

LCS Intl. B.V. v Bartone

2007 NY Slip Op 31210(U)

May 4, 2007

Supreme Court, Queens County

Docket Number: 0027067/2006

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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LCS INTERNATIONAL B.V. D/B/A No. 27067/06
LE COQ SPORTIF,

Plaintiff, Motion
-against- Date February 20, 2007

PAUL BARTONE, DIAMOND Motion
CUSTOMHOUSE BROKERS, INC., Cal. No. 21
AND BTC LLC,

Defendants. Motion
Seq. No. 1

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Plaintiff commenced this action seeking to recover damages alleged to have been sustained due to fraud, breach of contract, conversion, account stated and declaratory relief.

Defendant Paul Bartone (Bartone) moves for an order dismissing the complaint upon the ground that plaintiff does not have legal capacity to sue.

Contentions of the Parties

Counsel for defendant Bartone asserts that plaintiff is a foreign corporation not authorized to do business in the State of New York and, therefore, lacks the capacity to bring this action. Plaintiff states in its verified complaint that it is a corporation organized under and pursuant to the laws of the Netherlands. It further states that plaintiff filed an application for authority to do business in the State of New York and is awaiting approval.

Plaintiff submits an affidavit by Thomas Viganotti wherein he states that he is the legal advisor for

plaintiff. However, the affidavit was made in France. No translation is given for that portion of the affidavit which appears to contain the notarization. Plaintiff also submits a memorandum of law which states that it is a Netherlands corporation with its main offices in Sausheim, France and is not currently doing business in New York. It does not need, therefore, to register as a condition of maintaining this action. As a precaution however, an application has been filed with the State of New York for authority to do business. However, it is asserted that the filing of said application, which is currently pending, does not mean that plaintiff is now doing business in New York. Plaintiff also argues that the motion is untimely.

Decision of the Court

The motion by defendant Bartone is denied.

Initially, the court notes that defendant Bartone's motion is timely. He was served pursuant to CPLR 308(4) by nail and mail. Such service is complete ten days after the filing of the affidavit of service with the Clerk of the Court. Such affidavit was filed on December 18, 2006. Defendant Bartone's motion was made on December 14, 2006 prior to the expiration of the time that he was required to raise the issue herein by motion or in the responsive pleading. CPLR 3211(a)(3) and (e).

BCL § 1312(a) provides in pertinent part 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 and it has paid to the state all fees and taxes imposed under the tax law or any related statute *** as well as penalties and interest charges related thereto, accrued against the corporation."

The burden of proof with respect to showing that a foreign corporation does business in the state lies with the party relying upon BCL § 1312. S&T Bank v. Spectrum Cabinet Sales, Inc., 247 AD2d 373. In support of his motion, defendant Bartone submits the pleadings and copies of two of the parties' agreements and correspondence.

The court finds that there is insufficient indicia of plaintiff's doing business in New York so that authority is not required under BCL § 1312(a) to maintain this action.

As noted by the court in S&T Bank v. Spectrum Cabinet Sales, Inc., at 374: "Contrary to the defendant's contention, its motion papers did not establish, prima facie, that International was doing business in New York at the time that the parties entered into the contract being sued upon (see, International Fuel and Iron Corp. v. Donner Steel Co., 242 NY 224 229-231, 151 NE 214). Although International shipped a large amount of its product into New York, it neither maintained an office, a telephone, or a sales representative in New York. Nor did it do any advertising in New York. Under these circumstances, 'there is no showing that plaintiff conducted continuous activities in [New York] essential to its corporate business' (Von Arx A.G. v. Breitenstein, 52 AD2d 1049, 1050, 384 NYS2d 895, affd. 41 NY2d 958, 394 NYS2d 876, 363 NE2d 582)."

As defendant Bartone has not sustained his burden, the motion must be denied. In any event, even if plaintiff was doing business in New York, fairness would require that plaintiff be afforded additional time to show its compliance with BCL § 1312(a). McIntosh Builders, Inc. v. Ball, 247 AD2d 103.

Dated: May 4, 2007

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HON. DAVID ELLIOT