

**Douglas Stewart Co. v 2254 Third Ave Dept Store  
Inc.**

2019 NY Slip Op 31634(U)

June 7, 2019

Supreme Court, New York County

Docket Number: 654506/2017

Judge: Gerald Lebovits

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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: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 654506/2017

DOUGLAS STEWART COMPANY,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 003, 005

- v -

2254 THIRD AVE DEPT STORE INC. d/b/a J DEPT STORE,  
JERRY ZIRDOK, RACHEL ZIRDOK, and FREDDY SROUR a/k/a  
FREDDY ZIRDOK,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number 59, 60, 61, 64, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98 (motion 003); and 120, 212, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133 (motion 005)

were read on this motion to DISMISS AND REARGUE

*Ariel Bershadsky, Esq.*, for Plaintiff  
*Jerome E. Goldman, Esq.*, for Defendants.

Gerald Lebovits, J.

Motion sequences 003 and 005 are consolidated for disposition.

Defendants move under CPLR 3212 and BCL § 1312 for an order dismissing plaintiff’s claims (motion sequence 003). Defendants also move to reargue a disclosure order entered by this court at a March 6, 2019, compliance conference (motion sequence 005). For the reasons set forth below, we deny defendants’ motions.

**Background**

Plaintiff, Douglas Stewart Company (Douglas Stewart), is a Wisconsin corporation that sells office supplies and tablet computers. Defendants are 2254 Third Ave. Dept. Store Inc. (also known as J Dept. Store), a New York company, and its purported officers—Rachel Zirdok, Freddy Srouer (also known as Freddy Zirdok), and Jerry Zirdok (a fictitious person).

On October 28, 2014, defendants signed a “New Customer Profile” and “Acknowledgement of Terms & Conditions” with Douglas Stewart. Freddy Srouer, using the name “Freddy Zirdok,” signed the Agreement and the Profile. An individual using the name Jerry Zirdok signed both documents as J Dept Store’s accounts payable contact, authorized buyer, and authorized signatory. Rachel Zirdok signed both documents as president of the company.

Between August 19, 2016 and October 2, 2016, defendants ordered \$38,045.19 of products from Douglas Stewart's website. Douglas Stewart shipped the items to defendants, along with invoices. Defendants accepted the orders but never paid for the products. Douglas Stewart eventually discovered that J Dept. Store was an assumed name for 2254 Third Ave Dept. Store Inc. (2254 Third Ave). 2254 Third Ave. was dissolved on June 29, 2016 and reinstated two years later.

Plaintiff sued for breach of contract, account stated, detrimental reliance, and unjust enrichment. The instant motion is defendants' motion to dismiss plaintiff's cause of action. It originally was a cross-motion to plaintiff's now withdrawn motion for summary judgment.

## Discussion

### A. Motion for Summary Judgment

Because the instant motion was served after defendants answered and issue was joined, the court treats the motion as one for summary judgment under CPLR 3212 (a). A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The motion "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." (CPLR 3212 [b].)

#### 1. BCL 1312 (a) does not bar plaintiff's action

Defendants argue that Business Corporation Law (BCL) § 1312 (a) bars plaintiff's suit because plaintiff is not authorized to do business in New York. Plaintiff responds that it may maintain this claim without authorization because it is not "doing business" in New York within the meaning of BCL § 1312 (a).

Since BCL § 1312 (a) "constitutes a statutory barrier to the foreign corporation's right to bring suit, the party seeking to impose the barrier, in order to rebut the presumption that the corporation does business in its state of incorporation rather than New York, has the burden of proving that the foreign corporation's activity in New York is systematic and regular." (*Airtran NY, LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 214 [1st Dept 2007].) Defendants have not met this burden. At most defendants assert in conclusory fashion that the action is barred under BCL § 1312 (a) because plaintiff is not authorized to do business in New York. But that assertion is beside the point: the issue is whether plaintiffs' activities in New York make it subject to BCL § 1312 (a)'s authorization requirement in the first place.

"Doing business" for BCL § 1312 (a) purposes requires "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, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008], quoting *S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 373 [2d Dept 1998].)

Plaintiff is not “doing business” within the meaning of BCL § 1312 (a). Plaintiff is a Wisconsin corporation with no offices, property, bank account, inventory, or employees in New York. Plaintiff does not represent to its customers that it is a New York company. Plaintiff sends its invoices from Wisconsin and ships its products from warehouses in Wisconsin and Nevada. Plaintiff sells products throughout the United States and Canada. Plaintiff does not actively pursue New York customers and did not solicit defendants’ business. The volume of plaintiff’s New York sales is “a small portion” of its total revenue. Plaintiff need not obtain authorization under BCL § 1312 (a) before maintaining this suit.

## **2. Outstanding issues of material fact preclude summary judgment**

Defendants assert that they are entitled to summary judgment because plaintiff has failed to state a viable cause of action against the individual defendants. The motion is denied because discovery is incomplete.

Defendants’ first argument is that liability rests with the corporation and not its officers. The corporation was in existence when the individual defendants signed the agreement in October of 2014. Although the purported breach occurred in 2016 while the corporation was dissolved, the individual defendants are immune from liability because the corporation was reinstated in 2018. The essence of this argument is that when the corporation was reinstated, the individual defendants regained the protection of the corporate form retroactively over the period of dissolution. Plaintiff responds that defendants have not explained the circumstances of the corporation’s dissolution and reinstatement, or the extent of the individual defendants’ knowledge of the corporation’s status. Plaintiff asserts that these missing facts indicate precisely the circumstances that would weigh against a retroactive application of corporate immunity.

Because this action began almost a year before the corporation was reinstated, it is necessary to know the facts of the corporation’s dissolution and reinstatement in order to determine whether the individual defendants are retroactively immune from liability. On this basis, summary judgment is improper.

Defendants’ second argument is that plaintiff has not proven that the individual defendants acted as the corporation’s agents, or if they did, that they did so intending to substitute their personal liability for that of the corporation. Defendants assert that the individual defendants were not aware that the corporation had been dissolved. Defendants argue that plaintiff has not proven that the individual defendants are connected to the purported contract. Defendant also argues that the transaction is void under GOL § 5-701 (a) (2) because plaintiff has not shown that there is a writing connecting any of the individual defendants to the purported sales. Plaintiff responds that the individual defendants may not assert an agency defense to avoid the corporation’s contractual liability because defendant has not met its burden of establishing that the individual defendants disclosed to plaintiff the fact of their agency and the identity of the principal.

The court does not reach the merits of whether the individual defendants are entitled to retroactive protection of the corporate entity or whether they may validly assert an agency defense. Summary judgment is improper at this time. It is necessary to know the facts of the

corporation's dissolution and reinstatement, and the extent of the individual defendants' connection to the purported contract, in order to resolve this case.

**B. Motion to Reargue**

Defendants also move to reargue a compliance conference entered by this court on March 6, 2019, directing defendants to provide specific documents and information to plaintiffs. Defendants assert that plaintiffs improperly "snuck" certain items of burdensome discovery into the conference order, and therefore that defendants should not be required to comply with those aspects of the order.

Defendants' argument is without merit. The terms of the compliance conference order were reached following extensive discussion and negotiation among counsel for plaintiffs, counsel for defendants, and the court. Counsel for defendants also had a full opportunity to review the parties' proposed order—and the items of discovery that the order required defendants to provide—before it was presented to the court for approval and signature. That defendants now belatedly object to some of the discovery that the court directed them to provide in the March 6 order does not constitute a basis for reargument.

ACCORDINGLY, it is

ORDERED that defendants' motion to dismiss, motion sequence 003, is denied; and it is further

ORDERED that defendants' motion to reargue, motion sequence 005, is denied.

6/7/19  
DATE

  
GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE