

Tisa, Inc. v CP Ships (UK) Ltd.

2008 NY Slip Op 31275(U)

April 28, 2008

Supreme Court, New York County

Docket Number: 0115100/2006

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number: 115100/2006
TISA
vs.
CP SHIPS(UK)
SEQUENCE NUMBER: 001
DISMISS

INDEX NO. 115100/026
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

on this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits ... A-G
Answering Affidavits - Exhibits A-E
Replying Affidavits _____
Supplemental Aff. of Plaintiff ~~tech.~~ A-C
Cross-Motion: Yes No

PAPERS NUMBERED	
1	_____
2	_____
3	_____
4	_____

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

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 28, 2008

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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 1

-----X
TISA, INC.,

Index No. 115100/06

Plaintiff,

Decision & Order

-against-

CP SHIPS (UK) LIMITED, SHAHTAJ TEXTILE
LIMITED, HABIB BANK LIMITED,

Defendants.
-----X

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

MARTIN SHULMAN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

The defendants CP Ships (UK) Limited¹ and Shahtaj Textile Limited ("Shahtaj Textile") (collectively, "defendants") move, pursuant to CPLR 3211(a)(3) and Business Corporation Law ("BCL") §1312(a), for an order dismissing the action on the ground that the plaintiff Tisa, Inc. ("Tisa" or "plaintiff") is a foreign corporation that is not authorized to do business in the State of New York, and thus lacks the legal capacity to maintain this action. Alternatively, defendants move pursuant to CPLR §3126 for an order dismissing the complaint or precluding Tisa from offering any evidence or testimony at the time of trial for the failure to comply with discovery demands, or compelling Tisa to produce complete discovery responses.

Plaintiff purchased cotton fabric from the defendant Shahtaj Textile. This is an action seeking a refund of the contract price, alleging that as a result of the textiles being delivered prematurely, and incurring storage charges, the goods were sold as

¹ CP Ships (UK) Limited appeared in this action as Hapag-Lloyd, A.G. See answer at Exh. B to motion.

salvage pursuant to the contract of carriage in order to satisfy the carrier's lien. The defendants allege that plaintiff merely failed to pick up the cotton.

In support of their motions, the defendants argue that Tisa lacks the legal capacity to commence and maintain this action, and that Tisa has failed to properly respond to discovery requests. In opposition to the motions, plaintiff argues that it is a Delaware corporation and that it is now in compliance with the provisions of BCL §1312(a). In reply, the defendants argue that Tisa cannot rely on an attorney's affirmation.

Contrary to the defendants' assertion, the determination of a CPLR 3211(a) motion must be on the basis of documentation and not on affidavits. BCL §1312 provides:

Actions or special proceedings by unauthorized foreign corporations

(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. This prohibition shall apply to any successor in interest of such foreign corporation.

(b) The failure of a foreign corporation to obtain authority to do business in this state shall not impair the validity of any contract or act of the foreign corporation or the right of any other party to the contract to maintain any action or special proceeding thereon, and shall not prevent the foreign corporation from defending any action or special proceeding in this state.

The statute provides that a foreign corporation doing business in New York without authority is barred from maintaining any action or special proceeding in New York "unless and until" it has been authorized to do business and has paid all taxes and

penalties for the period during which it did business without authority. The disability is cured when the foreign corporation becomes authorized to do business in the state and pays the requisite franchise taxes. A foreign corporation's compliance with the requirements of BCL §1312(a) regarding authorization to do business in the state is permissible even after its commencement of an action in the state (Beer v. F.W. Myers & Co., Inc., 159 A.D.2d 943, 552 N.Y.S.2d 796 [4th Dept., 1990]). A determination by the New York State Department of Taxation and Finance allowing a foreign company to function in New York is prima facie evidence that there has been compliance with BCL §1312(a) (McIntosh Builders, Inc. v. Ball, 247 A.D.2d 103, 678 N.Y.S.2d 810 [3rd Dept., 1998]).

Here, there is proof in Tisa's opposition papers that this authorization was obtained. Therefore, the motion to dismiss on the ground that plaintiff is a foreign corporation that is not authorized to do business in the State of New York and thus, lacks the legal capacity to maintain this action, must be denied.

Turning to the discovery motion, the court agrees that Tisa's responses to defendants' demands should be supplemented as requested in the motions. Accordingly, it is

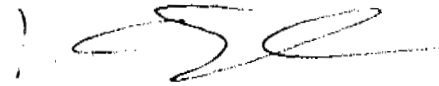
ORDERED that the portions of defendants' motions seeking dismissal of the complaint are denied; and it is further

ORDERED that the portions of defendants' motions to preclude and/or compel are granted to the extent that plaintiff is directed to serve supplemental responses to defendants' demands for interrogatories and production of documents within 20 days of the date of this order.

Counsel for the parties are directed to appear for a status conference on May 20, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
April 28, 2008



HON. MARTIN SHULMAN, J.S.C.

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK