[* 1]

INTERIM ORDER

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

PRESENT: Rosalyn Richter PART 24

Index Number : 601047/2005
CN VENTURE, L.L.C.
VS
KLEVER KONCEPTS USA, INC.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
FEB 15 2006
COUNTY CLERK'S OFFICE
NEW YORK

See Annexed decision

Trial on this motion scheduled for Part 24, 60 Centre St, rm 418 2/27/06, 10 AM

Dated: 2/6/06

R. Richter
HON. ROSALYN RICHTER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Interim Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

----------X

CN VENTURE, L.L.C.,

Plaintiff,

-against-

Decision & Order
Index No. 601047/05

KLEVER KONCEPTS USA, INC. and RALPH LAMACCHIA,

Defendants.

----------X

RICHTER, J.:

This is a dispute between a haircare products vendor and its agent over the amount of the agent's sales commissions taken on a particular product. Plaintiff CN Venture, L.L.C. moves for summary judgment on its causes of action for breach of contract, misappropriation/conversion, and a declaratory judgment. Defendant Klever Koncepts USA, Inc. (Klever) cross-moves for summary judgment dismissing the complaint, *inter alia*, on the ground that plaintiff, as a foreign limited liability company, is doing business in New York while not authorized to do so. Defendant Ralph Lamacchia, Klever's president, joins in the cross motion.

Section 808 (a) of the Limited Liability Company Law (LLCL) provides as follows:

> 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 any court of this state unless and until such limited liability company shall have received a certificate of authority in this state and shall have filed proof of publication pursuant to section eight hundred two of this article.

Klever bases its argument on the fact that the complaint alleges that plaintiff is a limited liability company formed under the laws of Florida and has its principal place of business in the County of New York. Plaintiff contends that this was, in essence, a mistake, and that it is not doing business

in New York.

The inquiry before the court is whether plaintiff's activities within New York are sufficient to constitute "doing business" under LLCL § 808. While the statute does not specifically define what activities are doing business, it does provide a nonexclusive list of activities that do not constitute doing business in New York. These activities are the following: (1) maintaining or defending any action or proceeding; (2) holding meetings of its members or managers; (3) maintaining bank accounts; or (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 (LLCL § 803 [a]).

There appears to be no reported case interpreting LLCL § 808. Section 1312 of the Business Corporation Law (BCL), the analogous door-closing statute for foreign corporations, is instructive (*see* Rich, 2005 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 32A, Limited Liability Company Law, 2006 Supp Pamph, at 30). It 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" (BCL § 1312 [a]). BCL § 1312 is:

> a revenue measure, designed to place foreign corporations on the same footing as domestic ones. Its purpose is therefore fulfilled when the foreign corporation complies and the state gets the money. Thus, if the plaintiff corporation is in breach of the statute when it begins an action but duly (and retroactively) complies while the action is pending, the action is validated ab initio and may proceed unhindered. But nothing less than full compliance will suffice. . . .

(Siegel, NY Prac § 30 [4th ed], citing *Oxford Paper Co. v S.M. Liquidation Co., Inc.*, 45 Misc 2d 612 [Sup Ct, New York County 1965]). A defendant relying upon BCL § 1312 bears the burden of

proving that the foreign corporate plaintiff's business activities were "so systematic and regular as to manifest continuity of activity in the jurisdiction" (*Alicanto, S.A. v Woolverton*, 129 AD2d 601, 602 [2d Dept 1987] [internal quotation marks omitted]; *see also CadleRock Joint Venture, L.P. v Klar*, 278 AD2d 39 [1st Dept 2000] [construing like provision of limited partnership law]). Where a foreign corporation's activities within New York are "merely incidental to its business in interstate and international commerce," section 1312 is not applicable (*Maro Leather Co. v Aerolineas Argentinas*, 161 Misc 2d 920, 924 [Sup Ct, App Term, 1st Dept 1994], *appeal dismissed* 85 NY2d 837, *cert denied* 514 US 1108 [1995]); *see also Storwal Intl., Inc. v Thom Rock Realty Co., L.P.*, 784 F Supp 1141, 1144 [SD NY 1992]).

The "doing business" standard under BCL § 1312 requires a greater amount of local activity than New York's long-arm statute for personal jurisdiction (*Maro Leather Co.*, 161 Misc 2d at 924). In this regard, there is a presumption that a plaintiff does business in its state of incorporation and not in New York (*Alicanto, S.A.*, 129 AD2d at 602). Noncompliance with the statute is not a jurisdictional impediment; rather, it affects the plaintiff's legal capacity to maintain the action (*see E&L, Inc. v Liberty Mut. Fire Ins. Co.*, 227 AD2d 303, 304 [1st Dept 1996]; *Tri-Terminal Corp. v CITC Indus., Inc.*, 78 AD2d 609 [1st Dept 1980]; *Hot Roll Mfg. Co. v Cerone Equip. Co.*, 38 AD2d 339, 341 [3d Dept 1972]).

In opposition to the cross motion, plaintiff concedes that it is a foreign limited liability company that is not authorized to do business in New York. It argues, however, that it does not do business in New York within the meaning of the statute. Specifically, plaintiff's president, Peter Coppola, avers that plaintiff maintains no offices or telephone listings in this state, that it ships all of its hair care products from Florida to Pennsylvania, and that QVC, Inc. (a Delaware corporation

that promotes, markets, and sells products on televised shopping programs) then sells its products nationwide. An affirmation by plaintiff's attorney, Carol M. Luttati, states that the allegation in the complaint about its principal place of business was a "*pro forma* pleading allegation," which was meant to reflect that plaintiff has a mailing address care of her office in New York County. Plaintiff also provides an affidavit of a certified public accountant indicating that it is not subject to taxation in New York.

In reply, defendants submit documentary evidence showing that Carol Luttati may, in fact, be acting both as an executive and general counsel of the company. The sales representative agreement between plaintiff and Klever lists plaintiff's address as plaintiff's attorney's office. A related agreement among QVC, plaintiff, and Klever shows that plaintiff's principal place of business is care of Luttati's office in New York. In addition, a letter from Luttati directs that all correspondence between plaintiff and Klever was to be sent to her office. Further documents show that Luttati may have made business decisions on behalf of the company in New York. A March 2005 memo that Luttati sent to Klever instructed that QVC pricing must be approved in writing either by Peter Coppola, as president, or Luttati, as general counsel. The year before, it was Luttati that sent Klever termination and reinstatement notices, and in neither notice does she identify her role as plaintiff's counsel. Finally, one payment made by Klever to plaintiff was deposited in plaintiff's New York bank account.

Plaintiff makes a formal judicial admission in the complaint that its principal place of business is located in New York County (*see generally* Prince, Richardson on Evidence § 8-215 [Farrell 11th ed]). Such admissions are generally conclusive, unless modified or relieved in the discretion of the court (*id.*). Plaintiff also has not moved, pursuant to CPLR 3025 (b), to amend the

complaint. On the other hand, plaintiff submits that it has no significant activities in this state at all, essentially claiming that this allegation was a mistake. The court, therefore, declines to ascribe conclusive import to this allegation, and finds that there is an issue of fact as to whether plaintiff is doing business within this state under LLCL § 808 (*see Capital Funding Servs., Inc. v Focus Real Estate Mgt., Inc.*, 259 AD2d 510, 511 [2d Dept 1999]; *Construction Specialties, Inc. v Hartford Ins. Co.*, 97 AD2d 808 [2d Dept 1983]). Pursuant to CPLR 3212c, the Court directs an immediate trial of this issue, which is necessary for an expeditious disposition of the controversy. Indeed, although the defendant could prevail on other grounds, if the Court were to find that the plaintiff was entitled to summary judgment, the Court would still have to resolve the critical question of plaintiff's capacity to sue before fully deciding the instant motion.

The remainder of the summary judgment motion shall be held in abeyance pending the trial on this limited issue, which will be held before this Court on Feb. 27, at 10 am, unless the parties file a stipulation, to have a non-jury trial conduced before a Special Referee of this Court, and any such stipulation shall indicate whether the referee shall hear and report with recommendations on this issue, or shall hear and determine the issue. In the event that the parties are not agreeing to have this trial conducted before a referee but cannot appear on Feb. 27, they shall contact the Clerk of the Part to determine a date when the Court is available.

Dated: February 6, 2006

Justice Rosalyn Richter