

Croat & Nap, Inc. v Excalibur Group, LLC
2011 NY Slip Op 31473(U)
June 3, 2011
Supreme Court, New York County
Docket Number: 110510/10
Judge: Barbara Jaffe
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SCANNED ON 6/6/2011

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

PRESENT. Taffe

PART 5

Index Number : 110510/2010
CROAT & NAP, INC.
vs
EXCALIBUR GROUP, LLC
Sequence Number : 001
DISMISS ACTION

INDEX NO. 110510/10
MOTION DATE 9/1/11
MOTION SEQ. NO. 001
MOTION CAL. NO. 20

CA # 20

The following papers, numbered 1 to 2 were read on this motion to/for dismiss the complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/3/11 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 5

-----X
CROAT & NAP, INC.,

Plaintiff,

-against-

Index No.: 110510/10

Motion Date: 4/1/11

Motion Seq. No.: 001

Motion Cal. No.: 20

DECISION AND ORDER

EXCALIBUR GROUP, LLC, RKR LIMITED PARTNERSHIP,
T&R ALARM SYSTEMS, INC., THE BERKSHIRE BANK,
and CITY OF NEW YORK,

Defendants.
-----X

FILED

JUN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, J.S.C.:

For defendants:

Diane McFadin, Esq.
The McFadin Law Group
11 Broadway, Suite 715
New York, New York 10004
646-723-2757

By notice of motion dated November 30, 2010 and submitted on default, defendants Excalibur Group, LLC and RKR Limited Partnership move pursuant to CPLR 3211(a)(3) and New York Business Corporation Law (BCL) § 1312(a) for an order dismissing plaintiff's claims against them.

I. BACKGROUND

Plaintiff is a New Jersey corporation. (Affirmation of Diane McFadin, dated Nov. 30, 2010 [McFadin Aff]). Some time before June 14, 2007, defendant Excalibur entered into a general construction contract with a medical services company whereby it agreed to furnish labor and materials for the renovation of a building located in Manhattan and owned by defendant RKR. (*Id.*, Exh. A). On September 27, 2007, Excalibur issued a request for proposal to plaintiff

for the provision and installation of heating, ventilation, and air conditioning equipment in the building, and on October 30, 2007, the parties entered into a construction subcontract whereby plaintiff agreed to provide same for an initial price of \$171,000.00. (*Id.*, Exhs. A, B). Through change orders, plaintiff completed additional work, increasing its cost to \$207,044.49. (*Id.*, Exhs. A, B).

Plaintiff alleges that Excalibur failed to pay \$68,906.39 it owes for the additional work. (*Id.*, Exh. A). On August 12, 2009, plaintiff filed a Notice Under Mechanic's Lien Law, claiming this amount against RKR's ownership interest in the building. By verified complaint dated August 6, 2010, plaintiff asserts claims for breach of contract and enforcement of the lien against Excalibur and RKR. (*Id.*, Exh. A).

On November 22, 2010, Geoffrey Pierini, Excalibur's Chief Executive Officer, executed an affidavit describing the transactions between Excalibur and plaintiff and plaintiff's performance. (*Id.*, Exh. B). According to Pierini, plaintiff sent employees to New York to staff the project, and its principal attended "several" meetings at the job site between the issuance of the RFP and plaintiff's completion of the work. (*Id.*).

By letter dated February 23, 2011, plaintiff admits that it is not authorized to do business in New York, as it was unaware of this requirement until the instant motion was filed, and that it applied for authorization on January 26, 2011, annexing a copy of the application and proof of mailing. (Letter of Richard M. Baron, Esq., dated Feb. 23, 2011).

II. CONTENTIONS

Defendants, relying solely on Pierini's affidavit, allege that plaintiff is barred from maintaining its suit against them, as it was doing business in New York by virtue of sending its

employees and principal here in connection with the project and performing over \$200,000 in work, and that it was not licensed to do so. (McFadin Aff.).

III. ANALYSIS

Section 1312(a) of the BCL provides 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” here. This section “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’ here without having obtained the requisite authorization to do so.” (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]). The party relying on this bar must prove that the corporation’s business activities in New York were neither casual nor occasional but rather “so systematic and regular as to manifest continuity of activity in the jurisdiction.” (*Id.*; *S & T Bank Spectrum Cabinet Sales, Inc.*, 247 AD2d 373, 373 [2d Dept 1998]). Absent sufficient evidence that the corporation is doing business in New York, it will be presumed to do business in the state of its incorporation. (*Highfill*, 50 AD3d at 744; *S & T Bank*, 247 AD2d at 374; *Alicanto, S.A. v Woolverton*, 129 AD2d 601, 602 [2d Dept 1987]; *Construction Specialties, Inc. v Hartford Ins. Co.*, 97 AD2d 808, 808 [2d Dept 1983]).

Whether a corporation is doing business in the state must be considered on a case-by-case basis, taking into account the type of business being conducted. (*Highfill*, 50 AD3d at 743; *Alicanto*, 129 AD2d at 602). With respect to a contract, it must be shown that it constituted more than a single transaction. (*Intl. Fuel & Iron Corp. v Donner Steel Co.*, 242 NY 224, 230 [1926]; *Interline Furniture, Inc. v Hodor Indus. Corp.*, 140 AD2d 307, 308 [2d Dept 1988]; *Construction Specialties*, 97 AD2d at 808). Indicia of doing business in the state include having

an in-state office, telephone listing, bank account, and employees (*S & T Bank*, 247 AD2d at 373; *Uribe v Merchants Bank of New York*, 266 AD2d 21, 22 [1st Dept 1999]) or deriving substantial profit from in-state transactions (*United Arab Shipping Co. v Al-Hashim*, 176 AD2d 569, 570 [1st Dept 1991]), although these factors alone may not be enough, as there must be evidence of regular, systematic activity that is not merely incidental to interstate commerce (*Fine Arts Enters. N.V. v Levy*, 149 AD2d 795, 796 [3d Dept 1989]; *Alicanto*, 129 AD2d at 603; *Intermar Overseas, Inc. v Argocean, S.A.*, 117 AD2d 492, 497 [1st Dept 1986]).

Here, defendants claim that plaintiff was doing business in New York, as it sent employees into the state to work on the site, its principal attended meetings between the issuance of the request for proposal and the end of its work, and it performed over \$200,000 worth of work. As there is no evidence that plaintiff engaged in other business activity in the state, such as maintaining an office, bank account, or employees or regularly soliciting or engaging in work here, defendants have failed to demonstrate that the construction subcontract was more than a single transaction. (*See Platus Corp. Pension Plan v Nazareth*, 271 AD2d 422, 422-23 [2d Dept 2000] [corporation, an assignee of a promissory note, not doing business in state, as only in-state activities were those involved in effecting assignment, and corporation's principal office located in other state]; *Airline Exch., Inc. v Bag*, 266 AD2d 414, 415 [2d Dept 1999] [corporation not doing business in state where it had one in-state bank account, occasionally used in-state office, and entered into three or four in-state transactions over eight year period]; *S & T Bank*, 247 AD2d at 373 [corporation not doing business in state as it did not have an in-state office, telephone listing, or sales representative]; *Fine Arts Enters.*, 149 AD2d at 796 [corporation not doing business in-state where only evidence presented was that it executed and performed a

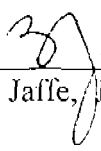
contract in state and had in-state address and bank account]; *Interline*, 140 AD2d at 308 [corporation not doing business in state where it entered into single contract, and no evidence of regular, systematic in-state business activity]; *cf Highfill*, 50 AD3d at 744 [corporation doing business in state where it regularly managed sales in state, regional vice president regularly and continuously solicited business in state and dealt with any problems that arose in state, employees came to state to staff and manage sales for two to three months at a time, and made millions of dollars from in-state transactions]; *United Arab Shipping*, 176 AD2d at 570 [corporation doing business in state where it maintained an in-state office, had 17 in-state employees, systematically and continuously conducted sales and advertising activities and executed contracts, and made millions of dollars from in-state transactions]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied.

ENTER:



 Barbara Jaffe, JSC

BARBARA JAFFE
 J.S.C.

DATED: June 3, 2011
 New York, New York

JUN 03 2011

FILED

JUN 06 2011

NEW YORK
 COUNTY CLERK'S OFFICE