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The Courthouse Doors Are Always Open (Sort of): Moving to Dismiss Under NY Business Corporation Law § 1312

When an out-of-state corporate plaintiff wishes to bring a lawsuit against a New York-based defendant, a litigator would likely recommend bringing that lawsuit in New York to secure jurisdiction over the defendant. Before pulling the trigger, however, it is critical to confirm the plaintiff's standing to seek relief from New York courts. While the assumption is the courthouse doors are open to all, [New York Business Corporation Law \(BCL\) § 1312](#) prohibits an unauthorized foreign corporation doing business in New York from commencing an action or special proceeding in the New York state courts. A recent decision from the Westchester Supreme Court, Commercial Division provides a cautionary tale to plaintiffs and defendants alike about the interplay between the BCL and a party's standing to sue in New York.

The Case: *Southwind Capital Funding Group, LLC v. COD USA, Inc. & Heather E. Smulson*

In *Southwind Capital Funding Group, LLC v. COD USA, Inc. & Heather E. Smulson*, No. 69441/2019 (Sept. 24, 2020), the plaintiff, a Delaware corporation based in Florida, commenced litigation in Westchester Supreme Court against the defendants for allegedly violating two financing agreements. The defendants moved to dismiss pursuant to BCL § 1312, arguing the plaintiff was an unauthorized foreign corporation doing business in New York and was therefore statutorily barred from commencing an action in New York state court. In support of their motion to dismiss, the defendants proffered evidence that the plaintiff had brought prior lawsuits and maintained one or more offices in New York. The defendants also sought security for costs under CPLR 8501(a), based similarly on the plaintiff's status as an unauthorized foreign corporation.

As it was undisputed that the plaintiff was an unauthorized foreign corporation, the court's analysis focused on whether the plaintiff was "conducting business" in New York. Pursuant to BCL § 1312 a), a corporation conducts business when it is "engaged in a regular and continuous course of conduct in the [s]tate." The defendants bear the burden of demonstrating the plaintiff engaged in such conduct within New York and rebutting the presumption that the plaintiff's activities occurred principally in its state of incorporation. Here, the court found the defendants failed to proffer sufficient evidence that the plaintiff conducted regular and continuous business in New York and so denied the motion.

In small consolation to the defendants, the court did require the plaintiff to furnish \$1,500 in security for costs under CPLR 8501(a), because the plaintiff failed to proffer evidence that it was: 1) a domestic corporation; 2) a foreign corporation licensed to conduct business in New York; or 3) a New York resident.

Takeaway

This case provides several takeaways for both plaintiff and defense lawyers in actions brought by foreign corporations. Plaintiffs' lawyers representing out-of-state entities should be diligent and confirm that BCL § 1312 will not stand as a bar to their lawsuit.

Defense counsel should always verify if a foreign corporation plaintiff is authorized to do business in New York, and if it is not, explore the possibility of filing a motion to dismiss for lack of standing under the BCL. Defense counsel should also be prepared to prove the plaintiff is conducting regular and continuous business in New York.