

Crum & Forster Specialty Ins. Co. v BCC Group, Inc.
2014 NY Slip Op 32463(U)
September 19, 2014
Supreme Court, New York County
Docket Number: 150826/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CRUM & FORSTER SPECIALTY INSURANCE
COMPANY,

Plaintiff,

- v -

Index No.
150826/2014

**DECISION
and ORDER**

Mot. Seq. 001

THE BCC GROUP, INC., THE AMERICAN GROCER,
LLC, A RISK PURCHASING GROUP, 54 ISLIP
FOOD CORP., 117 CORONA MEAT CORP.,
120 NORTH MAIN ST MEAT INC., 560 WEST
MEAT & PRODUCE CORP., 597 FOOD CORP.,
601 OLD COUNTRY CORPORATION, 725 COMMACK
MEAT CORP., 1115 PENNSYLVANIA MEAT CORP.,
1314 ST. NICHOLAS CORP., 1626 MEAT CORP.,
1757 TJM MEAT CORP., 3412 V & F FOOD CORP.,
3690 JAD FOOD CORP., A&J FAMILY CORP., A&K
SUPERMARKET CORP., A&N FOOD ENTERPRISES, INC.,
ALAN FOOD PRODUCTS, CORP., B & ME FOOD
CORP., BC FOOD & PRODUCE CORP., BEDFORD
BOULEVARD FOOD CORP., BROS. FOOD MARKET
INC., C-MARKET FOOD CORP., CEMAR MEAT &
PRODUCE CORP., CHARISSE & CHRISTINE
ENTERPRISES, LTD., COMPARE FOODS INC.,
DON BAUTISTA FOOD INC., F.T. MEAT CORP.,
FRUITS, VEGS & MEAT CORP., GOLD CITY
SUPERMARKET INC., GREEN FOOD CORP.,
HE)(FOODS INC., HMSM SUPERMARKET INC.,
JANICO MEAT CORP., JD 710 C.J. FOOD CORP.,
JD 840 EAST NEW YORK FOOD CORP., JESADAN MEAT
CORP., JFA FOOD CORP., JHY FOOD CORP., JOFAN
MEAT CORP., JORGU MEAT CORP., JUNCALITO
ABAJO MEAT CORP., LA JAVIELA MEAT CORP.,
MPM ENTERPRISES, INC., NEW FOOD CORP.,
NPS GROCERY, INC., PALERO FOOD CORP., PALMA

NUEVA FOODS CORP., RA YCA FOOD CORP.,
ROCKAWAY SUPERMARKET CORP., SAMAR FOOD
CORPORATION, TEO FOOD CORP., TIFFANY MEAT
INC., and WESTBURY FOOD CORP.,

Defendants.

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

This is an action for breach of contract, account stated, unjust enrichment, and attorney’s fees based on certain alleged insurance agreements between Plaintiff Crum & Forster Specialty Insurance Company (“CFSIC” or “Plaintiff”), a foreign excess lines insurer, and defendant, The American Grocer, LLC, A Risk Purchasing Group (“The American Grocer”), a risk purchasing group allegedly formed to obtain insurance at favorable rates for a group of individually owned supermarkets, including those named as defendants herein. Plaintiff alleges that The American Grocer procured two insurance policies from Plaintiff on behalf of the supermarkets in question, and that these policies each contain a Self-Insured Retention (“SIR”) provision obligating the defendants to indemnify Plaintiff for certain payments and/or losses incurred by Plaintiff. Plaintiff claims to have made such payments, and that the defendants failed to reimburse and/or indemnify Plaintiff as required.

Defendant 3690 JAD Food Corp. (“3690 JAD” or “Movant”) now moves for an Order, pursuant to CPLR § 3211(3), BCL § 1312, and LLC Law § 808, dismissing Plaintiff’s amended complaint on the grounds that Plaintiff lacks capacity to maintain this suit.

CPLR § 3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (3) the party asserting the cause of action has not legal capacity to sue;

LLC Law § 808(a) denies an unauthorized foreign LLC “doing business” in New York capacity to sue here unless or until such authorization is obtained. This statute provides:

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.

Section 808(a) is a statutory barrier to the foreign LLC's right to bring suit. Section 808(a), like its corporate counterpart, BCL § 1312(a), regulates foreign LLC's "doing business" in this state, and employs a heightened "doing business" standard in order to avoid unconstitutional interference with interstate commerce under the Commerce Clause. (*Airtran N.Y., LLC v. Midwest Air Group, Inc.*, 46 A.D.3d 208, 214 [1st Dep't 2007]; *Matter of Mobilevision Med. Imaging Servs., LLC v. Sinai Diagnostic & Interventional Radiology, P.C.*, 66 A.D.3d 685 [2d Dep't 2009]). Under this heightened "doing business" standard, the test is whether the foreign LLC's business activity is so systematic and regular as to manifest a continuity of activity in this state. (*Id.*). The party asserting this barrier to suit bears the burden of rebutting the presumption that the unauthorized foreign LLC is "doing business" in the state of incorporation, and demonstrating that the unauthorized foreign LLC's local business activity is "systematic and regular." (*Id.*; *Nick v. Greenfield*, 299 A.D.2d 172, 173 [1st Dep't 2002]). LLC § 808(a) presents a "higher hurdle" than the standard jurisdictional "doing business" test used to determine long-arm jurisdiction under CPLR § 302 (*Airtran*, 46 A.D.3d at 215). Thus, "incidents of business" may be sufficient to subject an unauthorized foreign company to service of New York process, "and yet insufficient to require it to take out a certificate authorizing it to do business in New York." (*Colonial Mortg. Co. v. First Fed. S&L Ass'n*, 57 A.D.2d 1046, 1047 [4th Dep't 1977]; *International Text-Book Co. v. Tone*, 220 N.Y. 313, 318 [1917]).

Movant argues that Plaintiff lacks capacity to maintain this action because Plaintiff is a foreign LLC doing business in New York without authorization. Movant argues that Plaintiff is an Arizona LLC with its principal place of business located in New Jersey, and that Plaintiff does not have a certificate of authority to do business in New York. Movant argues that Plaintiff issues insurance to business entities located in New York, and that Plaintiff maintains employees for purposes of conducting underwriting business in this state. Movant submits a document certified by the New York Secretary of State, which indicates that Plaintiff has not been issued a certificate of authority to do business in New York. Movant also points to Plaintiff's website and argues that this website contains a page titled, "New York

(Metro) – Underwriting Contacts”, which lists Plaintiff’s New York underwriting contacts and provides New York telephone numbers for some of those employees.

Plaintiff, in turn, argues that Plaintiff is an eligible excess and surplus lines insurer in New York through the Excess Line Association of New York (“ELANY”). As such, Plaintiff argues, New York’s Insurance Law and implementing regulations permit Plaintiff to issue certain insurance policies through a licensed excess lines broker, even though Plaintiff is not an authorized insurer in New York. Plaintiff argues that the policies at issue in Plaintiff’s complaint were effected by mail from Plaintiff’s principal place of business in New Jersey, in compliance with New York’s Insurance Law and regulations, and that Plaintiff does not maintain offices or employees in New York.

Here, Movant fails to meet its heavy burden of demonstrating that Plaintiff is “doing business” in this state so as to deny Plaintiff capacity to sue under LLC Law § 808(a). It is undisputed that Plaintiff is an Arizona LLC, that Plaintiff’s principal place of business is located in New Jersey, and that the policies at issue herein were mailed from New Jersey. In light of the foregoing, evidence of a handful of New York telephone numbers is insufficient, without more, to sustain Movant’s burden of showing that Plaintiff’s business activity in this state is “systematic and regular” within the meaning of LLC § 808(a)’s heightened “doing business” test. (*see Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 A.D.3d 418, 419 [1st Dep’t 2012] [“Although plaintiff often purchased debt held by New York debtors, this, as an activity carried on by an Ohio company with no offices or employees in New York, is not sufficient to constitute doing business under section 1312”]; *see also Palisades Tickets, Inc. v. Daffner*, 118 A.D.3d 619, 620 [1st Dep’t 2014]; *Beltone Electronics Corp. v. Selbst*, 58 A.D.2d 560 [1st Dep’t 1977]).

Wherefore it is hereby

ORDERED that Movant’s motion to dismiss Plaintiff’s complaint for lack of capacity is denied.

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

DATED: September 19, 2014


EILEEN A. RAKOWER, J.S.C.