

Jefferson Bus. Interiors, LLC v East Side Pharmacy, Inc.
2016 NY Slip Op 30082(U)
January 8, 2016
Supreme Court, New York County
Docket Number: 653876/2014
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

-----X
**JEFFERSON BUSINESS INTERIORS, LLC, as holder
of an assignment and assumption of contracts,
and JEFFERSON GROUP, LLC**

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 653876/2014

**EAST SIDE PHARMACY, INC., 94TH REALTY LLC,
GIANNASCA GALLO ARCHITECTS, P.C., and
"JOHN DOE" and "JANE DOE" 1-10, representing
tenants or persons who may be in possession of
or have an interest in the lien premises, PAUL
GALLO ARCHITECT a/k/a GIANNASCA GALLO
ARCHITECTS, and ATLANTIC SPECIALTY
INSURANCE COMPANY**

Defendants

-----X
NANCY M. BANNON, J.

In this action to, *inter alia*, recover damages for breach of contract and foreclose on a mechanic's lien, defendant East Side Pharmacy, Inc. ("ESP") moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(3), to discharge the mechanic's lien and a lien discharge bond, and for sanctions pursuant to 22 NYCRR 130-1.1. The plaintiffs, Jefferson Group, LLC ("Jefferson Group") and Jefferson Business Interiors, LLC ("JBI"), oppose the motion and cross-move to stay the action, to permit amendment of the "Notice Under Mechanic's Lien Law," and for attorney's fees. The motion is granted in part and the cross-motion is denied.

I. Background

In January 2014, Jefferson Group and ESP entered into a contract whereby Jefferson Group was to perform certain construction work on the premises leased by ESP located at 207 East 94th Street, 4th Floor in Manhattan. Upon ESP's architect's refusal to issue a Certificate of Substantial Completion to Jefferson Group and its failure to pay Jefferson Group the full contract amount, Jefferson Group filed a mechanic's lien on August 26, 2014.

On December 11, 2014, Jefferson Group and JBI executed an "Assignment and Assumption of Contracts," whereby Jefferson Group assigned all of its rights, interests, and benefits under the January 2014 contract to JBI. Pursuant to the assignment, JBI assumed all Jefferson Group's obligations under the contract arising after December 11, 2014, but Jefferson Group expressly

reserved the right to collect and receive any amounts due and owing to it under the January 2014 contract prior to the date of the assignment agreement. On December 18, 2014, JBI, as assignee, and Jefferson Group commenced this action seeking, *inter alia*, damages for ESP's alleged breach of the January 2014 contract and to foreclose on the mechanic's lien. Thereafter, on December 23, 2014, ESP posted and filed a lien discharge bond.

ESP now moves to dismiss the complaint on the grounds that the plaintiffs lack legal capacity to sue, to discharge the mechanic's lien and bond for Jefferson Group's failure to provide a New York business location on the Notice of Lien, and for sanctions. In the alternative, ESP moves pursuant to CPLR 3211(c) and 3212 for summary judgment dismissing the complaint on the same grounds. The plaintiffs oppose the motion and cross-move to stay the action to allow Jefferson Group to obtain authorization to do business in the State of New York, to permit them to amend the "Notice Under Mechanic's Lien Law" *nunc pro tunc* to include a New York business address, and for attorneys' fees.

II. Discussion

A. The Plaintiffs' Capacity to Sue

Dismissal under CPLR 3211(a)(1) is warranted when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" Fortis Financial Servs., LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). "Out of court transactions such as ... contracts ... would qualify as 'documentary evidence' in the proper case." Fontanetta v John Doe 1, supra at 84. Where such documentary evidence establishes that a plaintiff lacks legal capacity to sue, dismissal of the complaint pursuant to CPLR 3211(a)(3) is warranted. See Fountains Acquisition Properties, Inc. v Tocci Bldg. Corp. of N.Y., Inc., 17 AD3d 524 (2nd Dept. 2005).

Here, ESP established that JBI lacks capacity to sue pursuant to the "Assignment and Assumption of Contracts." According to the clear and unambiguous terms of the assignment (see Greenfield v Philles Records, Inc., 98 NY2d 562, 569 [2002]; MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640 [2009]; Ashwood Capital, Inc. v OTG Mgt., Inc., 99 AD3d 1 [1st Dept. 2012]), no right is conferred on JBI to collect the allegedly unpaid balance under the January 2014 contract, reflected in the August 2014 mechanic's lien, because any such balance was incurred prior to the assignment's effective date of December 11, 2014. Indeed, the assignment assigns only Jefferson Group's future obligations under the contract to JBI and expressly maintains Jefferson Group's authority to collect any amounts due and owing to it which were incurred prior to the effective date. The assignment is, therefore, insufficient to confer on JBI the capacity to sue for the allegedly unpaid balance under the January 2014 contract. It is further ineffective because, according to Section 19.1 of the January 2014 contract, ESP's written consent was required for any assignment of Jefferson Group's rights or obligations under that contract, which, undisputedly, was never given.

As JBI lacks capacity to sue under the assignment and it was not a party to the January 2014 contract, ESP's motion to dismiss the complaint insofar as asserted by JBI is granted. See generally Fountains Acquisition Properties, Inc. v Tocci Bldg. Corp. Of N.Y., Inc., supra.

Although it established JBI's lack of capacity to sue, the evidence submitted by ESP fails to show that Jefferson Group, as a foreign limited liability company, lacks such capacity under the Limited Liability Company Law. Pursuant to the Limited Liability Company Law, where a foreign limited liability company is doing business in New York without having received a certificate of authority, it is statutorily barred from maintaining an action in this state. See Limited Liability Company Law § 808(a). However, under relevant case law regarding the equivalent provision of the Business Corporation Law (see Business Corporation Law § 1312[a]; Mobilevision Medical Imaging Svs. v Sinai Diagnostic & Interventional Radiology, P.C., 66 AD3d 685 [2nd Dept. 2009]), where a foreign company without authority is not "doing business" in New York, it may maintain an action in this state. See Acno-Tec Ltd. v Wall Street Suites, L.L.C., 24 AD3d 392 (1st Dept. 2005); Uribe v Merchants Bank of New York, 266 AD2d 21 (1st Dept. 1999); S&T Bank v Spectrum Cabinet Sales, Inc., 247 AD2d 373 (2nd Dept. 1998); Alicanto, S.A. v Woolverton, 129 AD2d 601 (2nd Dept. 1987). In order to establish that any such company is "doing business" in the state and, thus, lacks legal capacity to sue, the moving party "bears the burden of proving that the corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction." Alicanto, S.A. v Woolverton, supra at 602 [internal quotation marks omitted]; see generally Airtran New York, LLC v Midwest Air Group, Inc., supra.

Jefferson Group's lack of a certificate of authority does not warrant dismissal of the action because insufficient evidence was submitted to show that it is "doing business" in New York within the meaning of the Limited Liability Company Law, such that a certificate of authority would be required to maintain the action. ESP submits only a seemingly incomplete document purporting to be a printout of Jefferson Group's website, which lists four renovation projects it completed in New York. There is no indication when such projects were completed and no other evidence is submitted as to any other contact with the state. Such submissions do not suggest that Jefferson Group maintains a systematic and regular presence in New York.

Under similar circumstances, courts have found that a defendant failed to meet its burden of establishing that the plaintiff was "doing business" in this state. For example, where the plaintiff maintained no office or telephone listing, owned no real property, and had no employees in New York State and its in-state activities were "limited to solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce," such activities failed to constitute "doing business" in the state. Uribe v Merchants Bank of New York, supra at 22. Similarly, even where a plaintiff shipped a large amount of its product into the state, it did not maintain an office, telephone, or sales representative in New York and the court found that there was insufficient evidence of the requisite continuous business activity. See S&T Bank v Spectrum Cabinet Sales, Inc., 247 AD2d 373 (2nd Dept. 1998); see also Acno-Tec Ltd. v Wall Street Suites, L.L.C., 24 AD2d 392, 393 (1st Dept. 2005) (evidence relating to a single business

transaction in New York was insufficient to show “regular and systematic business activities” in the state).

Here, while Jefferson Group may have conducted four renovation projects in New York at some time in the past, such activity alone is insufficient to establish the requisite continuity of activity in the state. Indeed, in opposition to the motion, Jefferson Group submits the affidavit of its managing member, who maintains that Jefferson Group has no staff, no lease to commercial space, and no bank account in New York. Further, it has merely informal access to a conference room to conduct occasional meetings in Manhattan and performs only sporadic work in New York. Under these circumstances, ESP has failed to meet its burden in demonstrating that Jefferson Group lacks capacity to sue pursuant to the statutory barrier contained in the Limited Liability Company Law. See generally Uribe v Merchants Bank of New York, supra; S&T Bank v Spectrum Cabinet Sales, Inc., supra. The plaintiffs’ cross-motion to stay the action to allow Jefferson Group to obtain authorization to do business in the State of New York is, thus, denied. In any event, while the authorization would not be retroactive, a failure to obtain such authorization is not a jurisdictional impediment to the commencement of an action. See Basile v Mullholland, 73 AD3d 597 (1st Dept. 2010).

B. Validity of Mechanic’s Lien

ESP further failed to establish that the “Notice Under Mechanic’s Lien Law” is invalid for failure to supply an in-state business address for Jefferson Group. A notice of lien is required to state the business address of the lienor and, if the lienor is a foreign corporation, its principal place of business within the state. See Lien Law § 9(1). However, the Lien Law provides that “[t]his article is to be construed liberally ... [and] substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same.” Lien Law § 23. Where the lienor maintains no principal place of business within the state, provision of the lienor’s principal place of business outside the state along with the address of an attorney upon whom service may be made in New York substantially complies with Lien Law § 9. See Butts v Valerio Const. Co., 236 AD 299 (3rd Dept. 1932), aff’d 261 NY 630 (1933); see also Application of Edmund J. Rappoli Co., 5 AD2d 758 (4th Dept. 1957); 5 Brothers, Inc. v D.C.M. of New York, LLC, 38 Misc 3d 1235(A) (Sup Ct NY Co., 2013); In Re New Jersey Window Sales, Inc., 190 Misc 2d 654 (Sup Ct NY Co., 2002); Garden State Brickface Co. v Artcourt Realty Corp., 40 Misc 2d 712 (Sup Ct NY Co., 1963).

Here, the “Notice Under Mechanic’s Lien Law” filed by Jefferson Group substantially complies with the notice requirements of the Lien Law. Although Jefferson Group did not provide a New York business location on the notice of lien, as noted above, it maintains no business location in New York. It supplied the address of its principal place of business in Stamford, Connecticut as well as the name and address of its New York attorney. The provision of the address of its principal place of business outside the state along with the address of its attorney within the state fulfills the purpose of the notice of lien, which is to provide information to a property owner so that the owner “may, upon inquiry, ascertain whether or not the material has been actually furnished and the

service have been actually rendered, and the value thereof." Matter of Lycee Francais de N.Y. v Calagna, 26 Misc 2d 374 (Sup Ct NY Co., 1960); see Toop v Smith, 181 NY 283 (1905). Further, the notice of lien is not otherwise facially defective. Accordingly, the "Notice Under Mechanic's Lien Law" filed by Jefferson Group substantially complies with Lien Law § 9 and is not subject to summary discharge. See Butts v Valerio Const. Co., supra; 5 Brothers, Inc. v D.C.M. of New York, LLC, supra; In Re New Jersey Window Sales, Inc., supra. That branch of ESP's motion seeking to discharge the lien is, therefore, denied. The branch of Jefferson Group's cross-motion to amend the notice of lien in the event it is found to be defective is denied as academic.

C. Sanctions and Attorneys' Fees

While ESP seeks the imposition of sanctions pursuant 22 NYCRR 130-1.1(a), the application is denied as it has not demonstrated that the plaintiffs' actions are frivolous within the meaning of the statute, i.e. "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," was undertaken to delay or prolong the litigation, or asserts material factual statements that are false. 22 NYCRR 130-1.1(c). Indeed, the court has denied ESP's motion in part. Accordingly, the branch of the motion seeking sanctions is denied.

As they have not prevailed on their cross-motion, there is no basis for an award of attorneys' fees to the plaintiffs, and that branch of their cross-motion is denied.

III. Conclusion

ESP established that JBI lacks capacity to sue under the January 2014 contract, but failed to make the requisite showing that Jefferson Group lacks capacity to sue based on its status as an unregistered foreign corporation. ESP's motion to dismiss the complaint insofar as asserted by JBI is, therefore, granted, and is otherwise denied. The plaintiffs' cross-motion is denied.

Accordingly, it is

ORDERED that the motion of defendant East Side Pharmacy, Inc. is granted to the extent that the complaint insofar as asserted by plaintiff Jefferson Business Interiors, LLC is dismissed and the motion is otherwise denied, and it is further,

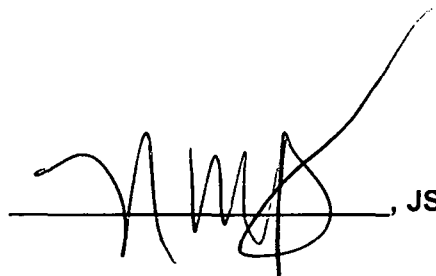
ORDERED that the cross-motion is denied, and it is further

ORDERED that defendant East Side Pharmacy, Inc. shall serve and file an answer to the complaint within 20 days of the date of service of this order with notice of entry, and it is further

ORDERED that the parties shall appear for a preliminary conference on April 7, 2016, at 2:30 p.m.

This constitutes the Decision and Order of the court.

Dated: January 8, 2016


_____, JSC
HON. NANCY M. BANNON