Schlenk Metallfolien GMBH & Co., Inc. v Dexter Sales Inc.
2019 NY Slip Op 33714(U)
December 10, 2019
Supreme Court, Kings County
Docket Number: 506443/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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SCHLENK METALLFOLIEN GMBH & CO., INC.,
Plaintiff, Decision and order

- against - Index No. 506443/19

DEXTER SALES INC.,
Defendant, December 10, 2019
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PRESENT: HON. LEON RUCHELSMAN MS #1 & 2

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff alleges that it sold copper foil goods to a third party, Adhesives Research, at the defendant's request and the plaintiff is owed approximately $275,246 as of May 18, 2018. Specifically, the plaintiff asserts it submitted three invoices to the defendant for goods shipped and the defendant has not paid. This lawsuit seeks payment for the goods shipped. This motion seeking summary judgement has been filed and the plaintiff argues there are no questions of fact the outstanding amount is due. The defendant has asserted various counterclaims. First, the defendant asserts that it maintained a relationship with Adhesives, selling to them copper foil it purchased from the plaintiff and that during August 2017 the plaintiff informed

defendant it would deal directly with Adhesives, eliminating the defendant as the middleman. Likewise, the defendant asserts the plaintiff began dealing directly with another company named Elkem/Insulated Wire who was a customer of the defendant, again, eliminating the defendant as the middleman. Further, the counterclaim asserts the plaintiff offered the defendant a commission if plaintiff sold any products to Adhesive as well as Elkem. Indeed, during August 2017 the plaintiff presented an offer to pay commissions to the defendant for two years, concerning any sales made to Elkem or Adhesives. Almost a year later the defendant accepted the offer to pay commissions for any sales to those entities following notifications they would no longer be doing business with the defendant. The counterclaims consist of allegations of tortious interference with the contracts the defendant maintained with Elkem and Adhesives and that the plaintiff has failed to pay commissions due. Based upon these counterclaims the defendant asserts there are questions of fact and the motion for summary judgement must be denied.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman

v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

First, it is well settled that pursuant to BCL §1312 a foreign corporation not authorized to do business in the state of New York may not maintain any actions within the state (Pergament Home Centers, Inc. v. Net Realty Holding Trust, 171 AD2d 736, 567 NYS2d 292 [2d Dept., 1991]). The precise definition of 'doing business' is fact specific, and must be decided on a case by case basis (Highfill Inc., v. Bruce and iris Inc., 50 AD3d 742, 855 NYS2d 635 [2d Dept., 2008]). There are no precise activities that demonstrate 'doing business' and the party relying on the statute must demonstrate that the activities of the foreign corporation were systematic and regular and manifested a continuity of activity within the jurisdiction (Construction Specialists, Inc., v. Hartford Insurance Company, 97 AD2d 808, 468 NYS2d 675 [2d Dept., 1983]). Thus, in Uribe v. Merchants Bank of New York, 266 AD2d 21, 697 NYS2d 279 [1st Dept., 1999] the court held that the foreign corporation was not 'doing business' in New York where there was no evidence that the foreign corporation maintained any business office, maintained a business telephone number, owned real estate and had any employees in the state. The court found the activities of the

foreign corporation consisted of "solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce" and the court concluded that was insufficient to demonstrate the foreign corporation was 'doing business' in New York. Moreover, without evidence of doing business there is a presumption that the corporation then does business in its area of incorporation (Household Bank (SB), NA v. Mitchell, 12 AD3d 568, 785 NYS2d 116 [2d Dept., 2004]). To rebut that presumption the party seeking to prevent the foreign business from maintaining jurisdiction has the burden of demonstrating the business activities of the foreign corporation were systematic and regular as to manifest continuity of activity within New York (Gemstar Canada Inc., v. George A. Fuller Co., Inc., 127 AD3d 689, 6 NYS3d 552 [2d Dept., 2015]).

In this case the defendant does not present specific evidence the plaintiff conducted business in New York, but rather seeks to further pursue the issue. While the plaintiff asserts its connection to New York is merely to solicit business and to sell goods "occasionally to customers in New York" (see, Reply Affirmation, ¶ 16). However, there are questions of fact concerning the existence of the traditional criteria to demonstrate 'doing business' in the state, namely an office, a

telephone, hired staff or advertising expenditures in the state (see, S & T Bank v. Spectrum Cabinet Sales Inc., 247 AD2d 373, 668 NYS2d 641 [2d Dept., 1998]). Therefore, there are questions whether the plaintiff is barred from maintaining this lawsuit in New York.

Substantively, the plaintiff argues there is no question of fact there was no meeting of the minds concerning the proposal to offer commissions and therefore the counterclaim is not a basis in which to deny summary judgement. Specifically, the plaintiff argues the email of the defendant accepting the proposal was only sent after Adhesives terminated the agreement with them, which the plaintiff characterizes as "disingenuous" (see, Affirmation in Reply, ¶ 25). However, there are questions of fact whether the email accepting the terms was sent precisely because the contract with Adhesives was terminated, thereby eliminating any revenue at all. Thus, as long as Adhesives dealt directly with the defendant, there was no urgency for the defendant to accept the commission proposal. The plaintiff notes that "it is obvious that the parties were continuingly [sic] negotiating and that there was no meeting of the minds for an agreement" (id at 27). However, there are questions that as long as the negotiations were ongoing there was no need to accept the agreement and that it still remained open. These questions must be explored by a

trier of fact.

Moreover, concerning the tortious interference counterclaims, the plaintiff argues those claims do not raise any question of fact since Elkem first approached the plaintiff. First, that does not in any way resolve the counterclaim concerning Adhesive. Moreover, even if true that Elkem first approached the plaintiff, there are still questions of fact whether the plaintiff tortiously interfered with the contract. It is well settled, the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Tri-Star Lighting Corp., v. Goldstein, 151 AD3d 1102, 58 NYS3d 448 [2d Dept., 2017]). Thus, even if Elkem approached the plaintiff first, it does not end the inquiry whether the plaintiff nevertheless tortiously interfered with the contract.

Therefore, based on the foregoing the motion seeking summary judgement is denied.

So ordered. ENTER:

DATED: December 10, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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