SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich Justice PART 54

0602084/2001

INTESEC GROUP LLC
vs
MADAH-COM, INC.

SEQ 2

SUMMARY JUDGMENT

INDEX NO. 602084/01

MOTION DATE 5/19/03

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

SCANNED AUG 07 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/4/03

SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

INTESEC GROUP LLC,

Plaintiff,

Index No.: 602084/01

-against-

DECISION AND ORDER

MADAH-COM, INC.

Defendant.

..... X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for breach of contract. Plaintiff is a New Jersey Limited Liability Company providing consulting services to companies which produce defense and security related technology products. Plaintiff filed a complaint dated April 17, 2001 alleging that defendant, a New York corporation, breached a contract dated June 1, 2000 whereunder plaintiff provided consulting services to defendant. The complaint alleged that defendant failed to pay $84,093.87 for services rendered and owed commissions under the contract in excess of $250,000.00.

Motion for Summary Judgment

Defendant now moves for summary judgment dismissing plaintiff's action on the ground that plaintiff is a foreign limited liability company doing business in New York without authorization under Limited Liability Company Law §§ 802 and 808 and, therefore, is not entitled to maintain an action in New York. Defendant submits its attorney's affirmation, a copy of the contract, deposition testimony of plaintiff by its founder John Kaufman and other documentary

evidence. Plaintiff does not oppose the motion.

Facts

Plaintiff and Defendant entered into an "Independent Contractor Agreement" dated June 1, 2000. See Affirmation of R. D'Emilia, Exhibit **A.** The agreement provided that plaintiff would be engaged to provide "marketing consulting services" for defendant from June 1, 2000 to May 31, 2002. Id. at ¶ 1. The consulting services were to be provided by John Kaufman (a managing member of plaintiff). Id. Mr. Kaufman would help defendant market its products to potential purchasers and provide support in "contract negotiation," "bid development'' and "contract management." Id. The contract provided that Kaufman would "render services at the InteSec Group LLC facilities, on the road and [at] the Company's New York offices, but [would], upon request, provide the services at other Company offices or such other places as reasonably requested by Company...." Id. at ¶ 3. The agreement is "governed by and construed in accordance with the laws of New York." Id. at ¶ 11.

At his deposition on March 20, 2003, Kaufman testified as follows. Plaintiff generally operated as a consultant matching up technology companies with potential purchasers of their products. EBT of J. Kaufman, p. 172. Plaintiff's primary assets in this business were Kaufman's "rolodex" and his reputation as an "honest broker." Id. Prior to the June 1, 2000 contract, plaintiff had one other agreement to provide services to defendant. Id. at 60. During the term of the June 1, 2000 contract, meetings were "rarely" held at defendant's New York offices and "no services were performed [there]." Id. at 52. Asked to describe the work under the contract, Kaufman replied that he "set up meetings, sat at meetings, went to meetings, helped close business, established **GSA** contract, designed it, wrote, got it." Id. at 154. Kaufman worked four

to eight hours per day during the contract term. Id. at 59. He generally phoned defendant once a day during that time. Id. at 57. At the same time, Kaufman was involved with several other projects, including one in Korea and one in Italy. Id. at 164.

Kaufman also worked for a approximately one year with Stratasec, a systems integrator, at the World Trade Center in New York City in 1997 or 1998. Id. at 66. His work with Stratasec was in connection with InteSec Inc., the predecessor in interest to plaintiff. Id. at 68. At the time of Kaufman's deposition, plaintiff had three clients: Electric Fuel, a New York battery company which marketed their products to the **U.S.** military; Xerburt, a Virginia company; and the U.S. Army. Id. at 161.

Defendant searched for "Intesec" in Lexis-Nexis under "NY Business and Corporation Information." The printout of the search results indicates: "no documents found." See D'Emilia Aff., **Ex.** D.

Conclusions of Law

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. Zuckerman v. City of N.Y., 49 N.Y.2d 557 (1980). Defendant argues that summary judgment should be granted because plaintiff was doing business in New York without authorization under Limited Liability Company Law §§ 802 and 808. The Court disagrees.

Under LLCL § 808, "[a] foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding... ." In order to receive a certificate of authority, a foreign

limited liability company doing business in New York must submit to the department of state a "certificate of existence" and an "application for authority as a foreign limited liability company..." LLCL § 802(a). 'Within one hundred twenty days after the filing of the application for authority with the department of state, a copy of the same or a notice containing the substance thereof shall be published once in each week for six successive weeks, in two newspapers....' LLCL § 802(b).

The New York Limited Liability Company Law does not define "doing business" under LLCL §§ 808 or 802. The LLCL "definitions" section defines "business" as "every trade, occupation, profession or commercial activity." See LLCL § 102(e). LLCL § 803 provides a nonexclusive list of activities which, if undertaken by a foreign limited liability company, "shall not be considered to be doing business in this state...." Those activities are: 1) "maintaining or defending any action or proceeding;" **2)** "holding meetings of its members or managers;" **3)** "maintaining bank accounts;" and **4)** "maintaining offices or agencies only for the transfer, exchange and registration of its membership interests or appointing and maintaining depositaries with relation to its membership interests." Id.

What constitutes "doing business" under LLCL § 808 appears to be a matter of first impression. Defendant cites no case construing that section, and the Court is aware of none. The practice commentaries to the LLCL suggest, however, that "[c]ases under the BCL which explain the parameters of doing business should be useful in analyzing the presence of an unauthorized foreign LLC for jurisdictional purposes." See Rich, Practice Commentaries, McKinney's Cons Laws of ***NY***, Book 32A, at 25. Applying the same logic, the Court reasons that cases under the BCL defining "doing business" should help define that term under the LLCL.

New York BCL § 1312 provides 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 this state...." Construing BCL § 1312, the Second Department has held that:

> There is no precise measure of the nature or extent of activities necessary for a finding that a foreign corporation is "doing business" in this State. Determination of this question must be approached on a case-by-case basis with inquiry made into the type of business being conducted. The party relying upon this statutory barrier 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. In this regard, there is a presumption that a plaintiff does business in its State of incorporation rather than in New York.

See Alicanto, S. A. v. Woolverton, 129 A.D.2d 601, 602 (2nd Dept. 1987)(citations omitted). Accord Cadle Co. II, Inc. v. Klar, 278 A.D.2d 40 (1st Dept. 2000); Storwal Int'l, Inc. v. Thom Rock Realty Co., L.P., 784 F. Supp. 1141 (S.D.N.Y. 1992)(holding that "doing business" standard under BCL § 1312 is stricter than "doing business" standard under New York long-arm statute).

Applying Alicanto, supra, defendant fails to make out a prima facie case that plaintiff was "doing business" in New York. The record demonstrates no special relationship between plaintiffs "type of business" and the State of New York. Plaintiffs offices were in New Jersey. Kaufman acted as a traveling consultant for plaintiff, visiting clients outside New Jersey, *some* of which happened to be in New York. Plaintiff's primary assets were Kaufman's reputation and contact list, neither of which had any particular connection with New York. Nothing about plaintiffs business, other than the address of some of its clients, had anything in particular to do with New York.

Nor does the record show that plaintiffs contacts with New York were "so systematic and regular as to manifest continuity of activity in the jurisdiction." Defendant points to plaintiff's work under the June 2000 contract, and its work with Stratasec. The record suggests that neither of these were "systematic" or "regular" contacts with New York. The June, 2000 agreement indicates that the work was to be performed in a variety of locations, both in and out of New York. Section 3 of the agreement describes plaintiffs "place of work" as: plaintiffs offices in New Jersey, defendant's New York offices, "on the road," and "other Company offices." Mr. Kaufman testified that the work under the contract was never performed at defendant's New York offices, and meetings were "rarely" conducted there. As to plaintiffs work for Stratasec, Kaufman testified that the work occurred prior to plaintiffs existence and constituted only a portion of his work at that time.

In light of the foregoing, defendant fails to rebut the presumption, set forth in Alicanto, that plaintiff was "doing business" where it was organized, i.e., in New Jersey. Defendant offers no evidence of plaintiffs contact with New York other than his work under the June 1,2000 contract and his work with Stratasec. The record suggests that these were no more than casual connections with New York, occasioned only by the fact that the clients were New York entities. Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Date: August 4, 2003
New York, New York

SHIRLEY WERNER KORNREICH