

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF WESTCHESTER

-----X  
 EASTFIELD GLASS CO., INC.,

Plaintiff,

DECISION and ORDER

Sequence No. 1

Index No. 54676/2015

-against-

AVANTI SYTEMS USA, INC.,

Defendant.

-----X  
 CONNOLLY, J.

The following papers were considered in connection with the defendant's motion to dismiss:

Notice of motion, affirmation, exhibits, memo of law	1-5
Affirmation in opposition, affidavit, exhibits	6-12
Reply affirmation, exhibits, memo of law	13-17
Sur-reply, memo of law	18-19

According to the complaint, the plaintiff, a Massachusetts corporation having its offices located in Indian Orchard, Massachusetts, entered into a subcontract with nonparty Barr & Barr, Inc. (hereinafter Barr), as general contractor, to provide certain glass products in connection with a construction project located in Pittsfield, Massachusetts (hereinafter the project). Subsequently, the plaintiff entered into a sub-subcontract with the defendant, a New York corporation having its offices in Port Chester, New York, to purchase, among other things, glass doors and frames, for the project. On October 23, 2014, the plaintiff issued a purchase order to the defendant in the amount of \$286,124.00 and, on October 24, 2014, forwarded \$71,531.00 to the defendant as a 25% deposit for the order. After it received the deposit, the defendant allegedly sought unilateral changes to the terms of the contract and refused to perform its obligations. On January 29, 2015, the defendant advised the plaintiff that it was retaining the deposit, which it considered to be non-refundable. The plaintiff commenced this action to recover the \$71,531.00 deposit, asserting two causes of action sounding in breach of contract and unjust enrichment.

The defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (3) and (7). The defendant contends that the plaintiff, a Massachusetts corporation not registered to conduct business in the State of New York as a foreign corporation, lacks capacity to sue in New York. Alternatively, the defendant contends that the plaintiff has failed to state a cause of action for breach

of contract since it has not identified precisely which terms of the parties' contract were breached. Further, the defendant contends that the unjust enrichment cause of action should be dismissed as duplicative of the breach of contract claim.

In opposition, the plaintiff contends that the defendant has failed to establish that it conducts business in the State of New York to the extent that, as a non-registered foreign corporation, it lacks capacity to sue.

### DISCUSSION/ANALYSIS

#### 1. The defendant has failed to establish that the plaintiff lacks capacity

"BCL 1312 (a) 'constitutes a bar to the maintenance of an action by a foreign corporation found to be 'doing business' in New York without the required authorization to do business there'" (*Interline Furniture Inc. v Hodor Industries, Corp.*, 140 AD2d 307, 308 [2d Dept 1988] citing BCL 1312 [a]). However, the burdens rests with the party relying upon this statutory barrier to prove "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, Inc. v Bruce and Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]; *see also Alicanto v Woolverton*, 129 AD2d 601, 602 [2d Dept 1987]). "Absent sufficient evidence to establish that a plaintiff is doing business in this State, 'the presumption is that the plaintiff is doing business in its State of incorporation . . . and not in New York'" (*Highfill, Inc. v Bruce and Iris, Inc.*, 50 AD3d at 733-744).

Here, the defendant's motion papers did not establish, prima facie, that the plaintiff was doing business in New York (*see Interline Furniture Inc. v Hodor Industries, Corp.*, 140 AD2d at 308 [the defendant failed to prove that the contract between plaintiff and defendant was more than a solitary transaction]). The sole transaction in the record involving the plaintiff is the one that is the subject of this action, which, notably, concerns a Massachusetts construction project. Moreover, the defendant's contention that the plaintiff should be deemed to conduct business in this state based upon the activities of nonparty Barr is improperly raised for the first time in reply and, in any event, is without merit. Barr's activities in the state are not attributable to the plaintiff.

Accordingly, the branch of the defendant's motion which is to dismiss the complaint pursuant to CPLR 3211 (a) (3) is denied.

#### 2. The complaint states causes of action sounding in breach of contract and unjust enrichment

On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (7), the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Here, the complaint states a cause of action for breach of contract. The plaintiff has

sufficiently alleged the existence of a contract to provide certain glass products, the plaintiff's performance by tendering the 25% deposit, the defendant's breach, and resultant damages (*see Dee v Rakower*, 112 AD3d 204, 208-209 [2d Dept 2013] ["The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's [\*209] performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach"]).

Further, given that the defendant contends that the deposit was not governed by the parties' contract, which was silent as to whether the deposit was refundable, the Court will permit the plaintiff to proceed under alternate theories of breach of contract and unjust enrichment (*see Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008] ["Although the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies. Therefore, the plaintiff may properly plead unjust enrichment and money had and received as alternative claims to the breach of contract claim" (internal citations omitted)]; *cf. Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]).

Based upon the foregoing, it is hereby,

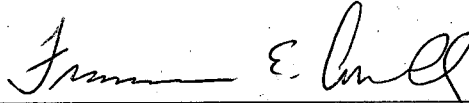
ORDERED that the defendant's motion to dismiss is denied; and it is further

ORDERED that the parties appear in the Preliminary Conference Part on March 14, 2016 at 9:30 a.m., in Room 811 of the Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
February 16, 2016

  
HON. FRANCESCA E. CONNOLLY, J.S.C.

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