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SHORT FORM ORDER

INDEX No. 38959-10

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/17/12
ADJ. DATES 3/23/12
Mot. Seq. #001 - MG
CDISP Y____ N x

NBTY ACQUISITION LLC d/b/a LEINER HEALTH PRODUCTS,

Plaintiff,

-against-

MARLYN NEUTRACEUTICALS, INC.

Defendant.

MARLYN NEUTRACEUTICALS, INC.,

Third-Party Plaintiff

-against-

KELATRON CORPORATION,

Third-Party Defendant.

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Upon the following papers numbered 1 to 13 read on this motion by third-party defendant to dismiss the third-party complaint ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 4 ; Other 5 (affidavit); 6-7 (affirmation); 8 (affidavit); 9 (affidavit); 10 (Memorandum); 11 (memorandum); 12-13 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by third-party defendant, Kelatron Corporation, for an order dismissing the third-party complaint is considered under CPLR 3211(a) and is granted.

This action arises out of contracts for the purchase of effervescent products in 2009 by the plaintiff, NBTY Acquisition LLC (hereinafter NBTY) from defendant, Marlyn Neutraceuticals, Inc. (hereinafter Marlyn). The plaintiff alleges that under the terms of its purchase orders, Marlyn agreed to

to tender and deliver to the plaintiff products which were free of the presence allergens such as soy. The plaintiff claims that Marlyn breached the contracts by delivering and tendering non-conforming effervescent products containing soy. The plaintiff seeks recovery of damages from the defendant under theories of contract, warranty and tort.

Marlyn commenced the above captioned third-party action against third-party defendant Kelatron Corporation (hereinafter Kelatron). Kelatron is a Utah company and it supplied Marlyn, an Arizona company, with selenium chelate which Marlyn used in the production of the effervescent products it sold to the plaintiff. In its third-party complaint, Marlyn charges Kelatron with breaches of contract, warranties and tort, for which, recovery of derivative and direct damages are demanded.

By the instant motion, Kelatron moves to dismiss the third-party complaint. Among the grounds alleged are: a lack of jurisdiction over Kelatron; a Utah forum selection clause in the Sales Agreement between it and Marlyn; a written disclaimer of warranties in said Sales Agreement; and an enforceable settlement agreement which allegedly precludes Marlyn's continued prosecution of its claims against Kelatron.

First considered are Kelatron's claims for dismissal of the third party complaint which rest upon certain of the provisions contained in Kelatron's "Sales Agreement". In support of these claims, Kelatron principally relies upon: copies of invoice purchase orders reflecting items sold to Marlyn in 2009, an internal handbook or manual describing standards and procedures for filling orders; and a copy of a document entitled "Terms and Conditions of Sale". Within the Terms and Condition of Sale [hereinafter TCS], is the forum selection clause wherein courts situated in Utah are designated as the forum in which disputes arising under the TCS are to be litigated. The TCSs also contains a written disclaimer of warranties. Kelatron argues that these documentary submissions conclusively establish the contractual defenses asserted in support of the instant motion to dismiss the third party complaint.

Marlyn opposes the motion contending, in part, that the documents relied upon by Kelatron are insufficient to establish the contractual defenses derived from the relied upon portions of the TCS. Marlyn emphasizes that the copy of the TCS attached to Kelatron's moving papers appears to be a separate document that is not referable to the invoice orders reflecting items sold to Marlyn. Since the TCS supplied by Kelatron on this motion is not attached to the invoice purchase orders nor incorporated by reference therein, the terms of the TCS are allegedly not binding on Marlyn due to a lack of assent.

"'A party seeking dismissal pursuant to CPLR 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" ***(Flushing Sav. Bank, FSB v Siunykalimi***, ___AD3d ___, 2012 WL 1194408 [2d Dept 2012], quoting ***Mazur Bros. Realty, LLC v State of New York***, 59 AD3d 401, 402, 873 NYS2d 326 [2d Dept 2009]). The nature of the proof must be such that it "utterly refute[s] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (***HSBC Bank, USA v Pugkhem***, 88 AD3d 649, 931 NYS.2d 635 [2d Dept 2011], quoting ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 326, 746 NYS2d 858[2002]). In order to be considered "documentary" under CPLR 321(a)(1), the evidence must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable (*see* ***Torah v Dell Equity, LLC***, 90 AD3d 746, 746–747, 935 NYS2d 33 [2d Dept 2011]).

Here, Kelatron failed to satisfy its burden of proof under CPLR 3211(a)(1) and the above cited cases authorities. The documents relied upon by Kelatron to establish its contractual defenses did not utterly refute plaintiff's factual allegations conclusively establishing a such defenses as a matter of law. None of the documents submitted constituted integrated writings by which the terms of the TCS were attached, incorporated by reference or were otherwise referable to the invoice orders reflecting the items purchased by Marlyn from Kelatron. The internal policy instruction manual for order placement relied upon by Kelatron did not fill this documentary gap as said instruction manual is not "documentary" within the purview of CPLR 3211(a)(1). The court thus finds that Kelatron is not entitled to a dismissal of the third party complaint pursuant to CPLR 3211(a)(1).

However, those portions of Kelatron's motion which are premised upon its claims for dismissal pursuant to CPLR 3211(a)(8) are meritorious. In support of its asserted defense that this court lacks personal jurisdiction over it, Kelatron advances the following facts: Kelatron is a Delaware corporation having its principle place of business in Ogden, Utah. It manufactures and sells mineral products, including selenium chelate which is an antioxidant. Kelatron does not maintain an office in New York, has no employees in New York and is not authorized to do business therein. Kelatron owns no New York property and has no agent designated to receive process in New York. The bulk of Kelatron products are shipped to west coast customers, including California. Direct sales to New York customers have averaged 1.3% of Kelatron's total sales for the years 2003-2011.

Marlyn is an Arizona company and it manufactures nutritional products. Although Marlyn has purchased products from Kelatron since 2003, the claims asserted by the plaintiff in the main action appear to be limited to five purchase orders in the fall of 2009. In 2009, Kelatron shipped selenium chelate FOB from its shipping dock in Ogden, Utah to Marlyn in Phoenix, Arizona. Some of that product ultimately made its way to the plaintiff located in New York through Marlyn. In opposing this motion, Marlyn admits that all business between it and Kelatron took place from their respective facilities in Arizona and Utah. Marlyn further admits that it did not inform Kelatron that Marlyn's ultimate customer was in New York and that such non disclosure arguably eliminates any claim for jurisdiction under New York's special long arm statute codified at CPLR 302 (*see* p.7 of Marlyn's Memorandum of Law in opposition). Marlyn nevertheless contends that there is sufficient proof for the attachment of jurisdiction over Kelatron under CPLR 301, New York's general jurisdictional statute (*see* page 7 of Marlyn's memorandum of law in opposition). Alternatively, Marlyn argues that there are sufficient facts regarding the possibility that jurisdiction exists over Kelatron to warrant discovery on the jurisdictional issue. For the reasons stated below, the court disagrees and thus sustains Kelatron's lack of jurisdiction defense.

New York courts have traditionally exercised personal jurisdiction over non- domiciliary, corporate defendants where such defendants engage in a "continuous and systematic course of doing business" as to warrant a finding of its "presence" in this state (*see* ***Landoil Resources Corp. v Alexander & Alexander Serv.***, 77 NYS2d 28, 563 NYS2d 739 [1990]; ***Tauza v Susquehanna Coal Co.***, 220 NY 259, 115 NE 915 [1917]). The "doing-business" rule, which evolved at common law and is now codified under the general jurisdictional statute set forth in CPLR 301, imposes a stringent standard since a corporation which is found amenable to suit thereunder may be sued on causes of action wholly unrelated to acts done in New York (*see* ***Landoil Resources Corp. v Alexander & Alexander Serv.***, 77 NYS2d 28, *supra*; ***Ball v Metallurgie Hoboken-Overspelt, S.A.***, 902 F2d 194 [2d Cir. 1990]; *cf.* CPLR 302[a]).

Engagement in occasional or casual business in New York does not suffice under CPLR 301 nor does mere solicitation of New York customers (*see Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 34, 563 NYS2d 739 [1990]; ***Laufer v Ostrow***, 55 NY2d 458, 449 NYS2d 456 [1982]; ***Daniel B. Katz & Assoc. Corp. v Midland,*** 90 AD3d 977, 937 NYS2d 236 [2d Dept 2011]). Instead, a finding of "doing business" under CPLR 301 is dependent upon the existence of traditional indicia, from which, the court may conclude that the foreign defendant has sufficient contacts with New York to warrant a finding that it is present here. Such indicia include whether the corporation has employees, agents, offices or property within the state; whether it is authorized to do business here and the volume of business which it conducts with New York residents (*see* ***Laufer v Ostrow***, 55 NY2d 305, *supra*; ***Frummer v Hilton Hotels Intl., Inc***, 19 NY2d 533, 281 NYS2d 41 [1967]).

While the courts have long espoused that the mere solicitation of business which attracts customers here or results in sales to New Yorkers is insufficient to confer jurisdiction under the traditional doing business rule CPLR 301, they have recognized that substantial solicitation by the foreign corporate defendant, coupled with financial or other commercial dealings in New York, may be sufficient for a finding of doing business here (*see* ***Arroyo v Mountain School***, 68 AD3d 603, 892 NYS2d 74, [1st Dept 2009]; ***Landoil Resources Corp. v Alexander & Alexander Serv., Inc.,*** 918 F2d1039 [2d Cir. 1990]). This second prong of the doing business test is known as the "solicitation-plus" rule. Under this rule, engagement in solicitation that is substantial and continuous, coupled with other activities of substance in the New York, may warrant a finding of a general jurisdiction under CPLR 301 (*see* ***Arroyo v Mountain School***, 68 AD3d 603, *supra*; ***Sedig v. Okemo Mountain,*** 204 AD2d 709, 612 NYS2d 643 [2d Dept 1994]; ***Weil v American Univ.***, 2008 WL 126604, 2008 U.S. Dist. LEXIS 1727 [SD NY 2008]; ***Landoil Resources Corp. v Alexander & Alexander Servs.***, 918 F2d 1039, *supra*; ***Brown v Ghost Town in the Sky***, 2001 WL 1078341 [ED NY 2001]).

Clearly, the ultimate burden of proof rests with the party asserting jurisdiction and to successfully defeat a motion to dismiss based upon a lack of long-arm jurisdiction the plaintiff must show, prima facie, that the defendant is subject to the personal jurisdiction of the court (*see* ***College v Brady***, 84 AD3d 1322, 924 NYS2d 529 [2d Dept 2001]; ***Lang v Wycoff Hgts. Med. Ctr.***, 55 AD3d 793, 866 NYS2d 313 [2d Dept 2008]; ***Cornely v Dynamic HVAC Supply, LLC***, 44 AD3d 986, 986, 845 NYS2d 797 [2d Dept 2007]). However, the plaintiff may delay determination of a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary. In such a case, the plaintiff need not make a prima facie showing of jurisdiction, but instead "need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant" (***Ying Jun Chen v Lei Shi***, 19 AD3d 407, 796 NYS2d 126 [2d Dept 2005]; quoting; ***Peterson v Spartan Indus.***, 33 NY2d 463, 467, 354 NYS2d 905 [1974]). If "it appear[s] from affidavits submitted in opposition to [the] motion ... that facts essential to justify opposition may exist but cannot then be stated," a court may, in the exercise of its discretion, postpone resolution of the issue of personal jurisdiction pending discovery (CPLR 3211(d); *see* ***Ying Jun Chen v Lei Shi***, 19 AD3d at 407–408, *supra*).

Here, Kelatron sufficiently established that is not subject to the jurisdiction of this court because Kelatron is not doing business here in New York within the contemplation of CPLR 301. The absence of an office, employees, authorization of an agent for service of process and the absence of any real property interests in New York reflects that Kelatron has insufficient traditional indicia of a presence in New York. Although Kelatron does ship to New York customers, the paltry volume of such business

compared to that which it conducts with non-New York customers provides an insufficient basis on which jurisdiction may attach. There is no evidence of the existence of any "continuous and systematic course of doing business" nor of any "solicitation-plus" contacts here in New York which would warrant a finding of Kelatron's "presence" in this state.

The opposing papers of Marlyn failed to establish facts necessary to support a finding that Kelatron may be deemed to have a presence under the "doing business" rule of CPLR 301 or to defer determination of this motion until discovery on the issue of Kelatron's business activities is conducted. As indicated above, jurisdiction under CPLR 301 may be acquired over a foreign corporation or other business entity only if that corporation or entity does business here, not occasionally or casually, but with a fair measure of permanence and continuity so as to warrant a finding of its presence in this jurisdiction (*see* ***Daniel B. Katz & Assoc. Corp. v Midland,*** 90 AD3d 977, *supra*). Other than innuendo and speculative assertions regarding Kelatron's possible solicitation of business in New York, Marlyn failed to establish that facts "may exist" to exercise personal jurisdiction over Kelatron and that they constitute a "sufficient start" to warrant further discovery on the issue as contemplated by CPLR 3211(d) (*cf.*, ***Ying Jun Chen v Lei Shi***, 19 AD3d 407, 408 *supra*).

Nor is there any basis in the record for a finding that jurisdiction may exist under New York's specialized long arm statute codified at CPLR 302. Under CPLR 302(a)(1), a court may exercise jurisdiction over any nondomiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." Courts have held that CPLR 302(a) is a "single act statute [and] ... proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted " (***Kimco Exch. Place Corp. v Thomas Benz, Inc.***, 34 AD3d 433, 434, 824 NYS2d 353 [2d Dept 2006]). Even if Kelatron transacted business within New York, Marlyn's injury and the claims predicated upon it cannot be said to have arisen directly out of this transaction. The affidavit of Marlyn's president submitted in opposition to this motion failed to demonstrate that facts essential to justify opposition may exist so as to warrant the postponement of the resolution of the issue of personal jurisdiction pending discovery(*see* CPLR 3211[d]).

Kelatron's alternative demands for relief, namely, an order enforcing a purported settlement are without merit (*see* CPLR 2104; ***Williams v. Bushman***, 70 AD3d 679, 894 NYS2d 94 [2d Dept 2010]).

In view of the foregoing, the instant motion (#001) by third-party defendant Kelatron to dismiss the third-party complaint on the grounds that this court lacks personal jurisdiction over Kelatron, a non-domiciliary corporation, is granted pursuant to CPLR 3211(a)(8). All other demands for relief are denied. The third-party complaint is thus dismissed and the caption amended to delete the third-party action and the parties thereto.

DATED: 4/26/12

THOMAS F. WHELAN, J.S.C.