

<b>R.D.R. Constr., Inc. v TCV Constr., LLC</b>
2013 NY Slip Op 31355(U)
June 17, 2013
Supreme Court, Suffolk County
Docket Number: 29470-2010
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 29470-2010

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**Present: HON. EMILY PINES**  
 J. S. C.

Original Motion Dates: 03-07-2013; 03-12-2013  
 Motion Submit Date: 04-02-2013  
 Motion Sequence No.: 004 MD  
 005 MOTD

[ ] FINAL  
 [x] NON FINAL

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**R.D.R. CONSTRUCTION, INC.,**

**Plaintiff,**

**-against-**

**TCV CONSTRUCTION, LLC and TCV  
 CONSTRUCTION GROUP., INC.,**

**Defendants.**

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Attorney for Plaintiff  
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Attorney for Defendants  
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**ORDERED** that the plaintiff's motion (004) for summary judgment in its favor is denied; and it is further

**ORDERED** that the branch of the cross motion by the defendants seeking leave to amend the answer is granted; and it is further

**ORDERED** that the defendant is directed to serve and file an Amended Answer containing the new affirmative defense within thirty days of service of this Order with Notice of Entry; and it is further

**ORDERED** that the branch of the defendants' cross motion which seeks to dismiss the

complaint is granted to the extent that this action is stayed until such time as the plaintiff obtains authority to conduct business within the State; and it is further

**ORDERED** that the branch of the defendants' cross motion which seeks summary judgment is denied; and it is further

**ORDERED** that counsel for the plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for the defendants, pursuant to CPLR 2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

**ORDERED** that the plaintiff is directed to move to restore the action upon submission of proof of its authority to conduct business in this State.

*In this breach of contract action, the plaintiff, a New Jersey corporation, seeks payment on six subcontracts it entered into with the defendants from April, 2008 through November, 2008. The plaintiff provided carpentry and drywall related labor and materials for the construction of stores and office buildings in the Shops at Atlas Park, located in Glendale, New York. For each of the subcontracts, the plaintiff alleges that it made demand for payment but the defendants have failed or refused to make full payment. The complaint alleges that the defendants are closely related entities under common ownership that operate as one another and were the general contractors on each project. The complaint alleges in eighteen causes of action that each of six subcontracts were entered into, that the plaintiff performed under the contracts, and that the defendants either paid only a portion of the subcontract price, or failed to pay any of the subcontract price. For each subcontract, the complaint alleges that the defendants breached the contract, that the defendants were unjustly enriched, and for accounts stated. The defendants assert in their answer that the defendant TCV Construction Group, Inc. did not enter into these subcontracts with the plaintiff, but that TCV Construction, LLC was the contracting party to these transactions. In addition, the defendants assert that they were not paid by the principals of Atlas Park, and therefore, should not be liable to the plaintiff.*

The plaintiff now moves for summary judgment in its favor to recover the balances due on

the six subcontracts. The defendants cross move to amend the complaint to add an affirmative defense that the plaintiff may not maintain this action since it is a foreign corporation which is not licensed or authorized to conduct business in the State of New York pursuant to New York Business Corporations Law (“BCL”) § 1312 (a), and seeks to dismiss the complaint pursuant to CPLR 3211 (a) (3) on the ground that the plaintiff has no capacity to sue, or, in the alternative, seeks summary judgment dismissing the complaint.

Procedurally, the plaintiff filed its note of issue on January 4, 2013, and a trial on the matter is scheduled for December 16, 2013.

Initially, the Court must entertain the defendants’ application seeking leave to amend the answer. It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise. CPLR 3025 [b]; *Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 544 NYS2d 580 (1989); *McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 463 NYS2d 434 (1983). It is incumbent upon the party seeking leave to make some evidentiary showing that the proposed amendment has merit. *Heckler Elec. Co. v Matrix Exhibits-New York, Inc.*, 278 AD2d 279, 718 NYS2d 213 [2d Dept 2000]; *Morgan v Prospect Park Assocs. Holdings, LP*, 251 AD2d 306, 674 NYS2d 62 [2d Dept 1998]).

New York 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 . . .” (BCL § 1312 [a]).

Significantly, the “doing business” standard under BCL § 1312 (a) requires a greater amount of local activity by a foreign corporation than the “doing business” standard applicable under New York’s long-arm statute (CPLR 302) relating to personal jurisdiction. *Colonial Mortg. Co. v First Fed. S&L Assn.*, 57 AD2d 1046, 1047, 395 NYS2d 728 (4th Dept 1977); Annotation, “Closed Door” Statutes, 88 ALR 4<sup>th</sup> 466, 485, § 6 [a]). In the context of BCL § 1312 (a), a foreign corporation

bringing suit in New York is presumed to be doing business in its State of incorporation and not in New York. *Alicanto, S.A. v Woolverton*, 129 AD2d 601, 602, 514 NYS2d 96 (2d Dept 1987). A defendant relying on BCL § 1312 (a) has the burden of proving that the foreign corporate plaintiff was “doing business” in New York without authority. *Great White Whale Advertising, Inc. v First Festival Productions*, 81 AD2d 704, 706, 438 NYS2d 655 (3rd Dept 1981). Noncompliance with the registration and taxation requirements of BCL § 1312 (a) does not raise a jurisdictional bar and is curable during the pendency of the action. *Intermar Overseas, Inc. v Argocean, S.A.*, 117 AD2d 492, 497, 503 NYS2d 736 (1st Dept 1986). However, dismissal would not be justified. The circumstances merely bring about a stay of the proceedings until authorization to do business is obtained. *Maro Leather Co. v Aerolineas Argentinas*, 161 Misc2d 920, 601 NYS2d 224 (App Term, 1st Dept 1993), *app disp* 85 NY2d 837 (1995), *cert den* 514 US 1108 (1995). Here, the defendants have met their burden by demonstrating that the plaintiff entered into six subcontracts, worked continuously over at least six months to perform each of the six subcontracts, and provided labor and materials to complete the projects.

In opposition, the plaintiff does not contest the issue of its lack of authority to conduct business in this State, nor does it explain its filing status with the Secretary of State. In addition, the plaintiff failed to show either that it has been prejudiced or surprised by the amendment, even at this late date. Therefore, the plaintiff is effectively precluded from commencing a suit. Accordingly, the branch of the defendants’ motion seeking leave to amend the answer is granted. The defendants are directed to serve and file an amended answer within thirty days of service of this order with notice of entry. The branch of the defendants’ motion to dismiss the complaint is granted solely to the extent that the action is stayed until such time as the plaintiff submits proof to the Court of its authority to conduct business in this State pursuant to BCL 1312.

Consequently, since the plaintiff is precluded from commencing suit, it is also precluded from moving for summary judgment. In any event, the Court finds that, upon review, the parties’ respective applications for summary judgment are denied inasmuch as there are numerous issues of fact which preclude the granting of summary judgment.

Accordingly, the plaintiff’s motion for summary judgment is denied. The branch of the

defendants' cross motion seeking leave to amend the answer is granted. The branch of the defendants' cross motion seeking to dismiss the action pursuant to CPLR 3211 (a) (3) is granted solely to the extent that the action is stayed; and the branch of the defendants' cross motion seeking summary judgment is denied. The plaintiff is directed to restore the action by order to show cause upon submission of proof that it has the authority to conduct business in this State. Upon restoration of the action, the parties shall proceed to trial.

**Dated: June 17, 2013**  
**Riverhead, New York**

  
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EMILY PINES  
J. S. C.

FINAL  
 NON FINAL