

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 3-16-09
SUBMITTED: 6-18-09
MOTION NO.: 003-MD

1198934 ONTARIO INC., d/b/a BASIC STRUCTURE
ENGINEERING GLAZING CONTRACTORS,

Plaintiff,

FOSTER & VANDENBURGH, LLP
Attorneys for Plaintiff
220 Roanoke Avenue, 2nd Floor
Riverhead, New York 11901

-against-

LAW OFFICES OF CHARLES A. SINGER,
ESQ., Attorney for Defendant Helmar
Construction, Inc.
11 Middle Neck Road, Suite 310
Great Neck, New York 11021

CALCEDO CONSTRUCTION CORP., HELMAR
CONSTRUCTION, INC., LIBERTY MUTUAL
INSURANCE COMPANY, SWING STAGING, INC., and
JOHN DOE, the name of said Defendant being fictitious, it
being intended to designate any and all lienors or holders
of interest in the funds being foreclosed, the true name of
such defendants being unknown to Plaintiff,

Defendants.

DUANE MORRIS LLP
Attorneys for Defendants Calcedo Construction
Corp. and Liberty Mutual Insurance Company
1540 Broadway
New York, New York 10036

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Upon the following papers numbered 1 to 12 read on this motion to dismiss; Notice of Motion and supporting papers 1-4; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5; 6-11; Replying Affidavits and supporting papers 12; it is,

ORDERED that this motion by the defendant Helmar Construction, Inc., for an order dismissing the complaint is denied.

The defendant Helmar Construction moves to dismiss the complaint on the ground, that the plaintiff, a Canadian corporation, lacks the capacity to sue (*see*, CPLR 3211[a][3]) since it is doing business in New York without authority.

Business Corporation Law § 1312 (a) is a bar to the maintenance of an action by a foreign corporation found to be doing business in New York without the required authorization (**S & T Bank v Spectrum Cabinet Sales**, 247 AD2d 373). In order for a court to find that a foreign

corporation is doing business in New York within the meaning of Business Corporation Law § 1312 (a), the corporation must be engaged in a regular and continuous course of conduct in the state (**Highfill, Inc. v Bruce and Iris, Inc.**, 50 AD3d 742, 743). The doing-business standard under Business Corporation Law § 1312 (a) requires a greater amount of local activity by a foreign corporation than the doing-business standard applicable to New York's long-arm statute (CPLR 302) relating to personal jurisdiction (**Maro Leather Co. v Aerolineas Argentinas**, 161 Misc 2d 920, 924; *see also*, **AirTran N.Y., LLC v Midwest Air Group, Inc.**, 46 AD3d 208, 214). The defendant bears the burden of proving that the corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction (**Highfill, Inc. v Bruce and Iris, Inc.**, *supra* at 743; **S & T Bank v Spectrum Cabinet Sales**, *supra* at 373). The defendant must show that the plaintiff conducted continuous activities in New York essential to its corporate business (**Id.** at 374). Absent sufficient evidence to establish that a plaintiff is doing business in this state, the presumption is that the plaintiff is doing business in its state of incorporation and not in New York (**Highfill, Inc. v Bruce and Iris, Inc.**, *supra* at 743-744).

The court finds that the defendants have failed to establish, *prima facie*, that the plaintiff was doing business in New York in 2004, when the parties entered into the contract being sued upon. The record reveals that the plaintiff's connection to and its business activities in New York were limited to taking orders from and delivering goods to buyers. The mere solicitation of sales in New York and the placement of orders do not constitute doing business in this state within the meaning of Business Corporation Law § 1312 (a) (*see*, **Maro Leather Co. v Aerolineas Argentinas**, *supra* at 924) even when coupled with other activities (*see*, 15 NY Jur 2d, Business Relationships § 1069; 20 Carmody-Waite 2d § 121:55). When, as here, the foreign corporation's contacts, no matter how extensive, are merely for the purpose of soliciting business and incidental to the sale and delivery of merchandise into the state, the foreign corporation is engaged in interstate commerce and is constitutionally beyond the reach of Business Corporation Law § 1312 (a) (*see*, **Bayonne Block Co. v Porco**, 171 Misc 2d 684, 687). The purpose of Business Corporation Law § 1312 (a) is to regulate foreign corporations that are doing business within the state and not to enable the avoidance of contractual obligations (*see*, **Acno-Tech Limited v Wall Street Suites, L.L.C.**, 24 AD3d 392, 393; **S & T Bank v Spectrum Cabinet Sales**, *supra* at 374).

In any event, the failure of the plaintiff to obtain a certificate pursuant to Business Corporation Law § 1312 may be cured prior to the resolution of the action, and its absence is not a jurisdictional bar to maintaining the action (*see*, **Maro Leather Co. v Aerolineas Argentinas**, *supra* at 924; *see also*, **Uribe v Merchants Bank of N.Y.**, 266 AD2d 21, 22). It merely brings about a stay of the action until authorization to do business is obtained (*see*, **Tars Uluslararası Dis Ticaret Turizm ve Sanayi Ltd. v Leonard**, 8 Misc 3d 1004[A], at *1, *affd as mod* 26 AD3d 298). Accordingly, the motion is denied.

DATED: July 30, 2009

J. S.C.