

SRS, Inc. v Airflex Indus., Inc.
2011 NY Slip Op 30907(U)
March 30, 2011
Supreme Court, Nassau County
Docket Number: 019822-09
Judge: Timothy S. Driscoll
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

SCAN

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
SRS, INC., a New Jersey
Corporation,

TRIAL/IAS PART: 20
NASSAU COUNTY

Plaintiff,

Index No: 019822-09
Motion Seq. Nos: 1 & 2
Submission Date: 2/10/11

- against -

AIRFLEX INDUSTRIAL, INC.,
a New York Corporation,

Defendant.

-----X

The following papers have been read on these motions:

- Notice of Motion, Affidavit in Support and Exhibits.....X
- Affirmation in Opposition and Exhibit.....X
- Notice of Cross Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....X
- Brief and Affidavit in Opposition to Cross Motion.....X

This matter is before the Court for decision on 1) the motion filed by Plaintiff SRS, Inc. ("SRS" or "Plaintiff") on January 24, 2011, and 2) the cross motion filed by Defendant Airflex Industrial, Inc. ("Airflex" or "Defendant") on February 10, 2011, both of which were submitted on February 10, 2011. For the reasons set forth below, the Court denies the motion and cross motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order striking Defendant's answer and rendering judgment by default against Defendant based on Defendant's failure to respond to Plaintiff's Interrogatories.

Defendant opposes Plaintiff's motion and cross moves, pursuant to CPLR § 3212, for an Order granting summary judgment to Defendant and dismissing the Complaint in its entirety, due to Plaintiff's alleged failure to obtain authorization to do business in the State of New York as required by Business Corporation Law § 1312. Plaintiff opposes Defendant's cross motion.

B. The Parties' History

The Complaint (Ex. A to Gurshman Aff. in Supp.) alleges as follows:

Plaintiff is a corporation that was incorporated in the State of New Jersey ("New Jersey") and whose principal place of business is in New Jersey. Defendant is a corporation that was incorporated in the State of New York ("New York"), whose principal place of business is in Nassau County, New York.

At all relevant times, Defendant was a contractor or subcontractor engaged in performing construction work on the Federal Courthouse ("Courthouse") located in Brooklyn, New York. In 2000, Plaintiff entered into a subcontract with Defendant for work ("Work") to be performed at the Courthouse. Plaintiff began its Work in 2002 and completed that Work in October of 2005. Pursuant to that subcontract, Defendant owed Plaintiff the sum of \$273,191.80 for the Work performed by Plaintiff but has refused to remit that payment. In the first cause of action in the Complaint, Plaintiff seeks judgment in the sum of \$273,191.80, plus interest and costs. The second count is based on the theory of unjust enrichment in connection with Defendant's alleged failure to pay Plaintiff for the Work performed, and also seeks judgment in the sum of \$273,191.80, plus interest and costs.

In support of Plaintiff's motion, counsel for Plaintiff affirms that Plaintiff served the Complaint on Defendant on September 28, 2009, and subsequently agreed to the request by Defendant's counsel for an extension of Defendant's time to answer the Complaint. On or about November 6, 2009, Defendant served its Answer (Ex. C to Gurshman Aff. in Supp.).

On or about December 31, 2009, Plaintiff served its interrogatories ("Interrogatories") (Ex. D to Gurshman Aff. in Supp.) on Defendant and received confirmation that Defendant received the Interrogatories on January 4, 2010. When he had not received responses to the Interrogatories by January 13, 2011, Plaintiff's counsel sent a letter ("Letter") (Ex. F to Gurshman Aff. in Opp.), as well as a second copy of the Interrogatories, to counsel for Defendant. Defendant has not replied to that letter or responded to the Interrogatories.

In opposition, counsel for Defendant provides a copy of Defendant's Response to Plaintiff's Interrogatories ("Response") (Ex. A to Ferrini Aff. in Opp.) which he concedes are not timely. Defendant's counsel affirms, however, that he believed that Plaintiff may have abandoned his claim. Plaintiff's claim was the subject of a prior proceeding in the United States District Court for the District of New Jersey ("Prior Action"), during which Plaintiff and Defendant engaged in settlement discussions. Those settlement discussions were "still pending, though inconclusive" (Ferrini Aff. in Opp. at ¶ 6) when Plaintiff commenced this action and served the Interrogatories. After Plaintiff served the Interrogatories, Defendant received no communication from Plaintiff for more than a year. Upon receiving the Letter, Defendant began preparing its Response. By way of explanation and not excuse, Defendant notes that Plaintiff never requested a preliminary conference or moved to compel a response to the Interrogatories prior to making this motion.

In support of Defendant's cross motion, Jonathan Fogelman ("Fogelman") affirms as follows:

Fogelman is an owner and officer of Airflex. Fogelman provides a copy of the contract ("Contract") between Airflex and SRS (Ex. B to Fogelman Aff. in Supp.) for the construction project that is the subject of this action. Fogelman submits that the Contract establishes that SJS, a New Jersey corporation, was doing business in New York. Moreover, the construction project that is the subject of this action was the Courthouse, which is located in New York. In connection with the project, representatives of SRS visited Airflex' office in New York to solicit Airflex' business, and to negotiate the terms of the Contract. In addition, SRS delivered materials to the Courthouse and had personnel present there "for extended periods of time to erect and install those materials" (Fogelman Aff. in Supp. at ¶ 4).

In his Affirmation in Support, counsel for Defendant affirms that the Contract provides, *inter alia*, that 1) any disputes would be resolved in New York; and 2) Plaintiff would "deliver and erect substantial amounts of materials in New York" (Ferrini Aff. in Supp. at ¶ 4). Moreover, SRS has effectively conceded that it did business in New York by alleging in the Complaint that it performed Work at the Courthouse, which is located in New York, between 2002 and 2005.

Counsel for Defendant affirms that on February 2, 2011, he searched the New Jersey

State Business Gateway Service for New Jersey Corporate and Business Information reporting and obtained a report reflecting that SRS is a New Jersey corporation with its principal offices in Metuchen, New Jersey. He affirms, further, that on February 3, 2011, he searched the New York State Department of State Division of Corporations online database for any records of SRS.¹ That search revealed two entities called “SRS, Inc,” the first of which was an inactive domestic New York corporation that was dissolved by proclamation on June 25, 2003 and the second of which is an active domestic corporation located in New York County, New York.

In his Affidavit in Opposition to Defendant’s cross motion, M.D. Bellware (“Bellware”) affirms as follows:

Bellware is the Chairman of the Board of Directors and former President of SRS which was incorporated in New Jersey in 1993. Bellware affirms that SRS 1) has never had an office in New York, has no warehouse or production facilities in New York and does not own real property in New York; 2) is engaged in the business of architectural metals, approximately 90% of which business is devoted to metal railings; 3) has only one physical facility which is located in New Jersey, where all fabrication and finish work on the railings is performed; 4) has never been a general contractor and has always acted as a subcontractor for projects in which it is involved; 5) does interstate business, as reflected by the fact that it has performed work in states including Connecticut, Pennsylvania, Massachusetts and Florida (“Other States”); 6) has no employees, real estate or facilities in the Other States; 7) generally never had more than four (4) employees present at the Courthouse pursuant to the Contract, and those employees generally worked for a partial day, or a day at a time and then would leave the site until the next area was ready for railing installation; 8) negotiated the Contract over a period of years, which negotiations took place by telephone, mail and fax between Plaintiff in New Jersey and Defendant in New York; and 9) all fabrication and finishing of the railings for the Contract were completed in New Jersey; only installation was completed in New York.

C. The Parties’ Positions

Plaintiff submits that the Court should dismiss Defendant’s Answer based on

¹ Defendant’s counsel affirms that copies of this reports are attached as Exhibits C and D. There is, however, no exhibit behind the tab for Exhibit C, and no tab for an Exhibit D or Exhibit D. Given Plaintiff’s concession, however, that it is a New Jersey corporation, these omissions have no bearing on the Court’s ultimate determination of these motions.

Defendant's failure to respond to Plaintiff's Interrogatories.

Defendant opposes Plaintiff's motion, submitting that Defendant's conduct was not egregious and does not warrant the requested sanction.

Defendant submits, moreover, that Plaintiff's motion should be denied as moot, as the Court should grant Defendant's cross motion to dismiss the Complaint on the grounds that Plaintiff is not authorized to do business in New York. In light of Plaintiff's alleged failure to comply with BCL § 1312, Plaintiff lacks standing to pursue this action.

Plaintiff concedes that it is a New Jersey corporation but submits that, given the facts outlined in Bellware's Affidavit, Plaintiff's activities within New York do not constitute "doing business" in a manner that would require Plaintiff to qualify to do business pursuant to BCL § 1312.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept. 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Discovery Sanctions

CPLR § 3124 provides as follows:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

CPLR § 3126 provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR § 3126 is a matter of discretion with the court. In addition, the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious. *1523 Real Estate, Inc. v. East Atlantic Properties, LLC*, 41 A.D.3d 567, 568 (2d Dept. 2007) (internal citations omitted).

C. Business Corporation Law Section 1312

Business Corporation Law § 1312(a) constitutes a bar to the maintenance of an action by a foreign corporation in New York if that corporation is found to be “doing business” in New York without having obtained the requisite authorization to do so. *Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 (2d Dept. 2008), quoting *Airline Exch. v. Bag*, 266 A.D.2d 414, 415 (2d Dept. 1999). The question of whether a foreign corporation is “doing business” in New York must be approached on a case-by-case basis with inquiry made into the type of business being conducted. *Id.*, quoting *Alicanto, S.A. v. Woolverton*, 129 A.D.2d 601, 602 (2d Dept. 1987). To find that a foreign corporation is “doing business” in New York within the meaning of BCL § 1312(a), the corporation must be engaged in a regular and continuous course of conduct in the State. *Id.*, quoting *Commodity Ocean Transp. Corp. of N.Y. v. Royce*, 221 A.D.2d 406, 407 (2d Dept. 1995). A defendant relying on BCL § 1312(a) as a statutory barrier to a plaintiff’s lawsuit bears the burden of proving that the plaintiff-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. *Id.*, citing *S & T Bank v. Spectrum Cabinet Sales*, 247 A.D.2d 373 (2d Dept. 1998), quoting *Peter Matthews, Ltd. v. Robert Mabey, Inc.*, 117 A.D.2d 943, 944 (3d Dept. 1986). Absent sufficient evidence to establish that a plaintiff is doing

business in New York, the presumption is that the plaintiff is doing business in its state of incorporation, and not in New York. *Id.* at 743-744, quoting *Cadle Co. v. Hoffman*, 237 A.D.2d 555 (2d Dept. 1997).

D. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion for sanctions in light of the Court's conclusion that Defendant's failure to respond to the Interrogatories was not wilful. Rather, Defendant's conduct appears at least partly attributable to Defendant's belief that Plaintiff had abandoned its claim, based in part on the Prior Action and Plaintiff's failure to move to compel a response to the Interrogatories.

The Court also denies Defendant's motion to dismiss in light of the Court's conclusion that Defendant has not demonstrated that Plaintiff, a New Jersey corporation, was "doing business" in New York within the meaning of BCL § 1312. In light of the Affidavit of Bellware regarding, *inter alia*, 1) Plaintiff's engagement in business in numerous states, 2) the fact that Plaintiff does not own manufacturing plants or real property in New York, and 3) the nature of the Work performed in this matter and the extent to which some of the Work was performed in New Jersey, the Court concludes that Defendant has not established that Plaintiff was doing business in New York within the meaning of BCL § 1312. Accordingly, the Court denies Defendant's motion to dismiss.

All matters not decided herein are hereby denied.

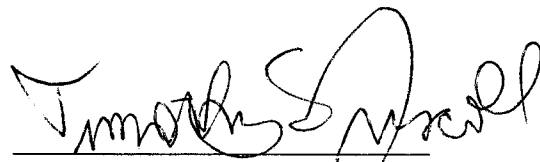
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on May 3, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

March 30, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
APR 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE