SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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RADIANCE CAPITAL, LLC, a Washington Limited Liability Company,

Plaintiff,

DECISION AND ORDER
(Motion #'s 1 and 2)

-against-

EXPERT SEWER AND DRAIN LLC and RAFAEL PAGAN,

Index No.: 034767/2012

Defendants.

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Margaret Garvey, J.

The following papers, numbered 1 to 7, were considered in connection with Plaintiff's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, awarding summary judgment to Plaintiff against both Defendants, and for such other and further relief as to this Court seems just and proper; and were also considered in connection with Defendants' Notice of Cross-Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3211(a)(3), dismissing the complaint because Plaintiff, a foreign corporation not licensed in the State of New York, lacks capacity to sue, and for such further relief as the Court may deem just and proper under the circumstances:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIDAVIT OF JODY BURLEIGH DATED JANUARY 14, 2013/EXHIBITS (A-H)/AFFIRMATION OF CARYN F. BLAUSTEIN, ESQ. DATED JANUARY 22, 2013/EXHIBIT (A)	1
NOTICE OF CROSS-MOTION/AFFIRMATION OF ADAM M. PESKA, ESQ. DATED FEBRUARY 20, 2013/AFFIDAVIT OF RALPH[1] PAGAN DATED FEBRUARY 21, 2013/	

[1] A review of the NYSCEF file for this case as well as Index No. 030685/2011 (Expert Sewer & Drain, LLC v. New England Municipal Equipment Company, Inc.) reveals that Defendant PAGAN's name is listed as "Rafael" on some documents, and "Ralph" on others. In fact, even Defendant PAGAN's attorney (same attorney on both cases) uses the two different

EXHIBITS (A-C)	2
AFFIDAVIT OF JODY BURLEIGH DATED FEBRUARY 28, 2013 IN OPPOSITION TO DEFENDANTS' CROSS-MOTION AND IN REPLY TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT/EXHIBITS (A-E)/AFFIRMATION OF CARYN F. BLAUSTEIN, ESQ. DATED MARCH 1, 2013	3
REPLY AFFIRMATION OF ADAM M. PESKA, ESQ. DATED MARCH 1, 2013	4
LETTER DATED MAY 14, 2013[2] (ADAM M. PESKA, ESQ.)	5
LETTER DATED MAY 15, 2013 (CARYN F. BLAUSTEIN, ESQ.)	6
LETTER DATED MAY 15, 2013 (ADAM M. PESKA, ESQ.)	7

Upon the foregoing papers, the Court now rules as follows:

This matter was commenced by Plaintiff with the filing of a Summons and Complaint on August 21, 2012. The action stems from a financing agreement wherein Plaintiff provided the funds for Defendants to purchase a vehicle and/or equipment: a 1989 Ford LN8000 truck, Vin # 1FDYR82A7KVA55785 and a used V390T combo sewer cleaner (hereinafter "truck"). The Equipment Financing Agreement between the parties includes a personal guarantee by Defendant PAGAN to make all payments and perform all of Defendant EXPERT SEWER & DRAIN, LLC's (hereinafter "EXPERT SEWER") obligations. Defendants were to make fifty nine (59) monthly payments of $1,101.90, plus an initial payment of $1,451.99, for a total of $66,464.09. According to Plaintiff, Defendants made the initial payment, and twenty seven (27) of the fifty nine (59) monthly payments, leaving a balance of $35,260.80 (32 remaining payments), plus late charges and attorneys' fees.

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names in different places. Further, Defendant PAGAN's own affidavits are submitted under different names in this case, and Index No. 030685/2011. The Court will refer to him as Defendant PAGAN to avoid any further confusion on this issue. It is clear from Defendant PAGAN's own use of the two different names that they are both identifying the same individual person.

[2] The letter actually contains the date "March 14, 2013," but it is obviously a typographical error as the letter was faxed to Chambers on May 15, 2013 and refers to an Appellate Division decision dated May 8, 2013.

Issue was joined when Defendants filed an Answer on October 11, 2012, asserting six affirmative defenses and two other defenses. The instant motions deal with Defendants' second affirmative defense: Plaintiff lacks the capacity to sue.

Plaintiff filed the instant Notice of Motion on February 1, 2013, seeking an Order granting summary judgment in favor of Plaintiff for the relief sought in the Complaint. Plaintiff argues that there are no disputed issues of fact as Defendants have acknowledged that they obtained financing from Plaintiff concerning the subject collateral (truck) in a Complaint filed by Defendant EXPERT SEWER (as plaintiff) under Index No. 030685/2011 (Expert Sewer & Drain, LLC v. New England Municipal Equipment Company, Inc.).[3] Plaintiff further argues that the Answer asserted by Defendants in this action is nothing more than a refusal to make payment and an attempt at delay while Defendants litigate the 030685/2011 matter.

In support of the motion for summary judgment, Plaintiff provides a copy of the April 18, 2011 Equipment Financing Agreement along with the attached personal guarantee of Defendant PAGAN, as well as a default judgment against Defendant PAGAN issued on October 11, 2011 in the State of Washington arising from the same Equipment Financing Agreement and personal guarantee.

Defendants oppose the summary judgment motion arguing that questions of fact exist. Specifically, Defendants argue that Defendant PAGAN was not aware of the nature of the personal guarantee and thought he was signing another document detailing the terms and conditions of the agreement. According Defendant PAGAN, "other than the words 'personal guaranty' (sic) the language beneath the words are not even legible. Moreover, I simply mistook what I believe was a schedule acknowledging basic terms and equipment financed, as opposed to a personal guaranty (sic), which is otherwise embedded in the document." [Pagan Affidavit, February 21, 2013, para. 2]. According to counsel for Defendants, the "personal

[3] For the sake of brevity, the Court will hereinafter refer to New England Municipal Equipment Company, Inc. as "New England."

guaranty (sic) was literally embedded in a document entitled 'Schedule A' and itself is barely legible to the reader." [Peska Affirmation, February 20, 2013, para. 13].

Regarding the default judgment entered against Defendant PAGAN in the State of Washington on October 11, 2011, Defendants argue that said judgment was issued in violation of due process as there is no authority for the courts of the State of Washington to exercise jurisdiction over Defendant PAGAN, a New York resident.

Additionally, Defendants filed a cross-motion seeking dismissal of the Complaint pursuant to *Civil Practice Law and Rules* § 3211(a)(3) (lack of legal capacity to sue), or in the alternative, denial of the summary judgment motion for continued discovery on the issue of whether Plaintiff, an unregistered foreign corporation, is "doing business" in the State of New York pursuant to *Business Corporation Law* § 1312.[4] In support of said application, Defendants attach twelve (12) Uniform Commercial Code filings made by Plaintiff RADIANCE CAPITAL LLC for debtors located in New York (one of them being for Defendant EXPERT SEWER). According to Defendants' counsel, each one of the UCC financing transactions alone is substantial, including the transaction which forms the basis of this case. Defendant PAGAN also states in his affidavit that he has no contacts with the State of Washington, yet he was "directly solicited by the Plaintiff via a mailing offering approved credit for the purchase of equipment." [Pagan Affidavit, February 21, 2013, para. 1].

Plaintiff opposes the cross-motion, arguing that Defendants cross-motion papers fail to evidence that Plaintiff is "doing business" in New York within the meaning of *Business Corporation Law* § 1312. Specifically, Plaintiff argues that the standard for "doing business"

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[4] BCL § 1312(a) states: "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 thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation."

requires a showing of permanent, continuous and regular activity within New York State, and those activities must be quantitative and qualitative. Plaintiff avers that it does not have bank accounts in New York, it does not have real property in New York, it does not have an office in New York, it does not have a phone listing in New York, it does not have sales people employed in New York (either permanently or temporarily), it has not transacted business in New York after 2008, and it did not transact any business in New York during 2005. Further, Plaintiff states that its business with New York customers from 2006 to 2008 is less than 2% of its total business, and its revenue from New York customers is less than 2% of its total revenue. Plaintiff notes that Defendants bear the burden of proving that a foreign corporation is "doing business" in New York, and further that there is a presumption that a defendant is doing business in its state of incorporation (in this case, Washington). Additionally, Plaintiff alternatively argues that even if the Court were to find that Plaintiff was "doing business" in New York and had not registered pursuant to *Business Corporation Law* § 1312, that statute does not call for dismissal of the action as a result of said violation, but rather stays the action until the unlicensed foreign corporation becomes registered and pays penalties and fees.

On the issue of Defendants allegations that Defendant PAGAN did not understand the terms of the Personal Guarantee he signed, Plaintiff states that the 2008 contract between the parties that is the subject of this action is actually an extension/modification of an earlier 2006 contract, which included identical text and language. Further, Plaintiff points out that in all places where Defendant PAGAN signed his name as the representative of Defendant EXPERT SEWER, he signed his name and wrote "member" with it, but where he signed the Personal Guarantee, he only signed his name - evidencing the fact that he knew that what he was signing was in his individual capacity. Plaintiff alleges that Defendants arguments regarding the size of the text and the language of the Personal Guarantee are frivolous, deceptive, and self-serving.

On the issue of the default judgment out of the State of Washington, Plaintiff

points to paragraph 26 of the Equipment Financing Agreement, which states that the parties agree that the contract is to be performed in the State of Washington, that any actions resulting therefore will be adjudicated pursuant to the laws of the State of Washington, and most importantly, that the debtor submit to the jurisdiction of the State of Washington. Plaintiff argues that Defendant PAGAN has not stated that he did not receive service of the pleadings in the Washington matter, and therefore should be estopped from attacking the Washington judgment on the merits.

On the issue of discovery, Plaintiff notes that Defendants have not served any discovery demands to date, and specifically, had not served any discovery demands between the commencement of this action and the filing of the summary judgment motion. Plaintiff's counsel argues that the instant cross-motion is merely a delay tactic because Plaintiff has refused to stall this action pending the outcome of the 030685/2011 matter. Specifically, Plaintiff argues that Defendants have sought its consent to stall this matter pending the outcome of the 030685/2011 matter, presumably on the basis that if Defendants recover in the 030685/2011 matter, a portion of the damages will be for payment to Plaintiff on the underlying Equipment Financing Agreement. Plaintiff's position is that it is entitled to summary judgment and recovery on the underlying Equipment Financing Agreement regardless of the status of the case between EXPERT SEWER and New England, and regardless of whether EXPERT SEWER succeeds in that other case.

Defendants filed reply papers, arguing that Plaintiff's conclusory statements that its New York business is less than 2% are not sufficient. Defendants argue that Plaintiff has to produce financial records and figures regarding its New York business, because without knowing the figures, it is impossible to know whether the 2% is substantial. Defendants again argue that "Plaintiff's action must be dismissed because the Plaintiff is a foreign corporation that is *apparently* doing business within the state of New York but is otherwise not registered with the Secretary of State, as required by law." (Emphasis added) [Peska Affirmation, March 1, 2013,

para. 3]. According to Defendants, "they have raised a legitimate argument that has yet to be fully explored,..." and as a result, the Plaintiff must provide all of its financial information regarding revenue generated from the State of New York. [Peska Affirmation, March 1, 2013, para. 6]. Defendants reiterate that Defendant PAGAN was solicited directly by Plaintiff through mail, and not in connection with the purchase of the subject truck. Further, Defendants argue that the Washington judgment should not be enforced because it was obtained in violation of due process.

At this point, the Court will address the three letters received on May 14 and 15, 2013 - after the submission date of the instant motions. The first letter, received May 14, 2013, authored by Attorney Peska, notified the Court that the pending appeal on the 030685/2011 matter had been decided, with the Appellate Division reversing the trial court. Attorney Peska included some argument in the May 14, 2013 letter regarding his position in that case as plaintiff, that discovery was necessary prior to the ruling on the jurisdictional issues raised by defendant New England, and his similar position in this case as the defendant.

The second letter, received May 15, 2013 from attorney Blaustein, objects to the submission of the first letter as an unauthorized sur-reply, argues that it provides information on an unrelated case, and has no bearing whatsoever on the instant case and Plaintiff's motion for summary judgment.

The third letter, received May 15, 2013 from attorney Peska, defends the submission of the first letter, and objects to the characterizations leveled in the second letter. Attorney Peska further states that it was Plaintiff's counsel who raised the existence of the other action (030685/2011 matter) in the summary judgment motion so it is not "unrelated," and further that he felt it was his duty as an attorney to update the Court on the status of the appeal as it was mentioned throughout the motion papers by both sides.

The Court will first note that it appreciates Defendants' counsel's prompt notification to the Court of the status of the appeal of the 030685/2011 matter, especially in light of the fact that some of the arguments made by both sides in the pending motions stem from that matter, the trial court's decision in that matter, or the pending appeal of that matter. It cannot be said that the 030685/2011 matter is an unrelated matter, especially in light of the fact that the plaintiff financing company and the underlying vehicle purchased (the truck) that are the subject of this case are cited in the Complaint in that case, and further that Plaintiff raised the existence of the other matter in argument (stating that Defendants have conceded the existence of the Equipment Financing Agreement by including it in the Complaint in the 030685/2011 matter).[5] However, the Court does agree with Plaintiff's counsel that the May 14, 2013 letter goes beyond merely notifying the Court of the status of the appeal, and goes into argument on the underlying issues in the motions before this Court. Therefore, the Court is considering only that portion of the May 14, 2013 letter which notifies it of the Second Department ruling, for whatever effect it may have on the motions before this case, which will be discussed at length. The remaining portions of the May 14, 2013 letter and the two May 15, 2013 letters will not be considered in the Court's decision on the instant motions.

At this point, the Court finds it necessary to discuss some background on this case as well as the 030685/2011 matter.

The 030685/2011 matter was commenced by Defendant EXPERT SEWER (plaintiff in that action) with the filing of a Summons and Complaint on July 13, 2011 against New

[5] The Court will note that it would appear that the two matters would be most efficiently and expeditiously adjudicated if the matters were before the same court, however the Request for Judicial Action filed in this matter (as the second matter filed) did not flag any related actions. In light of the fact that the Defendant in this matter is the plaintiff in the other matter, and the truck is the subject of both matters, counsel for the parties should consider moving for some consolidation or joinder relief, if they deem it appropriate and/or necessary.

England.[6] In paragraph 5 of the 030685/2011 Complaint, EXPERT SEWER alleges that it installed New England's equipment into EXPERT SEWER's 1989 Ford Truck Vin # 1FDYR82A7KVA55985 [the same truck at issue in this case]. Paragraph 6 of the 030685/2011 Complaint says that EXPERT SEWER obtained financing for the purchase and installation of the equipment with RADIANCE CAPITAL LLC [the Plaintiff in this case], using the truck and equipment as collateral. Paragraphs 10 and 11 of the 030685/2011 Complaint allege that as a result of damage caused by New England, the truck was declared a total loss and that New England is liable to EXPERT SEWER for damages in the amount of $500,000.00.

New England, a corporation organized under the laws of the State of Connecticut, filed a motion to dismiss the 030685/2011 matter, arguing that EXPERT SEWER and the Court had not obtained personal jurisdiction over it. EXPERT SEWER opposed that motion, arguing that facts existed to support the exercise of personal jurisdiction over New England pursuant to *Civil Practice Law and Rules* § 302 (long arm statute), and that further discovery on New England's contacts with the State of New York was necessary to fully argue and decide the issues of personal jurisdiction over that defendant.

The trial court in that matter disagreed, and New England's motion to dismiss was granted by the Hon. Victor Alfieri, Acting Justice of the Supreme Court, in a Short Form Order dated January 26, 2012. EXPERT SEWER appealed the January 26, 2012 Order dismissing Index No. 030685/2011.

On May 8, 2013, the Appellate Division, Second Department reversed the trial court's dismissal in the 030685/2011 matter. [*Expert Sewer & Drain, LLC v. New England Mun. Equipment Co., Inc.*, 964 N.Y.S.2d 597 (2d Dept. 2013)]. The Second Department held that the plaintiff seeking to assert personal jurisdiction bears the burden of proof on the issue but that plaintiff need not make a prima facie showing of jurisdiction - it need only set forth a

[6] Attorney Adam M. Peska represents Defendants EXPERT SEWER and PAGAN on this action, and also represents EXPERT SEWER as plaintiff in the 030685/2011 matter.

sufficient start, and show that its position is not frivolous. [*Expert Sewer & Drain, LLC v. New England Mun. Equipment Co., Inc.*, 964 N.Y.S.2d 597, 598 (2d Dept. 2013)]. The Second Department went on to state that the jurisdictional issue is likely to be complex and discovery would be desirable and essential and could lead to a more accurate judgment than one made solely on the basis of preliminary affidavits. [*Expert Sewer & Drain, LLC v. New England Mun. Equipment Co., Inc.*, 964 N.Y.S.2d 597, 598 (2d Dept. 2013)]. Finally, the Second Department found that the affidavit of the President of EXPERT SEWER established that facts exist to support the exercise of personal jurisdiction over New England and further discovery was necessary on the issue of personal jurisdiction over New England. [*Expert Sewer & Drain, LLC v. New England Mun. Equipment Co., Inc.*, 964 N.Y.S.2d 597, 598 (2d Dept. 2013)]. The dismissal was reversed, and the motion to dismiss was denied without prejudice to renewal upon the completion of discovery on the issue of personal jurisdiction over the defendant. [*Expert Sewer & Drain, LLC v. New England Mun. Equipment Co., Inc.*, 964 N.Y.S.2d 597, 598 (2d Dept. 2013)].

CROSS-MOTION TO DISMISS - BUSINESS CORPORATION LAW § 1312(a)

The Court will deal first with Defendants motion to dismiss the matter pursuant to *Civil Practice Law and Rules* § 3211(a)(3), alleging that Plaintiff lacks the legal capacity to sue because it is an unregistered foreign corporation "doing business" in New York in violation of *Business Corporation Law* § 1312(a).

A defendant relying upon *Business Corporation Law* § 1312(a) has the burden of proving that the foreign corporate plaintiff was "doing business" in New York without authority. [*Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 (2d Dept. 2008); *Maro Leather Co. v. Aerolineas Argentinas*, 617 N.Y.S.2d 617 (1st Dept. 1994)]. To be "doing business" in the State of New York, the foreign corporation "must do more than make a single contract, 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." [*International Fuel & Iron Corporation v. Donner Steel Co.*, 242 N.Y. 224, 230 (1926)]. The moving defendant must prove that the plaintiff's business activities within the State of New York were so systematic and regular as to manifest continuity of activity in the jurisdiction. [*S & T Bank v. Spectrum Cabinet Sales, Inc.*, 247 A.D.2d 373 (2d Dept. 1998); *Maro Leather Co. v. Aerolineas Argentinas*, 617 N.Y.S.2d 617 (1st Dept. 1994); *Top Apex Enterprises Ltd. v. Cayton*, 32 Misc.3d 1204(A) (Sup. Ct. Suffolk Cty 2011)]. When a foreign corporation's activities in the State of New York are "merely incidental to its business in interstate and international commerce," *Business Corporation Law* § 1312(a) is not applicable. [*Maro Leather Co. v. Aerolineas Argentinas*, 617 N.Y.S.2d 617, 619 (1st Dept. 1994)].

"The 'doing business' standard under BCL § 1312(a) requires a greater amount of local activity by a foreign corporation than the 'doing business' standard applicable under New York's long-arm statute (CPLR 302) relating to personal jurisdiction." [*Maro Leather Co. v. Aerolineas Argentinas*, 617 N.Y.S.2d 617, 619 (1st Dept. 1994); *Top Apex Enterprises Ltd. v. Cayton*, 32 Misc.3d 1204(A) (Sup. Ct. Suffolk Cty 2011); *Bayonne Block Co., Inc. v. Porco*, 171 Misc.2d 684 (Civ. Ct. Bronx Cty 1996)]. Absent proof establishing that the plaintiff is doing business in New York, a foreign corporation bringing suit in New York is presumed to be doing business in its state of incorporation and not in New York. [*Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742 (2d Dept. 2008); *Airline Exchange, Inc. v. Bag*, 266 A.D.2d 414, 415 (2d Dept. 1999); *Maro Leather Co. v. Aerolineas Argentinas*, 617 N.Y.S.2d 617, 619 (1st Dept. 1994); *Top Apex Enterprises Ltd. v. Cayton*, 32 Misc.3d 1204(A) (Sup. Ct. Suffolk Cty 2011)]. Further, noncompliance with the registration and taxation requirements of *Business Corporation Law* § 1312(a) does not raise a jurisdictional bar and is curable during the pendency of the action. [*Maro Leather Co. v. Aerolineas Argentinas*, 617 N.Y.S.2d 617, 619-20 (1st Dept. 1994); *Top Apex Enterprises Ltd. v. Cayton*, 32 Misc.3d 1204(A) (Sup. Ct. Suffolk Cty 2011)].

The mere solicitation of sales in new York and placement of orders do not

constitute doing business in the State within the meaning of Business Corporation Law § 1312(a). [Maro Leather Co. v. Aerolineas Argentinas, 617 N.Y.S.2d 617, 620 (1st Dept. 1994); Top Apex Enterprises Ltd. v. Cayton, 32 Misc.3d 1204(A) (Sup. Ct. Suffolk Cty 2011)]. If the foreign corporation's contacts here, no matter how extensive, are merely for the purpose of soliciting business and activities incidental to the sale and delivery of merchandise into the State, then the foreign corporation is engaged in interstate commerce and is constitutionally beyond the reach of BCL § 1312(a). [Top Apex Enterprises Ltd. v. Cayton, 32 Misc.3d 1204(A) (Sup. Ct. Suffolk Cty 2011); Bayonne Block Co., Inc. v. Porco, 171 Misc.2d 684 (Civ. Ct. Bronx Cty 1996)]. The purpose of Business Corporation Law § 1312(a) is to regulate foreign corporations that are doing business within the state and not to enable the avoidance of contractual obligations. [S & T Bank v. Spectrum Cabinet Sales, Inc., 247 A.D.2d 373 (2d Dept. 1998); Top Apex Enterprises Ltd. v. Cayton, 32 Misc.3d 1204(A) (Sup. Ct. Suffolk Cty 2011)].

In S & T Bank v. Spectrum Cabinet Sales, Inc., the Second Department reversed the trial court's dismissal based on Business Corporation Law § 1312. [247 A.D.2d 373 (2d Dept. 1998)]. In that case, the Second Department noted that although the plaintiff shipped a large amount of its product into New York, it neither maintained an office, a telephone, or a sales representative in New York, nor did it do any advertising in New York. [S & T Bank v. Spectrum Cabinet Sales, Inc., 247 A.D.2d 373 (2d Dept. 1998)]. The Second Department held that there was no prima facie showing by defendant in its motion papers that plaintiff conducted continuous activities in New York essential to its corporate business. [S & T Bank v. Spectrum Cabinet Sales, Inc., 247 A.D.2d 373 (2d Dept. 1998)].

In Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard, the First Department was faced with a similar fact pattern as the instant case. [26 A.D.3d 298 (1st Dept. 2006)]. In that case, the foreign corporation moved for summary judgment in lieu of complaint to enforce a promissory note executed by the defendant, along with legal fees and costs and disbursements. [Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard, 26 A.D.3d 298

(1st Dept. 2006)]. The defendant cross-moved to dismiss the complaint, arguing, among other things, that the foreign corporation was doing business in New York and therefore in violation of *Business Corporation Law* § 1312(a). [*Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard*, 26 A.D.3d 298 (1st Dept. 2006)]. The trial court granted the plaintiff's motion, denied the defendant's cross motion to dismiss the complaint. [*Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard*, 26 A.D.3d 298 (1st Dept. 2006)]. The First Department affirmed that portion of the trial court's ruling, holding that the plaintiff had presented a prima facie showing of entitlement to summary judgment in lieu of complaint and that the defendant had not demonstrated any triable issues of fact to warrant the denial of summary relief. [*Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard*, 26 A.D.3d 298, 299 (1st Dept. 2006)]. The First Department went on to state that the defendant had failed to meet his burden of demonstrating plaintiff was conducting business in New York so as to deprive it of the right to maintain the action. [*Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard*, 26 A.D.3d 298 (1st Dept. 2006)].

In this case, the only "showing" by Defendants is the attachment of twelve (12) UCC filings, which merely show that Plaintiff engaged transactions where it provided financing for two (2) individual residents and nine (9) corporate residents of the State of New York.[7] The Court will further note that a review of each and every UCC filing reflects Plaintiff's address as either 2505 Third Avenue, Suite 200, Seattle, **Washington** 98121 or 820 A Street, Suite 560, Tacoma, **Washington** 98402 ranging from May of 2006 through June of 2008. Defendants have offered nothing to rebut Plaintiff's assertion that it does not maintain an office, telephone listing, sales representative or any employees in the State of New York. Defendants' conclusory

[7] The twelfth filing attached is merely an Amendment to one of the other eleven, and therefore does not reflect an additional transaction.

allegation that there may be more filings out there under a different name[8] is unsupported and speculative. The mere fact that Plaintiff engaged in eleven (11) commercial financing transactions with New York residents (either individual or corporate) does not rise to the level of "doing business" pursuant to *Business Corporation Law* § 1312(c). Further, even assuming that Defendant PAGAN received a direct solicitation from Plaintiff regarding financing, that does not rise to the level of "doing business" pursuant to *Business Corporation Law* § 1312(c). Finally, those two allegations, if taken together, still do not rise to the level of "doing business."

As to Defendants allegations that discovery is necessary regarding Plaintiff's financial records coming from New York business, the Court will note that Defendants have never served any discovery demands in this matter to date. Defendants had more than ample opportunity to pursue discovery on that issue prior to Plaintiff's summary judgment motion, and failed to do so. Additionally, Defendants reference to the Second Department's May 2013 decision in the 030685/2011 matter is misplaced, as the court was in that matter faced with a defendant's contacts with the State of New York under the long arm statute (CPLR § 302), which is a lower standard and involves different burdens than those before this Court on this motion.

Therefore, Defendants' Notice of Cross-Motion to dismiss the complaint pursuant to *Civil Practice Law and Rules* § 3211 and *Business Corporation Law* § 1312(c) is denied in its entirety.

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[8] The Court will note that the reference to MERS (Mortgage Electronic Registration Systems Inc.) appears to be designed to inflame the Court, as the Court is well aware of the foreclosure crisis and case law surrounding robo-signing and the issues with the MERS cases in the foreclosure industry. However, the Court sees absolutely no reason why that company would be referenced in this commercial financing transaction case.

SUMMARY JUDGMENT MOTION

Turning now to Plaintiff's motion, the proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 AD2d 250 (2d Dept. 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez*, supra, and *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988) *Zuckerman v. City of New York*, 49 NY2d 557 (1980)].

Plaintiff has sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the underlying Equipment Financing Agreement and Personal Guarantee executed by Defendant PAGAN in his individual capacity and as a member of Defendant EXPERT SEWER, the terms of repayment, and Defendants failure to make payment. [*Bank of New York v. Lockwood Venture Housing, Inc.*, 222 A.D.2d 633, 634 (2d Dept. 1995); *Famolaro v. Crest Offset, Inc.*, 24 A.D.3d 604, 604-05 (2d Dept. 2005); *MDJR Enterprises v. La Torre*, 268 A.D.2d 509, 510 (2d Dept. 2000); *Capital Circulation Corp. V. Gallop Leasing Corp.*, 248 A.D.2d 578 (2d Dept. 1998)].

In opposition, Defendants raised alleged issues of fact as to the personal guarantee signed by Defendant PAGAN, and also cross-moved for dismissal pursuant to *Civil Practice Law and Rules* § 3211(a)(3) and *Business Corporation Law* § 1312(a). Defendants offer no opposition to the motion for summary judgment as it relates to Defendant EXPERT

SEWER. Therefore, summary judgment is granted as against Defendant EXPERT SEWER.

On the issues of fact raised concerning the personal guarantee, Defendant PAGAN argues that he was not aware that he was signing a personal guarantee when he signed the Schedule A. This issue turns on the credibility of Defendant PAGAN, a determination that cannot be made on papers alone. The finder of fact must observe the demeanor of Defendant PAGAN during live testimony in order to make a reasoned determination. In fact, Plaintiff's motion papers submitted in opposition to the cross-motion essentially concede that this issue turns on the credibility of Defendant PAGAN as the affidavit of Jody Burleigh states that "Defendant Pagan's sworn statements are deceptive and self-serving." [Burleigh Affidavit, February 28, 2013, para. 18]. The Court is therefore of the opinion that the papers themselves create an issue of fact, as each party is essentially asking this Court to accept their version over that of the other.

Next, the Defendant PAGAN argues that the Washington judgment was obtained in violation of due process. First, the Court will note that Paragraph 26 of the Equipment Financing Agreement states that the "*debtor* agrees to submit to the jurisdication (sic) of the State of Washington in King County." (Emphasis added). The debtor on the Equipment Financing Agreement is Defendant EXPERT SEWER, not Defendant PAGAN individually. There is no similar submission to jurisdiction contained in the Schedule A Personal Guarantee, and even if there was, it would be subject to the issue regarding credibility of Defendant PAGAN discussed above.

Defendants correctly argue that in order to enforce the out-of-state default judgment against Defendant PAGAN, this Court must determine whether the courts of the State of Washington possessed personal jurisdiction over the defendant. [*Augusta Lumber & Supply, Inc. v. Herbert H. Sabbeth Corp.*, 101 A.D.2d 846 (2d Dept. 1984)]. That review requires inquiry into the jurisdictional statutes of the State of Washington as well as due process considerations. [*Augusta Lumber & Supply, Inc. v. Herbert H. Sabbeth Corp.*, 101 A.D.2d 846

(2d Dept. 1984)].

Extending the jurisdiction of Washington courts to persons outside its borders is chiefly accomplished under the long-arm statute of the State of Washington: *Revised Code of Washington* 4.28.185, titled "Personal service out-of-state -- Acts submitting person to jurisdiction of courts -- Saving." [*Oytan v. David-Oytan*, 171 Wash.App. 781 (Ct. of App., Div. 1 2012)]. *Revised Code of Washington* 4.28.185 states:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
> (a) The transaction of any business within this state;
> (b) The commission of a tortious act within this state;
> (c) The ownership, use, or possession of any property whether real or personal situated in this state;
> (d) Contracting to insure any person, property, or risk located within this state at the time of contracting;
> (e) The act of sexual intercourse within this state with respect to which a child may have been conceived;
> (f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.
> (2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

The Washington long arm statute is intended to operate to the fullest extent permitted by due process. [*Oytan v. David-Oytan*, 171 Wash.App. 781 (Ct. of App., Div. 1 2012)]. "The party asserting jurisdiction under the long-arm statute has the burden of establishing its requirements by 'prima facie evidence.'" [*Oytan v. David-Oytan*, 171 Wash.App. 781 (Ct. of App., Div. 1 2012)].

In this matter, Plaintiff relies upon the submission to jurisdiction contained in paragraph 26 of the Equipment Financing Agreement, which, as discussed above, binds only Defendant EXPERT SEWER, not Defendant PAGAN individually. Plaintiff offers no other basis upon which the State of Washington could exercise jurisdiction over Defendant PAGAN. As an

aside, the Court will note that Defendant PAGAN never denies receipt of service in the Washington matter, however there is no showing by Plaintiff of any basis for the State of Washington to be able to assert long-arm jurisdiction over him. Accordingly, this Court will not grant summary judgment to Plaintiff against Defendant PAGAN individually based on the default judgment obtained in the State of Washington against Defendant PAGAN.

The Court will note that Defendants do not dispute the existence of the debt, or the default. The main contention of the Defendants on the underlying summary judgment motion is that Defendant PAGAN did not knowingly sign the personal guarantee so he cannot be held personally liable for the debt.

Therefore, the Court is denying Plaintiff's Notice of Motion for summary judgment as it relates to Defendant PAGAN individually, but granting Plaintiff's Notice of Motion for summary judgment as it relates to Defendant EXPERT SEWER. At this point, in light of the fact that the two defendants are so intertwined, the Court will hold off on issuing a judgment (or scheduling an inquest if necessary) against Defendant EXPERT SEWER until the outcome of the case against Defendant PAGAN individually. If Plaintiff wishes to move forward on the case against Defendant EXPERT SEWER, it can submit a proposed Judgment on notice to Defendants.

Further, the Court finds that any ancillary issues raised by Defendants, and not otherwise mentioned or discussed in this Order, are without merit.

Accordingly, it is hereby

ORDERED that the Notice of Motion filed by Plaintiff is granted in part and denied in part consistent with the terms and conditions of this Decision and Order; and it is further

ORDERED that Plaintiff's motion for summary judgment against Defendant EXPERT SEWER & DRAIN LLC is granted; and it is further

ORDERED that Plaintiff's motion for summary judgment against Defendant PAGAN is denied; and it is further

ORDERED that the Notice of Cross-Motion filed by Defendants is denied; and it is further

ORDERED that counsel for the parties shall appear at a conference before the undersigned on **THURSDAY, JUNE 27, 2013 at 9:15 a.m.**.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
June 12, 2013

HON. MARGARET GARVEY
Justice of the Supreme Court

TO:

CARYN F. BLAUSTEIN, ESQ.
KLEINMAN, SALTZMAN & BOLNICK, PC
Attorneys for Plaintiff
(e-filed)

ADAM M. PESKA, ESQ.
PESKA & ASSOCIATES, PC
Attorneys for Defendants EXPERT SEWER & DRAIN LLC and RAFAEL PAGAN
(e-filed)