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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
CIVIL TERM IAS PART 3

C.B.I. DRYWALL CORP., X BY: Justice John A. Milano
: :
: Index No. 12597/99
Plaintiff, : :
: Motion Date: July 11, 2000
- against - : :
: Motion Cal. No. 8
ANTON AIRFOOD, INC., : :
: :
Defendant. : :
X

Plaintiff C.B.I. Drywall Corp. ("C.B.I.") has moved for summary judgment, inter alia, dismissing the counterclaims asserted by defendant Anton Airfood, Inc. ("Anton").

C.B.I. entered into a contract with Anton whereby the former obligated itself to furnish work, labor, and materials for projects at JFK International Airport, Queens, New York. C.B.I. subsequently brought this action, alleging that it discharged its obligations under the contract, but Anton failed to pay \$56,436. Anton answered the complaint and counterclaimed, alleging that C.B.I. breached the contract. Anton is a foreign corporation not authorized to do business in New York.

That branch of the motion which is for summary judgment dismissing the counterclaims asserted by defendant Anton is denied. Business corporation Law § 1312 provides in relevant part: "(a) 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. * * *. (b) The failure of a foreign corporation to obtain authority to do business in this state shall not * * * prevent the foreign corporation from defending any action or special proceeding in this state." (See, United Arab Shipping Co. v Al-Hashim, 176 AD2d 569.) Although Anton may not be authorized to do business in New York, nevertheless, it may still assert counterclaims which relate to the causes of action asserted against it. (See, James Howden & Co. v American Condenser and Engineering Corp., 231 NY 627; Tri Terminal Corp. v CITC Industries, Inc., 100 Misc 2d 477; Williams Erectors of Suffolk County v Mulach Steel Corp., 684 F Supp 357.) The statute permits an unauthorized foreign corporation to defend an action in this state, and the assertion of a counterclaim is considered to be within the scope of defending an action. (See, Williams Erectors of Suffolk County v Mulach Steel Corp., supra.)

That branch of the motion which is for summary judgment dismissing the fourth affirmative defense asserted by defendant Anton is granted. Defendant Anton alleges in its fourth affirmative defense that the plaintiff failed to join a necessary party, Merchandising Construction and Management, Inc. ("MCM"), which, according to defendant Anton, actually contracted with the plaintiff. However, CPLR 1001(a) defines necessary parties as

those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." (See, Doner v Comptroller of the State of New York, 262 AD2d 750.) Whatever may be the merits of the plaintiff's causes of action against defendant Anton, the dispute between those parties may be completely adjudicated without prejudice to MCM.

Short form order signed herewith.

Dated: September 12, 2000

Justice John A. Milano