

Intelligent Tech. & Design, D.O.O. v NY Renaissance Corp.

2019 NY Slip Op 32256(U)

July 24, 2019

Supreme Court, New York County

Docket Number: 653296/2018

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM

Justice

X

INTELLIGENT TECHNOLOGIES AND DESIGN, D.O.O.

INDEX NO. 653296/2018

Plaintiff,

MOTION DATE 11/07/2018

- v -

MOTION SEQ. NO. 001

NY RENAISSANCE COTP.,

DECISION AND ORDER

Defendant.

X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 40

were read on this motion to/for

DISMISSAL

The critical issue before the court is whether Intelligent Technologies and Design, D.O.O. (ITD) is "doing business" in New York for the purposes of New York Limited Liability Company Law § 808. For the reasons set forth on the record (7/22/19), and as otherwise set forth below, because this court answers this question in the affirmative, NY Renaissance Corp.'s (NYR) motion to dismiss is granted pursuant to CPLR § 3211 (a) (3).

Under CPLR § 3211 (a) (3), a party may move to dismiss a complaint on the ground that the plaintiff lacks the legal capacity to sue.

Section 808 (a) of the New York Limited Liability Company Law 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 (NY Limited Liability Company Law § 808 [a]).

Section 802 (b) (i) provides:

Within one hundred twenty days after the filing of the application for authority with the department of state, a copy of the same or a notice containing the substance thereof shall be published once in each week for six consecutive weeks, in two newspapers of the county within this state in which the office of the foreign limited liability company is located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk (*id.*, § 802 [b] [i]).

Section 802 requires that a foreign limited liability company must submit an application for authority to do business in New York setting forth, among other things, "a designation of the secretary of state as its agent upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him or her" (*id.*, § 802 [a] [4]).

It is undisputed that ITD has not complied with Section 802 in that it has not applied for authority to do business in New York, it has not designated an agent for service of process, and it has not met the publication requirement under Section 802 (b) (i) set forth above.

Section 803 provides a non-exclusive list of activities which do not constitute doing business in New York:

- (1) maintaining or defending any action or proceeding, whether judicial, administrative, arbitral or otherwise or effecting settlement thereof or the settlement of claims or disputes;
- (2) holding meetings of its members or managers;
- (3) maintaining bank accounts; or
- (4) maintaining offices or agencies only for the transfer, exchange and registration of its membership interests or appointing and maintaining depositories with relation to its membership interests (*id.*, § 803 [a]).

ITD's activities in New York are not limited to and do not fall within any of the non-exclusive enumerated list of activities set forth in Section 803.

In determining whether a foreign limited liability company is doing business in New York for purposes of Limited Liability Law § 808, courts look to the analogous provision for foreign corporations under Business Corporation Law § 1312 (*see, e.g., Arles Financial, LLC v 2729 Claflin Ave., LLC*, 26 Misc.3d 1236(A), *3 [Sup Ct Bronx County, Jan. 26, 2010]; Bruce A. Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 32A, at 25 [“cases under the BCL which explain the parameters of doing business should be useful in analyzing the presence of an unauthorized foreign LLC for jurisdictional purposes.”]).

Rather than applying a “precise formula,” the determination of whether a foreign company is doing business in New York under Business Corporation Law § 1312 must be made on a case-by-case basis, considering the nature of the business at issue (*Alicanto, S.A. v Woolverton*, 129 AD2d 601, 602-03 [2d Dept 1987]). The burden of proving that a foreign company is doing business in New York lies with the party invoking Business Corporation Law § 1312 to challenge the plaintiff's capacity to maintain the action in New York (*Highfill, Inc. v Bruce and Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]). The relevant inquiry is whether the foreign company is “engaged in a regular and continuous course of conduct in the State” (*Commodity Ocean Transp. Corp. of N.Y. v Royce*, 221 A.D.2d 406, 407 [2d Dept 1995]). The foreign company's activities in New York must be “so systematic and regular as to manifest continuity of activity in the jurisdiction” (*S & T Bank v Spectrum Cabinet Sales, Inc.*, 247 AD2d 373, 373 [2d Dept 1998] [citation omitted]).

In the case before the court, ITD, a foreign limited liability company organized under the laws of the Republic of Croatia with its principal place of business located in Rijeka, Republic of Croatia (Complaint, ¶ 1), which is not authorized to do business in New York under Section 802 of the Limited Liability Company Law, brought this action alleging breach of contract by NYR relating to specialized façade design and construction work allegedly performed by ITD in New York in connection with three construction projects in New York City.

The documentary evidence establishes that, far from "casual or occasional," ITD's business activities in New York "[are] 'systematic and regular,' interstate in character, and essential to the plaintiff's corporate business" (*Highfill, Inc.*, 50 AD3d at 744). The complaint refers to three projects in which ITD provided design and engineering services for NYR in New York City: (i) "260 West 40th Street 'AC' Hotel," (ii) "150 Rivington Street," and (iii) "145 Central Park North" (Complaint, ¶¶ 4-46). On its website, ITD holds itself out as doing business in New York. To wit, the website states that it is currently engaged in five additional projects in New York City, identified as "26th Street," "29th Street," "37th Street," "39th Street," and "42nd Street" (Johnson aff, exhibits D4-D11). ITD's website also refers to three previously completed projects, identified as "5 Beekman," "Broadway," and "13th Street" (Johnson aff, exhibit D12-D15).

On the "Supervision" page of its website, ITD represents that it provided "on-site installation support" for at least one of its projects (Johnson aff, exhibit D3). On other pages within its website, ITD proclaims "[s]ee how ITD Systems is modeling New York City, one project at a time" (Johnson aff, exhibit D15), and "[i]n New York City, look UP [sic] to see our work


embedded in commercial and residential buildings” (Johnson aff, exhibit D1). Finally, ITD further held itself out to the world as having an address in New York by filing a mechanic’s lien which lists its address as 43-11 19th Avenue, Queens, New York 11105, Marino Frankola, Vice President (Johnson aff, exhibit B). To the extent that ITD argues that the address provided on the mechanic’s lien is merely its attorney’s former office, this argument is unavailing as the address on the mechanic’s lien does not state that it is a law office address or that it is otherwise “in care of” ITD’s attorney. Rather, the address is listed as a company office and identifies the company Vice President at that address.

In other words, NYR has met its burden in establishing that ITD is doing business in New York. Inasmuch as ITD has not complied with Section 802 of the Limited Liability Company Law, ITD lacks the capacity to bring this action under Section 808 and NYR’s motion to dismiss is granted.

Accordingly, it is

ORDERED that the defendant’s motion to dismiss is granted and the complaint is dismissed without prejudice, and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

7/24/2019
DATE


ANDREW BORROK, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE