SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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GOLDEN GATE CAPITAL PARTNERS INC.,

Plaintiff,

- against -

BLAST APPLICATIONS INC. As Successor In Interest to MEDIVISOR, INC.,

Defendant.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 16222-11
Motion Seq. No. 1
Submission Date: 3/16/12

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition and Affidavit in Opposition.....x

This matter is before the Court for decision on the motion filed by Defendant Blast Applications Inc. as Successor in Interest to Medivisor Inc. ("Blast" or "Defendant") on January 24, 2012 and submitted on March 16, 2012. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR § 3211(a)(3) and Business Corporation Law ("BCL") § 1312, dismissing the Complaint.

Plaintiff Golden Gate Capital Partners Inc. ("Plaintiff") opposes the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Bolton Aff. in Supp.) alleges as follows:

Plaintiff, Defendant Blast Applications Inc. ("Blast") and Defendant Medivisor Inc. ("Medivisor") were and are corporations organized and existing by virtue of the laws of the State of Delaware, with principal places of business in Nassau County, New York. On or about February 15, 2008, Golden Gate [1] and Medivisor entered into a Consulting Service Agreement (Ex. A to Compl.). On or about February 15, 2008, Medivisor executed a Demand Promissory Note in favor of Golden Gate in the sum of $240,000.00 (*id.* at Ex. B). On or about July 10, 2009, Blast became the successor in interest to Medivisor.

On or about July 30, 2011, Plaintiff sent a written notice to Defendant demanding the payment of $240,000.00, together with accrued interest from February 15, 2011. On or about July 30, 2011, Plaintiff sent a written notice to Defendant demanding the sum of $240,000.00, plus an additional $22,500.00 as additional principal, together with accrued interest from February 15, 2011. The $22,500.00 demanded as additional principal should be the sum of $15,500.00, not $22,500.00. Defendant has failed to pay the sums demanded, except for the sum of $27,500, which was paid in two installments in 2009 and 2010.

The Complaint contains two causes of action. In the first, Plaintiff alleges that Defendant breached the terms of the Promissory Note by failing to make required payments, and seeks damages of not less than $212,500.00, together with accrued interest from February 15, 2008. In the second, Plaintiff alleges that Defendant breached the terms of the Consulting Services Agreement by failing to make required payments and failing to deliver designated shares of stock. Plaintiff seeks damages of not less than $255,950.00, and not more than $267,750.00, together with accrued interest from February 15, 2008.

In support of Defendant's motion, counsel for Defendant ("Defendant's Counsel") submits that the Court should dismiss the Complaint on the grounds that Plaintiff is a foreign corporation doing business in New York, but which is not authorized to do business in New York. Defendant's Counsel notes that the Complaint does not allege that Plaintiff is authorized

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[1] Paragraphs 4 and 5 of the Complaint refer to Golden "Globe," but the Court gleans that Plaintiff intended to refer to Golden Gate.

to do business in New York. He affirms that he conducted a review of the records available from the website of the New York State, Department of State, Division of Corporations (Ex. B to Bolton Aff. in Supp.), which revealed that there is no record of Plaintiff being authorized to do business in New York.

Defendant's Counsel notes, further, that the Complaint alleges that Plaintiff maintains a principal place of business in Nassau County, New York, and that the Summons with Notice (Ex. C to Bolton Aff. in Supp.) reflects that Plaintiff placed venue in Nassau County based on the fact that Plaintiff resides at Nassau County. Defendant's Counsel submits that, pursuant to CPLR § 503(c), a corporation is deemed to be a resident of the county in which its principal office is located and argues that if Plaintiff's principal office is located in Nassau County, then it must be deemed to be doing business in the State of New York.

In opposition, Dean Petkanas ("Petkanas") affirms that he is the sole managing member, sole stock holder and sole employee of Golden Gate. Petkanas avers that he organized Golden Gate to render consulting and advisory services to corporations and entities throughout the United States and overseas. From 2008 to date, Golden Gate has performed advisory and consulting to five (5) entities, including Defendant Blast. Almost all of Golden Gate's clients were incorporated and/or located outside of New York, and most of the work was performed outside of New York. Petkanas provides details regarding those five (5) entities, including 1) their states of incorporation, which include Texas, Nevada and New Jersey, and 2) the locations where Golden Gate performed services, which included Arizona, Florida, Pennsylvania and Sri Lanka.

Petkanas affirms that, with respect to its business transactions with Blast, Golden Gate handled all of Medivisor and Blast's public filings from 2009 through 2010 on the "Pink Sheets" (Petkanas Aff. in Opp. at ¶ 4), which is an electronic board that publishes filings and quotes for publicly traded companies that do not file with the Securities and Exchange Commission ("SEC"). Petkanas affirms that Blast's public stockholders are located throughout the United States. Petkanas avers that Golden Gate has had "minimal contacts" within New York (*id.* at ¶ 5) and, in light of the fact that its business is not regularly conducted in New York, Golden Gate determined that it was not necessary to obtain a Certificate of Authority to do business in the State of New York. Petkanas submits that the mere fact that Golden Gate has a place of

business in Nassau County, New York is an insufficient basis on which to conclude that it was doing systematic and regular business within New York.

C. The Parties' Positions

Defendant submits that the Court should dismiss the Complaint on the grounds that Plaintiff is a foreign corporation doing business in New York, which is not authorized to do business in New York.

Plaintiff opposes Defendant's application, submitting that the Petkanas Affidavit establishes that Golden Gate does not systematically, continuously and regularly conduct business in New York and, therefore, the statutory bar of BCL § 1312 is inapplicable.

RULING OF THE COURT

Business Corporation Law § 1312(a) constitutes a bar to the maintenance of an action by a foreign corporation in New York if that corporation is found to be "doing business" in New York without having obtained the requisite authorization to do so. *Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 (2d Dept. 2008), quoting *Airline Exch. v. Bag*, 266 A.D.2d 414, 415 (2d Dept. 1999). The question of whether a foreign corporation is "doing business" in New York must be approached on a case-by-case basis with inquiry made into the type of business being conducted. *Id., quoting Alicanto, S.A. v. Woolverton*, 129 A.D.2d 601, 602 (2d Dept. 1987). To find that a foreign corporation is "doing business" in New York within the meaning of BCL § 1312(a), the corporation must be engaged in a regular and continuous course of conduct in the State. *Id.*, quoting *Commodity Ocean Transp. Corp. of N.Y. v. Royce*, 221 A.D.2d 406, 407 (2d Dept. 1995). A defendant relying on BCL § 1312(a) as a statutory barrier to a plaintiff's lawsuit bears the burden of proving that the plaintiff-corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction. *Id.*, citing *S & T Bank v. Spectrum Cabinet Sales*, 247 A.D.2d 373 (2d Dept. 1998), quoting *Peter Matthews, Ltd. v. Robert Mabey, Inc.*, 117 A.D.2d 943, 944 (3d Dept. 1986). Absent sufficient evidence to establish that a plaintiff is doing business in New York, the presumption is that the plaintiff is doing business in its state of incorporation, and not in New York. *Id.* at 743-744, quoting *Cadle Co. v. Hoffman*, 237 A.D.2d 555 (2d Dept. 1997).

The Court denies Defendant's motion based on the Court's conclusion that, in light of the

Petkanas Affidavit which details the nature and extent of Plaintiff's business activities in New York and elsewhere, Defendant has not established that Plaintiff's business activities in New York were so systematic and regular as to manifest continuity of activity in the jurisdiction. Thus, the presumption is that Plaintiff is doing business in its state of incorporation, Delaware, and BCL § 1312 is inapplicable to the matter at bar.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on June 7, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 3, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAY 11 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE