SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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NLR UNLIMITED, INC., NIRA LEVINE,

Plaintiffs,

-against-

G.O.L.A.INC., JOHN WOODWARD, KRISTINE WOODWARD

Defendants.

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DECISION/ORDER
Index No. 155481/2016

Motion Sequence 1 and 2

HON. DAVID B. COHEN, J.:

Petitioners brought this action for pre-action discovery pursuant to CPLR 3102, seeking documents relating to the certain transactions between the parties. According to the petition, petitioners are in the business of transactions involving the purchase, acquisition, consignment, transfer and/or sale of fine art. Beginning in 2002 and through November 2008, respondents purchased works of fine art on behalf of petitioners. There were also purchases made jointly by the parties. For works purchased by respondents, respondents would store, market and exhibit the art on behalf of petitioners. Upon a sale of the art, petitioners would be reimbursed for the purchase price and the parties would split the profits. Over the six years, the parties engaged in 140 transactions.

In or around April 2014, petitioners learned that in one of the transactions the parties entered into, respondents may have actually paid less for the art than what they told petitioners. Additionally, petitioners discovered that in a second transaction, respondents may not have been truthful about certain details. Petitioners then sought certain clarifications as to these transactions and now fear that they had been defrauded. However, petitioners have not been able to obtain the necessary documents to prosecute a civil action. Accordingly, they brought the instant petition by order to show cause ("Mot. Seq. 1") seeking pre-action discovery from respondents related to the transactions in question.

Respondents answered and asserted several affirmative defenses, including that petitioners are in violation of Business Corporation Law 1312(a) and that the Court lacks personal jurisdiction over respondents. Respondents then moved ("Mot. Seq. 2") for dismissal based upon 3211(a)(8) and BCL 1312(a).

BCL 1312(a) provides:

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation.

Petitioners are an Oregon corporation and resident. Thus, NLR Unlimited is a foreign corporation. However, NLR asserts that it is not "doing business" in New York within the meaning of the statute. The traditional standard for doing business in New York for the purposes contained in BCL 1312(a) is described in *Intl. Fuel & Iron Corp. v. Donner Steel Co.* (242 NY 224 [1926]). The Court of Appeals explained, "[t]o come within this section, the foreign corporation must do more than make a single contract, engage in an isolated piece of business, or an occasional undertaking; it must maintain and carry on business with some continuity of act and purpose" (*Id.*)). The question of whether a foreign corporation is "doing business" in New York is approached on a case-by-case basis (*Highfill, Inc. v. Bruce and Iris, Inc.*, 50 AD3d 742 [2d Dept 2008]). The burden is on the defendant asserting the statutory bar to prove that plaintiff's business in New York was "so systematic and regular as to manifest continuity of activity in the jurisdiction" (*Nick v Greenfield*, 299 AD2d 172, 173 [1st Dept 2002]). Absent sufficient evidence that the plaintiff is doing business in New York, the presumption is that the plaintiff does business in its state of incorporation (*Peak Fin. Partners, Inc. v Brook*, 119 AD3d 539 [2d Dept 2014]).

In the petition, petitioners stated that for a period of years it and respondents had acted pursuant to an oral contract and had conducted more than 140 transactions with respondents. That respondents, a New York corporation with its principal place of business in New York, purchased works of fine art on behalf of petitioners and would store, market and exhibit the art on behalf of petitioners in New York. Petitioners argue that NLR is not "doing business" in New York because purchasing on behalf of NLR's behalf "does not constitute 'doing business' for purposes of BCL 1312." However, petitioners do not cite any case law supporting the contention that entering into an agreement and having an entity make sales on NLR's behalf

is not doing business. Additionally, petitioners do not attach an affidavit of anyone with personal knowledge of NLR's business activities.

Accordingly, the Court finds that NLR was "doing business" in New York within the meaning of BCL 1312. Petitioners' oral agreement with respondents and 140 transactions were systematic, regular and continuous within the state of New York as respondents, whose task it was to buy, sell, market and store the pieces of art, are located in New York. Thus, until NLR registers with the state of New York and pays all applicable fees, taxes, and penalties, it may not maintain this action. However, outright dismissal of the action is not appropriate (*Tri-Term. Corp. v CITC Indus., Inc.*, 78 AD2d 609 [1st Dept 1980]). Rather, the Court shall stay grant this motion to the extent of providing NLR with a reasonable time period of 90 days to cure its deficiency under BCL 1320 (*see Showcase Limousine, Inc. v Carey*, 269 AD2d 133, 134 [1st Dept 2000], mod in part, 273 AD2d 20 [1st Dept 2000]). Should NLR not provide the Court and respondents with proof of cure of its deficiency within the 90-day time period, upon letter application to the Court or motion, the Court shall dismiss this action as to NLR.

After review of the affidavit of Kristine Woodward and the affidavit of service and notes of the process server, the Court finds that respondents have properly raised a jurisdictional question relating to service. Accordingly, a traverse hearing is required to determine the issue of proper service. This matter shall be referred to a JHO to conduct a traverse hearing. Pending the outcome of that hearing and of NLR registering, this matter is stayed until restored by the parties.

It is therefore

ORDERED, that the motion to dismiss based upon NLR's failure to comply with BCL 1312 is granted to the extent of providing NLR with a reasonable time period of 90 days to cure its deficiency under BCL 1320; and it is further

ORDERED, that this matter shall be referred to a JHO for a traverse hearing; and it is further

ORDERED, that pending the outcome of NLR's cure and the traverse hearing this matter is stayed until restored by the parties.

This constitutes the decision and order of the Court.

DATE : 1-31-17 ~~12/27/2016~~

COHEN, DAVID B., JSC