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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 111371/2011
CONSTRUCTION MANAGEMENT
vs.
CARNEGIE HILL PROPERTIES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED

FEB 27 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/20/13

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CONSTRUCTION MANAGEMENT & DEVELOPMENT, LLC,

Plaintiff,

- against -

CARNEGIE HILL PROPERTIES, LLC,

Defendant.

----------X

Index No. 111371/2011

DECISION and ORDER

Mot. Seq. 01, 02

HON. EILEEN A. RAKOWER

Plaintiff Construction Management & Development, LLC ("Plaintiff") was hired by Defendant Carnegie Hill Properties, LLC ("Defendant") to oversee a renovation project of the building that Defendant owns at 154 West 70th Street, New York, NY ("the Project"). The parties entered into an agreement that governed the work that Plaintiff was to perform, the fees that were to be paid, and the manner in which the contract could be terminated by Defendant. Paragraph 12 of the Agreement states that the contract may be terminated by either party "for any or no reason" on two days' written notice to the other party. Upon termination, Defendant was required to pay within thirty days "any amounts then earned by unpaid under this Agreement, unless [Defendant] is disputing the amount due in good faith, in which case the undisputed portion shall be promptly paid."

Defendant thereafter terminated Plaintiff's services under the Agreement. Plaintiff alleges in this action that although it diligently performed the services mandated by the terms of the Agreement and Defendant never disputed or objected to any of its monthly statements, Defendant failed to pay the outstanding amount due to Plaintiff upon its termination.

Defendant, in its Verified Answer, asserts the following three affirmative defenses: (1) failure to state a cause of action upon which relief may be granted; (2) Plaintiff's claims are barred based on Plaintiff's failure to adhere to Business

Corporation Law Section 1312; and (3) Plaintiff's claims are barred by the doctrines of waiver and estoppel.

Defendant also asserts a Counterclaim for breach of contract. The Counterclaim alleges that Plaintiff failed to perform all of its obligations under the Agreement, including but not limited to, failing to complete design documents and bid packages for the Project within the specified deadline, failing to review and amend consultant proposals to adequately address the required scope of services for the Project, delivering services that were defective and unsuitable for the Project's needs. The Counterclaim alleges that as a result of Plaintiffs's failure to perform its obligations, Defendant incurred significant damages.

Mot. Seq. #1

Plaintiff's Motion to Dismiss and for Summary Judgment

Plaintiff now moves for an Order, pursuant to CPLR 3211, striking Defendant's affirmative defenses and counterclaim on the grounds that they are "baseless" and pursuant to CPLR 3212, granting summary judgment in favor of Plaintiff and against Defendants (Mot. Seq. # 1). In support of its motion, Plaintiff submits the attorney affirmation of Romeo Salta, which annexes, among other documents. Plaintiff's Verified Complaint, Defendant's Verified Answer, the parties' Agreement, and Defendant's letter terminating Plaintiff's services.

Defendant opposes, and submits the attorney affirmation of Wojciech Jackowski and the affidavit of Kayvan Hakim, a managing member of Defendant. Hakim disputes Plaintiff's contention that Defendant had not objected to Plaintiff's performance. Defendant contends that Plaintiff's motion for summary judgment should be denied because it is not supported by an affidavit by a person with personal knowledge of the facts and triable issues of facts exist as to Plaintiff's alleged performance under the Agreement. Defendant also contends that Plaintiff's motion is premature. Defendant states that Plaintiff filed the instant motion only after limited discovery. Defendant states that the parties had agreed to depositions, yet none were held despite repeated requests from Defendant's counsel and the directive set forth in the parties' Preliminary Conference Order and Compliance Conference Order of September 11, 2012.

Defendant also cross moves for an Order to dismiss Plaintiff's Verified Complaint pursuant to CPLR 3211(a)(3) and CPLR 3211(a)(7) on the basis that Plaintiff, a foreign limited liability company maintaining an office and doing business in New York without authorization, cannot maintain an action in New York under Limited Liability Company Law Section 808(a).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (see CPLR §3211[a][7]).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Here, Plaintiff has failed to demonstrate entitlement to dismissal of Defendant's affirmative defenses and Counterclaim for breach of contract. Upon review of Defendant's Verified Answer, Defendant's affirmative defenses are sufficiently pled and Defendant's Counterclaim for breach of contract states a claim. Therefore, dismissal is not warranted.

Furthermore, Plaintiff has not made a prima facie showing of entitlement to summary judgment. Plaintiff's motion is supported only by the affirmation of counsel who lacks personal knowledge of the underlying facts. Furthermore, as set forth in the opposing affidavit submitted by Defendant's managing member Kayvan Hakim, questions of fact still exist as to Plaintiff's alleged performance issues under the Agreement. Additionally, summary judgment is premature under CPLR §3212(f). Defendant contends, and Plaintiff does not dispute, that only limited discovery has taken place to date and Plaintiff has refused to produce a witness for a deposition despite agreeing to the same.

Defendant's Cross Motion to Dismiss

Defendant cross moves to dismiss Plaintiff's Complaint under Limited Liability Company Law Section 808(a).

Section 808(a) of the Limited Liability Company Law provides as follows:

> A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state and shall have filed proof of publication pursuant to section eight hundred two of this article.

As set forth in *Aries Financial LLC v. 2729 Claflin Av., LLC*, 26 Misc. 3d 1236(A) (Sup. Ct. Bronx County, January 26, 2010):

> Cases decided pursuant to Business Corporation Law 1312 have defined the parameters of what constitutes "doing business" in the State of New York. That statute provides that a foreign corporation doing business in New York without authority may not maintain an action or special proceeding unless and until such corporation has been authorized to do so and paid all fees and taxes required (BCL § 1312[a]).
>
> The mere presence of company activity in the State does not necessarily meet the definition of "doing business" within the meaning of the statute. A casual or occasional activity within the State does not constitute "doing business" (*FIA Card Services, NA v. Dilorenzo,* 22 Misc.3d 1127[A][Dist. Ct., Nassau Cty 2009]). Rather, the company's activities must be so "systematic and regular" as to manifest continuity of activity within the jurisdiction (*id.; see also Highfill, Inc. v. Bruce & Iris, Inc.*, 50 AD3d 742 [2nd Dept 2008] [plaintiff found to be "doing business" in state where plaintiff regularly and continuously solicited potential costumers in New York in effort to persuade them to retain plaintiff to conduct "special sales", conducted 3 such sales totaling $1,750,000 in 2001 and 2002 and 6 sales in 6–month period in 2005 and 2006 totaling $4,850,000]; *cf. Airline Exchange, Inc., v. Richard Bag et al.*, 266 A.D.2d 414 [2nd Dept 1999][3

to 4 loan transactions in New York over 8–year period not sufficient to show corporation doing business within meaning of Business Corporation Law § 1312]).

Defendant alleges, in a conclusory fashion that Plaintiff, a foreign limited liability company, is "doing business in this state" without having obtained the proper authorization to do so. In opposition, Plaintiff states that "defendant has not proffered any evidence whatsoever that the plaintiff is 'doing business in New York, as that phrase is defined by the courts of this jurisdiction." Plaintiff states that its "'mere presence in New York and having done one deal with the defendant is not enough to establish 'doing business'" in the State. Here, in light of Defendant's failure to specify or provide any evidence to substantiate its allegation that Plaintiff is "doing business" in New York, the Court finds that Defendant has not met its burden. Dismissal, pursuant to Section 808(a) of Limited Liability Company Law, is therefore inappropriate at this juncture.

Mot Seq. #2

Defendant also moves for an Order declaring Romeo Salta, New York State Attorney Registration No. 1733369, disqualified to serve as counsel for Plaintiff, pursuant to the Rules of Professional Conduct [22 NYCRR 1200.00] Rule 4.2 and 1.7 (Mot. Seq. #2). Plaintiff opposes, and requests that the Court deem Defendant's motion frivolous and that sanctions be imposed.

"The basis of a disqualification motion is an allegation of a breach of a fiduciary duty owed by an attorney to a current or former client."*Rowley v. Waterfront Airways, Inc.*, 113 A.D.2d 926, 927 [2nd Dept 1985] (citations omitted). Where the moving party was never represented by the attorney whose disqualification is sought, the moving party lacks standing to complain about the representation. *Id.* at 927. However, the Court has the authority to act *sua sponte* to disqualify counsel if it finds a conflict of interest warranting counsel's disqualification. *See Flushing Savings Bank v. FSB Properties, Inc.*, 105 A.D.2d 829, 830-31 [2nd Dept 1984].

Here, there is no evidence presented of a conflict of interest warranting Plaintiff's counsel's disqualification at this juncture. Defendant is not a current of former client of Mr. Salta. The alleged conflict arises out of Mr. Salta's separate representation of Carlyle Development Services LLC in a separate action as against Defendant. Defendant alleges that it utilized Carlyle as "litigation consultant" in preparation of its defense to Plaintiff's instant action and that Mr. Salta's representation of Carlyle would make Plaintiff privy to confidential information. However, Mr. Salta avers that both of his clients (Carlyle and Plaintiff) have consented to his representation of them and no confidential information has been disclosed. As such, Defendant's motion to disqualify Mr. Salta is denied.

Wherefore it is hereby

ORDERED that Plaintiff's motion to strike Defendant's affirmative defenses and counterclaim and for summary judgment is denied; and it is further

ORDERED that Defendant's cross motion to dismiss is denied; and it is further

ORDERED that Defendant's motion to disqualify Plaintiff's counsel is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: 2/20/13

EILEEN A. RAKOWER, J.S.C.