

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS

 FOX CAPITAL GROUP, INC.,

Plaintiff,

vs.

ANTON TOMASSETTI D/B/A TONY'S TREE SERVICE AND
 TONY'S TREE SERVICE 4 LLC AND ANTON TOMASSETTI,
 DEFENDANTS.

Index No.: 523737/2021

Decision/Order

*Motion Sequence
 Nos. 02 and 03*

 X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this Motion:

<u>Papers</u>	<u>NYSCEF Document No:</u>	
	<u>Sequence # 02</u>	<u>Sequence # 03</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	33 – 34; 37 – 38	48 – 49; 52 - 53
Exhibits	35 – 36; 39 – 45	50 - 51
Opposition	47	54 - 55
Reply		56
Exhibits		57

Based upon the foregoing papers and after oral arguments, Plaintiff’s motion for summary judgment, dismissing Defendant’s affirmative defenses and awarding Plaintiff costs, expenses, and distributions is **DENIED**. Defendant’s cross-motion for summary judgment based upon lack of subject matter jurisdiction is **GRANTED** in its entirety, and this matter is DISMISSED.

On or about June 24, 2021, the parties entered into a contract wherein Defendant sold a portion of its future revenue stream at a discount to the Plaintiff. Defendant was to make daily payments of \$599.60 until the purchased amount of \$59,960.00 was paid in full.¹ On or about September 21, 2021, Defendant stopped making the daily payments, causing Plaintiff to file this action for breach of contract.²

¹ This amount comprised of the purchase price of \$40,000.00 with the purchase interest at 15%. See Plaintiff’s Memorandum of Law, Exhibit A.

² See Plaintiff’s Memorandum of Law, Exhibit G.

Although both parties to this action are foreign corporations/entities, section 6.5 of their contract states in pertinent part:

Governing Law, Venue, and Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regards to any applicable principles of conflicts of law. Any suit, action, or proceeding arising out of or relating to this Agreement or the transaction contemplated herein or the interpretation performance, or breach hereof, shall be instituted in any federal or state court sitting the State of New York (the "Acceptable Forums") , provided that FCG may institute suit in another forum. Merchant, each Guarantor and each Owner agree that the Acceptable Forums are convenient to them, and submit to the personal jurisdiction of the Acceptable Forums and waive any and all objections to jurisdiction or venue in the Acceptable Forums. Should a proceeding be initiated by Merchant, any Guarantor and any Owner in any other forum, Merchant, each Guarantor and each Owner waives any right to oppose any motion or application made by FCG to dismiss such proceeding, to remove and/or transfer the proceeding to an Acceptable Forum, and for an anti-suit injunction against such proceeding (which FCG may make in the Acceptable Forums).

Even though there is a provision in the contract that designates New York State as its choice of forum, Defendant argues that New York State does not have subject matter jurisdiction over this matter as each party is a foreign entity and that this matter does not fall under one of the enumerated sections of Business Corporation Law §1314(b)³.

³ New York Business Law §1314(b) states

Except as otherwise provided in this article, an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident in the following cases only:

- (1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.
- (2) Where the subject matter of the litigation is situated within this state.
- (3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.
- (4) Where, in any case not included in the preceding subparagraphs, a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules.
- (5) Where the defendant is a foreign corporation doing business or authorized to do business in this state.

Conversely, Plaintiff argues that Business Corporation Law §1314(b) is not applicable in this matter as Plaintiff is a corporation that was formed under the laws of the United States and maintains an office in New York.⁴

While Plaintiff states that it not only maintains an office in New York, but it is registered to do business in the state as well, it has not provided the Court with its New York business address, nor has it provided documentation from the Department of State that it is registered to conduct business in the state of New York.

Therefore, the Court finds that since there has not been a showing that Plaintiff falls under Business Corporation Law §1314, the motion for summary judgment is GRANTED and this matter is DISMISSED.

This constitutes the decision and order of this Court.

Dated: December 20, 2022



Hon. Robin K. Sheares, A.J.S.C.

⁴ See Business Corporation Law §1314(c).