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MKC-S, Inc. v Laura Realty Co.
2014 NY Slip Op 50650(U)
Decided on April 21, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on April 21, 2014

Supreme Court, Kings County

MKC-S, Inc., Plaintiff,

against

Laura Realty Co., Defendant.

507918/2013

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Carolyn E. Demarest, J.

Plaintiff MKC-S, Inc. moves, by Order to Show Cause, for a *Yellowstone* injunction prohibiting its landlord, defendant Laura Realty Co., from terminating its commercial lease while this action is pending, and tolling plaintiff's time to cure any defaults of the lease for the property located at 101-01 Avenue D, Brooklyn, New York ("Property"). Defendant argues, *inter alia*, that the instant motion should be denied, because MKC-S lacks standing to bring this action pursuant to BCL §1312(a) as a foreign corporation not registered to do business in New York.

Background

MKC-S is a Delaware corporation, not registered to do business in the State of New York. Laura Realty is the ground lessee of the Property, which is owned by the City of New York. Laura Realty has a landlord/tenant relationship with MKC-S pursuant to a commercial lease dated September 7, 1967. The Property was originally occupied by the manufacturing operations of Admiral Plastics, which was sold in 1993 to Setco, Inc., a division of MKC-S. Setco was later sold, and MKC-S assumed Admiral Plastics's leasehold interest.

Parties agree that in 2008, a petroleum hydrocarbon contamination was discovered beneath the Property. Plaintiff sets out, in considerable detail, the steps it undertook to remediate the petroleum contamination, which included hiring an independent contractor to study the contamination under the supervision of the New York State Department of Environmental Conservation. By July 2013, Laura Realty had apparently grown concerned with the slow speed of the cleanup of the petroleum

spill, along with several other required repairs. Laura Realty's counsel sent an email to MKC-S's counsel on July 26 asking for an update on the cleanup. Laura Realty was dissatisfied with the response they received from MKC-S, and on October 23, 2013, Dennis Ratner, a Partner of Laura Realty, signed a 30-day Notice to Cure instructing MKC-S to cure various violations of the lease, including the petroleum spill. The parties negotiated further about effectuating repairs to the property and, as a direct consequence of these negotiations, Laura Realty granted MKC-S two one-week extensions to the Notice to Cure. Cooperation between the parties broke down near the end of the cure period, and Laura refused to grant any further extensions. MKC-S filed the instant motion, via an Order to Show Cause, to preserve the status quo of its commercial tenancy on the property, and Laura Realty opposed.

Discussion

Laura Realty claims MKC-S is barred from maintaining this *Yellowtone* action pursuant to BCL § 1312(a) because it is not authorized to do business in New York. BCL § 1312(a) provides: [*2]

> 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 defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation.

While MKC-S does not claim that it is authorized to do business in New York, it asserts that it is not "doing business" in New York within the meaning of the statute. MKC-S correctly argues that BCL § 1312(a) acts as a bar to a foreign corporation bringing an action in this state only if the corporation is "doing business" in New York within the meaning of the statute (*see Int'l Fuel & Iron Corp. v Donner Steel Co.*, 242 NY 224, 228-229 [1926]) (interpreting §110 of the Stock Corporation Law, predecessor to BCL § 1312). To come within BCL § 1312(a), "a corporation must do more than make a single contact, engage in an isolated piece of business, or an occasional undertaking; it must maintain and carry on business with some continuity of act and purpose"(*Id.* at 230). The question of whether a foreign corporation is "doing business" in New York is approached on a case-by-case basis (*see Highfill, Inc. v Bruce and Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]). The burden is on the defendant asserting the statutory bar to prove that plaintiff's business in New York was "so systematic and regular as to manifest continuity of activity in the jurisdiction"

(*Id.*, quoting *S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 373 [2d Dept 1998]). Absent sufficient evidence that the plaintiff is doing business in New York, the presumption is that the plaintiff does business in its state of incorporation, here Delaware (*see Cadle Co. v Hoffman*, 237 AD2d 555, 555 [2d Dept 1997]).

Plaintiff argues that it is not "doing business" in New York because it has no place of business in New York; owns no property in New York; has no employees, officers or directors residing or working in New York; has no bank accounts, telephone numbers, or mailboxes in New York; does not solicit any business in New York, and does not physically occupy any portion of the Property. Defendant counters that Plaintiff has acted as sub-landlord for the Property for a number of years. Plaintiff admits that it leases the Property from Defendant, and it appears from the Notice to Cure annexed to defendant's opposition that MKC-S sub-leases the Property to Brookdale University Hospital and Medical Center, Alpha Plastics, Inc., Food Professionals, Inc., Wesco Distribution, Inc., CapGen CHP, Inc., Teri Nichols Institutional Food Merchants, Inc., and Ramela Distributors, Inc.

The Court finds that acting continuously as the sub-landlord for commercial property is "doing business" within the meaning of BCL § 1312(a) (*See Scaffold-Russ Dilworth, Ltd. v Shared Management Group, Ltd.* 256 AD2d 1087 [4th Dept 1998])(Contractor was "doing business" in the state when it rented scaffolding to eight public and private construction sites). MKC-S has held the leasehold rights to the Property, directly or through a subsidiary, since 1993. It has subleased the property continuously since then. The Court finds that, upon the facts admitted, MKC-S's subleasing activity was wholly intrastate, systematic, and regular. (*See Parkwood Furniture Co. v OK Furniture Co.*, 76 AD2d 905, 905 [2d Dept 1980]). Until it has registered with the State of New York and paid all applicable fees, taxes, and penalties, MKC-S is precluded from maintaining this action in New York. [*3]

Defendant has not moved to dismiss this action, but has asked the Court to deny plaintiff's *Yellowstone* motion pursuant to BCL § 1312(a). At oral argument, the Court was advised that the lease will expire on April 30, 2014. While denial of the motion may not be appropriate, as noncompliance with BCL § 1312(a) is curable during the pendency of an action (*see Tri-Terminal Corp. v CITC Industries, Inc.*, 78 AD2d 609 [1st Dept 1980]), this matter cannot be maintained if plaintiff does not cure its incapacity. Accordingly, the Yellowstone injunction previously continued on consent, is extended to April 30, 2014, to afford the plaintiff an opportunity to cure by obtaining authority to do business in New York.

Conclusion

The action is adjourned to 9:45 A.M. on April 30, 2014. In the interim, defendant is enjoined from terminating the lease or taking legal action to evict plaintiff.

E N T E R,

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J. S. C.

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