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Commercial division update: Unregistered foreign business entities 'doing business' in New York and their right to sue

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In New York state, business entities formed or incorporated outside New York that meet the criteria of "doing business" in New York are classified as foreign business entities and are required to register to do business in New York. Both the New York BCL and the New York LLC Law provide that, without registering in New York, a foreign business entity does not have the legal capacity to bring suit in any New York state courts, although it can be sued in New York.

Specifically, foreign business entities doing business in New York without authorization may not "maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company [or corporation] shall have received a certificate of authority in this state" to do business in New York. LLC Law §808(a); *see* BCL § 1312(a).

This prohibition gives rise to a number of issues that have come before the Commercial Division. The first is the standard that is applied to determine if a foreign entity is doing business in New York to trigger this prohibition. The second is whether its failure to register to do business in New York is jurisdictionally fatal or instead is a waivable defect. Finally, we examine whether the failure to register to trigger this prohibition can be cured following the initiation of suit.

'Doing business' in New York

"Absent adequate proof to establish that the plaintiff is doing business in New York, the presumption is that the plaintiff is doing business in its State of incorporation…and not in New York." *Cadle v. Hoffman*, 237 A.D.2d 555, 555 (2d Dep't 1997). The burden of proving that the statutory bar to commencing suits applies is on the party so asserting. *Great White Whale Advertising v. First Festival Productions*, 81 A.D.2d 704, 706 (3d Dep't 1981). "The question of whether a foreign corporation is 'doing business' in New York must be approached on a case-by-case basis with inquiry made into the type of business being conducted." *Highfill v. Bruce & Iris*, 50 A.D.3d 742, 743 (2d Dep't 2008).

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Nearly 100 years ago, the New York Court of Appeals grappled with the issue, then under Section 15 of the General Corporation Law, when a foreign corporation is doing business in New York to require it to register with the state. "The policy of our state, as manifested in its laws, is not to impose any unconscionable restrictions upon the transactions of foreign corporations here… To be 'doing business in this State' implies corporate continuity of conduct…such as might be evidenced by the investment of capital here, with the maintenance of an office…and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business." *International Fuel & Iron v. Donner Steel*, 242 N.Y. 224, 230 (1926).

Therefore, to have crossed the line into "doing business" territory, it must be proven that "the [plaintiff] 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." *Highfill*, 50 A.D.3d at 744 (citing *ST Bank v. Spectrum Cabinet Sales*, 247 A.D.2d 373, 373 (2d Dep't 1998) (quoting *Peter Matthews v. Robert Mabey*, 117 A.D.2d 943, 944 (3d Dep't 1986)).

New York courts have observed that a higher bar exists for proving "doing business" under BCL §1312 and LLC Law §808 than for proving personal jurisdiction under CPLR §301, although it is unclear whether that distinction has any tangible effect on the courts' analyses.

In *Airtran New York v. Midwest Air Group*, 15 Misc. 3d 467 (N.Y. Co. 2007), *rev'd on other grounds*, 46 A.D.3d 208 (1st Dep't 2007), Justice Helen Freedman of the New York County Commercial Division addressed a books and records request pursuant to BCL §1315, which permits a New York resident who is a shareholder of a foreign corporation to demand access to the corporate books and records of that foreign corporation if it is "doing business in New York."

While the issue in *Airtran* was whether the "doing business" standard in BCL §1315 was the same as that in BCL §1312, in addressing the standard under §1312, the court observed that that statute requires "a higher level of 'doing business' than the general jurisdiction statute" in CPLR §301.

The court reasoned that BCL §1312 requires a "heightened standard, in order to avoid infringing on the Interstate Commerce Clause, which grants Congress the power to regulate commerce among the states."

The *Airtran* court cited *Tauza v. Susquehanna Coal*, 220 N.Y. 259 (1917) (Cardozo, J.), in which the Court of Appeals grappled with whether the Commerce Clause of the U.S. Constitution, which prevents state legislation that unduly burdens interstate commerce, prevented New York courts from asserting general jurisdiction over a company incorporated and headquartered in Pennsylvania with a branch office in New York, or if such jurisdiction was limited to suits arising out of its transaction of business in New York.

While the court recognized that "[i]n construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference of the state with interstate competition," the court found no burden on interstate commerce by a New York court exercising general jurisdiction over corporations doing business within the state.

A recent Commercial Division case, *Airball Capital v. Rosenthal & Rosenthal*, 73 Misc. 3d 1218(A) (N.Y. Co. 2021), dealt with a defendant's motion to dismiss under LLC Law §808(a). The defendants alleged that plaintiff "Airball is an unregistered foreign LLC conducting business in New York [and is therefore] precluded from access to New York's courts."

Justice Robert R. Reed of the New York Commercial Division found the evidence supporting that motion, that the three members of the plaintiff LLC are headquartered in New York City, fell short of the requisite showing of "permanent, continuous, and regular." The court cited *Spectrum Origination v. Hess*, No. 653171/13, 2014 WL 1511159 (N.Y. Co. Apr. 16, 2014)), in which Justice Melvin Schweitzer of the New York County Commercial Division had held that the plaintiff owning an office in New York and holding a security interest in property in New York were insufficient to prove that the plaintiff was doing business in New York.

In *MKC-S v. Laura Realty*, 43 Misc. 3d 1215(A) (Kings Co. 2014), the defendant leased property in New York to the plaintiff, which subleased it to a third party. The plaintiff had no other presence or business in New York. The defendant moved to dismiss pursuant to BCL §1312(a).

Agreeing with defendant that this constituted doing business in New York, Justice Carolyn Demarest of the Kings County Commercial Division reasoned: "[P]laintiff 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."

Despite the plaintiff possessing none of those concrete, tell-tale signs of a foreign company doing business in New York, the court held "that acting continuously as the sub-landlord for commercial property [since 1993] is 'doing business' within the meaning of BCL §1312(a) [and]…that, upon the facts admitted, [plaintiff's] subleasing activity was wholly intrastate, systematic and regular."

The failure to register is waivable

Lacking the legal capacity to bring suit is not a fatal jurisdictional bar to an unregistered foreign corporation filing a complaint in New York state court. That the foreign plaintiff is not registered in New York is an affirmative defense that the defendant must raise in a timely manner, in either a pre-answer motion to dismiss or in its answer. Under CPLR Rule 3211(e), if a defendant fails to raise an "objection or defense based upon [the plaintiff lacking legal capacity to sue, such objection or defense] is waived."

In *Daper Realty v. Al Horno Lean Mexican 57*, No. 655100/2021, 2022 WL 5247161 (N.Y. Co. Oct. 5, 2022), the defendant moved to dismiss the plaintiff's complaint pursuant to BCL § 1312(a). However, the defendant had previously filed its answer which did not assert this defense.

The court found the defect to have been waived: "No party disputes that the plaintiff was unregistered to do business in New York when it commenced this action and that it remains unregistered, in contravention of BCL § 1312(a). However, the defendant is not entitled to dismissal of the complaint on this ground inasmuch as the defendant failed to raise the issue of registration on a pre-answer motion to dismiss or in its answer . . . ."

A curable defect

Even where a foreign plaintiff's failure to register in New York is timely raised, Commercial Division courts have held that failure can be cured by the plaintiff without the necessity of dismissing the complaint.

In *South Beach Tristar 800 v. Lincoln Arts ERFR*, No. 654461/2023, 2023 WL 8618195 (N.Y. Co. Dec. 12, 2023), the defendant filed a motion to dismiss the complaint pursuant to Section 808(a) of the LLC Law. In response, the plaintiff filed for the requisite authorization to do business in an effort to moot the motion. While the plaintiff had filed its application to register to do business, it had not completed all of the necessary steps to register, including publishing a notice once a week for six consecutive weeks.

LLC Law §802(b) establishes a 120-day period during which a foreign LLC must complete New York's publication requirement. South Beach asserted that the 120-day period provided it enough time "to establish its compliance with the law" without the court needing to stay or conditionally dismiss the matter. The court agreed with South Beach, denying the motion to dismiss with leave to renew if the plaintiff did not provide proof of registration within that 120-day period.

The court concluded that "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."

Conclusion

The question of whether a foreign business plaintiff not registered in New York is doing business in New York is fact-intensive. While it may be prudent for such a plaintiff to register to do business in New York before commencing suit, whether it is doing business in New York, and therefore required to be registered, may not be so clear.

Without registering, however, a foreign plaintiff found to be doing business in New York still has two potential escape hatches. First, if the defendant fails to raise this defense in its answer or pre-answer motion to dismiss, it is likely waived. Second, even if properly raised, the plaintiff can promptly seek to register to do business in New York to stave off dismissal of its case.