

**Bizfund LLC v Aid Bldrs., Inc.**

2023 NY Slip Op 31596(U)

May 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 503829/2023

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS ; CIVIL TERM: COMMERCIAL 8

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BIZFUND LLC,

Plaintiff,

Decision and order

- against -

Index No. 503829/2023

AID BUILDERS, INC. and ED HASSAN ALBADRY,  
Defendants,

May 9, 2023

-----x  
PRESENT: HON. LEON RUCHELSMAN

Motion Sequence #1

The defendant has moved seeking to dismiss the lawsuit pursuant to CPLR §3211. The plaintiff opposes the motion. Papers were submitted by the parties and reviewing all the arguments this court now makes the following determination.

According to the complaint on December 28, 2022 the defendants, residents of California entered into a merchant cash agreement with the plaintiff. The complaint asserts that the plaintiff is a Delaware corporation with a principal place of business located in Kings County. The defendants have now moved seeking to dismiss the lawsuit on the grounds the plaintiff cannot maintain subject matter jurisdiction in New York since it did not conduct business in New York. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of

[\* 1]

those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

Pursuant to BCL §1312 and Limited Liability Law §808 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]). Article 11.4 of the Merchant Agreement states that "any controversy or claim arising out of or relating to this Agreement or any Ancillary Document or the transactions contemplated hereby or thereby, or any breach hereof or thereof or default hereunder or thereunder, shall be submitted for resolution to a State or federal court sitting in the City, County and State of New York, which courts shall have exclusive jurisdiction with respect to any such controversy or claim. Each of the Parties agrees not to assert in any forum that such courts are not a convenient forum, or that there is a more convenient

forum, for the resolution of any such controversy or claim, and waives any and all objections to jurisdiction or venue" (NYSCEF Doc. No. 2]).

First, while there is no dispute the plaintiff is a Delaware corporation there is no evidence presented the plaintiff is not authorized to conduct such business in the state of New York. The motion is based upon the complete speculation that no such authority exists. More importantly even if BCL §1314(b)(1) applied to this case that may not be a basis to dismiss the lawsuit. That statute states that a nonresident may not maintain an action against a foreign corporation. The statute does enumerate five exceptions, namely (1) the action is brought to recover damages arising from the breach of a contract made or to be performed in New York; (2) the subject matter of the litigation is within New York; (3) the cause of action arose within New York; (4) the non-domiciliary would be subject to personal jurisdiction under CPLR §302; and (5) the defendant is a foreign entity doing business or authorized to do business in New York. Thus, there are certainly questions of fact which cannot be summarily decided whether the contract was "made or to be performed in New York" (id). To be sure the defendants are residents of California, however, the purchase of the future receivables took place in New York. Furthermore, the forum selection clause specifically states that any lawsuit must take


place in New York. While that forum selection clause may not override issues of subject matter jurisdiction, that circular argument is based upon the conclusory assertion no authorization exists. Therefore, based on the foregoing the motion seeking to dismiss the complaint is denied at this time without prejudice. The parties shall engage in discovery and the defendant may file any further motion in this regard.

The defendant shall have thirty days from receipt of this order in which to answer the complaint.

So ordered.

ENTER:

DATED: May 9, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC