Bilcare GCS, Inc. v Spring Bio Solutions, Ltd.

2020 NY Slip Op 30772(U)

March 11, 2020

Supreme Court, New York County

Docket Number: 655952/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK — *Justice* — **PART** IAS MOTION 38EFM

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BILCARE GCS, INC.,

Plaintiff,

- v -

SPRING BIO SOLUTIONS, LTD.

Defendant.

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INDEX NO. 655952/2018

MOTION DATE 05/24/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion of defendant Spring Bio Solutions, Ltd. ("Defendant") to dismiss the complaint of plaintiff Bilcare GCS, Inc. ("Plaintiff") is denied, in accord with the following memorandum decision.

Background

This action originates from a dispute between two foreign corporations that are both in the business of procurement and supply of rare or difficult to obtain pharmaceutical goods (Compl. ¶¶ 6-7). Plaintiff is a Delaware corporation with a primary place of business in Pune, India (Compl. ¶ 2). Defendant is an English corporation with a primary place of business in the United Kingdom (*Id.* ¶ 3). On or about July 7, 2016, Plaintiff received an order from non-party Reliant Specialty LLC ("Reliant") for a supply of certain difficult to obtain pharmaceutical goods, which it was to supply to Reliant in New Britain, Connecticut (*Id.* ¶¶ 8-9). By a purchase order dated January 24, 2017 (the "Purchase Order"), Plaintiff ordered the pharmaceutical goods from Defendant for a total purchase price of $990,000, and Defendant was to deliver the goods to

non-party PHSE, USA ("PHSE") in Elmont, New York (*Id.* ¶ 12, 23). As alleged in the Complaint, Defendant delivered or attempted to deliver goods to PHSE that did not conform with the Purchase Order, and it brought this action to recover damages for the portion of the order that was unfulfilled or non-conforming (*Id.* ¶¶ 30-44).

Plaintiff commenced this action by filing a summons with notice on November 30, 2018 and the Complaint on March 7, 2019. Defendant filed this pre-answer motion on April 26, 2019, seeking dismissal of the action pursuant to CPLR § 3211(a)(3) and BCL § 1312(a) on the grounds that Plaintiff lacks capacity to bring this action because it is a foreign corporation that is doing business in New York but has failed to register with the New York Secretary of State. Defendant opposes, asserting that it has not transacted business in the state and any New York activities it engaged in were merely "incidental to its business in interstate and international commerce" (Mem. in Opp. at 1-2).

Discussion

Pursuant to BCL § 1312(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 well as penalties and interest charges related thereto, accrued against the corporation." On a motion to dismiss for failure to comply with BCL § 1312(a), there is a rebuttable presumption that the corporation does business in its state of incorporation rather that New York, (*Airtran New York, LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 214 [1st Dept 2007]) and the moving party bears the burden of demonstrating that plaintiff has engaged in "systematic and regular unauthorized activity in New York warranting application" of the statute (*8430985 Canada Inc. v United Realty Advisors LP*, 148 AD3d 428, 428 [1st Dept 2017]; *G.P. Exports v Tribeca Design*, 147 AD3d 655, 656 [1st Dept 2017][Plaintiff's in-state activities must be "so systematic and regular as to manifest continuity of activity in New York"]).

To determine whether a corporation is "doing business" for the purposes of BCL § 1312(a), New York courts examine the totality of the corporation's activities within the state, making a "case-by-case" inquiry into the type of business being conducted (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 744 [2d Dept 2008]). Among other factors, courts have considered whether the corporation maintains a physical presence or has employees located within the state (*Uribe v Merchants Bank of New York*, 266 AD2d 21, 21 [1st Dept 1999][Plaintiff was not "doing business" where it maintained no office or telephone listing, owned no real property and had no employees in the state]), the frequency and regularity of activities within the state (*G.P. Exports v Tribeca Design*, 147 AD3d 655, 656 [1st Dept 2017] [A single business transaction within the state did not warrant the application of BCL § 1312(a)], and the volume and nature of the activities within the state (*United Arab Shipping Company v Al-Hashim,* 176 AD2d 569 [1st Dept 1991][Plaintiff was "doing business" within the state where its New York office employed approximately 17 full-time employees, actively solicited business, conducted sales activities, negotiated and executed contracts, and generated substantial in-state revenue]). "[T]he solicitation of business and facilitation of the sale and delivery of merchandise incidental to business in interstate and/or international commerce is typically not the type of activity that constitutes doing business in the state within the contemplation of section 1312 (a)" (*Digital Ctr., S.L. v. Apple Indus., Inc.*, 94 A.D.3d 571, 572 [1st Dept 2012][citation omitted]), but regularly and continuously entering the state to solicit, complete and manage sales to customers in New York may constitute doing business in the state (*Highfill*, 50 AD3d at 744 [Corporation was "doing business" where its regional vice president regularly sent employees to New York to manage "special sales," and made approximately $6,600,000 in New York sales over several years).

As evidence that the Plaintiff is "doing business" for the purposes of BCL § 1312(a), Defendant highlights the delivery of the goods to a New York address, Plaintiff's use of a New York address on the Purchase Order and its website, Plaintiff's use of a New York bank account, and Defendant's assertion, made upon information and belief, that Plaintiff "has sold product to at least one wholesaler based in New York" (Marla Aff. ¶ 6). Finally, citing to New York Education Law § 6808(1) and New York Public Health Law § 3310, Defendant argues that because Plaintiff's business "includes the purchase, sale, and shipment of pharmaceuticals of the sort that the State of New York normally regulates—the sort of activity which the State requires an entity to be registered to engage in at all . . . even *de minimis* activity of this sort should constitute 'doing business' for the purposes of the statute" (Mem. in Support at 3).

In opposition, Abhingyan Upadhyay, President of Plaintiff ("Upadhyay"), affirms that Plaintiff does not own, lease, or occupy real property in New York, has no officers or employees located in New York, and "conducts no advertising or marketing activities directed towards New York" (Upadhyay Aff. ¶ 5-6). Upadhyay indicates that Plaintiff "utilizes specialist courier services in the US and elsewhere in the world, and has bank accounts in different currencies to facilitate its interstate and international business, including a US dollar account with a bank in New York," and affirms that the mailing address used on the Purchase Order and Plaintiff's website, Bilcare GCS Inc. c/o Accumera LLC, 911 Central Avenue, #101, Albany New York 12206 USA, shows the name of a corporate services agent, Accumera LLC ("Accumera"), which provides "virtual office, mail handling and telephone services" to Plaintiff. Upadhyay asserts that these services "could be provided by agents anywhere in the US" (*Id.* ¶¶ 5-6).

Taking into account all of the evidence available on this motion, Defendant has demonstrated that Plaintiff shipped a single sale involving a pharmaceutical to a New York address, utilized a New York bank account, and engaged the services of a third-party company located within New York to receive mail and provide administrative services on its behalf in order to facilitate its business activities. This is insufficient to demonstrate that Plaintiff has

engaged in systemic and regular activity in New York sufficient to warrant application of § 1312(a). Plaintiff does not own or lease real property in the state, maintain an office, have employees in New York, or conduct advertising or marketing activities in the state (Upadhyay Aff. ¶ 5-6). The subject transaction was between two foreign corporations and took place outside the state, and the mere shipment of goods purchased outside the state into New York does not constitute "doing business" for the purposes of BCL § 1312 (*Digital Ctr*, 94 A.D.3d at 572 [Plaintiff that shipped "hundreds of photo booths into NY State" was not "doing business" for the purposes of BCL § 1312[a]). Defendant's assertion, made upon information and belief, that Plaintiff "has sold product" to a New York wholesaler has no evidentiary value and is unpersuasive. The affiant does not state the basis for the information or provide any supporting evidence; and even admissible evidence of a single New York sale would not constitute "doing business" for the purposes of the statute (*G.P. Exports*, 147 AD3d at 656).

Absent additional evidence of more extensive in-state activities, Plaintiff's use of a New York bank account and engagement of a New York company to receive mail and provide administrative services on its behalf do not constitute "doing business" within the state (*Digital Centre,* 94 AD3d at 572 ["[I]t is well established that the solicitation of business and facilitation of the sale and delivery of merchandise incidental to business in interstate and/or international commerce is typically not the type of activity that constitutes doing business in the state within the contemplation of section 1312(a)."]). On its face, Plaintiff's use of a "care of" address with Accumera demonstrates only that Plaintiff engaged a third party to receive mail on its behalf, and maintaining a New York bank account does not warrant application of the statute absent evidence of systemic and regular activity within the jurisdiction (*Airline Exchange v Bag*, 266 A.D.2d 414, 415 [2d Dept 1999][Plaintiff that maintained a New York bank account, occasionally used a New York office, and entered into three or four New York transactions over an eight-year period was not "doing business" for the purposes of BCL § 1312(a)]).

Defendant's contention that because Plaintiff's business "includes the purchase, sale, and shipment of pharmaceuticals of the sort that that the State [] normally regulates . . . even *de minimis* activity of this sort should constitute 'doing business' for the purposes of the statute" is supported by neither fact nor law. The single case cited by Defendant in support of this argument, *Centurion Capital Corp. v. Guarino*, (35 Misc. 3d 1219[A][Civ. Ct. Richmond County 2012]), is distinguishable from the present matter because the *Centurion* plaintiff had engaged in extensive New York business transactions and there was a prior determination that the plaintiff was required to be licensed as a debt collector and had failed to do so (*Id.* at *3-4). Here, there is only one transaction at issue and there has been no determination regarding whether Plaintiff has engaged in a regulated activity. The question of Plaintiff's compliance or non-compliance with relevant portions of the New York Education Law and the New York Public Health Law governing the sale and distribution of pharmaceuticals is not before this court at this time, and neither party has submitted evidence or briefing on this issue. The court cannot make such a determination based solely on the description of a single transaction set forth in the pleadings. Therefore, on the record currently before the court, Defendant has failed to meet its burden of demonstrating that the Plaintiff has engaged in systemic and regular activity in New York sufficient to warrant application of BCL § 1312(a).

Accordingly, it is

ORDERED that Defendant's motion to dismiss is denied; and it is further

ORDERED that Defendant shall file an answer to the complaint within 30 days of entry of this order; and it is further

ORDERED that a preliminary conference will be held in this matter on May 14, 2020 at 2:15 in the courtroom located at 111 Centre Street, Room 1166, New York, New York.

ENTER:

[signature]

3/11/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER

[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE