STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ATLANTIC AMERICAN FIRE EQUIPMENT COMPANY,

Plaintiff,

-against-

JOHN V. WARREN, INC. and WILLIAM A. YOUNG

Defendants.

DECISION and ORDER
INDEX NO. 3804-11
RJI NO. 01-11-105326

Supreme Court Albany County All Purpose Term, December 5, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Plaintiff commenced this action to recover the amount due on its unpaid invoices, for materials purchased by John V. Warren, Inc. (hereinafter "Defendant"). Issue was joined and Plaintiff now moves for summary judgment.[1] Defendant opposes the motion by cross-moving to amend its answer, to add a Business Corporations Law § 1312(a) affirmative defense. Because

[1] William A. Young previously settled this action to the extent that it was brought against him individually.

Defendant failed to establish its entitlement to relief, its motion is denied. However, because Plaintiff established its entitlement to judgment on its account stated cause of action, and Defendant raised no material issue of fact, Plaintiff's motion is granted.

Considering first Defendant's motion, "leave to amend a pleading should be freely granted so long as no prejudice befalls the nonmoving party and the amendment is not plainly lacking in merit." (Davis v. Wyeth Pharmaceuticals, Inc., 86 AD3d 907, 908 [3d Dept. 2011], quoting Shelton v New York State Liq. Auth., 61 AD3d 1145 [3d Dept 2009] and Smith v Haggerty, 16 AD3d 967, 967–68 [3d Dept 2005]). "In determining the merit of the proposed amendment, [this Court] must accept as true the facts alleged and draw all reasonable inferences in favor of [the Defendant]." (Shelton v New York State Liq. Auth., supra at 1149).

Defendant seeks to add a Business Corporations Law § 1312(a) affirmative defense. "Under that statute, a foreign corporation 'doing business' in this State without authorization cannot maintain an action in New York." (Fine Arts Enters. v Levy, 149 AD2d 795, 795–96 [3d Dept. 1989]; Business Corporation Law § 1312[a]). Doing business means "be[ing] engaged in a regular and continuous course of conduct in the State." (Highfill, Inc. v Bruce & Iris, Inc., 50 AD3d 742, 743 [2d Dept 2008] quoting Commodity Ocean Transp. Corp. of N.Y. v Royce, 221 AD2d 406 [2d Dept 1995]). Merely shipping "a large amount of... product into New York... [without] an office, a telephone, ... a sales representative... [or] any advertising in New York" is insufficient. (S & T Bank v Spectrum Cabinet Sales, 247 AD2d 373, 374 [2d Dept 1998]). Moreover, "[t]here is a presumption that a foreign corporation does business in the state of its incorporation and not in New York." (Fine Arts Enters. v Levy, supra at 796).

On this record, even if Plaintiff would not be prejudiced by the proposed amendment,

because Defendant failed to establish that its amendment does not plainly lack merit, it failed to establish its entitlement to amend its answer. Defendant proffers no documentary proof showing that Plaintiff is "doing business" in New York. Instead, Defendant relies solely upon its attorney's allegations that (1) Plaintiff is a foreign corporation and (2) that Plaintiff is not authorized to do business in New York. Even accepting such allegations as true, however, Defendant wholly failed to allege that Plaintiff is "doing business" in New York. Without any proof or allegation that Plaintiff is "doing business" in New York, Defendant failed to establish that its amendment is not plainly lacking in merit. Moreover, Plaintiff's credit manager's uncontroverted affidavit alleges sufficient facts to demonstrate that it is not engaged in "a regular and continuous course of conduct in [New York]." (Highfill, Inc. v Bruce & Iris, Inc., supra at 743; S & T Bank v Spectrum Cabinet Sales, supra; Fine Arts Enters. v Levy, supra).

Accordingly, Defendant's motion to amend is denied.

Turning to Plaintiff's motion, "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v Finn, 229 AD2d 869, 870 [3d Dept 1996], quoting Moskowitz v Garlock, 23 AD2d 943 [3d Dept. 1965]).

On this summary judgment motion Plaintiff bears the initial burden to demonstrate, with admissible evidence, its prima facie entitlement to judgment as a matter of law. (J.B.H., Inc. v Godinez, 34 AD3d 873 [3d Dept 2006]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; DiBartolomeo v St. Peter's Hosp. of the City of Albany, 73 AD3d 1326 [3d Dept 2010]). Once established, the burden shifts to Defendant to raise a triable issue of fact. (Id).

On this record, Plaintiff demonstrated its entitlement to an account stated judgment as a matter of law. "An account stated is an agreement between parties to an account based upon

prior transactions between them with respect to the correctness of the account items and balance due." (Antokol & Coffin v. Myers, 86 AD3d 876 [3d Dept. 2011], quoting J.B.H., Inc. v Godinez, 34 AD3d 873 [3d Dept 2006] and Jim-Mar Corp. v Aquatic Constr., 195 AD2d 868 [3d Dept 1993], lv. denied 82 NY2d 660 [2000]; American Express Centurion Bank v. Cutler, 81 AD3d 761, 762 [2d Dept. 2011]). To establish its account stated Plaintiff submits a copy of the Defendant's credit application, which became the parties' contract. Plaintiff also submitted the numerous invoices it sent to Defendant for the product it delivered, with its credit manager's sworn affidavit. The credit manager explicitly alleged that Plaintiff sent Defendant the attached invoices on or about the date inscribed on each, and that Defendant did not object to any of the invoices. According to the invoice dates, they were retained without objection for over six months prior to this action's commencement. From the foregoing, Plaintiff duly demonstrated its entitlement to summary judgment on its account stated cause of action. (Antokol & Coffin v. Myers, supra; J.B.H., Inc. v Godinez, supra).

With the burden shifted, Defendant raised no issue of fact. In opposition, Defendant submitted only its attorney's affirmation with a proposed amended answer. Its attorney's affirmation, however, is of no probative value. (Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]). Nor does it even address the merits of Plaintiff's summary judgment motion. As such, it raised no triable issue of fact.

Accordingly, Plaintiff's motion for summary judgment on its account stated cause of action is granted. To the extent Plaintiff sought judgment on its breach of contract cause of action, considering the above, that portion of its motion is denied as moot.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this

Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 20, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated November 7, 2011; Affirmation of Conor E. Brownell, dated November 7, 2011; Affidavit of Robert Frescatore, dated November 3, 2011, with attached Exhibits 1–7.
2. Notice of Cross Motion, dated November 23, 2011; Affirmation of Paul Marthy, dated November 23, 2011, with attached Exhibit A.