SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

SCHWARZ SUPPLY SOURCE,

Plaintiff,

INDEX No. 016733/08

MOTION DATE: Nov. 5, 2008
Motion Sequence # 001

-against-

REDI BAG USA LLC,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... XX
Memorandum..... X
Reply Affirmation..... X

This motion, by defendant, for an order dismissing plaintiff's complaint, as follows:

(a) Pursuant to Business Corporation Law §1312(a), on the ground that plaintiff Schwarz Supply Source is a foreign corporation which is not authorized to do business in New York;

(b) Pursuant to CPLR 3211(a)4, because there exists a prior pending action in this Court, between the parties involving the same facts, issues and claims;

(c) Pursuant to CPLR 3211(a)1 and 7, on the ground that the plaintiff's causes of action for declaratory judgment and breach of contract are barred by documentary evidence and fall to state a cause of action;

(d) Together with such other, further and different relief as to the Court may seem just and proper,

is determined as hereinafter set forth.

Procedurally, the defendant herein commenced an action, entitled **Redi Bag USA LLC v Schwarz Supply Source and Bed Bath & Beyond, Inc.**, **Index no. 11066/2008** alleging, **inter alia**, a Breach of Contract against Schwarz Supply for failure to pay for bags manufactured "for and on behalf of Schwarz Supply"; a cause of action sounding in tortious interference with contract against Bed Bath & Beyond (which has been dismissed); a cause of action alleging a concerted effort of unfair business practice by those defendants. The plaintiff herein commenced the instant action for Breach of Contract, alleging that Redi Bag breached its obligation to ship quality, conforming plastic bags to this plaintiff for distribution to Bed Bath & Beyond and for a declaratory judgment of the precise legal requirements of the contract. The **Redi Bag** action was the first to be commenced.

The defendant Redi Bag asserts that because its action was the first to be commenced and because it is based on the same facts and issues, as well as the same parties, then dismissal is warranted on that basis. The defendant avers that because the instant complaint is predicated on the failure of Redi Bag to provide written notice of termination of the agreement and there is clear documentation of such notice of termination, then dismissal is also warranted on the grounds of documentary evidence and for failure to state a cause of action. The defendant also argues that pursuant to statutory law, this plaintiff, as a corporation that's not authorized to do business in this State and cannot prosecute an action in New York.

The plaintiff purports to set forth facts in an unsworn memorandum of law, and asserts that based upon its business operation and its analysis, it should not be barred from commencing an action in New York. The plaintiff, through another affiant, avers that it never received the cancellation letter from the defendant, noting that there was an incorrect zip code that was one digit off.

In reply, the defendant argues that, in fact, the plaintiff does substantial business in New York State, and distributes to Bed Bath & Beyond (a vendee in the subject contract, with more than 50 stores), K-Mart, Sears and Old Navy. Counsel for the defendant further argues that the plaintiff's self-described contacts and systematic operations do, indeed, demonstrate a sufficient level of operations in this State to preclude its ability to sue in New York under the statute. Counsel avers that the opposition does not explain why the plaintiff's claims could not be set forth as counter-claims in the prior pending action, and this action is an unnecessary duplicative action. Counsel repeats the arguments previously made to support dismissal of the action.

## DECISION

Business Corporation Law §1312(a) provides as follows:

> "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.
>
> 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".

Case law holds that

> "There is no precise measure of the nature or extent of activities necessary for finding that a foreign corporation is "doing business" in this State. Determination of this question must be approached on a case by case basis with inquiry made into the type of business being conducted (**Great white Whale Adv. v First Festival Prods.**, 81 AD2d 704, 706, 438 NYS2d 655; **Conklin Limestone Co. v Linden**, 22 AD2d 63, 64, 253 NYS2d 578). The party relying upon this statutory barrier bears the burden of proving that "the corporation's business activities in New York were not just casual or occasional, but 'so systematic and regular as to manifest continuity of activity in the jurisdiction' (**Construction Specialties v Hartford Ins. Co.**, 97 AD2d 808, 468 NYS2d 675; accord, **International Fuel & Iron Corp. v Donner Steel Co.**, 242 NY 224, 230)" (**Peter Matthews, Ltd. v Robert Mabey, Inc.**,

> 117 AD2d 943, 944, 499 NYS2d 254). In this regard, there is a presumption that a plaintiff does business in its State of incorporation rather than in New York (**98 Construction Specialties v Hartford Ins. Co., supra; Great White Whale Adv. v first Festival Prods., supra)".

(**Alicanto, S.A. v Woolverton**, 129 AD2d 601, 514 NYS2d 96, 97, 2nd Dept., 1987). Accordingly, an analysis of the plaintiff's activities is required.

The sole admissible assertions of the plaintiff's activities are as follows:

> "3. Schwarz is headquartered in Illinois and does not have a business office or a distribution center in New York.
>
> 4. Schwarz does not have any employees based in New York.
>
> 5. Schwarz does not maintain a New York telephone number.
>
> 6. Schwarz does not have any bank accounts based in New York.
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> 7. Schwarz does not own any real estate in New York.
>
> 8. Schwarz does not advertise its services through any print, radio, or television advertisements that are displayed or broadcasted in New York.
>
> 9. Schwarz's business activities

> with New York-based companies is limited to the placing of orders with vendors who are incidentally located in New York, such as Redi Bag, for certain goods that Schwarz then distributes to its customers located across the country.
>
> 10. Specifically with respect to Schwarz's business conducted with Redi Bag, Redi Bag shipped goods to Schwarz in Illinois, California and Pennsylvania. Those goods were then sent to Schwarz distribution centers for further distribution to Bed Bath & Beyond retail stores located throughout the country". (Kelleher affidavit ¶'s 3 - 9).

The defendant's argument and proof focuses on the Kelleher statement that the plaintiff places orders with vendors and distributes to, **inter alia**, New York customers and is vague on the particulars of the plaintiff's business operations. The agreement which forms the basis of this and the **Redi Bag** action clearly describes the plaintiff as a distributor of the defendant's products and essentially creates an agency relationship between the parties on the aspect of Market Development Support requirements set forth in the agreement. Similarly, the business relationship created by the agreement demonstrates indicia, e.g., Insurance requirements, indemnification and a trade secret and confidentiality disclosure, that manifests a working relationship between the parties that leads to a categorization of the plaintiff as a distributor to Bed Bath & Beyond, at least. There is also a concession in the Kelleher affidavit that the plaintiff also has "business activities with New York based companies". Notwithstanding the plaintiff's denial that its business is not more than "incidental" and not "systematic and regular" so as to bring it with (in the purview of BCL1312(a), the essence of the contractual relationship describes the plaintiff's distribution network to, **inter alia**, a substantial number of business contacts in New York State, even if the calculation is limited to the Bed Bath & Beyond entity in New York. The nature of the plaintiff's business – the supply of material to retail stores (Complaint ¶3) — necessarily would not include such case law indicia as advertising, and the plaintiff's practice does not require an office, telephone or a sales representative in New York State. Instead, as described herein, the relationship arises out of an Internet auction, initiated by Bed Bath &

Beyond and utilized by the plaintiff to provide services to, **inter alia**, New York businesses. That manner of doing business appears to "sidestep" the traditional case law requirements for "doing business" in New York (see, **Airline Exchange, Inc. v Bag**, 266 AD2d 414, 698 NYS2d 694, 2nd Dept., 1999). This defendant has demonstrated that the plaintiff's business activities in New York State are not just "casual or occasional" (**Interline Furniture, Inc.v Hodor Industries Corp.**, 140 AD2d 307, 527 NYS2d 544, 2nd Dept., 1988). The plaintiff cannot insulate itself behind a description of activity that it is "merely" an out-of-state distributor whose activity only occasionally involves New York businesses.

The defendant has demonstrated the existence of a letter, dated August 21, 2007, which terminated the Distributor agreement between the plaintiff and defendant. Inasmuch as the plaintiff pinions the instant action on the lack of such notice of termination (Complaint, ¶21), the defendant demonstrates the existence of documentary evidence that disposes of the plaintiff's claim (**Gorilla Realty, LLC v SLK Westbury LLC**, 288 AD2d 344, 734 NYS2d 458, 2nd Dept., 2001), and the plaintiff's self-serving and conclusory denial is insufficient to pose a factual issue herein (Catris affidavit, ¶4). It is also significant that there is no mention in the plaintiff's opposition of the clear repetition in the defendant's letter of April 14, 2008, i.e.,

> "While I will agree that the relationship with Schwarz and BBB began by way of internet Auction, the Auction relationship ended in May of 2007 with the non renewal of the Auction contract and the subsequent cancellation of our vendor agreement".

With respect to the prior pending action between these two parties, there is no dispute that the commencement of the **Redi Bag** action was prior to the action at bar. The plaintiff's attorney's analysis of controlling case law, while correct, is not entirely analogous. The rationale of the First Department, in **Reliance Insurance Company v American Electric Power Company, Inc.** (224 AD2d 235, 637 NYS2d 710, 711, 1996), is not entirely on target. In **Reliance**, the second action in equity sought reformation of certain insurance policies, while the prior action sought recovery for damages attributable to a flood in a coal mine; and the court ruled that the two actions did not mirror each other. Herein, the **Redi Bag** action seeks damages arising out of the specific contract that forms the basis of the

action at bar sounding in Breach of Contract and declaratory judgment of that self-same contract. The Court also notes that while New York is not a jurisdiction that mandates counterclaims, such pleading would serve to reduce costs and conserve judicial resources.

Accordingly, for all the above reasons, the defendant's motion is **granted**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated DEC 22 2008

XXX J.S.C.

ENTERED

JAN 02 2009

NASSAU COUNTY

COUNTY CLERK'S OFFICE