

**South Beach Tristar 800 LLC v Lincoln Arts ERFR  
LLC**

2023 NY Slip Op 34425(U)

December 12, 2023

Supreme Court, New York County

Docket Number: Index No. 654461/2023

Judge: Barry Ostrager

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

|                                            |                 |             |
|--------------------------------------------|-----------------|-------------|
| -----X                                     | INDEX NO.       | 654461/2023 |
| South Beach Tristar 800 LLC,<br>Plaintiff, | MOTION DATE     |             |
| - against -                                | MOTION SEQ. NO. | 001         |
| Lincoln Arts ERFR LLC,<br>Defendant.       |                 |             |

**DECISION + ORDER ON MOTION**

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HON. BARRY R. OSTRAGER

Before the Court is a motion by defendant Lincoln Arts ERFR LLC (“RFR”) for an Order, pursuant to CPLR 3211(a)(3), dismissing the Complaint filed by plaintiff South Beach Tristar 800 LLC (“South Beach” or “Plaintiff”) on the ground that South Beach is not licensed to do business in the State of New York and therefore lacks legal capacity to sue. South Beach has opposed the motion. The motion is denied without prejudice, as provided herein.

According to the Complaint (NYSCEF Doc. No. 1), South Beach commenced this action against its asset and property manager and agent, defendant RFR, alleging that RFR failed to repay \$2.75 million that was purportedly diverted from a bank account managed by RFR for the benefit of South Beach. The bank account held rents collected from a real estate project in Miami Beach owned by South Beach. As South Beach’s asset manager, RFR was allegedly solely responsible for operating and supervising the bank account and maintaining the deposited funds for the benefit of South Beach. South Beach asserts a single cause of action in its Complaint sounding in breach of contract and seeking damages of at least \$2.75 million plus attorney’s fees.

The motion to dismiss by RFR is supported by the affidavit of its Vice President Jonathan Reifler to offer evidence that South Beach is doing business in New York without the required

New York State certificate (NYSCEF Doc. No. 12). Specifically, Reifler authenticates the Asset Management Agreement between the parties dated October 21, 2014, which provides that the Agreement shall be construed in accordance with the laws of New York State and that any legal proceedings relating to the Agreement shall be brought in a federal or state court in the State of New York (“the Agreement”, NYSCEF Doc. No. 14, ¶19). Reifler further asserts that, since the Agreement was executed, he and other employees of RFR “have attended business meetings with Plaintiff’s officers and other representatives in New York City, including as recently as November 1, 2023.”

Also in support of the motion is an affirmation from counsel for RFR (NYSCEF Doc. No. 13). There counsel confirms that he “performed an online search of the Delaware Department of State, Division of Corporations database, and the search results show that an entity called ‘South Beach Tristar 800 LLC,’ the same name as the Plaintiff, is registered as a Delaware limited liability company in that State.” Counsel adds that, on November 8, 2023, he “performed an online search of the Florida Department of State, Division of Corporations database, and the search results show that an entity called ‘South Beach Tristar 800 LLC,’ the same name as Plaintiff, is registered as a foreign (Delaware) limited liability company in that State, with a principal address and current mailing address listed as 1500 Broadway, Suite 1902, New York, New York 10036 and a prior mailing address listed as 590 Madison Avenue, 21<sup>st</sup> Floor, New York, New York 10022.” RFR also provides “a true and accurate copy of a Certificate of Status dated October 30, 2023 from the Secretary of State of the State of New York and the Custodian of Records of the New York State Department of State, certifying that no record of an entity known as "South Beach Tristar 800 LLC" has been found in the index of

corporations and other business entities maintained by the New York Department of State.”  
(NYSCEF Doc. Nos. 15-17).

Based on this information, RFR urges the Court to dismiss this action, arguing that pursuant to New York Limited Liability Company (“LLC”) Law § 808(a), a foreign limited liability company such as South Beach doing business in this State without a certificate of authority to do business in this State may not maintain any action or proceeding in any court of this State. Specifically, Section 808(a) of the LLC Law provides that:

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.

The indicia for “doing business” in New York, established in the case law, include the company’s designation of its principal place of business in New York, as RFR alleges has been the case here since October 2014 when the parties’ Agreement was signed. Also relevant are the business meetings in New York attested to in the Reifler Affidavit. To acquire the requisite authority to sue, a foreign limited liability company must obtain a certificate of authority from the New York Department of State by (1) submitting a “certificate of existence” and an application “for authority to do business in this state” [LLC Law § 802(a)], and (2) complying with certain publication requirements, including publishing a copy of its application in two newspapers for six successive weeks, and then filing proof of the publication with the Department of State [LLC Law § 802(b)].

RFR has produced evidence of the failure by South Beach to obtain the requisite certificate, which, if true, would bar South Beach from maintaining this action. *See, e.g., Caring People Mgmt. Servs., LLC v. Assistcare Home Health Servs. LLC*, 162 A.D.3d 509 (1st Dep’t 2018) (reversing lower court’s denial of motion to dismiss because the plaintiff New Jersey

limited liability company did not obtain a certificate of authority to do business in New York State); *Sotomayor v Medifast, Inc.*, 28 A.D.3d 309, 310 (1st Dep't 2006) (affirming dismissal of plaintiff's claims brought derivatively on behalf of a Delaware limited liability company because the LLC was not authorized to do business in New York when the action was commenced); *Intelligent Techs. & Design, D.O.O. v NY Renaissance Corp.*, Index No. 653296/2018, 2019 WL 3413559 at \*3 (Sup. Ct. N.Y. Co. July 24, 2019, Borrok, J.) (as [plaintiff] ITD has not complied with Section 802 of the LLC Law, ITD lacks the capacity to bring the action under Section 808 and defendant's motion to dismiss is granted).

In opposition to the motion, South Beach has submitted an Affirmation from Tom Herrschaft, Head of Retail at Commerz Real AG, a real estate asset management and holding company incorporated in Germany and the parent company of CRI, which is the sole member of South Beach. South Beach urges denial of the motion for two reasons. First, South Beach insists it does not do business in New York but was obligated to bring this action under the exclusive jurisdiction clause in the parties' Agreement. Herrschaft provides pages of detail explaining the business of South Beach, an LLC registered in Florida which conducts its business primarily in Miami. The New York address on the South Beach registration is the address of its legal counsel, not the place where South Beach conducts its business, Herrschaft maintains.

Second, Herrschaft asserts that, to proceed to the merits as expeditiously as possible, South Beach registered to do business in New York on November 20, 2023 (NYSCEF Doc. Nos. 20-21, 28-30), which moots the motion to dismiss. South Beach points to the amendment to LLC Law § 802(b)(i), which South Beach construes as providing a 120-day period for the LLC to establish its compliance with the law. Since the action was commenced on September 13, 2023, the November 20, 2023 filing authorizes South Beach to commence this action, plaintiff claims.

South Beach further argues that noncompliance with LLC Law 808(a) is not a jurisdictional defect but instead is a curable defect. Thus, the November filing is sufficient authority for the case to proceed, even if the statute is not construed to provide the 120-day period that South Beach advocates. *See, e.g., Basile v Mulholland*, 73 A.D.3d 597, 597 (1st Dep't 2010) (plaintiff LLC's failure to obtain a certificate of authority to do business in New York before initiating the action is not a fatal jurisdictional defect and such certificate has since been obtained, allowing the action to proceed).

In reply, RFR maintains its position, arguing that while South Beach has submitted an application for a certificate of authority to do business, it has yet to fully comply with the above-referenced statutory requirements relating to publication that are needed to actually obtain the certificate. And South Beach's insistence that it is not doing business in New York at most creates an issue of fact that requires a hearing after limited discovery. Significantly, though, while RFR distinguishes many of South Beach's cases, it does not dispute that plaintiff's failure to obtain a certificate of authority to do business in New York is a curable defect.

Having considered the papers and various arguments presented by the parties, the Court denies the motion to dismiss without prejudice on the condition that South Beach fully comply with the statute and present to RFR by February 26, 2024, proof that South Beach has satisfied the statutory requirements needed to obtain authority to do business in New York, including the publication requirements. In the opinion of the Court, the \$2.75 million claim by South Beach in its Complaint should proceed on the merits once all the requirements of the LLC Law have been met. Granting RFR's motion and dismissing the action would serve no purpose, as plaintiff South Beach could easily commence the action anew once New York State issues the certificate of doing business. Nor would judicial or party resources be wisely spent on discovery and a

hearing to determine whether or not South Beach is doing business in New York. The most efficient course of action is for South Beach to complete the registration process as expeditiously as possible. Should South Beach fail to obtain the certificate of authority to do business in New York, RFR may renew its motion in 2024 before the Commercial Division Justice assigned to the case after this Court retires from the Commercial Division Bench at the end of 2023.

Accordingly, defendant’s motion to dismiss is denied without prejudice to renewal, if appropriate, should South Beach fail to present to RFR a certificate of South Beach’s authority to do business in New York by February 26, 2024. If the motion is not renewed, RFR shall file an Answer to the Complaint by March 26, 2024. A preliminary conference is scheduled for April 1, 2024 at 10:00 a.m., subject to adjustment by the Commercial Division Justice assigned to the case in 2024.

Dated: December 12, 2023

  
BARRY R. OSTRAGER, J.S.C.

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| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED              | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER     |
| APPLICATION:          | <input type="checkbox"/> GRANTED                    |                                            | <input type="checkbox"/> GRANTED IN PART                  |                                    |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER               |                                            | <input type="checkbox"/> SUBMIT ORDER                     |                                    |
|                       | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN |                                            | <input type="checkbox"/> FIDUCIARY APPOINTMENT            | <input type="checkbox"/> REFERENCE |