Encloth, LLC v Madam & Adam, LLC
2020 NY Slip Op 33355(U)
October 6, 2020
Supreme Court, Kings County
Docket Number: 519351/2018
Judge: Peter P. Sweeney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
----------X
ENCLOTH LLC,

Plaintiff,

-against-

MADAM & ADAM, LLC,

Defendant.
----------X

Index No.: 519351/2018
Motion Date: 7-20-20
Mot. Seq. Nos.:1&2

DECISION/ORDER

The following papers numbered 1 to 4 were read on these motions:

Papers:	**Numbered:**
Notice of Motion Affidavits/Affirmations/Exhibits/Memo of Law	1
Notice of Cross-Motion Affidavits/Affirmations/Exhibits/Memo of Law	2
Answering Affirmations/Affidavits/Exhibits/Memo of Law	3
Reply Affirmations/Affidavits/Exhibits/Memo of Law	4
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover monies owed for the sale of goods, the plaintiff, ENCLOTH LLC, moves for an order pursuant to CPLR 3212 granting summary judgment in its favor for the relief demanded in the complaint. By Notice of Cross-Motion, defendant MADAM & ADAM, LLC, moves for an Order dismissing plaintiff's complaint, granting a default judgment against plaintiff on its counterclaims and granting such other and further relief as the Court may deem just and proper. The two motions are consolidated for disposition.

Background:

The instant action was commenced by plaintiff on September 26, 2018 alleging causes of action for breach of contract, account stated and quantum meruit for monies plaintiff claimed are owed by defendant in connection with defendant's purchase of certain goods from plaintiff. In

MS#01-XMD
MS#02-GEXT

support of plaintiff's motion for summary judgment, the plaintiff submitted a copy of the complaint, which was verified by Mr. Wang, plaintiff's general manager, and Mr. Wang's affidavit. Mr. Wang averred in these submissions that based on his review of plaintiff's business records, the plaintiff rendered services to the defendant for which the defendant has failed to pay. He stated that there remains a balance on defendant's account in the amount of $39,525.33 and that a statement of account reflecting this was sent to the defendant on September 10, 2017.

In opposition to the motion and in support of the cross-motion, the defendant submitted proof that the plaintiff was served with an Amended Answer with Counterclaims on November 28, 2018 and that to date, the plaintiff has failed to interpose an Answer to the Counterclaims. Defendant's counterclaims include causes of action for breach of express and implied warranty, slander and conversion. Defendant also submitted the affidavit of affidavit of Robyn Schachter, its managing member, which set forth the facts underlying defendant's counterclaims and defendant's defenses to the causes of action alleged in the complaint.

Defendant further maintains that since plaintiff is not a New York State corporation and is not registered to do business in the State of New York, the plaintiff lacked capacity to bring the action in this State. Defendant annexed a printout from the New York State Department of State's website reflecting that the plaintiff is not a New York limited liability company and is not registered to do business in the State of New York. Defendant points out that the plaintiff alleged in the complaint that it is a corporation based in Atlanta, Georgia.

Plaintiff's Motion:

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v.*

Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]; *see also* CPLR 3212[b]). If the movant makes such a showing "the burden shift[s] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposing papers" (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]).

Assuming without deciding that plaintiff a made prima facie showing of entitlement to judgment as a matter of law, the affidavit of Robyn Schachter which was submitted in opposition to the motion raises triable issue of fact requiring denial of the motion

Defendant's Cross-Motion:

Turning to the cross-motion, Business Corporation Law § 1312(a) provides that "[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." There is no precise measure of the nature or extent of activities necessary for a finding that a foreign corporation is "doing business" in this State. Determination of this question must be approached on a case by case basis with inquiry made into the type of business being conducted (*Great White Whale Adv. v. First Festival Prods.*, 81 A.D.2d 704, 706, 438 N.Y.S.2d 655; *Conklin Limestone Co. v. Linden*, 22 A.D.2d 63, 64, 253 N.Y.S.2d 578). The party relying upon this statutory barrier bears the burden of proving that "the corporation's business activities in New York were not just casual or occasional, but 'so systematic and regular

as to manifest continuity of activity in the jurisdiction' (*Construction Specialties v. Hartford Ins. Co.*, 97 A.D.2d 808, 468 N.Y.S.2d 675; *accord, International Fuel & Iron Corp. v. Donner Steel Co.*, 242 NY 224, 230)" (*Peter Matthews, Ltd. v. Robert Mabey, Inc.*, 117 A.D.2d 943, 944, 499 N.Y.S.2d 254). In this regard, there is a presumption that a plaintiff does business in its State of incorporation rather than in New York (*Construction Specialties v. Hartford Ins. Co., supra; Great White Whale Adv. v. First Festival Prods., supra*).

Here, the defendant did not demonstrate as a matter of law that the plaintiff's business activities in New York were not just casual or occasional, but 'so systematic and regular as to manifest continuity of activity in the jurisdiction. Thus, the Court must presume that the plaintiff does business in the state of Georgia, not in New York. Defendant's motion insofar as it seeks to dismiss the complaint based on plaintiff's alleged incapacity to sue must therefore be denied.

With respect to defendant's motion for a default judgment on its counterclaims, in order to obtain this relief, the defendant was required to submit proof of plaintiff's failure to timely answer the counterclaims, which it did, as well as proof of the facts constituting the causes of action alleged in the counterclaims (*see* CPLR 3215[f]; *Roy v. 81E98th KH Gym, LLC,* 142 A.D.3d 985, 985, 37 N.Y.S.3d 337; *Fried v. Jacob Holding, Inc.,* 110 A.D.3d 56, 59, 970 N.Y.S.2d 260; *Dupps v. Betancourt,* 99 A.D.3d 855, 855, 952 N.Y.S.2d 585; *Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.,* 89 A.D.3d 649, 651, 932 N.Y.S.2d 109). To demonstrate the facts constituting the cause of action alleged by defendant in its counterclaim, the defendant was only obligated to submit sufficient proof to enable a court to determine if the cause of action is viable (see *Clarke v. Liberty Mut. Fire Ins. Co.*, 150 A.D.3d 1192, 1194, 55 N.Y.S.3d 400, 402–403; *Woodson v. Mendon Leasing Corp.,* 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156; *Roy v. 81E98th KH Gym, LLC,* 142 A.D.3d at 985–986, 37 N.Y.S.3d 337; *Fried v. Jacob*

Holding, Inc., 110 A.D.3d at 60, 970 N.Y.S.2d 260) which Courts have held requires proof of a prima facie case (see *Walley v. Leatherstocking Healthcare, LLC*, 79 A.D.3d 1236, 1238, 913 N.Y.S.2d 380; *Silberstein v. Presbyterian Hosp. in the City of N.Y.*, 96 A.D.2d 1096, 1096, 463 N.Y.S.2d 254). Here, contrary to plaintiff's contention, the affidavit of ROBYN SCHACHTER was sufficient to establish the facts constituting the causes of action alleged in the counterclaims.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is **DENIED**; and it is further

ORDERED that defendant's cross-motion is granted solely to the extent that that the defendant demonstrated its entitlement to a default judgment on its counterclaims. An inquest on the issue of what damages the defendant is entitled to on its counterclaims will be held at the time of trial. It is further

ORDERED that the cross-motion is in all other respects denied.

This constitutes the decision and order of the Court.

Dated: October 6, 2020

KINGS COUNTY CLERK
FILED
2020 OCT -9 PM 12: 25

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020