SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

NATIONAL CONTINENTAL INSURANCE COMPANY NY,

Index No. 652758/2012

Plaintiff,

against

EXECUBUS, INC. D/B/A VAMOOSE BUS,

Defendant.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for to recover unpaid premiums for a vehicle insurance policy, plaintiff National Continental Insurance Company NY ("plaintiff") moves for summary judgment in its favor.

In response, defendant Execubus, Inc. d/b/a Vamoose Bus ("defendant") cross moves to dismiss the complaint on the ground that plaintiff lacks standing to sue.

Factual Background

Plaintiff provided automobile insurance to defendant pursuant to a policy for the period from February 18, 2011 to February 18, 2012. Defendant hired and/or leased buses that were insured under the subject policy, but which had not originally been scheduled on the policy when the policy was first written. When plaintiff discovered that defendant hired and/or leased the non-scheduled buses, an audit was performed which resulted in the issuance of a bill to defendant for the difference between earned premium $88,335 and the paid premium of $9,817.

Plaintiff commenced this action for breach of contract and account stated (first and second causes of action, respectively) for the balance due of $78,518.

In support of summary judgment on its account stated claim, plaintiff's account

receivables manager Israel Antoine Williams ("Williams") attests that defendant was duly billed, but did not render payment. Plaintiff contends that a statement of account and other documents concerning the amount due were mailed by first class mail to defendant and that defendant retained said documents without objection. Plaintiff further argues that none of defendant's affirmative defenses has merit, given that (1) contrary to defendant's claim, plaintiff is licensed by the New York State Insurance Department, and thus, is authorized to conduct business in this State; (2) defendant produced no documents related to its claim of unclean hands or estoppel, despite plaintiff's demand for same; and (3) plaintiff failed to produce discovery as demanded to support its alleged defense that the agreement upon which this action is based was induced by fraud.[1] Defendant failed to conduct plaintiff's deposition, and cannot raise any issues of fact as to plaintiff's motion. Therefore, judgment should be granted against the defendant for $78,518.00, with interest at the rate of 9% per annum from July 15, 2011, together with costs and disbursements of this action.

Defendant cross moves to dismiss the complaint, arguing that plaintiff lacks the capacity to sue. Plaintiff does not state in its complaint that it is a domestic or foreign corporation. Business Corporation Law ("BCL") 202 states that domestic corporations have the capacity to sue, and a certified statement from the Secretary of State indicates that plaintiff is not a domestic corporation plaintiff. Further BCL 1312 provides that a foreign corporation shall not maintain any action unless it is authorized to do business in this state. Notwithstanding that plaintiff does

[1] Although plaintiff's demand for documents reference a "Third" affirmative defense of fraudulent inducement and unclean hands, no such defenses appear defendant's Answer. As defendant only addresses the defense of lack of capacity to sue, which is the only defense in the Answer, the Court does not address the purported fraudulent inducement or unclean hands arguments asserted by plaintiff.

substantial business in this state, plaintiff has not filed for authority to do business as a foreign corporation in accordance with BCL 1304(a). And, the document plaintiff submits to show that the New York State Department of Insurance authorized it to conduct insurance business is not only in inadmissible form (since it is not certified), but is insufficient to grant plaintiff the capacity to sue. Finally, plaintiff failed to include a Certificate of Conformity in compliance with CPLR 2309(c) in connection with Williams' affidavit, which was notarized in Ohio. Therefore, such affidavit must be ignored.

In opposition, plaintiff argues that dismissal on the ground that it is a foreign corporation not authorized to do business in New York must be denied, as defendant failed to first show, through any evidence, that plaintiff is in fact "doing business" in New York. In the absence of evidence showing that a plaintiff is doing business in New York, the presumption is that plaintiff is in fact doing business in its state of incorporation and not in New York. In any event, the failure to obtain such authorization is not a jurisdictional defect, and the certificate may be filed at any time before judgment.

Discussion

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v. Shareholder Representative Services, LLC,* 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v. Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to

demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v. Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]; *Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986] and *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212[b]; *Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]; *Ostrov. v. Rozbruch*, 91 AD3d 147, 936 NYS2d 31 [1st Dept 2012]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v. Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

To state a cause of action of account stated, plaintiff must allege defendant's receipt and retention of the subject statement of account without proper objection within a reasonable time (*Goldmuntz v. Schneider*, 99 AD3d 544, 952 NYS2d 172 [1st Dept 2012]). Where an account is rendered showing a balance, if the party receiving the account fails to dispute its correctness or completeness, that party will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Shaw v. Silver,* 95 AD3d 416, 943 NYS2d 89 [1st Dept 2012]

citing Peterson v. IBJ Schroder Bank & Trust Co, 172 AD2d 165 [1st Dept 1991]).

CPLR 2309(c) provides:

> . . . . An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

Although Williams's affidavit lacked the authenticating certificate required by CPLR 2309(c) "courts are not rigid about this requirement. As long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given *nunc pro tunc* effect if necessary" (*Indemnity Ins. Corp., Risk Retention Group v. A 1 Entertainment LLC*, 107 AD3d 562, 967 NYS2d 364 [1st Dept 2013] *citing Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 AD3d 672, 673, 891 NYS2d 394 [1st Dept. 2009]). The absence of such a certificate is a mere irregularity, and not a fatal defect (*Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 AD3d at 673 *citing Smith v. Allstate Ins. Co.*, 38 AD3d 522, 832 NYS2d 587 [2007]).

Here, assuming that the Williams' affidavit is later authenticated by the proper certificate, such affidavit, coupled with the statement of charges, sufficiently establishes that on May 30, 2012, plaintiff mailed defendant by first class mail the statement indicating the amounts due and owing, and that defendant did not object to the bill or render payment. Defendant does not dispute these facts.

Further, plaintiff established its entitlement to dismissal of defendant's affirmative defense of lack of capacity to sue. As defendant points out, the records of the State of New York Department of State showing plaintiff's address as a location in Ohio, coupled with plaintiff's

failure to contest such document, demonstrate that plaintiff is not a domestic corporation, but a foreign corporation.

Thus, whether plaintiff, a foreign corporation, may maintain this action depends on the applicability of BCL 1312. BCL 1312 provides:

> (a) A foreign corporation doing business in this state without authority shall not maintain any action . . . 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 such, in order for a foreign corporation *doing business* in New York to maintain any action or special proceeding in this state, "it must obtain a certificate of authority[2] to do so and pay all state fees and taxes [Business Corporations Law § 1301 & § 1312(a)]. The failure of a foreign corporation doing business in New York to so register precludes that entity from 'maintaining' an action or special proceeding until such authority is obtained [BCL § 1312(a)]" (*Centurion Capital Corp. v. Guarino*, 35 Misc.3d 1219(A), 951 NYS2d 85 (Table) [New York City Civ. Ct. 2012] (emphasis added)). On the other hand, a foreign corporation *which does not do business* for purposes of BCL 1312 *need not be licensed or registered* by the Secretary of State in order to utilize this State's courts (*Bayonne Block Co., Inc. v. Porco*, 171 Misc.2d 684, 654 NYS2d 961 [New York City Civ. Ct. 1996]).

Defendant failed to meet its burden of demonstrating that plaintiff was conducting business in New York so as to deprive it of the right to maintain this action (*Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard*, 26 AD3d 298, 810 NYS2d 157 [1st Dept 2006]

---

[2] Under BCL 1304 (a), "A foreign corporation may apply for authority to do business in this state. An application, entitled "Application for authority of .... (name of corporation) under section 1304 of the Business Corporation Law", shall be signed and delivered to the department of state."

citing Airline Exch. v. Bag, 266 AD2d 414, 698 NYS2d 694 [1999]). In fact, the record contains no evidence that plaintiff was doing business for purposes of BCL 1312 *(Acno-Tec Ltd. v. Wall Street Suites, L.L.C.*, 24 AD3d 392, 806 NYS2d 551 [1st Dept 2005] ("defendant'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 [BCL 1312]")). BCL 1312 exists "to regulate foreign corporations 'doing business' within New York State and not to enable avoidance of a contractual obligation" *(Acno-Tec Ltd. v. Wall Street Suites, L.L.C.*, 24 AD3d at 392).

It is noted that there is a presumption that a corporation does business in its state of incorporation rather than New York, and thus, defendant has the burden of proving that the foreign corporation's activity in New York is systematic and regular *(Airtran New York, LLC v. Midwest Air Group, Inc.*, 46 AD3d 208, 844 NYS2d 233 [1st Dept 2007]). Here, defendant failed to overcome the presumption that plaintiff does business in its state of incorporation rather than New York so as to trigger the statutory barrier created by BCL 1312 (*Landmark Capital Investments, Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012] ("Although plaintiff often purchased debt held by New York debtors, this, as an activity carried on by an Ohio company with no offices or employees in New York, is not sufficient to constitute doing business under section 1312)).

Thus, BCL 1312 does not apply to bar plaintiff's entitlement to summary judgment.[3]

---

[3] Even assuming BCL 1312 applied, dismissal of the complaint would be unwarranted. The records of the State of New York Department of State, coupled with plaintiff's failure to contest such document, demonstrate that plaintiff did not file an application to do business in New York state. And, while plaintiff submits a license from the New York State Insurance Department to show that it is authorized to do business, plaintiff failed to cite any caselaw

Consequently, plaintiff's motion for summary judgment on its account stated claim is warranted. The cross-motion by defendant to dismiss the complaint on the ground that plaintiff lacks standing to sue is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment on its account stated claim against the defendant for $78,518.00, with interest at the rate of 9% per annum from July 15, 2011, together with costs and disbursements of this action is granted on the condition that plaintiff files an authenticating certificate pursuant to CPLR 2309(c) in connection with the affidavit of Israel Antoine Williams within 20 days of entry of this order; and it is further

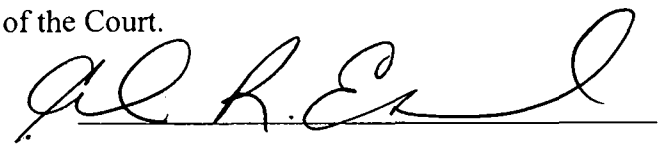
ORDERED that the cross-motion by defendant to dismiss the complaint on the ground that plaintiff lacks standing to sue is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 9, 2014



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

---

footnote 3, cont'd.

indicating that such license is equivalent to a certificate of authority. However, the failure to obtain a certificate of authority is not a fatal defect, and can be cured prior to resolution of the action (*Tri-Terminal Corp. v. CITC Industries, Inc.*, 78 AD2d 609, 432 [1st Dept 1980]; *Paper Mfrs. Co. v. Ris Paper Co., Inc.*, 86 Misc 2d 95, 381 NYS2d 959 [1976]).