

Chalan USA Inc. v Ashmawy
2019 NY Slip Op 31911(U)
June 28, 2019
Supreme Court, New York County
Docket Number: 160545/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 160545/2017

CHALAN USA INC. d/b/a THE SUIT CO.,

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

MOHAMED ASHMAWY individually and d/b/a PRATO OUTLETS
a/k/a PRATO MEN'S WEAR OUTLETS,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 14, 15, 16

were read on this motion to/for STRIKE ANSWER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISS

In this action to recover for monies due and owing, plaintiff Chalan USA Inc. d/b/a The Suit Co. moves, in effect, pursuant to CPLR 3126 (motion sequence 001), to strike the answer of defendant Mohamed Ashmawy individually and d/b/a Prato Outlets a/k/a Prato Men's Wear Outlets. Defendant moves separately for, inter alia, dismissal of the complaint pursuant to CPLR 3211(a)(3) and Business Corporation Law ("BCL") § 1312 (motion sequence 002). After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced the captioned action by filing a summons and verified complaint on November 29, 2017. Doc. 2. In its complaint, plaintiff alleged that it was a foreign corporation;

that between March and May of 2016, it sold certain goods to defendant for the price of \$32,149.32; and that although demand for payment had been made, defendant has not paid any of this sum. Doc. 2.

Defendant joined issue by its answer filed December 27, 2017. Doc. 5. In its answer, defendant denied the substantive allegation of wrongdoing and asserted numerous affirmative defenses, including, as fifth and sixth affirmative defenses, that he is an improper party and, as a thirteenth affirmative defense, that this action was barred by BCL 1312 since plaintiff was a foreign corporation unauthorized to do business in New York State and thus lacked the capacity to bring the suit. Doc. 5.

On or about April 10, 2018, plaintiff served a set of interrogatories on defendant. Docs. 9 and 10. By letter dated May 21, 2018, plaintiff's attorney wrote to defendant's attorney stating that he had not received responses to the interrogatories and that, if he did not receive such a response within seven days, he would make an "appropriate motion." Doc. 11. Plaintiff's attorney did not receive a response to the interrogatories and, on June 20, 2018, filed a motion, in effect, pursuant to CPLR 3126 (motion sequence 001), seeking to strike defendant's answer. Doc. 6. In support of the motion, plaintiff argues that the answer should be stricken because defendant failed to answer the interrogatories and never objected to, or asked for an extension of time to respond to, the same. Doc. 7.

In opposition, defendant argues that, since there has been no discovery conference held in this matter, and since it has not violated any court order regarding discovery, its answer cannot be stricken. Doc. 15. Defendant further asserts that plaintiff's proper remedy would have been to move to compel responses to the interrogatories pursuant to CPLR 3124. Defendant also

maintains that, instead of striking its answer, this Court should dismiss the complaint for the reasons set forth in his motion seeking that relief, which is addressed below.

On the same day that defendant filed his opposition to plaintiff's motion, he moved, pursuant to CPLR 3211(a)(3) and BCL 1312 (motion sequence 002), to dismiss the complaint with prejudice on the ground that plaintiff is a foreign (California) corporation unauthorized to do business in New York State and thus without legal capacity to sue. Doc. 17. Defendant also moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint on the ground that the party which owes plaintiff money for goods sold and delivered is not Ashmawy, but rather a New Jersey corporation known as "Prato Outlets," which fact, claims defendant, is established by plaintiff's own correspondence and accounts receivable reports. Thus, urges defendant, the claim against Ashmawy is frivolous. Defendant also moves, pursuant to CPLR 8501 et. seq., for an order directing defendant to post a bond for security for costs and to stay this action until such bond is filed.

In opposition to the motion, plaintiff's counsel argues that the branch of defendant's motion seeking dismissal based on plaintiff's lack of capacity to sue is without merit since plaintiff is not "doing business in New York." Doc. 27 at par. 4. Rather, asserts plaintiff's counsel, plaintiff's contacts with New York are merely incidental to interstate commerce. Plaintiff's counsel also asserts that Ashmawy was properly named as a defendant since he held himself out as doing business as "Prato Outlets" or "Prato Men's Wear Outlets" and the New York Secretary of State website does not even have a listing for either of those entities. Doc. 27 at pars. 11, 15.

Mike Chalan, plaintiff's president, submits an affidavit in opposition to the motion in which he states, inter alia, that defendant's argument that plaintiff does business in the State of

New York is incorrect. Doc. 28 at par. 2. He represents that plaintiff has no office, telephone number, employees, or assets in New York. Doc. 28 at par. 3. He insists that the fact that plaintiff “has sold products to companies that then stock them in New York does not mean that [plaintiff] is doing business in New York.” Doc. 28 at par. 4. He also represents that defendant never told plaintiff that plaintiff was doing business with anyone other than defendant and that all correspondence received from defendant indicated that Ashmawy was doing business as “Prato Outlets” or “Prato Men’s Wear Outlets.” Doc. 28 at par. 5. Chalan notes that the purchase orders sent by defendant to plaintiff reflect that defendant’s name is “Prato Men’s Wear Outlets” and that the invoices sent by plaintiff to defendant reflect that they are from “Prato Outlets” and/or “Prato Men’s Wear Outlets.” Doc. 28 at pars. 6-7. He insists that, because defendant did not indicate that a corporate entity was to be responsible for the charges, it was appropriate for Ashmawy to be named individually. Doc. 28 at par. 8. Additionally, urges Chalan, Ashmawy did not object to the bills sent to defendant. Doc. 28 at par. 10.

In a reply affirmation in further support of defendant’s motion, defendant’s attorney asserts that plaintiff does not dispute that it is not authorized to do business in New York. Doc. 33 at par. 4. Defense counsel maintains that plaintiff was “doing business” in New York within the meaning of BCL 1312 since it engaged in a regular and systematic course of conduct in the state, as evidenced by plaintiff’s customer receivables report and customer account inquiry report. Doc. 33 at pars. 7-17. Additionally, defendant’s attorney argues that the documentary evidence establishes that the claims against Ashmawy must be dismissed because he is not personally liable for any monies owed to plaintiff. Doc. 33 at pars. 18-31. In support of this argument, defendant submits proof of payments made to plaintiff by Karnak Men’s Wear, Inc. d/b/a “Prato Outlets”, a New Jersey corporation, and maintains that, since “Prato Outlets” was

the entity listed on plaintiff's invoices, plaintiff should have known that the said corporation was the entity responsible for payment. Doc. 33 at par. 23. Defendant also asserts that there is no proof that Ashmawy ordered the merchandise in his individual capacity or was personally responsible for payment. Doc. 33 at par. 24.

LEGAL CONCLUSIONS:

Plaintiff's Motion to Strike Defendant's Answer (Motion Sequence 001)

Defendant does not deny that it failed to respond to plaintiff's interrogatories and sets forth no explanation for why it did not do so. While this Court does not condone such conduct, it also notes that defendant's failure does not warrant the striking of its answer. As defendant notes, plaintiff never moved to compel a response to the interrogatories before making its motion to strike, and there has been no court order issued against defendant containing any preclusionary warning language. Thus, plaintiff's motion to strike is "premature given the lack of evidence that [defendant's] delay in [responding to the interrogatories] was willful, contumacious, or due to bad faith." *Michaluk v New York City Health & Hosps. Corp.*, 169 AD3d 496 (1st Dept 2019). Since a preliminary conference has yet to be held, the parties can address the interrogatory responses at the time of such conference if the responses are not provided prior to that time.

Defendant's Motion to Dismiss (Motion Sequence 002)

Lack of Capacity to Sue

Defendant argues that the complaint must be dismissed pursuant to CPLR 3211(a)(3) (lack of legal capacity to sue) and BCL 1312 because plaintiff is an unauthorized foreign corporation doing business in New York.

BCL § 1312 provides, in pertinent part, that:

(a) [a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation.

“Since Business Corporation Law § 1312 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. The burden of showing ‘doing business’ is therefore a heavy one since a lesser showing might infringe on Congress's constitutional power to regulate interstate commerce.” *Airtran NY, LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 214 (1st Dept 2007) (citations omitted).

This Court finds that defendant has failed to meet this high burden of proof and that “a question of fact exists concerning whether or not plaintiff’s contacts [with the State of New York] were systematic and regular enough to warrant compliance with [GBL § 1312].” *Digital Centre, S.L. v Apple Industries, Inc.*, 94 AD3d 571, 572 (1st Dept 2012) (citation omitted). In reaching this conclusion, this Court primarily addresses defendant’s reliance on a “*list of retail vendors from [p]laintiff’s website with [which] [p]laintiff transacts business in New York.*” Doc. 17 at par. 16 (emphasis provided). This printout from the internet merely shows that plaintiff’s products are available at certain retailers located in New York. It does not establish that plaintiff transacts business directly with those New York retailers. Additionally, although defendant argues that plaintiff’s own customer receivables report and customer account inquiry report

reveal that plaintiff has done a significant amount of business with Prato Outlets in New York State, these documents do not definitively establish that plaintiff's activity in the state was regular and systemic.

Improper Defendant

This Court also denies that branch of defendant's motion, pursuant to CPLR 3211(a)(1) (defense based on documentary evidence) and (a)(7) (failure to state a claim), seeking to dismiss the complaint against Ashmawy on the ground that he is an improper party.

In the verified complaint, plaintiff alleges that it sold and delivered goods to Ashmawy, who "conducts business under the trade name and style of Prato Outlets a/k/a Prato Men's Wear Outlets", and that the latter failed to pay amounts owed to plaintiff. Doc. 2 at par. 2. Thus, plaintiff has clearly stated a claim against Ashmawy. Additionally, since plaintiff's invoices reflect that they were sent directly to Ashmawy (Doc. 30), "[t]he documentary evidence [submitted by defendant] does not utterly refute the allegations in the [complaint]." *Cassidy v Greater N.Y. Auto. Dealers Assn., Inc.*, ___ AD3d ___, 2019 Slip Op 04876 (1st Dept June 18, 2019). There is thus no basis for dismissal of the complaint against Ashmawy, especially before any discovery has been conducted regarding the details of his business relationship with plaintiff.

Security for Costs

Finally, defendants also move, pursuant to CPLR 8501 (a), for an order directing plaintiff to post a bond for security for costs in the amount of \$500.00. CPLR 8501 (a) requires a plaintiff to post security for costs when he or she is not a resident of the state or is a foreign

corporation not licensed to do business in the state. Since it is undisputed that plaintiff is a foreign corporation unlicensed to do business in New York, it is therefore subject to the mandate of that statute. Therefore, this Court orders plaintiff to post an undertaking in the amount of five hundred dollars (\$500.00) as security for costs. Pursuant to CPLR 8502, all proceedings in this matter are stayed for 30 days pending the posting of the bond. See *Royal Warwick, S.A. v Hotel Representative, Inc.*, 34 Misc 3d 1232(A) (Sup Ct New York County 2012), *aff'd* 106 AD3d 451 (1st Dept 2013).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff seeking to strike defendant's answer (motion sequence 001) is denied; and it is further

ORDERED that the branch of defendant's motion (motion sequence 001) seeking to dismiss the complaint pursuant to CPLR 3211(a)(3) and Business Corporation Law § 1312 is denied; and it is further

ORDERED that the branch of defendant's motion seeking to dismiss the complaint pursuant to CPLR 3211 (a)(1) and CPLR 3211 (a)(7) is denied; and it is further

ORDERED that the branch of defendant's motion seeking an order directing plaintiff to post a bond for security for costs pursuant to CPLR 8501 et. seq. is granted to the extent that within 15 days from the date of service of a copy of this order with notice of entry, plaintiff is to

either (i) pay into the Court the sum of five hundred dollars (\$500.00) to be applied to the payment of costs, if any, awarded against plaintiff, or (ii), at its election, file with the Clerk of this Court an undertaking with a sufficient surety in a like amount to be applied to the payment of costs, if any, awarded against the plaintiff in this action, and it is further

ORDERED that within 15 days from the date of service of a copy of this order with notice of entry, plaintiff shall serve upon the attorney for defendant a written notice of the payment or of the filing of such undertaking, and it is further

ORDERED that all further proceedings, except to review this order, are stayed for 30 days after entry of this order; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on September 24, 2019 at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

ORDERED that this constitutes the decision and order of the court.

6/28/2019

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: