

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

PRESENT: Honorable Elizabeth H. Emerson

**MOTION DATE: 12-2-10; 1-6-11
SUBMITTED: 4-14-11
MOTION NO.: 001-MD
002-XMD**

**TOP APEX ENTERPRISES LTD, HONG
KONG,**

Plaintiffs,

**BRODY, O’CONNOR & O’CONNOR, ESQS.
Attorneys for Plaintiff
7 Bayview Avenue
Northport, New York 11768**

-against-

**PAUL E. CAYTON and INNOVATIVE
BRANDS, INC.,**

**COOPERMAN LESTER MILLER LLP
Attorneys for Defendants
1129 Northern Boulevard
Manhasset, New York 11030**

Defendants.

X

Upon the following papers numbered 1-17 read on this motion for order of attachment and cross-motion to dismiss ; Notice of Motion and supporting papers 1-9 ; Notice of Cross Motion and supporting papers 10-14 ; Answering Affidavits and supporting papers 15-16 ; Replying Affidavits and supporting papers 17 ; it is,

ORDERED that the motion by the plaintiff for an order of attachment is denied; and it is further

ORDERED that the temporary restraining order in the order to show cause dated November 18, 2010, is hereby vacated; and it is further

ORDERED that the cross motion by the defendants for an order dismissing the complaint is denied.

Prejudgment attachment is a provisional remedy to secure a debt by preliminary levy upon the property of the debtor in order to conserve that property for eventual execution. Because attachment is a harsh remedy, the statute must be strictly construed in favor of those against whom it may be applied. The granting of prejudgment attachment is discretionary. Even

when the statutory requisites are met, it may be denied (*see, Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285, 300-301 [and cases cited therein])

The plaintiff seeks an order of attachment under CPLR 6201(3). Under this provision, the plaintiff must demonstrate (1) that the defendants have assigned disposed of, encumbered, or secreted its property, removed it from the state, or are about to do any of these acts and (2) that the defendants have acted or will act with the intent to defraud the plaintiff's creditors or to frustrate the enforcement of a judgment that might be rendered in the plaintiff's favor (*see, CPLR 6201[3]*). Fraud is not lightly inferred, and the moving papers must contain evidentiary facts, as opposed to conclusions, proving the fraud. Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient. It must appear that such fraudulent intent really exists in the defendant's mind. The mere removal, assignment, or other disposition of property is not grounds for an order of attachment (**Id.** at 301-302 [and cases cited therein]).

Here, the plaintiff alleges that the defendants have diverted the plaintiff's accounts receivables and other monies into an account at Capital One Bank, that the defendants have refused the plaintiff's demands for an accounting and for return of the funds, and that the defendants have indicated that they intend to hold the funds as leverage until the plaintiff agrees not to compete with the defendants. The court finds that these allegations, without evidentiary facts indicating a fraudulent concealment of assets, are insufficient to obtain a prejudgment attachment (**Id.** at 302). Accordingly, the motion is denied.

The defendants cross move to dismiss the complaint on the grounds (1) that the plaintiff, a Hong Kong corporation, lacks the capacity to sue (*see, CPLR 3211[a] [3]*) since it is doing business in New York without authority, (2) that the complaint fails to state a cause of action (*see, CPLR 3212 [a] [7]*), and (3) that they have a defense founded upon documentary evidence (*see, CPLR 3211 [a] [1]*).

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 defendants bear the burden of proving that the plaintiff corporation's business activities in New York are 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 defendants 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 is doing business in New York. The record reveals that the plaintiff's connection to and its business activities in New York are limited to taking orders from and delivering goods to buyers. The solicitation of sales in New York or the placement of orders by an agent of the foreign corporation do not constitute doing business in this state within the meaning of Business Corporation Law § 1312 (a) even when coupled with other activities (*see, Maro Leather Co. v Aerolineas Argentinas*, *supra* at 924; 15 NY Jur 2d, Business Relationships § 1097; 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 Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v Leonard*, 8 Misc 3d 1004[A], at *1, *affd as mod* 26 AD3d 298).

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see, Leon v Martinez*, 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see, Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88). Applying these principles to the case at bar, the court finds that the plaintiff has set forth sufficient factual allegations to survive dismissal of its claims and that those claims are not defeated as a matter of law by the documentary evidence. Accordingly, the cross motion is denied.