jersey physical rehabilitation clinic.

Several months after the surgery, Mr. Zipper allegedly re-injured his knee while using a Fitter balance training product as part of his physical therapy. Following the re-injury, the claimant underwent a series of knee surgeries and setbacks in his recovery, including the alleged onset of reflexive sympathetic dystrophy.

Mr. Zipper had commenced the action in the United States District Court for the Eastern District of New York against the limousine driver and owner, both of whom were New York residents. During the course of plaintiff's deposition, the defendants learned of Mr. Zipper's subsequent accident at Healthsouth. Consequently, the defendants commenced a Third-Party action against Healthsouth. In turn, Healthsouth

commenced a second Third-Party action against Fitter, the manufacturer of the device, the designer of the device and other distributors.

Fitter, a Canadian company with no offices, employees or property in New York, vigorously contested jurisdiction from the very beginning of the litigation. Consequently, the Court ordered that the initial discovery phase be limited to the personal jurisdiction issue.

As a preliminary matter, New York's long arm statute, CPLR § 302, did not apply because the alleged physical therapy accident occurred in New Jersey. Rather, Healthsouth argued that Fitter was subject to jurisdiction in New York based on C.P.L.R. §301, New York's "general jurisdiction" statute. If general jurisdiction exists, a foreign corporation can be brought before a Court in New York for matters wholly unrelated to its activities in New York. *Ball v. Metallurgie Hoboken-Overpelt*, 902 F.2d 194, 198 (2d Cir. 1990).

Fitter's New York directed activities were limited to the following: direct sales to New York consumers; sales to distributors who in turn sold to New York consumers; catalogues sent to potential customers in New York; licensing New York stores to sell its products; advertisement in magazines circulated in New York; and limited purchases of products from New York vendors.

At first blush, it appeared that Fitter might be subject to jurisdiction in New York based on the aggregate of its activities. During discovery, Fitter successfully argued that, in order for Healthsouth to obtain jurisdiction over it under CPLR § 301, the foreign defendant must be "doing busi-

AGF&J

One Battery Park Plaza
4th Floor
New York, New York 10004
Phone: 212 422-1200
Fax: 212 968-7573

www.agfjlaw.com

ness” at the time the action is brought, not when the cause of action arose. Williams System, Ltd. v. Total Freight Systems, Inc., 27 F.Supp 2d 386, 388 (E.D.N.Y. 1998), Arrow Trading Co. v. Sanyei Corp., 576 F.Supp 67, 69 (S.D.N.Y. 1983).

Success in limiting the “doing business” test to the time the action was brought was crucial because the aggregate of Fitter’s business activities in New York over a number of years ranging from when the claimant was initially injured (2002) through his ongoing physical rehabilitation (present day) was much greater than a focused period of time. The Court agreed and limited the scope of inquiry to the year in which the action against Fitter was brought, significantly narrowing the relevant time period to only Fitter’s 2005 activities.

Once the timeframe of inquiry was narrowed, the Court next addressed the extent to which Fitter had business contacts with New York. Fitter’s sales to New York consumers in 2005 amounted to less than 2% of its worldwide sales. AGF&J argued that the Second Circuit has consistently applied a 5% sales threshold. Judge Garaufis agreed and found that Fitter’s New York sales were not “substantial solicitation.” Landoil v. Resources v. Alexander & Alexander Services, 918 F.2d 1039 (2d Cir. 1990).

Judge Garaufis also adopted AGF&J’s position that the scope of Fitter’s New York activities must exclude the sales of Fitter’s distributors for purposes of determining jurisdiction. In this vein, while jurisdiction may sometimes be predicated upon a foreign corporation’s agent, Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (2d Cir. 2000), Judge Garaufis held that Fitter’s distributors were not agents or employees of Fitter.

In conclusion, while it may appear at first that a foreign corporation is subject to the jurisdiction of the United States courts, the critical inquiry is whether it engages in “substantial and continuous solicitation.” Here, after limiting the scope of discovery to only Fitter’s direct sales to New York consumers in 2005, AGF&J was able to demonstrate to the Court that Fitter’s relative New York directed activities were not sufficient so as to subject it to jurisdiction in New York.

AGF&J Obtains Two Favorable Jury Verdicts

Leonard Kamlet obtained two favorable jury verdicts. Jacek Ziomek v. Dorothy Kozakiewicz, a bodily injury case venued in Kings County Supreme Court, was tried in bifurcated fashion. On liability, the jury found our client 78% responsible and plaintiff 22% comparatively negligent. Plaintiff, who was 26 years old at the time of the accident, was an electrician’s helper employed by M&R Electrical Contracting and Repair Service, Inc., a contractor employed by our client to upgrade the electrical service in a building recently purchased by Kozakiewicz. On the second day in which plaintiff was working at the building, he fell down a flight of stairs to the basement. He brought suit alleging that defendant was negligent and failed to provide a safe place to work in violation of §§200 and 241(6) of the New York State Labor Law. It was alleged that the stairway was littered with construction debris left by other contractors which caused plain-

tiff to slip when descending the first few steps to reach a light switch. In addition, plaintiff claimed he could not reach the handrail as it was partially blocked by an inward opening door. Despite essentially clear liability, the jury was persuaded that plaintiff’s awareness of the conditions warranted an apportionment of liability. Although, plaintiff’s employer had been impleaded as a third-party defendant based on a contractual indemnification theory, the third-party action was discontinued after jury selection since proof that the dangerous condition arose from its work was tenuous. It was believed that defending the case before a jury without being encumbered by a weak indemnification claim would be the best strategy to obtain a favorable outcome. Nevertheless, the employer paid \$3500 in settlement.

The damages phase of the trial presented contested issues regarding the nature and extent of injuries suffered. Plaintiff claimed he sustained a comminuted intra-articular fracture of the distal fibula of the right ankle, a torn anterior talo-fibular ligament, a torn posterior tibialis tendon, joint laxity and post-traumatic arthritis. He had undergone arthroscopic surgery to remove loose cartilage and heat shrinkage of the ligament. Plaintiff’s treating orthopaedic surgeon recommended further surgical reconstruction of the ligament.

In summation plaintiff’s counsel requested that the jury award \$400,000 for past pain and suffering and \$1,250,000 for future pain and suffering over the course of plaintiff’s life expectancy of over 40 years. The jury verdict was as follows:

Past medical expenses:	\$ 13,000
Past pain and suffering:	\$ 15,000
Future medical expenses:	\$ 12,000 (for 2 years)
Future pain and suffering:	\$ 15,000 (for 2 years)

The jury’s determination reflected acceptance of defense arguments that the fracture did not affect the joint and did not cause laxity or arthritis. As well, the defense disputed the torn ligament claim. Cross examination of plaintiff’s expert disclosed that he had requested that the radiologist from his office, who had interpreted MRI films prior to the surgery, revise the MRI report to be consistent with his own interpretation. The original report did not indicate a torn ligament or joint involvement. It was revealed during cross-examination that there were three versions of the MRI report. Although the Court permitted plaintiff’s expert to testify, over objection, as to his own reading and interpretation of the films, no explanation was offered for the failure to produce the actual films at trial or in pre-trial discovery. It was explained, however, that the radiologist had been discharged because of a pattern of incomplete or inaccurate film interpretations.

Finally, the defense highlighted the conservative treatment course which included a regimen of at-home exercises after a period of casting and formal physical therapy before and after the surgery. It was suggested to the jury, and apparently accepted by them, that the treatment regimen, the lack of any follow-up MRI’s, and plaintiff’s return to work was not consistent with the degree of residual complaints made by plaintiff

or the testimony of plaintiff's orthopaedist regarding his bleak future prognosis.

For more information about this trial or other Labor Law issues, contact Leonard Kamlet at lkamlet@agfjlaw.com

In a second trial, Len and Dan Friedman, with the assistance of Gabrielle Puchalsky defended Lloyds of London Underwriters in a first party Jeweler's Block case entitled *Aldiam International v. All Those Underwriters at Lloyd's*, venued in New York County Supreme Court. Aldiam, a dealer in loose diamonds located in Manhattan, made claim for \$944,843 (approximately \$1.3 million with interest) under its policy for the loss of 14 diamonds. In 2003, its sales agent at a jewelry exhibition in Hong Kong was allegedly robbed by an unidentified perpetrator.

On the morning of the last day of the exhibition Aldiam's sales agent was setting up his booth when he was allegedly pushed from behind causing him to hit his head and fall. The robber took one box of diamonds.

After conducting an investigation, Underwriters at Lloyd's refused to pay the claim, believing that the circumstances of the robbery were not credible. Aldiam thereafter commenced suit and the case was tried before a jury. The jury found in favor of the defense. Interesting issues regarding burden of proof impacted the conduct of the trial. The defense did not contest the fact that Aldiam had suffered a "loss" under the policy, which would otherwise have been its burden to prove. Underwriters also did not dispute the value of the claim. Rather, Underwriters relied upon an exclusion to the policy commonly known as the "Dishonest Entrustment" exclusion. It was claimed by Lloyd's that the sales agent, to whom the diamonds had been entrusted, engaged in a dishonest act by falsely claiming to have been robbed. As such, it was the burden of the defense to prove by a preponderance of the evidence that the robbery did not occur as claimed. As a result, the defense summed up last. No complicity or fraud was alleged against the insured. Had such a claim been made, the defense burden would have been subject to a "clear and convincing" standard.

The principal of Aldiam had several brothers who were also involved in the diamond business. One brother who had offices in Hong Kong shared Aldiam's booth at the Hong Kong Exhibition. Another brother did business based in Israel. About a year after the robbery the Israeli brother shipped in excess of one hundred loose diamonds to Aldiam in New York for submission on his behalf to the Gemological Institute of America (GIA) to be graded and certified. This was being done by Aldiam in return for a small fee. For a fee, the Israeli brother was servicing other dealers in Israel because it was not economically feasible for overseas dealers to submit diamonds to GIA in small quantities.

Underwriters had earlier provided GIA with copies of the certificates for the stolen diamonds. GIA routinely checks its database to see if submitted diamonds match reports of stolen

diamonds and, in doing so in this instance, determined that a 5.01 carat diamond matched a 5.05 carat diamond which was part of Aldiam's insurance claim. Interestingly, the difference in carats did not prevent a match. It did, however, suggest that the submitted diamond had been altered. When Aldiam's principal was informed of the match he contacted his brother in Israel who insisted that the stone had been purchased from an individual who had recently come to his office. He did not know his name, had never done business with him before and could not contact him. However, an invoice was allegedly received from this individual.

The brother in Israel was deposed via telephone and his testimony was read to the jury. His answers to questions created doubt as to his claim that he legitimately obtained the diamond. The match by GIA, as well as the brother's inability to give credible testimony as to how he received the diamond was a major factor in the jury's returning a verdict in favor of Lloyd's.

Although these circumstances were before the jury, the invoice was not admitted into evidence since the Court granted Aldiam's motion *in limine*. Aldiam's attorneys argued to the jury that notwithstanding that Aldiam's sales agent knew the brother, the circumstances of the "GIA stone" were no more than coincidence and proved nothing. While there was no direct proof that the brother who submitted the stone was somehow complicit in the phony robbery, either before or after, the Court instructed the jury as to circumstantial evidence allowing them to weigh those circumstances along with the facts of the robbery.

Post verdict juror interviews indicated that various defense arguments concerning the robbery were persuasive. For example it was suggested to the jury that the force with which the sales agent was purportedly thrown against the booth partition would have damaged or knocked it over and photographs taken by the Hong Kong police afterwards did not show any damage. Additionally, plaintiff described having sustained a cut and bump on his forehead but no photographs or other evidence of these injuries were presented. Finally, it was effectively established that the alleged time of the robbery was before the exhibition opened to the public contrary to the claim that the public had already been granted access.

As this was an "all or nothing" case, the verdict meant that Underwriters at Lloyds did not have to pay Aldiam anything on its claim.

For more information about Jeweler's Block issues, please contact Daniel Friedman at dfriedman@agfjlaw.com; or Michael Gorelick at mgorelick@agfjlaw.com.

Recent Decision of Interest

J.E.M. Inc., v. Seneca, Insurance Company, Inc. (U.S. District Court for the District of Connecticut)

Daniel Friedman, Esq. was successful in obtaining summary judgment in favor of AGF&J client, Seneca Insurance Company, Inc., dismissing three of four causes of action against the client in a federal action in Connecticut.

J.E.M. Inc. brought suit against Seneca alleging breach of contract, bad faith, violation of the Connecticut Unfair Trade Practices Act and also seeking declaratory judgment. Upon motion by AGF&J, the court granted summary judgment in favor of Seneca dismissing the first three causes of action.

Seneca issued to J.E.M. a policy that covered property damage for a period of February 18, 2000 to February 18, 2001 for a commercial building in Connecticut. However, Seneca sent a letter to J.E.M. on April 14, 2000 canceling the policy because it was found vacant upon inspection. The letter stated that coverage would expire on April 26, 2000 because J.E.M. made a material misrepresentation in the course of obtaining the policy. However, Seneca did offer to continue coverage if J.E.M. provided Seneca with proof it contracted a security firm to provide security for the premises 24 hours per day, seven days per week. In response, J.E.M. wrote to Seneca advising that the premises were not vacant, that J.E.M. would maintain offices with three full time employees at the site and that the City of Meriden where the building was located provides continuous off hours patrol through a community based policing program. Seneca agreed to reinstate the policy, which was then renewed for the periods of February 18, 2001 to February 18, 2002, as well as February 18, 2002 and February 18, 2003. Prior to the last renewal, J.E.M.'s insurance broker represented to Seneca that there was 24 hour police protection at the premises as the Meriden Police Department occupied a portion of the building as a substation.

On February 15, 2003, a homeless man broke into the building and plugged the toilet on an upper floor causing the toilet to overflow. Extensive water damage resulted. At the time of the loss, the Meriden Police Department did not have a presence at the premises, but had moved from the premises several months prior. In addition there were three other break-ins at the premises in February 2003: a window was broken on the 5th, an exhaust fan was damaged on the 10th and an emergency door was destroyed on the 16th. No claims were made for these incidents. However, on March 5, 2003, J.E.M. filed a claim for damage resulting from the February 15, 2003 incident. J.E.M. filed a claim for damage resulting from the February 15, 2003 incident.

Upon investigation and learning of the absence of security, on March 7, 2003, Seneca sent a notice of cancellation to J.E.M. due to "increase in hazard." In response, J.E.M.'s insurance broker advised Seneca that the premises were not vacant, but were being occupied by three tenants. Seneca then offered to reissue the policy with an increased premium and the policy was reissued for the period of February 18, 2003 to February 18, 2004, with the same security provision as the prior policy. Seneca then learned that the tenants were not located in the main section of the premises and cancelled the policy on June 9, 2003.

In granting summary judgment to Seneca, the court found

that J.E.M. materially breached the contract as the policy clearly provided that coverage is contingent upon compliance with security directives. Furthermore, J.E.M. conceded that the police had vacated the premises and that there was no guard patrolling the premises, an admitted material breach.

In opposition J.E.M. argued that by continuing to insure J.E.M., Seneca waived its defense to the claim for the February 15, 2003 incident. The court was not persuaded as the evidence showed that when Seneca learned in March 2003 that the police were no longer located on the premises, it issued a Notice of Cancellation. It only issued a new policy after obtaining further information from J.E.M., including representation that the premises were occupied by three tenants. Seneca did not continue to insure J.E.M. on the same terms, but rather on the condition the premises were occupied by three tenants and at a higher premium than the previous policy. The court explained that the fact that the new policy contained the same security provision as the old does not show an intentional relinquishment of a known right, as is required by the law in order to deem Seneca's defense waived. Rather, Seneca's actions showed intent to enforce the security provision as an integral component of the policy.

The court concluded that J.E.M. produced no evidence to support a finding that there was an express or implied waiver of rights under the 2002-2003 policy and because the first three causes of action were all based upon an alleged failure of Seneca to comply with the terms of the policy Seneca was entitled to summary judgment on each of these claims.

AGFJ DEVELOPMENTS

- James Kimmel won his first trial for AGF&J. After completion of jury selection in Civil Court, Bronx County, Mr. Kimmel made a series of motions in limine which the court granted, resulting in plaintiff's preclusion from offering evidence of cervical and lumbar disc herniations at trial, which we contended were attributable to a subsequent accident. Judge Aarons then indicated that, in the absence of any additional medical evidence, she was inclined to grant our motion for a directed verdict on the Insurance Law section 5102(d) "serious injury" threshold following the conclusion of plaintiff's case. Plaintiff's counsel then elected to voluntary discontinue the action with prejudice.

- AGF&J is pleased to announce that, effective June 25, 2007, Dennis Monaco, Esq., joined the firm. Dennis, an associate of the firm, is an experienced defense attorney with a B.S. from Seton Hall University and a J.D. from Brooklyn Law School.

PUBLIC EDUCATION SERVICE

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.