

Fan Yu Intl. Holdings, Ltd. v Seduka, LLC

2016 NY Slip Op 31799(U)

September 29, 2016

Supreme Court, New York County

Docket Number: 651228/2014

Judge: Ellen M. Coin

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ELLEN M. COIN, Justice

PART: 63

Fan Yu International Holdings, Ltd.

INDEX NO. 651228/2014
MOTION DATE July 13, 2016
MOTION SEQ. NO. 005

-v-

Seduka, LLC a/k/a Seduka Jeans, LLC a/k/a
Seduca Jeans, Inc.

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

Notice of Motion/Order to Show Cause—Affidavits—Exhibits _____	No(s). <u> 1 </u>
Answering Affidavits—Exhibits _____	No(s). <u> 2 </u>
Replying Affidavits _____	No(s). <u> 3 </u>

Upon the foregoing papers, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR §3126 to compel responses to its discovery demands is granted as set forth herein, and the cross-motion to dismiss is denied. It is further

ORDERED that within thirty (30) days from the date of this order, defendant shall answer all outstanding discovery without interjecting an objection, except one premised on the attorney-client privilege accompanied by a privilege log, and shall make the non-conforming goods available for an inspection. In the event defendant is unable to satisfy plaintiff's request for an inspection, defendant shall submit an affidavit detailing the circumstances leading to the unavailability of said goods within thirty (30) days from the

[* 2]
date of this order. Failure to comply with this order shall result in an award of judgment on the issue of liability as against defendant.

Plaintiff, a clothes manufacturer located in the People's Republic of China, commenced this action to recover payment for goods sold and delivered in New York. Defendant bases its cross-motion to dismiss the complaint pursuant to Business Corporation Law §1312(a) on plaintiff's location of its operations in China and a website printout indicating that plaintiff is a corporation registered in Hong Kong. Defendant argues that because plaintiff is a Chinese corporation that is conducting business in New York without requisite authorization, it may not sue in the courts of this state. Further, defendant argues that the motion to compel should be denied because plaintiff's counsel had no contact with defense counsel's office between November 12, 2015 and the date of the filing of this motion, March 11, 2016. Defendant has not produced any discovery in the wake of this motion and does not represent that it complied with all outstanding discovery demands.

Defendant's cross-motion is wholly devoid of legal basis. 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 required authorization. In order for a court to find that a foreign corporation is doing business in New York within the meaning of the Business Corporation Law §1312(a), the corporation must be engaged in a regular and continuous course of conduct in this state (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]). The doing business standard under this statute requires a greater amount of local activity by a foreign corporation than the doing business standard

for personal jurisdiction under CPLR 302. (*Frontiers Unlimited, LLC v Greenstein*, 40 Misc 1239(A) [Sup Ct, Suffolk County 2013]). The defendant bears the burden of proving that the plaintiff corporation's business activities in New York are not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction (*Highfill*, 50 AD3d at 743 [citations omitted]). The defendant must show that the plaintiff conducted continuous activities in New York essential to its corporate business (*id.*). Absent sufficient evidence to establish that a plaintiff is doing business in this state, the presumption is that the plaintiff is doing business in its state of incorporation and not in New York (*id.* at 743-44).

The maintenance of an office in New York, without more, does not constitute doing business in this state within the meaning of BCL §1312(a) (*Stafford-Higgins Indus., Inc. v Gaetone Fabrics, Inc.*, 300 F Supp 65, 67 [SDNY]; *Frontiers Unlimited supra*). Moreover, with respect to a contract, it must be shown that it constitutes more than a single transaction (*Intl. Fuel & Iron Corp. v Banner Steel Co.*, 242 NY 224 [1926]). There must be evidence of regular, systematic activity that is not merely incidental to interstate commerce (*Fine Arts Enters. N.V. v Levy*, 149 AD2d 795, 796 [3d Dept 1989] [in sale of syndicated horse ownership, evidence that contract was executed and performed in New York, together with maintenance of office and bank account in New York, insufficient]; *see also Alicanto, S.A. v Woolverton*, 129 AD2d 601, 602-03 [2d Dept 1987] [New York activities incidental to international commerce]).

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

Business Corporations Law § 1312(a), even when coupled with other activities (*see Maro Leather Co. v Aerolineas Argentinas*, 161 Misc 2d 920, 924 [1st Dept 1994] ; 15 NY Jur 2d, Business Relationships § 1097).

Here, defendant does not explain what intrastate activities plaintiff engaged in and relies wholly on plaintiff's corporate registration in Hong Kong. Not only is this insufficient for defendant to meet its burden under applicable caselaw, it speaks of absence of even the most basic legal research in preparation of the cross-motion, bordering on frivolous litigation. The purpose of Business Corporations Law §1312(a) is to regulate foreign corporations that are doing business within the state and not to enable the avoidance of contractual obligations (*see Acno-Tech Ltd. v Wall Street Suites, LLC*, 24 AD3d 392, 393 [1st Dept 2005]). This cross-motion appears to be a thinly veiled attempt to avoid disclosure, and the Court rejects it as such.

This constitutes the Decision and Order of the Court.

Dated: 9/29/16

EM
Ellen M. Coin, A.J.S.C.

Check One:.....

- CASE DISPOSED
- NON-FINAL DISPOSITION