MS Global Sourcing Co. v Cue Ball Prods. LLC
2018 NY Slip Op 31601(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 156366/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MS Global Sourcing Co.,

Plaintiff,

Index No.: 156366/2017

against

DECISION & ORDER

Cue Ball Productions LLC d/b/a M&M Productions

Defendants.

Anthony Cannataro, J.:

Defendant Cue Ball Productions LLC d/b/a M&M Productions (hereinafter referred to as "CBP") moves to dismiss plaintiff's, MS Global (hereinafter referred to as "MS"), breach of contract claim under CPLR 3211(a)(3) for lack of standing. Alternatively, defendant requests that this case be stayed until plaintiff gains standing in New York, with security posted to the court.

This claim arises from two unpaid invoices totaling $286,945.93. The invoices were for goods KJ Productions (hereinafter referred to as "KJ") sold to defendant, which at defendant's request, were delivered to a public warehouse facility in New Jersey. KJ assigned its claims on these invoices to MS.

In 2014, KJ, a Korean based company, entered into an agreement with defendant. KJ agreed to facilitate transactions between defendant and Southeast Asian garment factories. At the time of this agreement, KJ was not registered as a corporation in the State of New York and it did not have any employees, officers, or bank accounts in New York. Between January 2015 and August 2015, KJ rented office space in New York from CBP for $1,500 per month from which it took orders worth over one million dollars. Since August 2015, KJ has not had offices in New York.

Defendant argues that MS lacks standing to bring this action because its assignor, KJ, has not satisfied the requirements of Business Corporations Law (hereinafter referred to as "BCL") § 1312(a) to register with the Secretary of State in New York to operate as a foreign corporation. Defendant also argues that affidavits submitted by plaintiff are inadmissible because they do not comply with language or certification requirements of CPLR § 2309(c).

In opposition, MS argues that it was not required to register with the Secretary of State in New York as it was not doing business within the state. MS maintains instead, that it's assignor was engaged solely in conduct incidental to interstate commerce. As such, MS argues that denying it access to the New York courts amounts to unconstitutional interference with a foreign corporation's right to engage in interstate commerce.

On a motion to dismiss under CPLR 3211, the Court affords pleadings a "liberal construction" and accepts the facts as alleged in the complaint as true, according plaintiffs the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Courts function on such a motion is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Id.*).

In a case arising from claims assigned to another party, the assignee stands in the shoes of the assignor with "the same rights and interests with regard to [those] claim[s] to which the assignor had been entitled" (*Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 472 [1st Dep't 2017]). Here, KJ assigned its claims to MS, and as such stands in the shoes of KJ.

BCL § 1312(a) states 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 [the state of New York]" (*see Nat'l Cont'l Ins. v Execubus, Inc.*, 2014 NY Slip Op 31511 [Sup Ct NY Cty 2014]). The relevant inquiry when applying BCL § 1312(a) is whether the foreign corporation was "doing business" in the state of New York, at the time the agreement between both parties took place. Whether a company is "doing business" in New York "depends upon the particular facts of each case with inquiry

into the type of business activities being conducted" (*Von Arx, A. G. v Breitenstein*, 52 AD2d 1049, 1050 [4th Dep't 1976], *aff'd*, 41 N.Y.2d 958.) The party moving for dismissal under BCL § 1312(a), must show that the business activities within the state were so systematic and regular as to manifest continuity of activity (*Maro Leather Co. v Aerolineas Argentinas*, 161 Misc 2d 920, 923 [1st Dep't 1994]). A showing of "doing business" requires that that there be intrastate character of actions (*Posadas de Mexico, S.A. de C.V. v. Dukes*, 757 F Supp 297 [S.D.N.Y 1991]). Whereas, "where a corporation's activities within New York are merely incidental to its business in interstate and international commerce, BCL § 1312(a) is not applicable" (*Maro Leather Co. v Aerolineas Argentinas*, 161 Misc 2d at 923).

The shipment of goods into New York from a foreign country for further shipment within or without the state is considered incidental to interstate and international commerce (*Von Arx*, 52 AD2d at 1049). Having a bank account, occasionally using an office in the state, and engaging in three transactions in the state, does not support a finding that the business activity was so systematic and regular and essential to its corporate activities as to constitute doing business in New York (*Airline Exch., Inc. v. Bag*, 266 AD2d 414, 415 [2d Dep't 1999]).

Movant has not established that KJ was doing business within the meaning of BCL § 1312(a). CBP relies on the facts that KJ was soliciting business, rented an office space for a period of eight months, and took orders in excess of a million dollars. However, KJ had no bank accounts here nor did it have any employees in New York. Furthermore, the goods from both invoices at issue here were delivered outside of New York. Thus, the facts demonstrate that KJ engaged in conduct solely incidental to interstate commerce.

Since plaintiff's assignor was engaged in conduct solely incidental to interstate commerce, denial of access to New York courts would infringe on the federal government's power to regulate interstate commerce (*Airtran N.Y., LLC v. Midwest Air Group*, 46 AD3d 208, 312 [1st Dep't 2007]).

Given the holding above, defendant's request to have the action stayed with security posted to the court is academic. Courts require foreign corporations not licensed to do

business in the state to post security for costs in order to protect defendants against frivolous suits and ensure that they would be able to recover any costs from the foreign corporation (*Cie Noga, S. A. v. Heather Financial Corp.*, 130 Misc 2d 1086, 1088 [Sup Ct NY Cty 1986]). This relief would be available if, based on the facts as pled, there was a showing that KJ was "doing business" in the state. Since there is no such showing, there is no need to consider defendant's request to have the action stayed.

Finally, defendant's contention that the affidavits submitted in opposition should be disregarded pursuant to CPLR § 2309 is rejected. Under CPLR § 2309, an affidavit submitted to the court that is "taken without the state shall be treated as if taken within the state if it is accompanied by [a] certificate or certificates." Such certificates authenticate the authority of the one administering the oath which should accompany an out of state affidavit (*Sparaco v. Sparaco*, 309 AD2d 1029, 1031 [3d Dep't 2003] appeal denied 2 N.Y.3d 702 [2004]). Failure to comply with CPLR § 2309 is not a fatal defect, where the defendant does not dispute "the authority of the notary or the veracity of the statements in the affidavit, nor [demonstrating] any prejudice resulting from the defect" (*Id.* at 1031). While the affidavits do not comply with CPLR § 2309(c), CBP does not dispute any of the information provided in them. Accordingly, it is

ORDERED that defendants motion to dismiss is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 490, 111 Centre Street, on July 25, 2018 at 2:15PM.

Dated: 7/10/18

ENTER:

Anthony Cannataro, JSC

HON. ANTHONY CANNATARO J.S.C.