

Winchester Group, Ltd. v Occunomix Intl., LLC

2005 NY Slip Op 30615(U)

April 21, 2005

Supreme Court, New York County

Docket Number: 112655/04

Judge: Shirley Werner Kornreich

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

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THE WINCHESTER GROUP, LTD., a/s/i, NORMAN
BROADBENT INTERNATIONAL, INC. & CHARLES
CHALK,

DECISION & ORDER

Plaintiffs,

- against -

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OCCUNOMIX INTERNATIONAL, LLC & GARDNER
WEBSTER CAPITAL PARTNERS,

Defendants.

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KORNREICH, J.:

This is an action seeking payment of a finder's fee. Defendants now move to dismiss Charles Chalk as a plaintiff pursuant to CPLR §3211(a)(1), (3) and (7); to dismiss the action as against Gardner Webster Capital Partners ("Gardner") pursuant to CPLR §3211(a)(1) and (7); to dismiss the Third Cause of Action pursuant to CPLR §3211(a)(7); and to dismiss the entire action pursuant to BCL §1312.

Facts

1. Pleadings

The complaint alleges that The Winchester Group, LTD ("Winchester") is a Georgia corporation and the successor in interest to Norman Broadbent International, Inc. ("NBI"). It alleges that Charles Chalk is the CEO and majority owner of Winchester and was the acting CEO of the Atlanta, Georgia office of NBI at the time of the subject action. It further alleges that Douglas Rose is a principal manager and member of OccuNomix International LLC ("OccuNomix") and a partner of Gardner Webster Capital Partners ("Gardner Webster"). The complaint then alleges that the parties negotiated and entered into a written agreement

("Agreement") and that "the intent" of the Agreement was for the "plaintiffs" to search for a CEO for OccuNomix and that "Rose, as managing member of [OccuNomix], and his partners at [Gardner Webster] accepted and agreed to the Agreement."

The written, one-page Agreement, annexed to the complaint, was signed by Charles Chalk as Chief Executive of NBI, and by Douglas S. Rose for OccuNomix. The Agreement provided that NBI would work on an exclusive basis to find a CEO for OccuNomix. Provision was made for a non-contingent fee of \$66,667 to be paid in three payments and for a contingency fee of one-third the compensation of the CEO and thirty per cent of the first year's cash payment if another employee was found for OccuNomix. The complaint alleges that extensive work was done to find the CEO, but only the initial payment of the non-contingent fee was paid. Four causes of action, thereafter, are alleged: 1) breach of contract as against OccuNomix and Gardner Webster for non-payment of the portion of the non-contingent payment not paid; 2) breach of the implied covenant of good faith as against OccuNomix and Gardner Webster for the same amount; 3) breach of contract and breach of the implied covenant of good faith as against OccuNomix and Gardner Webster, for non-payment of the contingency fees for a CEO candidate and for a candidate for a second position; 4) an account stated as against OccuNomix.

2. Motion

Defendants contend that Mr. Chalk has no standing to bring this action and that no cause of action exists as against Gardner Webster. In addition, they argue that the action must be dismissed since Winchester is not authorized to do business in New York and it, therefore, is foreclosed by BCL §1312 from bringing suit in the New York Courts. Finally, it argues that the third cause of action alleged, improperly combines two causes of action and is repetitive of the

first two causes of action. Plaintiffs oppose the motion.

Conclusions of Law

1. Standing

The Court agrees with defendants. There is no dispute but that this action is based upon the written contract submitted to the Court. The contract clearly notes that it sets forth the terms and conditions of an agreement between NBI and OccuNomix and is signed by Mr. Chalk as the chief executive of NBI and Mr. Rose, the managing member of OccuNomix, for OccuNomix. Mr. Chalk and Gardner Webster are not parties to this writing. Consequently, Mr. Chalk cannot bring suit upon the Agreement, and Gardner Webster cannot be held liable for it.

2. Third Cause of Action

The Court denies defendants' motion to dismiss the third cause of action. This cause of action, although it may have been better worded, is an action based upon breach of the Agreement and seeks damages different from the three other causes of action. It states facts sufficient to give notice of the claim against OccuNomix and sufficiently sets forth the material elements of the claim of breach of contract. CPLR §3013. Defendants, if they wish, may seek further clarification of the claim by means of a Bill of Particulars.

3. BCL §1312

BCL §1312 bars a foreign corporation doing business in New York without authorization, from bringing suit in the courts of this State. The statute is meant to regulate such corporations and to protect against the avoidance of contractual obligations. *Airline Exch., Inc. v. Bag*, 266 A.D.2d 414, 415 (2d Dept. 1999). Doing business within the purview of BCL §1312, however, depends upon the type of business activities in which the company is engaged. *Von Arx, A.G. v.*

Breitenstein, 52 A.D.2d 1049, 1050 (4th Dept. 1976), *aff'd*, 41 n.Y.2d 958 (1977). The statute's bar to litigation will come into play only when a foreign corporation is "engaged in intrastate activity that is permanent, continuous, and regular" [*A.I. International Corp. Holdings, Inc. v. Surgicare, Inc.*, 2003 U.S. Dist. LEXIS 20561 (S.D.N.Y.)]; the business activities in New York must be so systematic as to manifest continuity of activity here and not merely casual or incidental to the company's business in interstate and international commerce. *Id.*; *Nick v. Greenfield*, 299 A.D.2d 172, 173 (1st Dept. 2002); *S&T Bk. v. Spectrum Cabinet Sales, Inc.*, 247 A.D.2d 373 (2d Dept. 1998); *Von Arx, A.G. v. Breitenstein, supra*.

BCL §1312 may be raised in a motion to dismiss or as an affirmative defense. *FBB Asset Managers, Inc. v. Freund*, 2 A.D.2d 573, 574 (2d Dept. 2003). When this is done, the defendant bears the burden of demonstrating that the foreign corporation's activities in New York are regular and systematic. *Nick v. Greenfield, supra*; *S&T Bk. v. Spectrum Cabinet Sales, Inc., supra*; *Von Arx, A.G. v. Breitenstein, supra*; *A.I. International Corp. Holdings, Inc. v. Surgicare, Inc., supra*. Absent such proof, a presumption exists that the corporation is conducting business in the state in which it was incorporated. *Id.* Finally, even where BCL §1312 is violated, the appropriate remedy is a conditional dismissal or a stay of the proceeding pending cure of the violation. *Tri-Terminal Corp. v. CITC Indus., Inc.*, 78 A.D.2d 609 (1st Dept. 1980); *A.I. International Corp. Holdings, Inc. v. Surgicare, Inc., supra*. Here, defendants have not presented sufficient proof to show that NBI or Winchester are doing business in New York within the meaning of BCL §1312.

Accordingly, it is

ORDERED that Charles Chalk is dismissed as a plaintiff in this case and the Clerk shall

enter judgment accordingly; and it is further

ORDERED that the actions as against Gardner Webster Capital Partners are dismissed, the remainder of the actions are severed and shall continue and the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendants' motion to dismiss the third cause of action is denied; and it is further

ORDERED that defendants' motion to dismiss the action pursuant to BCL §1312 is denied.

Dated: April 21, 2005

ENTER:



SHIRLEY WERNER KORNEICH J.S.C.

FILED
APR 25 2005
NEW YORK
COUNTY CLERK'S OFFICE