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| Credit Suisse Intl. v Urbi |
| 2013 NY Slip Op 32028(U) |
| August 21, 2013 |
| Supreme Court, New York County |
| Docket Number: 651318/13 |
| Judge: Charles E. Ramos |
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**SUPREME COURT OF THE STATE OF NEW YORK -
NEW YORK COUNTY**

PRESENT: CHARLES E. RAMOS
Justice

PART 53

CREDIT SUISSE

INDEX NO. 651318/13

MOTION DATE _____

- V -

URBI

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) _____

Answering Affidavits - Exhibits No(s) _____

Replying Affidavits No(s) _____

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



DATED: 8/27/2013

CHARLES E. RAMOS J.S.C.

1. CHECK ONE : CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE : SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 53

-----x
 CREDIT SUISSE INTERNATIONAL,

Plaintiff,

Index No.
 651318/13

-against-

URBI, DESARROLLOS URBANOS, S.A.B.
 DE C.V., INGENIERIA Y OBRAS, S.A. DE C.V.,
 OBRAS Y DESARROLLOS URBI, S.A. DE C.V.,
 CYD DESARROLLOS URBANOS, S.A. DE C.V.,
 TEC DISNEO E INGENIERIA S.A. DE C.V.,
 PROMOCION Y DESARROLLOS URBI, S.A. DE C.V.,
 PROPULSORA MEXICANA DE PARQUES
 INDUSTRIALES, S.A. DE C.V., URBI
 CONSTRUCCIONES DEL PACIFICO S.A. DE C.V.,
 CONSTRUCTORA METROPOLITANA URBI S.A. DE
 C.V., and FINANCIERA URBI, S.A. DE C.V.
 SOFOM E.N.R.,

Defendants.

-----x
Hon. Charles E. Ramos, J.S.C.

In motion sequence 001, defendant Urbi, Desarrollos Urbanos, S.A.B. de C.V. ("Urbi") moves pursuant to CPLR 3211(a) and Business Corporation Law § 1312 ("BCL § 1312") to dismiss the plaintiff Credit Suisse International's ("CSI") complaint or in the alternative, to stay this action.

This action arises out of a dispute over a credit default swap agreement. Urbi's motion to dismiss challenges CSI's ability to maintain this action as an unauthorized foreign corporation doing business in New York. To this extent the background and details of the transaction are not relevant to the instant motion.

In seeking dismissal, Urbi argues that BCL § 1312 prohibits CSI from maintaining this action because it is a foreign corporation not authorized to do business in New York. CSI does not dispute that it regularly does business in New York and that it is not in compliance with BCL § 1312.

The relevant portion of BCL § 1312 provides that:

"(a) 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. This prohibition shall apply to any successor in interest of such foreign corporation..."
(BCL § 1312 [a]).

Notwithstanding the undisputed fact that CSI actively does business in the state of New York though it is not in compliance with BCL § 1312, CSI counters that General Obligations Law § 5-140 ("GOL § 5-1402") supercedes BCL § 1312(a) and permits CSI to bring and maintain this action.

The relevant portion of GOL § 5-1402 provides that:

"1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law, any person may maintain an action or proceeding against a

foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state" (GOL § 5-1402 [1]).

CSI argues that GOL § 5-1402 is clearly applicable here because the transaction at issue involves an amount greater than \$1 million and the agreement governing the transaction contains a New York choice of law provision.

"[GOL § 5-1402] permits parties to maintain an action in New York state courts pursuant to a contractual agreement providing for a choice of New York law and forum in cases involving \$1 million or more" (*AIG Fin. Products Corp. v Penncara Energy, LLC*, 83 AD3d 495, 496 [1st Dept 2011]).

However, it is well established that the operative effect of GOL § 5-1402 is to "preclude a New York Court from declining jurisdiction even where the only nexus is the contractual agreement" (*Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 230 [1st Dept 1999]).

Amendments to other statutes after the enactment of GOL § 5-1402 support this interpretation. For example, after GOL § 5-

1402 was enacted, CPLR 327, "which allows a court to dismiss or stay a case on the basis of inconvenient forum..." was amended to specify that CPLR 327 "has no application to an action arising out of an agreement to which [GOL 5-1402] applies" (AIG at 497).

Thus, the application GOL 5-1402 in conjunction with CPLR 327(b) "prevent[s] a party that has agreed to jurisdiction in New York from later asserting that the New York courts are inconvenient or that they lack jurisdiction" (AIG at 497).

However, Urbi does not base its motion to dismiss on this Court's lack of jurisdiction or the inconvenience of the forum. Rather, it argues that CSI lacks the capacity to bring and maintain this action pursuant to BCL § 1312. As a result, GOL § 5-1402 is not applicable to the instant dispute.

This Court finds that Urbi's interpretation of BCL § 1312 is amply supported by New York law. Consequently, this Court will provide a reasonable period for CSI to comply with BCL § 1312, if so advised, in order to obtain the required authorization to bring and maintain an action in this forum (*Showcase Limousine, Inc. v Carey*, 269 AD2d 133, 134 [1st Dept 2000] ["[a]lthough plaintiff's complaint is thus subject to dismissal, dismissal should have been conditioned upon plaintiff's failure to establish within a reasonable time that it had complied with Business Corporation Law § 1312 (a)"]). In the event that CSI ultimately fails to establish its compliance with BCL § 1312

within a reasonable period of time, this Court must dismiss the action.

According it is,


ORDERED that the defendants' motion to dismiss is denied without prejudice, and it is further

ORDERED that the plaintiff is directed to establish its compliance with BCL § 1312 within sixty (60) days of service of this decision with notice of entry by the defendant, and it is further

ORDERED that the defendant may renew this motion after the expiration of the sixty (60) days to seek dismissal of this action.

This constitutes the decision and order of the Court.

Dated: August 21, 2013



J.S.C.

CHARLES E. RAMOS