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TOP FIVE BUSINESS TORTS CASES – NJAJ 2017

Vincent Crepy v. Reckitt Benckiser, LLC, et al, Superior Court of New Jersey, Law Division, Essex County, ESX-L-730-15; Decided, February 19, 2016; approved for publication, February 7, 2017.

Holding: The trial court granted defendant’s motion to transfer venue from Essex County to Morris County because plaintiff did not meet its burden of proving that defendant was “actually doing business” in Essex County pursuant to R. 4:3-2(b).

Facts and Legal Analysis: Plaintiff’s claims arose out of alleged wrongful termination of his employment by Reckitt Benckiser, LLC (“RBLLC”), in February 2012, in violation of his employment contract (among other claims). Plaintiff filed suit on January 30, 2015, in Essex County. Plaintiff was a French citizen with a green card, residing in Irvine, California. He held positions in other countries and in Parsippany, New Jersey. RBLLC was a Delaware limited liability company, registered in Mercer County, with a principal place of business in Morris County. It had no registered locations in Essex County. All events leading up to RBLLC terminating plaintiff’s employment occurred outside of Essex County.

Thus, plaintiff’s basis for filing in Essex County was that, pursuant to R. 4:3-2(b), RBLLC was “actually doing business” in Essex County. (p. 6.)

Defendant moved to change venue pursuant to R. 4:3-3(a)(1), making two arguments: (1) R. 4:3-2 applies only to corporations, not to limited liability companies (“LLCs”); and (2) if it does apply to LLCs, then RBLLC’s business activities in Essex County are insufficient to satisfy the “actually doing business” requirement.

The posture of the motion was that it had been denied without prejudice so further discovery could be taken regarding RBLLC’s business activities in Essex County. This was defendant’s renewed motion.

Since the cause of action did not arise in Essex County, the relevant inquiry under R. 4:3-2, if applicable to an LLC, was whether RBLLC resided in Essex County at the time the action was commenced. See R. 4:3-2(a)(3). A “corporation” resides in the county in which its registered office is located or in any county in which it is “actually doing business.” R. 4:3-2(b).

The trial court first rejected defendant’s argument that R. 4:3-2 does not apply to LLCs. It found that the New Jersey Supreme Court had not yet provided a clear directive on the issue. Citing *Int’l Shoe v. Wash.*, 326 U.S. 310, 66 S.Ct. 154 (1945) (an unincorporated business entity can reasonably foresee being sued in forums where it conducts business operations), the trial court held that the R. 4:3-2(b) “actually doing business” requirement applies to both incorporated and unincorporated business entities. (p. 14.)

The trial court then analyzed defendant’s second argument, whether RBLLC was “actually doing business” in Essex County when the action was commenced. Because defendant relied on R. 4:3-3(a)(1), arguing that venue was not laid in accordance with R. 4:3-2, the burden was on plaintiff “to demonstrate good cause for not changing venue by establishing that venue was proper when laid.” (p. 14.)

The trial court noted that neither party cited New Jersey law for guidance on the requirements for “doing business” for the purpose of establishing venue; nor could the court itself find any such guidance. The court found *Bucklew v. G.D. Searle & Co.*, 562 N.E. 2d 186 (Ill. 1990), cited by defendant, to be persuasive, noting that the Illinois venue statute is identical to that of New Jersey. The court rejected plaintiff’s argument that the court should use the factors used by the New Jersey Division on Taxation to determine whether a company does business in New Jersey for tax purposes because the underlying purpose of the venue statute is consideration of the “convenience of litigants and witnesses.” (p. 15, citation omitted.)

The *Bucklew* court reasoned that the “doing business” standard for venue required more extensive contacts with the forum than does the long-arm statute analysis, because of the legislature’s intent to expand personal jurisdiction to the extent permitted by the Constitution. (See p. 17.) Thus, the Illinois court held that, for venue, the defendant must be conducting its “usual and customary business within the county in which venue is sought.” *Bucklew* at 190.

As set forth in great detail at pp. 18 through 24, the court then compared the *Bucklew* facts to the facts at bar to address whether RBLLC was conducting “usual and customary business” in Essex County. First, it reviewed the facts in *Bucklew*,

including that defendant had only two sales representatives in the venued county, which represented less than .4% of its national sales force, that those representatives only took orders and could not bind the company, and that the defendant's sales in the venued county for the two prior years were less than 3% of its statewide sales and .12% and .13% respectively of its national sales. The trial court then compared defendant's affidavits to those submitted in *Bucklew*, noting, among other things, that from 2014 to the present RBLLC had no storage facility in Essex County, that because RBLLC no longer manufactured goods it no longer imported raw materials through the Port of Newark or Newark Airport for several months prior to the filing of the lawsuit, that none of RBLLC's sales were made in Essex County, that only .003% of RBLLC's nationwide sales were shipped to a third-party commercial carrier in Essex County, for a total of \$133,214, that of 67 national sales representatives, four made calls in New Jersey, one of whom did so in Essex County, that they promoted and educated doctors about RBLLC's drugs but did not solicit or take orders and, thus, did not make sales, that of the 17,569 doctors on which representatives made calls 64 were in Essex County, and that of the 70,940 calls made nationally, 322 (.47%) took place in Essex County.

As a result, the trial court found that the minimal amount and "incidental" nature of RBLLC's business contacts with Essex County were insufficient to conclude that RBLLC was "actually doing business" in Essex County. (p. 23.)

The trial court then rejected several of plaintiff's arguments that were counter to the legal and factual reasoning in *Bucklew*. (see pp. 25-32.)

As a result, the court granted defendant's motion to transfer venue from Essex County to Morris County.