

CIVIL COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY: SP. TERM, PART I

SILHOUETTE, LLC.,

Plaintiff,

- against -

PIRUZ ENTERPRISES, INC. d/b/a
VARIAZIONI,

Defendant.

Index No. 23016/05

Motion Date: 06/23/06 (#21)

Papers: Motion (2), Opp. (2),

Reply (3)

NEW YORK COUNTY
CIVIL COURT

SEP 22 2006

FILED

DIANE A. LEBEDEFF, J.C.C.:

Plaintiff seeks summary judgment upon its claim for a balance due and owing on certain goods sold and delivered to defendant (CPLR 3212). Defendant, having interposed a general denial, asserts that plaintiff's claim cannot proceed because it is a foreign corporation not authorized to do business in New York.

Professor David Siegel, in N.Y. Prac. § 83 (4th ed.), addresses the "doing business" test and states:

"The 'doing business' test . . . determines whether a corporation is amenable to New York jurisdiction. It's a test carried forward by CPLR 301 and for convenience we can call it the CPLR 301 test.

"We have also met two other corporate doing business tests. One arises under § 1314 (b)(5) of the Business Corporation Law, a kind of forum non conveniens provision that requires a showing in certain cases that a defendant corporation is doing business in New York before the court is authorized to entertain the case. We can call this one the BCL 1314 test.[FN1]

"The third arises under § 1312 of the Business Corporation Law, which precludes a plaintiff foreign corporation from maintaining a New York action if it is doing business in New York without having duly licensed itself to do so. We will refer to this one as the BCL 1312 test.

"Are these tests the same? But while the CPLR 301 and BCL 1314 tests are said by caselaw to be the same, the CPLR 301 and BCL 1312 tests are

said by caselaw to differ. The extent of the difference is not clear, but more appears to be demanded for the BCL 1312 test because of its penal effect in precluding suit by a foreign corporation." (Footnotes omitted.)

Despite its age, *International Text-Book Co. v. Tone*, 220 N.Y. 313, 317-318 (1917, Cardozo, J.), remains the definitive case addressing the application of this penal standard at issue here as follows:

"The plaintiff was engaged in interstate commerce. It did nothing in New York except in furtherance of that commerce. It solicited orders, which did not ripen into contracts until accepted in Pennsylvania. It fulfilled its contracts by the transmission of information through the medium of the mails. [The predecessor statutes of BCL § 1312] are not aimed at such activities. That is now the settled rule.

"Business may be sufficient to subject the foreign corporation that does it to the service of process, and yet insufficient to require it to take out a license. . . . The question before us here is not one of the jurisdiction of courts under the rules of private international law. It is one of statutory construction. We have steadily upheld the right of foreign corporations, without the aid of any license, to engage in activities incidental to commerce between the states.

"To read the states otherwise would be to condemn them as unconstitutional. They would then be unlawful obstructions of interstate commerce." (Citations omitted.)

Given the foregoing, the defendant has not made out this unpleaded defense by asserting that plaintiff took the order for goods at an unidentified trade show (a fact not entirely consistent with the month separation of the two orders at issue).

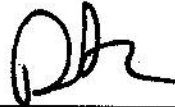
As to any claim that the goods were defective, it is conclusory and does not defeat a right to judgment herein.

Accordingly, judgment is awarded to plaintiff. No sooner than five (5) days after service upon defendant of a copy of this order with notice of entry and a proposed judgment, and service thereafter of a copy of this order and proof of compliance with the foregoing condition upon the appropriate clerk, the clerk is directed to enter judgment in favor of plaintiff as demanded in the

complaint, plus interest, plus costs and disbursements as taxed by the clerk.

This decision constitutes the order of the court.

Dated: September 18, 2006

A handwritten signature in black ink, appearing to be 'D.H.', written above a horizontal line.

J.C.C.