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

PRESENT: Cahn Justice PART 49

Atlantis

- v -

Insured

INDEX NO. 101106/07

MOTION DATE

MOTION SEQ. NO. 01

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 8/18/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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ATLANTIS CAPITAL MANAGEMENT, L.P.,

Plaintiff,

-against-

Index No.101106/07

INSURED DEVELOPMENT EQUITY ADVISORS, LLC,

Defendant.

----------X

CAHN, J.:

Plaintiff Atlantis Capital Management, L.P. (ACM) brings this action to recover amounts claimed to be due it on a promissory note.

Defendant Insured Development Equity Advisors, LLC (IDEA) moves to dismiss the complaint, CPLR 306-b, 327, and 3211 (a) (1), (7) and (8). ACM cross-moves for summary judgment on its sole contract cause of action, CPLR 3212.

BACKGROUND

It is alleged in the complaint that ACM is a limited partnership organized under Delaware law, with a principal place of business in New York. IDEA is a Colorado limited liability company located in Colorado.

The complaint alleges that, on April 7, 2005, ACM loaned $500,000.00 to IDEA, as evidenced by a promissory note (the Note) that was executed by S. Christopher Kontogiannis, the managing member of IDEA, and Roman Lyniuk, the managing member of the General Partner of ACM (see Schreck Aff., Exh. A). The Note allegedly was negotiated by Lyniuk from ACM's place of business in New York. Under the terms of the Note, IDEA agreed to make interest-only payments, at the rate of 5% compound per annum, on the 7th of each month. Interest payments

were received at ACM's bank in New York City.

Plaintiff alleges that IDEA breached the terms of the Note, by failing to make any interest payments after July 7, 2006. As of May 15, 2007, the date of the complaint, IDEA allegedly owed ACM a total of $20,850 in interest, plus $938.25 in late fees. Due to this material breach of the terms of the Note, ACM now demands payment in full of all sums due, including the full amount of the principal, in its sole cause of action for breach of contract.

IDEA moves to dismiss on the grounds that: ACM lacks standing/capacity to sue on the Note; the Court lacks personal jurisdiction over IDEA; New York is an inconvenient forum; and, plaintiff's service of the complaint was improper and untimely.

Initially, IDEA argues that ACM is not the proper party to bring this action, as it is not the signatory on the Note, and the complaint alleges no other basis on which ACM might be entitled to bring the action. In support of its contention, IDEA submits a copy of the Note, which recites that it was executed by Lyniuk as "Authorized Agent" of Atlantis Capital Group (ACG), an entity that is not a party to this action. Additionally, IDEA notes that the complaint fails to include any allegations with respect to ACG, or to allege any relationship between ACG and ACM; nor is there anything in the Note itself to indicate that ACM was intended to be a third-party beneficiary of the Note.

Even assuming that ACM and ACG are the same or related entities, defendant argues that the Court lacks personal jurisdiction over IDEA under CPLR 301, because IDEA has never engaged in any systematic course of business, and does not solicit business, in New York. IDEA argues that there is no personal jurisdiction under CPLR 302 (a) (1), because the Note, itself, recites that it was executed in Colorado and payable in New Jersey, and there is no evidence of

intent by IDEA to project itself into New York. According to the affidavit of Kontogiannis, IDEA's manager, while there were some telephone conversations and e-mail exchanges with Lyniuk prior to execution of the Note, these calls were generally made to Lyniuk's cell phone or to an office number at Lyniuk's residence in New Jersey, the only address that Lyniuk ever provided to defendant. Additionally, IDEA notes, under the terms of the Note, all payments were to be sent to an address in New Jersey. Kontogiannis avers that, while Lyniuk subsequently did request that all payments be wired directly to his bank, Lyniuk never specified an address for the bank, which Kontogiannis believed to be located in New Jersey.

IDEA argues that dismissal on the ground of forum non conveniens is warranted, as all parties to this matter, including plaintiff, reside outside of New York, and thus all witnesses and documents are located outside the state. IDEA notes that plaintiff has not identified or alleged any specific New York address for ACM in the complaint, and proffers evidence suggesting that Lyniuk worked primarily from his home in New Jersey.

IDEA further argues that dismissal is warranted as plaintiff originally filed the action as a motion for summary judgment in lieu of complaint on January 24, 2007, but then failed to serve the summons and notice of motion until after the return date, rendering it a nullity. IDEA contends that plaintiff then improperly converted its CPLR 3213 motion to the instant summons and complaint, which it filed on May 16, 2007, without first obtaining leave of the Court, and then failed to serve the new complaint until August 2007, more than 120 days after the purchase of the original index number.

In opposition, plaintiff argues that, although ACM was not a signatory on the Note, ACM's funds were used to fund the loan; thus, ACM is the real party in interest in the action.

Plaintiff also contends that ACM is the proper party to bring the action, as ACG is merely a name under which ACM does business. In support of this contention, plaintiff proffers the affidavit of Lyniuk, who avers that

> [t]here is no registered entity known as Atlantis Capital Group ("ACG"). ACG, the signatory to the promissory note (the "Note") at issue in this case, is simply a d/b/a for ACM and other related entities that I own and operate. ACM holds 100% of the interest presently held under the Note

(Lyniuk Aff., ¶ 3).

Plaintiff argues that the Court has obtained personal jurisdiction over IDEA, pursuant to CPLR 302 (a) (1), because the Note was the culmination of several months of negotiations with Kontogiannis, primarily over the phone and via e-mail, from Lyniuk's office space located at 2 Rector Street in New York City. Lyniuk further avers that, during the course of those negotiations, Kontogiannis made two or three trips to New York City for face-to-face meetings regarding the potential loan, which took place in Lyniuk's office or at another New York City location. In any event, plaintiff contends that the Court also has jurisdiction over IDEA pursuant to CPLR 301, as IDEA's marketing materials indicate that several members of its advisory committee had substantial contacts with New York, that IDEA had a relationship with a bank in New York, and that IDEA had certain legal work performed in New York, all of which evidences a continuous and systematic course of doing business in this state.

Plaintiff argues that dismissal on the ground of forum non conveniens is not warranted, as defendant has identified no non-party witnesses located outside New York. Plaintiff argues that defendant's service arguments are merely technical and also without merit.

ACM cross moves for summary judgment on its breach of contract cause of action,

arguing that there is no genuine issue of material fact as to IDEA's liability on the Note, and no dispute that IDEA breached its terms in failing to pay the interest due.

In its reply memorandum, IDEA argues that, plaintiff's cross motion for summary judgment must be denied, as issue has not yet been joined. Additionally, IDEA argues that, as plaintiff has now acknowledged that ACM was doing business in new York as an unregistered entity, dismissal of this action is required under General Business Law § 130 (9). As to Lyniuk's averments with respect to the issue of personal jurisdiction, IDEA proffers a reply affidavit from Kontogiannis, who states, inter alia, that there was no extended dialog or negotiation leading up to the execution of the Note, and that there was never any face-to-face meetings between the parties in New York prior to its execution.

DISCUSSION

Because ACM is a foreign limited partnership that maintains its principal place of business in New York, New York State's Partnership Law is applicable to this action. Under our Revised Limited Partnership Act (RLPA), which applies to all foreign limited partnerships, a limited partnership is required to use its real name, as set forth in its certificate of limited partnership, in its conduct of business, unless the limited partnership has complied with General Business Law (GBL) § 130 (see RLPA § 121-102 [b]).[1]

General Business Law § 130 provides, in pertinent part, that

> [n]o person shall hereafter (i) carry on or conduct or transact business

[1] GBL § 130 does not apply to a fictitious name filed by a foreign limited partnership in its application for authority to do business in this state (see RLPA § 121-902 [a] [1]). Additionally, the use of a divisional, departmental or trade name or designation, in conjunction with the real name of the limited partnership, is deemed to be use of the real name (GBL § 130 [1-a] [c]). There is, however, no indication that either of these circumstances applies here.

> in this state under any name or designation other than his or its real name . . . unless:
>
> * * *
>
> (b) Such person, if a corporation, limited partnership or limited liability company, shall file . . . in the office of the secretary of state a certificate setting forth the name or designation under which business is carried on or conducted or transacted, its corporate, limited partnership or limited liability company name, the location including number and street, if any, of its principal place of business in the state, the name of each county in which it does business or intends to do business, and the location including number and street, if any, of each place where it carries on or conducts or transacts business in this state.

(GBL § 130 [1] [b]). The purpose of the statute "is to protect the public, to afford the public information as to the identity of the persons conducting the business, [and] to prevent deception and confusion" (Cifone v Andros Broadway, Inc., 40 AD3d 549, 550 [1st Dept 2007], quoting Parks v Steinbrenner, 115 AD2d 395, 396-397 [1st Dept 1985]). To that end, the statute provides that,

> [a]ny person or persons carrying on, conducting or transacting business as aforesaid who fails to comply with the provisions of this section shall be prohibited from maintaining any action or proceeding in any court in this state on any contract, account or transaction made in a name other than its real name until the certificate required by this section has been executed and filed in accordance with the provisions set forth herein.

(GBL § 130 [9]).

Nevertheless, our courts have held that the failure to file the certificate is not jurisdictional, and thus can be cured at any time prior to entry of judgment (Cohen v OrthoNet New York IPA, Inc., 19 AD3d 261 [1st Dept 2005]). Thus, an action will generally be permitted to proceed pending proper certification where the failure appears inadvertent and/or there is no

showing of intent to defraud or sign in a different capacity (Cohen, 19 AD3d at 261; see also Graham Cook Assoc. v Mintz, 155 Misc 2d 273 [Civ Ct, NY County 1992]; but see Clove Road Deli, Inc. v C & V Italian Gourmet, Inc., 5 Misc 3d 137 [A] [App Term, 2d & 11th Jud Dists 2004]; Supreme Realty Assoc. Co. v Korovessis, 171 Misc 2d 996 [Civ Ct, Bronx County 1997]), or where the failure is unrelated to the purpose of the statute (see Cifone at 550).

It is clear from Lyniuk's affidavit, in which he states that there is no registered entity known as ACG, that ACM never filed a certificate of doing business under that assumed name, as required by GBL § 130. While such failure, alone, would not mandate dismissal of the action, here, there also remain questions as to ACM's exact status with respect to the Note and, thus, as to ACM's capacity/standing to maintain the action. As indicated above, the Note itself, which was executed solely by ACG, contains no reference to, or mention of, ACM. Nor does the complaint contain any allegation that ACG signed the Note on behalf of ACM, or that ACM was doing business as ACG when it signed the Note. Indeed, there is no mention or reference to ACG anywhere in the complaint, although it is the sole signatory on the Note. The affidavit submitted by Lyniuk is insufficient to remedy this deficiency, as Lyniuk avers only that ACG was a d/b/a for ACM and "other related entities" owned and operated by him, without specifically addressing the status of ACM and ACG with respect to the transaction at issue.

Given that ACM ultimately will be barred from maintaining this action until it files the certificate required by GBL § 130, and given that plaintiff's pleadings and evidentiary submissions otherwise fail to establish ACM's relationship to ACG and/or status with respect to the Note, IDEA's motion to dismiss the complaint is granted.

In light of this determination, the Court need not reach the merits of that portion of

IDEA's motion, which seeks dismissal on the ground of lack of personal jurisdiction. In any event, given the parties' conflicting accounts with regard to the circumstances surrounding the execution of the Note, as well as with IDEA's alleged contacts and dealings in New York, any determination of such issue would require an evidentiary hearing.

Accordingly, it is

ORDERED that the motion by defendant Insured Development Equity Advisors, LLC to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the cross motion by plaintiff Atlantis Capital Management, L.P. for summary judgment is denied, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 18, 2008

ENTER:

J.S.C.