Devon Quantitative Serv. Ltd. v Broadstreet Capital Partners, LP
2013 NY Slip Op 32235(U)
September 19, 2013
Sup Ct, New York County
Docket Number: 650588/13
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice PART 19

Index Number : 650588/2013
DEVON QUANTITATIVE SERVICES
vs
BROADSTREET CAPITAL
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. 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

motion ~~and cross-motion are~~ is decided in accordance with ~~a~~ accompanying memorandum decision.

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

Dated: 9/19/13

SALIANN SCARPULLA, 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: CIVIL TERM: PART 19

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DEVON QUANTITATIVE SERVICES LIMITED,

Plaintiff,

-against-

Index No.: 650588/13
Submission Date: 5/22/13

BROADSTREET CAPITAL PARTNERS, LP,

DECISION AND ORDER

Defendant,

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For Plaintiff:
Hung G. Ta, Esq. PLLC
250 Park Avenue, 7th Floor
New York, NY 10177

For Defendants:
Lazare Potter & Giacovas LLP
950 Third Avenue
New York, NY 10022

Papers considered in review of the motion to dismiss:

Notice of Motion 1
Memo of Law in Support. 2
Aff in Support 3
Memo of Law in Opp 4
Aff in Opp 5
Reply Memo of Law 6

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract, defendant BroadStreet Capital Partners, LP ("BroadStreet") moves to dismiss the complaint pursuant to CPLR 3211(a)(3) and Business Corporation Law §1312(a). BroadStreet alleges that plaintiff Devon Quantitative Services Limited ("Devon") lacks the legal capacity to maintain this action as it is not an authorized foreign corporation doing business in New York State.

As alleged in the complaint, Devon brings this action to recover an amount due and owing for services Devon performed under a consulting services agreement (the

"agreement") dated January 22, 2012. Devon alleges that despite providing BroadStreet with invoices totaling £70,450.00 (approximately U.S. $110,000), BroadStreet has breached the agreement and refuses to pay the invoices.

Devon states it is a London-based advisory firm which has its place of business in London, as well as a New York office. Devon also alleges in the complaint that the agreement states that "the Agreement, and any claims or causes of action (whether in contract or tort) that may be based upon, arise out of relate [sic] to this Agreement . . . shall be governed by and construed in accordance with the internal laws of New York . . . . Each party agrees that all disputes arising under the Agreement must be resolved in the state or federal courts in New York County, New York, and consents to jurisdiction and venue in such courts."[1]

BroadStreet moves to dismiss the complaint. Without addressing the merits of the allegations, BroadStreet argues that Devon lacks capacity to bring suit in New York, and that Devon fails to show its authority to maintain an action in New York. To that end, BroadStreet argues that although Devon is a London based company, it conducts continuous business activities in New York yet is not registered as a foreign corporation, and is therefore precluded from bringing an action in any New York court.

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[1] The Agreement was not annexed to the complaint, nor was is submitted by either party with their papers on this motion.

In support of its motion, BroadStreet submits the affirmation of its attorney, David E. Potter ("Potter"). Potter states that "[m]ultiple facts indicate that Plaintiff is a foreign corporation that is engaged in continuous business within New York, yet has failed to meet the licensing requirements of " B.C.L. §1312(a). Potter then notes that Devon alleges it is a foreign corporation that maintains a New York office, and that Devon admits in the complaint that it was engaged to provide research services and advice on matters related to an action pending in Supreme Court, New York County. In addition, Potter states that Devon also alleged in the complaint that it entered into an agreement for such services with BroadStreet, a New York based investment manager with a place of business in New York, and with BroadStreet's counsel, a New York law firm.

In opposition, Devon argues that it was not "doing business" in New York for purposes of BCL §1312(a). Devon also asserts that even were it "doing business" in New York for purposes of BCL §1312(a), dismissal is not the proper remedy because the lack of a certificate of authority may be cured at any point prior to the resolution of the litigation.

In support, Devon submits the affidavit of Saul Haydon Rowe ("Rowe"), Devon's principal, in which Rowe states that Devon has no bank accounts or assets in New York. It also has no employees residing or working in New York, and that all of its employees are based in th United Kingdom.

Rowe also states that from 2012 to 2013, Devon maintained only a "virtual office" in New York. There were no employees at the virtual office. It provided Devon with a local address and phone number for potential clients. All calls and mail received at the virtual office were to be forwarded to Devon in London. Rowe states that "to the best of [his] knowledge," no calls were received by Devon's virtual office.

Rowe further states that all of the initial work performed under the agreement was done by Devon personnel located in London. At the conclusion of the initial work, BroadStreet's counsel came to London for a meeting to discuss Devon's conclusions. No Devon personnel traveled to New York to conduct the initial services. Subsequent work was also performed by Devon personnel located in London.

Discussion

Business Corporation Law ("B.C.L.") §1312(a) requires that:

> 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. . . .

A defendant relying upon Business Corporation Law §1312(a) has the burden of proving that the foreign corporate plaintiff was "doing business" in New York without authority. *Uribe v. The Merchants Bank of New York*, 266 A.D.2d 21, 22 (1st Dep't 1999); *Maro Leather Co. v. Aerolinas Argentinas*, 161 Misc.2d 920, 923 (1st Dep't 1994).

Specifically, a defendant must prove that plaintiff's business activities here were so "systematic and regular as to manifest continuity of activity in the jurisdiction." *Maro Leather,* 161 Misc.2d at 923 (quoting *Construction Specialties v. Hartford Ins. Co.*, 97 A.D.2d 808 (2d Dep't 1983)). Where a foreign corporation's activities within New York are "merely incidental to its business in interstate and international commerce," Business Corporation Law §1312(a) is not applicable. *Id.*, at 924. A corporation is presumed to be doing business in its state of incorporation and not in New York. *Alicantro v. Woolverton,* 129 A.D.2d 601, 602 (2d Dep't 1987).

"[B.C.L.]Section 1312(a), which denies an unauthorized foreign corporation 'doing business' in this state capacity to sue here, employs a heightened 'doing business' standard, fashioned specifically to avoid unconstitutional interference with interstate commerce under the Commerce Clause." *Airtran N.Y., LLC v. Midwest Air Group, Inc.*, 46 A.D.3d 208, 214 (1st Dep't 2007) (citing *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267-268 (1917)).

Here, BroadStreet has failed to meet its burden of showing that Devon's business activities were so "systematic and regular as to manifest continuity of activity in the jurisdiction." BroadStreet argues that the virtual office maintained by Devon, and the fact that Devon entered into an agreement to perform work for a New York business represented by New York Counsel establish that Devon was doing business in New York and should therefore is in violation of B.C.L. §1312(a).

However, BroadStreet offers no evidence that Devon maintains offices, telephones or employees in this state, and has not even suggested that Devon systematically and regularly conducts business in this state. Maintaining a virtual office presence, with no employees is not sufficient to meet the heightened "doing business" standard. Moreover, negotiating and entering into a single agreement to perform work for a New York entity, is also not sufficient. *See, e.g., Airline Exch., Inc. v. Bag*, 266 A.D.2d 414, 415 (2d Dep't 1999) ("The plaintiff has one New York bank account, has occasionally used a New York office which the plaintiff's president maintains for his other business interests, and has, over at least an eight-year period, entered into three or four transactions in New York. These facts do not support a finding that the plaintiff's business activities in New York were so systematic and regular as to manifest continuity of activity in this jurisdiction").

Here, the single agreement and work performed subsequent to that agreement are insufficient to establish that Devon was obligated to comply with B.C.L. § 1312(a). "[D]efendant's evidence, relating exclusively to a single business transaction, was insufficient to raise a triable issue as to whether plaintiffs were, in fact, engaged in regular and systematic business activities in New York and thus 'doing business' within the meaning of the statute." *Acno-Tec Ltd. v. Wall St. Suites, L.L.C.*, 24 A.D.3d 392, 393 (1st Dep't 2005).[2]

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[2] Further, BroadStreet incorrectly asserts that *Devon* must establish that it had authority to bring this action in New York. It is well established that the burden is on defendant BroadStreet to establish that Devon was doing business in New York without

Lastly, even were I to find that Devon was not in compliance with B.C.L. §1312(a), a plaintiff foreign corporation's failure to comply with B.C.L. §1312(a) is not a jurisdictional defect, and may be cured. *See Showcase Limousine, Inc. v. Carey,* 269 A.D.2d 133 (1st Dep't 2000); *Tri-Terminal Corp. v. CITC Industries, Inc.*, 78 A.D.2d 609 (1st Dep't 1980). In *Tri-Terminal Corp.*, the First Department held that where a non-licensed foreign corporation doing business in New York commences suit here, "the more appropriate remedy [is] not outright dismissal of the complaint, but a conditional dismissal or a stay affording plaintiff an opportunity to cure this non-jurisdictional defect, *i.e.*, to obtain the requisite authority." *Tri-Terminal Corp.*, 78 A.D.2d at 609. "It bears repetition that Business Corporation Law § 1312 exists to regulate foreign corporations doing business' within New York State and not to enable avoidance of a contractual obligation." *Acno-Tec*, 24 A.D.3d at 393 (internal citation omitted).

Accordingly, BroadStreet's motion to dismiss the complaint is denied.

In accordance with the foregoing, it is

ORDERED that the motion by defendant BroadStreet Capital Partners, LP to dismiss plaintiff Devon Quantitative Services Limited's complaint pursuant to CPLR 3211(a)(3) and B.C.L. §1312(a) is denied; and it is further

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authority, and not on Devon to prove that it was not. *Uribe,* 266 A.D.2d at 22.

ORDERED that defendant BroadStreet Capital Partners, LP is directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry.

Dated: New York, New York
September 19, 2013

ENTER:

Saliann Scarpulla J.S.C.