SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SKYCOM SRL,

Plaintiff,

-against-

F.A. & PARTNERS, Inc., FLINTLOCK CONSTRUCTION SERVICES, LLC and VIGILANT INSURANCE COMPANY,

Defendants.

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Index No.: 155999/2013
(Action No. 1)

DECISION & ORDER

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SKYCOM SRL,

Plaintiff,

-against-

F.A. & PARTNERS, Inc., FLINTLOCK CONSTRUCTION SERVICES, LLC and VIGILANT INSURANCE COMPANY,

Defendants.

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Index No.: 155985/2013
(Action No. 2)

SHIRLEY WERNER KORNREICH, J.:

Motion Sequences 001 in each of the above entitled actions are consolidated for disposition.

Defendants Flintlock Construction Services, LLC (Flintlock) and Vigilant Insurance Company (Vigilant) move to dismiss the Complaints in both actions for lack of standing, pursuant to CPLR 3211(a)(3) and Business Corporations Law 1312(a). Further, in Action No. 1, they move to dismiss the second cause of action for unjust enrichment for failure to state a claim. CPLR 3211(a)(7). Defendants' motions are granted in part and denied in part for the reasons that follow.

I. Background

Plaintiff Skycom SRL (Skycom) filed separate actions against defendants related to two construction projects in New York: (1) a property located at 136 West 42nd Street (Action No. 1); and (2) a property located at 218 West 50th Street (Action No. 2). As this is a motion to dismiss, the facts recited are taken from the Complaints and the documentary evidence.

A. 42nd Street Property (Action No. 1)

136-140 42nd Street Owner, L.P., (42nd Street Owner) is a Delaware limited partnership that owns a high-rise building located at 136 West 42nd Street, New York (the Building). Complaint ¶¶ 3,5; *See* Dkt. 20.[1] On May 8, 2012, 42nd Street Owner contracted with Flintlock, a general contractor, to repair the Building for $49,547,687. ¶18; *See* Dkt. 28. Pursuant to the contract, Flintlock was permitted to subcontract portions of its repair work. *See* Dkt. 28 at 6. On April 23, 2012, in anticipation of executing the contract, Flintlock entered into a Letter of Intent (a subcontract) with defendant F.A. & Partners, Inc. (FA) to furnish, fabricate, and install curtain walls[2] and to repair the façade of the Building. ¶20; *See* Dkt. 29. Shortly thereafter, in October 2012, FA entered into a sub-subcontract with Skycom to manufacture and deliver the curtain walls for an agreed upon price of $1,768,817.75. ¶¶ 20,23. Skycom alleges that 42nd Street Owner and Flintock consented to the sub-subcontract. ¶21. The sub-subcontract is not in the record.

Skycom is a foreign corporation located in Milan, Italy, which specializes in producing and installing curtain walls in high-rise buildings. ¶¶ 1-2. Pursuant to the sub-subcontract, Skycom and FA set out a schedule for the pricing and delivery of the curtain walls. ¶7. Skycom

[1] References to "Dkt" followed by a number refer to documents in this action filed in the New York State Courts Electronic Filing System.

[2] Non-structural glass walls that cover the exterior of a building.

was to first draft a template and supply sample materials for the Building. ¶22. FA was then to install and test the sample materials to ensure that the permanent curtain wall was precisely measured. ¶24. Following testing, FA was to apprise Skycom of necessary modifications, and Skycom was to manufacture and produce new materials accordingly. *Id.*

In a letter dated November 19, 2012, Flintlock agreed to pay Skycom for work related to an agreement between Skycom and FA (Flintlock Agreement). *See* Dkt. 39 at 2. The Flintlock Agreement provides:

> ..., in reference to the agreement between Flint Lock, as General Contractor, and FA & Partners/Megalltech, relating to the work process for Hilton 42[nd] – New York – for the supply relative to it, **Flint Lock agrees to pay directly the main supplier Skycom**, as reported in the **Financial Plan attached**, up to the achievement amount, equal to the Contract of Skycom srl with Fa and Partner/Megalltech.

[emphasis supplied] *Id.* The Flintlock Agreement is sent from "SKYCOM srl, Gruppo Megalltech Inc. NY", and signed by Flintlock, Fa and Megalltech, Inc. The Financial Plan is not in the record.

In January and February 2013, Skycom ordered, manufactured, and delivered the template and sample materials to FA, incurring a cost of $505,000. ¶¶ 27,29. Flintlock, on behalf of FA, paid Skycom approximately $450,000 for its work. ¶30. After delivery, Skycom continuously corresponded with Flintlock and FA, requesting the (1) unpaid balance of $55,717.50; and (2) re-calculated specifications so that Skycom could timely produce the permanent materials. ¶36. To meet the schedule deadlines, Skycom continued to order materials, equipment, hire additional employees, and lease additional factory space. ¶38. In the spring of 2013, FA terminated the sub-subcontract and has not paid Skycom the alleged $55,717.50 balance due. *Id.* On May 10, 2013, Skycom filed a mechanic's lien against the Building. ¶91. Flintlock's surety, defendant Vigilant, posted a bond to discharge the lien. ¶94.

Skycom argues that Flintlock received the full benefit of the completed work. In ¶58 of the Complaint, Skycom alleges that "Defendant" will be unjustly enriched if Skycom is not granted quantum meruit relief because it was credited "on account with that portion of its contract with the General Contractor [defined as Flintlock] and Owner [defined as 42nd Street Owner]" without compensating Skycom for its work. In other words, it argues that FA benefited from Skycom's work and merchandise and will be unjustly enriched. In ¶59, Skycom then alleges in conclusory fashion that all of the "Defendants" benefited from its work on the Building.

Skycom filed the Complaint on June 24, 2013 in Action No. 1, asserting six causes of action: (1) breach of contract (related to the $55,717.50 unpaid balance for the template and sample materials); (2) unjust enrichment; (3) account stated; (4) breach of contract (related to wrongful termination of the contract); (5) detrimental reliance; and (6) foreclosure of the mechanic's lien.

B. 50th Street Property (Action No. 2)

Friars 50th Street Garage, Inc. (50th Street Owner) is a New York Corporation that owns a high-rise building located at 218 West 50th Street (the Project). Complaint ¶¶ 13,15; *See* Dkt. 12. 50th Street Owner contracted with Flintlock to renovate the Project. ¶21. Flintlock subsequently entered into a subcontract with FA to furnish curtain walls and to repair the façade of the Project. ¶23. Shortly thereafter, FA entered into a sub-subcontract with Skycom to furnish, manufacture, and deliver the curtain walls for $991,348.86 plus tax. ¶¶ 24, 30. None of the contracts relating to the Project are in the record. The Complaint alleges that the sub-subcontract was executed with the knowledge and consent of 50th Street Owner and Flintlock. ¶24. According to the complaint, during the term of the sub-subcontract, Flintlock and FA

requested additional materials through change orders. ¶31. As a result, Skycom furnished additional labor and materials for a total price of $1,200,590.84, plus shipping ($1,216,720.58). ¶32. Skycom shipped the curtain walls from its facilities in Italy to New York in several stages. ¶26. Skycom delivered some shipments to the Project, and FA rejected or never received other orders. ¶¶ 27-29. Skycom alleges that FA failed to pay $515,580.94 of the sub-subcontract. ¶¶ 34,38. On May 10, 2013, Skycom filed a mechanic's lien for $489,613.76 against the Project.[3] ¶39. Flinlock's surety, defendant Vigilant, posted a bond to discharge the lien. ¶¶ 51,53.

Skycom filed the complaint on October 29, 2013 asserting three causes of action: (1) foreclosure of its mechanic's lien; (2) unjust enrichment; and (3) account stated.

C. Registration of Skycom Italian Interiors, LLC

On March 12, 2014, Skycom Italian Interiors LLC (Skycom Interiors) registered as a limited liability company in New York. *See* Action 1, Dkt. 38 at 2-3. Although Skycom denies that it is "doing business" in New York, it asserts that it is currently affiliated with Skycom Interiors. On March 27, 2014, Expo Magazine released an article that mentioned Skycom's partnership with FA, its production and service centers in Milan, Turin, Catanzaro, London, and New York, and displayed four pictures of buildings that Skycom was allegedly involved in. *See* Action 1, Dkt. 26 at 3-4. Further, according to Skycom's website, it has subsidiary commercial offices in New York and the United Arab Emirates. *See* Action 1, Dkt. 25 at 3. The Skycom website lists 40 Wall Street, 30th Floor, New York, 10005, as a "Skycom subsidiary commercial office". Defendants submitted snapshots of the website as documentary evidence. The snapshots post-dated Skycom's affiliation with Skycom Interiors. Thus, it is unclear whether the New York office is Skycom's satellite office or simply a related subsidiary office.

[3] Skycom subsequently amended the amount owed to $515,580.94.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Capacity to Sue

Defendants move to dismiss the actions, claiming that Skycom is "doing business" in New York without authority and, therefore, lacks capacity to bring a lawsuit in New York. Business Corporation Law §1312 (BCL) provides that an unlicensed foreign corporation doing business in New York "shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized." The purpose of the section "is not to enable

defendants to avoid contractual obligations but to regulate such foreign corporations which are in fact conducting business within the state." *Von Arx, A. G. v Breitenstein*, 52 AD2d 1049, 1050 (4th Dept 1976).

However, the power of a state to regulate foreign corporations is limited. A state cannot interfere with a foreign corporation's right to engage in purely interstate commerce, or in activities incidental to commerce between states. *Tauza v Susquehanna Coal Co.*, 220 NY 259, 267 (1917); *International Text Book Co. v Tone*, 220 NY 313, 318 (1917). Therefore, a corporation of one state may enter into another, "without obtaining a license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." *Dahnke-Walker Milling Co. v. Bondurant*, 257 US 282, 291 (1921).

As a result, there is a presumption in an action brought by a foreign corporation that it is doing business in the state of its incorporation, rather than in New York. *Cadle Co. v Hoffman*, 237 AD2d 555, 655 (2d Dept 1997). Hence, the party invoking BCL §1312 bears the burden of proving that the corporation's business activities in New York "were not just casual or occasional" but rather so "systemic and regular as to manifest continuity of activity in the jurisdiction." *Nick v Greenfield*, 299 AD2d 172, 173 (1st Dept 2002); *Alicanto, S.A. v Woolverton*, 129 AD2d 601, 602 (2d Dept 1987); *Peter Matthews, Ltd. v Robert Mabey, Inc.*, 117 AD2d 943, 944 (3d Dept 1986).

There is no precise measure of the nature or extent of activities necessary to find that a foreign corporation is "doing business" in New York; courts consider the facts of each case. *Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 855 (2d Dept 2008). To qualify as "doing business", New York courts weigh several factors including: (1) the number of transactions the

corporation entered into; (2) the services the corporation provided; and (3) whether the corporation has an office, bank account, telephone number, employees, or property or advertised in New York. *Acno-Tec Ltd. v Wall St. Suites, L.L.C.*, 24 AD3d 392, 393 (1st Dept 2005); *S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 374 (2d Dept 1998). "Where a company's activities within New York are merely incidental to its business in interstate and international commerce, §1312 is not applicable." *Alicanto, S.A.*, 129 AD2d 601, 603 (2d Dept 1987).

Contrary to defendants' contention, their motion papers do not establish, prima facie, that Skycom was doing business in New York at the time the parties entered into the subject contracts. At most, the complaints and documentary evidence create an issue of fact as to whether Skycom's business activities in New York are sufficient to demonstrate a regular and continuous course of conduct. Defendants point to a complaint in another state court (Bronx Complaint), Skycom's website, and the Expo magazine article as evidence that Skycom is "doing business" in New York. None of these factors sustain defendants' burden.

The Bronx Complaint mentions but one additional transaction in New York. According to the Bronx Complaint, Skycom "agreed to, and did, perform [portions of] the design, construction, manufacture, and installation of windows and/or 'curtain walls,'... at 3710 Webster Avenue, Bronx, New York." *See* Action 1, Dkt 23 at 4-5. The Bronx Complaint does not specify when Skycom was involved in the Bronx project or detail the services it rendered. The Bronx contract, as many of the essential documents here, was not submitted.

Further, although Skycom's website lists a New York address, the mere maintenance of an office for a corporation within another state is not in and of itself, absent other proof, evidence that it is doing business within that state. *International Fuel & Iron Corp*, 242 NY 224, 229 (1926). There is no proof as to the activity emanating from that office, how many if any

employees work there, whether business is solicited from that office or, for that matter, what is done in that office. Indeed, the office may belong to Skycom's subsidiary. In response to this motion, Skycom counters that it did not have any "permanent physical presence in the form of an office, warehouse, etc." *See* Action 1, Dkt. 36 at 2. The website address merely evidences Skycom's casual or occasional presence in New York.

Defendants also claim that Skycom was involved in four additional transactions in New York, based on an Expo Magazine article. The article, which speaks to the FA-Skycom relationship, exhibits four New York buildings. Skycom's involvement in those building-projects and the time frame of such possible involvement is not mentioned. The article is insufficient to establish that Skycom participated in systemic and regular business activity in New York.

Defendants, in support of dismissal, cite *Scaffold-Russ Dilworth Ltd. v Shared Management Corp. Ltd.* 256 AD2d 1087 (4th Dept 1998). There, plaintiff, a Canadian company was found to do systematic and regular business in New York where it rented scaffolding to contractors at eight construction projects between 1991 and 1992 and leased a facility for storage of scaffolding and accessories. Similarly, *Highfill, Inc.*, 50 AD3d at 742, also cited by defendants, involved a Louisiana plaintiff whose regional vice president regularly and continuously solicited New York companies. The vice president also was required to handle problems arising in New York, and the company's employees came to New York to work. In both case, defendants presented evidence of systematic and regular activity in New York far surpassing what was presented here. *See Airline Exchange, Inc. v Bag*, 266 AD2d 414 (2d Dept

1999) (plaintiff not "doing business" in New York where it had entered into three or four transactions in New York, even though it had an office and bank account in New York).[4]

In sum, a question of fact exists concerning whether or not Skycom's contacts were systematic and regular enough to warrant compliance with the statute. *Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 572 (1st Dept 2012). Defendants' motion to dismiss pursuant to BCL §1312 is denied.[5]

B. Unjust Enrichment

Unjust enrichment is a quasi-contractual claim. A cause of action for unjust enrichment requires a showing that the defendant received a benefit or was enriched at the plaintiff's expense under circumstances that would make it unjust or inequitable for the defendant to retain the benefit. *Clifford R. Gray, Inc. v LeChase Const. Servs., LLC*, 31 AD3d 983, 987-88 (3d Dept 2006). The existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter. *Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 (1987). Where it is unclear whether there is an express agreement on the same subject matter, unjust enrichment and breach of contract can be pleaded alternatively. *Loheac v Children's Corner Learning Ctr.*, 51 AD3d 476, 857 (1st Dept 2008).

i. Unjust Enrichment Against Flintlock in Action No. 1

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[4] Skycom argues that even were it doing business in New York under BCL §1312, it has cured its defect by currently operating under Skycom Interiors, an affiliate company. Operating under an affiliate company is not analogous to being licensed to "do business" in New York. Moreover, even if it were, Skycom has not shown that Skycom Interiors has paid back fees, taxes, penalties and interest charges. *See* Action 1, Dkt. 38.

[5] Even were Skycom doing business in New York in violation of BCL §1312, it could register with the state and pay all fees, taxes, penalties and interest charges during the pendency of the action, thereby avoiding dismissal. *See Bancorp v Pompee*, 82 AD3d 935 (2d Dept 2011); *Showcase Limousine, Inc. v Carey*, 269 AD2d 133, 134 (1st Dept 2000).

Skycom may maintain its alternative claim for unjust enrichment against Flintlock in Action No. 1. Skycom claims that Flintlock knowingly received and accepted the benefits of work performed for which Skycom was not fully paid. However, there is an issue of fact as to whether the Flintlock Agreement covers the same subject matter as the express agreement – the sub-subcontract. As previously noted, the sub-subcontract is not before the court. If Skycom performed without compensation, which was beneficial to Flintlock, then in the absence of an express agreement, Flintlock could be liable for unjust enrichment. Flintlock's argument that it was not in privity of contract with Skycom supports the unjust enrichment claim because it negates the existence of a written contract covering the same subject matter. Thus, Flintlock's motion to dismiss the second cause of action is denied.

ii. Unjust Enrichment Claim Against Vigilant in Action No. 1

Skycom's unjust enrichment claim in Action No. 1, is dismissed against Vigilant. Skycom's unjust enrichment claim was made against all defendants in Action No. 1, including Vigilant. Vigilant, a surety for the 42nd Street high-rise, derived no benefit from Skycom's performance of the sub-subcontract. Vigilant paid off the lien to discharge encumbrances on the Building, which was a detriment, not a benefit. Consequently, Skycom's unjust enrichment claim against Vigilant is dismissed.

Accordingly, it is

ORDERED that the motion in Action No. 1, Index No. 155999/2013, by defendants Flintlock Construction Services, LLC (Flintlock) and Vigilant Insurance Company (Vigilant) to dismiss the Complaint for lack of standing and to dismiss the second cause of action for unjust enrichment is granted solely to the extent of dismissing the second cause of action against Vigilant and is otherwise denied; it is further

ORDERED that the motion in Action No. 2, Index No. 155985/2013, by defendant Flintlock Construction Services, LLC (Flintlock) and Vigilant Insurance Company (Vigilant) to dismiss the Complaint for lack of standing is denied; it is further

ORDERED that the captions of the actions bearing index numbers 155999/2013 and 155985/2013 each are amended to read as follows:

SKYCOM SRL,

Plaintiff,

-against-

F.A. & PARTNERS, Inc., FLINTLOCK CONSTRUCTION SERVICES, LLC and VIGILANT INSURANCE COMPANY,

Defendants;

and all further papers in these actions shall bear the amended captions; it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Trial Support Office at genclerk-ords-non-mot@nycourts.gov and the Clerk of the Court at cc-nyef@courts.state.ny.us, who are directed to note the amended captions in their respective records; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on January 29, 2014 at 10:30 in the forenoon.

Dated: January 7, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C