

Asia World Enter. Co., Ltd. v Schecter

2013 NY Slip Op 31045(U)

March 27, 2013

Sup Ct, New York County

Docket Number: 651989/2012

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE OF THE SUPREME COURT
Justice

PART 10

Index Number : 651989/2012
ASIA WORLD ENTERPRISE CO.,
vs.
SCHECHTER, JOAN
SEQUENCE NUMBER : 001
DISMISS ACTION

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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

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

[Faint, illegible text]

Dated: 3-27-13

APR 27 2013

[Signature], J.S.C.

TOP OF COURT FILED
JUSTICE OF SUPREME COURT

- 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 IAS 10

-----X
ASIA WORLD ENTERPRISES CO., LTD.,

Plaintiff,

-against-

JOAN SCHECTER,

Defendant.

-----X
HON. KATHRYN E. FREED:

DECISION/ORDER
Index No.: 651989/2012
Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

Recitation, as required by CPLR §2219[a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....4.....
REPLYING AFFIDAVITS.....5.....
EXHIBITS.....
OTHER.....(memo of law),,.....6-7.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant moves for an Order pursuant to CPLR§3211(a)(3) and Business Corporation Law § 1312, dismissing the complaint, without prejudice on the ground that plaintiff is an unauthorized corporation doing business in New York, and therefore lacks the legal capacity to sue. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and caselaw, the Court denies the motion.

Factual and procedural background:

This action arose out of a dispute between the parties pursuant to an agreement between

plaintiff Asia World Enterprises, Co., LTD, (hereinafter, "Asia World") and Destination Solutions, defendant Schecter's company. According to plaintiff, it is a Thailand company which is in the business of supplying services for travel to Thailand. Defendant Schecter provided services in the capacity of an independent contractor to plaintiff, and not as an employee. As part of her duties, defendant was required to promote plaintiff's travel services to travel agents in the United States. In order to avoid delays in processing checks drawn on United States banks located in Thailand, plaintiff agreed that defendant would receive and cash checks on plaintiff's behalf, and would then wire transfer the money to its bank account in Thailand. In July 2008, defendant received a number of checks totaling the amount of \$28, 180.00 on behalf of plaintiff. However, she failed to transfer and pay the money to plaintiff despite repeated promises to do so, prompting the commencement of the instant suit for conversion.

According to defendant, she is the "sole proprietor" of Destination Solutions, and both she and her business are located in New York, New York. Asia World is in the business of providing land services ie. hotels, guides, sightseeing, etc., in Asia, mostly Thailand. Its clients consist of mostly tour operators based in the United States, including New York. Two of its large accounts were with clients located in New York State, and she estimates that Asia World derived at least \$100,000 or more per year from these clients.

On May 1, 2007, Destination Solutions and Asia World entered into an agreement. Asia World, via defendant, would solicit and service clients, including obtaining payment from them. She would make the sales calls, personally visit with existing or prospective clients, coordinate with airlines and represent Asia World at trade shows. Additionally, Stephen McEvoy, Asia World's Managing Director, would come to New York approximately twice a year, and she would

accompany him to meetings with clients in New York and along the East Coast.

The subject agreement between the parties entitled "AGREEMENT BETWEEN ASIA WORLD ENTERPRISE, CO., LTD and DESTINATION SOLUTIONS, is appended to defendant's moving papers as Exhibit "B." Defendant specifically refers to and relies on Section III in support of her position. This section provides in pertinent part that "The Agreement may be terminated by either party with three (3) months written notice." Defendant asserts that upon reviewing her records, she has not found any written notice of termination from either party. Thus, she asserts that the subject Agreement was not terminated in accordance with its terms, and remains in effect.

Defendant also asserts that Asia World has failed to compensate her pursuant to their Agreement, since "sometime in 2008" (Def.'s Aff. ¶5). Therefore, she asserts that she has counterclaims against it well in excess of the claims asserted in their complaint.

Positions of the parties:

Defendant argues that plaintiff lacks the legal capacity to sue her, in that it has never been authorized to do business in the State of New York. Therefore, the complaint warrants dismissal until such time as plaintiff complies with the requirements promulgated by BCL§1312(a). In an affidavit appended to plaintiff's motion, Stephen McEvoy, managing director of Asia World, avers in pertinent part, that plaintiff is a travel services corporation located in Bangkok, Thailand. He also avers that since plaintiff does not employ anyone in New York, and does not maintain any bank accounts or offices here, it cannot be classified as "doing business," here, as contemplated by BCL§ 1312.

Defendant asserts that plaintiff has failed to rebut her showing that it is an unauthorized corporation doing business in New York. She argues that Mr. McEvoy does not dispute her

allegations that she acted in the capacity as sales agent and representative for plaintiff; that she is plaintiff's fiduciary; that the agreement between she and plaintiff was not terminated; that he came to New York at least twice a year and that at least two of plaintiff's larger accounts exist with clients located in New York. Defendant notes that Mr. McEvoy is "utterly silent" as to how frequently he travels to New York, what he does when he is here and how much revenue plaintiff derives from New York clients consulted with, and activities performed here.

Conclusions of law:

Business Corporation Law § 1312(a) is a bar to the maintenance of an action by a foreign corporation found to be doing business in New York without the proper authorization (*see S&T Bank v. Spectrum Cabinet Sales, Inc.*, 247 A.D.2d 373 [2d Dept. 1998]). In order for a foreign corporation doing business in New York to maintain any action or special proceeding here, it must obtain a certificate of authority to do so and pay all state fees and taxes (*see BCL* § 1301 & § 1312(a)). The failure of a foreign corporation doing business in New York to so register precludes that entity from maintaining an action or special proceeding until such authority is obtained (*BCL* § 1312(a)).

In order for a court to determine 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 (*see Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 [2d Dept. 2008]). Indeed, the doing business standard under *BCL* § 1312(a) requires a greater amount of local activity by a foreign corporation than the doing business standard applicable to New York's long-arm statute (*CPLR* § 302), which relates to personal jurisdiction (*Maro Leather Co. v. Aerolineas Argentinas*, 161 Misc.2d 920, 924, 617 N.Y.S.2d 617 (Sup. Ct. N.Y. County 1994), *appeal dismissed*

85 N.Y.2d 837 [1995]).

Under BCL§ 1312(a), there exists a presumption that the corporation in question does business in its state of incorporation rather than New York. Thus, defendant bears the burden of proving that the foreign corporation's activities in New York are not just casual or occasional, but so systematic and regular, as to manifest continuity of activity in the jurisdiction (see Alicanto S.A. v. Woolverton, 129 A.D.2d 601, 602 [2d Dept. 1987]; see also Acno-Tec Ltd. v. Wall St. Suites, LLC, 24 A.D.3d 392 [1st Dept. 2005]; Airtran New York, LLC v. Midwest Air Group, Inc., 46 A.D.3d 208 [1st Dept. 2007]; Highfill, Inc. v. Bruce and Iris, Inc., 50 A.D.3d 742 at 743-744). Defendant is required to show that plaintiff conducted continuous activities in New York, essential and vital to its corporate business (see S&T Bank v. Spectrum Cabinet Sales, Inc., 247 A.D.2d 373 [2d Dept. 1998]). Absent sufficient evidence that plaintiff is doing business in New York, the presumption is that plaintiff is doing business in its state of incorporation (i.e. Thailand), and not in New York (Highfill, Inc. v. Bruce and Iris, Inc., 50 A.D.3d 742 at 743-744).

In the case at bar, the Court finds that defendant has failed to establish that plaintiff is doing business in New York, in accordance with BCL§ 1312(a). Indeed, defendant has only established that plaintiff's connection to and activities within New York are limited to Mr. McEvoy's two annual visits, and to defendant herself and her indeterminate amount of sales calls, and personal visits with clients located here.

It is well established that the solicitation of sales in New York or the placement of orders by an agent of the foreign corporation do not constitute doing business in this state within the meaning of BCL§1312(a), even if coupled with other activities (see Maro Leather Co. v. Aerolineas Argentinas, 161 Misc.2d 920 at 924; see also 15 N.Y. Jur 2d, Business Relationships § 1097; 20

Carmody -Waite 2d § 121:55). Moreover, it is undisputed that plaintiff does not have any corporate office(s) or employees here. It has also been held that an activity carried on in New York by an out of town company with no offices or employees in New York, is not sufficient to constitute doing business under section § 1312 (see Beltone Electronics Corp. v. Selbst, 58 A.D.2d 560 [1st Dept. 1977]; Landmark Capital Investments, Inc. v. Li-Shan Wang, 94 A.D.3d 418 [1st Dept. 2012]).

Furthermore, whether or not the contract between the parties has been terminated or still exists is irrelevant to the issues of whether plaintiff is doing business here, and lacks the legal capacity to sue. The Court finds that plaintiff is not doing business pursuant to BCL§ 1312 and is entitled to bring suit.

In accordance with the foregoing, it is hereby

ORDERED that defendant’s motion to dismiss the complaint without prejudice is denied and it is further

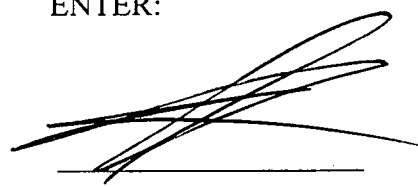
ORDERED that plaintiff shall serve a copy of this Order on the opposing party and the Trial Support Office, 60 Centre Street, Room 158 and it is further

ORDERED that this constitutes the decision and order of the Court

DATED: March 27, 2013

MAR 27 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT