SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15
Justice

Index Number : 652992/2012
WORLD MARKETING, INC.
vs.
GORDON, MARTIN
SEQUENCE NUMBER : 001
STRIKE ANSWER

INDEX NO. 652992/12
MOTION DATE
MOTION SEQ. NO. 001

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, 3
Answering Affidavits — Exhibits ____ | No(s). 4, 5, 6
Replying Affidavits ____ | No(s). 7

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

MOT... ...ANCE WITH
THE AC... ...DUM DECISION.

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

Dated: 6/26/13

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

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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WORLD MARKETING, INC.,

Plaintiff,

- against -

MARTIN GORDON, personally and doing business as MARTIN GORDON STYLES, and MIYAMA TRI-WAVE, INC.,

Defendant.

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Index No. 652992/2012

DECISION and ORDER

Mot. Seq. 001

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

In this action, as alleged in the Complaint, Plaintiff, World Marketing, Inc. ("WMI" or "Plaintiff"), a manufacturer and importer of men's and women's clothing, alleges that in or about July 2011, defendant, Martin Gordon ("Gordon") and WMI entered into an agreement whereby Gordon would design clothing for WMI, WMI would manufacture and import such clothing, and Gordon would sell the clothing to customers. Orders that Gordon obtained would be written in WMI's name, and Gordon would share in the profits. The Complaint further alleges that during a trip to Los Angeles and to attend a show in Las Vegas, Nevada, Gordon met with defendant Miyama Tri-Wave, Inc. ("Miyama"), and agreed to leave WMI and join Miyama. Thereafter, Gordon refused to turn over the customer orders/agreements that he had obtained for WMI at the show, and transferred the orders to Miyama. The Complaint alleges breach of contract, breach of fiduciary duty, theft of business opportunity, intentional interference with contracts, and aiding and abetting and inducing breach of fiduciary duty.

Miyama USA Tri-Wave, Inc., incorrectly sued as Miyama Tri-Wave, Inc., now moves to strike the answer previously filed on its behalf by Jed Schlacter, Esq. and to set aside his appearance. Miyama also moves to dismiss the Complaint pursuant to CPLR § 3211(8)(a), in conjunction with New York Business Corporation Law

("BCL") § 307 and 302, for lack of personal jurisdiction. Plaintiff opposes.

"The rule is well settled that by the appearance of an attorney for a nonresident the court acquires no jurisdiction if it should develop that such appearance was unauthorized." *(See Amusement Sec. Corp. v. Academy Pictures Distributing Corp.*, 251 A.D. 227, 230 [1st Dept 1937])("In view of the proof submitted by appellant, plaintiff is called upon to show that appellant in fact authorized the appearance. The conduct, acts or statements of the attorneys, presumably in appellant's behalf, whether inadvertent or deliberate, are not binding upon him in the absence of affirmative proof of authority to appear.").

Miyama submits the attorney affirmation of Kenneth R. Schachter and the affidavit of Yoshito Fukuda, the vice president of Miyama. Fukada avers that upon receiving the summons and complaint by mail in this action, Miyama contacted its California attorneys, who in turn referred Miyama to New York based attorney Kenneth Schachter, of Sills Cummis & Gross, to represent Miyama. After retaining Mr. Schachter, Miyama learned that a New York attorney, Jed Schlacter, had already appeared and filed an answer. Fukada avers that Miyama never retained Mr. Schlacter or authorized him to act on its behalf, Schlacter never communicated with Miyama about this case or any other matter, and Fukada never authorized anyone other than Mr. Schachter and his firm, Sills Cummis & Gross, P.C., to appear in this action.

In opposition, Plaintiff does not provide evidence that Miyama retained Mr. Schlacter, but rather states that "Mr. Gordon . . . had the authority to retain him. . . " Miyama has demonstrated that Mr. Schlacter's appearance was unauthorized, and his unauthorized appearance therefore does not confer jurisdiction.

Miyama also moves to dismiss the Complaint on the basis that service of process has not been properly effectuated and on the basis that the Court lacks personal jurisdiction over them because Miyama is a California company.

Plaintiff's affidavit states that it served Miyama through the Secretary of State pursuant to BCL §307. BCL §307 only applies when a "non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil practice law and rule[.]." BCL §307(a). BCL §307 does not apply to entities over which the Court lacks general or long-arm jurisdiction. Miyama

argues that Plaintiff's service is deficient because Miyama is not subject to jurisdiction under Article 3.[1]

As set forth in Fukada's affidavit, Miyama asserts that it is a California company, does not maintain any offices in New York, does not have any agent for service of process in New York, is not licensed to do business in New York, and has no contacts with New York, as it does not advertise in New York, does not provide any services in New York, does not own any real or personal property in New York, and does not maintain any bank accounts in New York. Miyama contends that, "From time to time Miyama retains independent sales representative [sic] in the State of New York. These representatives are not authorized to enter in any contract on behalf of Miyama." Miyama also alleges that Plaintiff's complaint is based on acts that occurred in Nevada and California.

In opposition to Miyama's motion to dismiss, Plaintiff submits the attorney affirmation of Laurence Shiff and the affidavits of Jerry Mossberg, Plaintiff's President, and Neil Mossberg, Plaintiff's Vice President. Plaintiff contends that Miyama is present in New York by way of doing business through its employee/agent/partner Gordon. Plaintiff alleges that Gordon's main offices are located at 264 West 40th Street, with the name "Gramercy Foundry" painted on the door to the suite, "the assumed name of Miyama." Plaintiff also contends that Miyama's interference with Plaintiff's orders with customers and with its agreement with Gordon, as alleged in the Complaint, constitute torts for which there is jurisdiction over Miyama in this court. Plaintiff also contends that it has a right to discovery before a dismissal should be entertained concerning the relationship between Miyama and Gordon.

Miyama submits the reply affidavit of Fukuda, which states that although it

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[1] Miyama also argues that service is defective because Plaintiff did not timely file an affidavit of compliance pursuant to BCL 307(c)(2). In response, Plaintiff states that while a proof of mailing and service was not filed with the Court, a copy was sent to Miyama's current attorney, Mr. Kenneth Schachter, and is annexed as an exhibit to Mr. Schachter's affirmation in support of Miyama's motion. Plaintiff requests that it be allowed to file that proof of service within three business days after issuance of the Order.

retains independent sales representatives, such as Gordon, Gordon has no authority to bind Miyama to any contract. Miyama states that it does not issue invoices in Gordon's name, Gordon does not issue Miyama's invoices, and all customer payments are directed by Miyama to be sent directly to Miyama at its California office. Miyama also states that it believes Gordon's New York offices are leased by Gordon's company, and that the offices are not leased, occupied, or paid by Miyama.

Miyama states that "Gramercy Foundry" is a trademark owned by Somewhere in the World, Inc , that Miyama does business in California with World Inc, and that "for purposes of facilitating its business" with that company, Miyama filed a "certificate of assumed in California for Gramercy Foundry," another corporation for which Gordon provides sales representative services. Miyama states that it had "nothing to do with Mr. Gordon's listing Gramercy Foundry on his New York showroom door and can only surmise that he did so in connection with his representation of [California with] World Inc."

CPLR § 3211(a)(8) states:

> . . . A party may move for judgment dismissing one or more causes of action asserted again him on the ground that:
>
> (8) the court has not jurisdiction of the person of the defendant . . .

CPLR § 302(a)(1) states, in relevant part:

> (a) Acts which are the basis of jurisdiction. As to the cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person, or through an agent:
>
> (1) transacts any business within the state or contracts anywhere to supply goods or services in the state . . .

CPLR 302(a)(1) provides that a court may exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, "transacts any business" *within* the State, provided that the cause of action arises out of the transaction of business (*Lebel v. Tello*, 272 A.D.2d 103, 707 N.Y.S.2d 426 [1st Dept. 2000]).

To determine the existence of jurisdiction under section 302(a)(1), a court must decide (1) whether the defendant "transacts any business" in New York, and, if so, (2) whether this cause of action "aris[es] from" such business transaction (*see Best Van Lines, Inc. v. Walker*, 490 F.3d 239 [2d Cir. 2007]. *Citing Deutsche Bank Securities, Inc. v. Montana Board of Investments,* 7 N.Y.3d, 818 N.Y.S.2d 164, 850 N.E.2d 1140 [2006].

As for the first part of the standard, courts look to "the totality of defendant's activities within the forum" (*Deutsche Bank*, 7 N.Y.3d 65, 818 N.Y.S.2d 164, 850 N.E.2d 1140) to determine whether a defendant has transacted business in such a way that constitutes "purposeful activity," defined as "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*McKee Electric Co. Inc. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34, 229 N.E.2d 604 [1967], *quoting Handon v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 [1958]; *accord Fischbarg v. Doucet*, 9 N.Y.3d 375, 380, 849 N.Y.S.2d 501, 880 N.E.2d 22 [2007]).

As for the second part of the standard, "[a] suit will be deemed to *have arisen out* of a party's activities in New York if there is an articulable nexus, or a substantial relationship, between the claim asserted and the actions that occurred in New York" (*Deutsche Bank; Henderson v. INS*, 157 F.3d 106, 123 [2d Cir.1998] [internal quotation marks omitted]).

Here, based on the parties' submissions, in light of Miyama's acknowledgment that it employs Gordon as a sales representative whose offices are in New York and "filed a certificate of assumed" in California on behalf for "Gramercy Foundry," the name of the entity that Gordon lists on his New York showroom, and that Plaintiff's action arises from Miyama's alleged interference with Plaintiff's orders with customers and with its agreement with Gordon, Plaintiff has demonstrated that

dismissal based on a lack of personal jurisdiction is not warranted at this juncture. Plaintiff is entitled to discovery as to the relationship between the parties and their connection to New York.

Wherefore it is hereby

ORDERED that defendant Miyama USA Tri-Wave, Inc.'s, incorrectly sued as Miyama Tri-Wave, Inc., motion is granted only to the extent that the answer previously filed by Jed Schlacter, Esq. is stricken and Mr. Schlacter's appearance is set aside; and it is further

ORDERED that defendant Miyama USA Tri-Wave, Inc.'s, incorrectly sued as Miyama Tri-Wave, Inc., shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof; and it is further

ORDERED that Plaintiff shall proof of mailing and service within three days of receipt of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 6/26/13

EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER