

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of August 2023

HONORABLE FRANCOIS A. RIVERA

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PARKVIEW ADVANCE LLC,

Plaintiff,

- against -

HIGH PURITY NATURAL PRODUCTS, LLC,
EIBHIR, LLC, FFT HOLDINGS, LLC, FUTURE FARM
TECHNOLOGIES, INC, and WILLIAM A. GILDEA JR

Defendants.
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DECISION & ORDER

Index No.: 527753/2021

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross-motion filed on February 13, 2023, under motion sequence number four, by defendants High Purity Natural Products, LLC, Eibhir, LLC, FFT Holdings, LLC, Future Farm Technologies, Inc and William A. Gildea Jr, for an order pursuant to CPLR 3211(a)(2) dismissing the complaint of the plaintiff Parkview Advance LLC (hereinafter Parkview or the plaintiff) pursuant to Business Corporation Law §1314(b) on the basis that the court lacks subject matter jurisdiction. This motion is opposed.

- Notice of Cross Motion
- Affirmation in Support
 - Exhibits A-C
- Memorandum of Law in Support
- Affirmation in Opposition
 - Exhibits A-D
- Memorandum of Law in Reply
 - Exhibit D-E
- Additional Memorandum of Law in Support¹

¹ The additional memorandums of law were submitted by the parties in compliance with the Court's order issued on February 27, 2023.

- Exhibits A-D
- Additional Memorandum of Law in Opposition

BACKGROUND

On October 29, 2021, Parkview commenced the instant action for, inter alia, breach of contract and breach of a guarantee by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). The verified complaint alleges twenty-five allegations of fact in support of two causes of action, namely breach of contract and breach of a personal guarantee. On November 30, 2021, the defendants interposed and filed an answer with the KCCO.

The verified complaint alleges the following salient facts. Defendants High Purity Natural Products, LLC, Eibhir, LLC, FFT Holdings, LLC, and Future Farm Technologies, Inc (hereinafter collectively as Company Defendants) were and are companies organized and existing under the laws of State of Massachusetts. Defendant Guarantor William A. Gildea Jr (hereinafter Guarantor) is an individual residing in the State of Massachusetts.

On or about May 14, 2021, the plaintiff and the Company Defendants entered into a Secured Merchant Agreement (hereinafter the Subject Agreement) whereby the plaintiff agreed to purchase all rights of Company Defendants' future receivables having an agreed upon value of \$313,498.10. The purchase price for said receivables was \$241,152.39.

Pursuant to the Subject Agreement, the Company Defendants agreed to remit to plaintiff 15% of their receivables. The Guarantor personally guaranteed all the amounts owed to the plaintiff by the Company Defendants, upon a breach in performance by the Company Defendants. Pursuant to the Subject Agreement, the Company Defendants agreed to have one bank account approved by the plaintiff from which the Company Defendants authorized the plaintiff to make daily ACH withdrawals until the \$313,498.10 was fully paid to the plaintiff.

The plaintiff remitted the purchase price for the future receivables to the Company Defendants as agreed.

Initially, the Company Defendants met its obligation under the Subject Agreement, however, on or about September 16, 2021, the Company Defendants breached the Subject Agreement by failing to perform their obligations under the terms of the Subject Agreement, by blocking and depriving the plaintiff of its daily ACH withdrawals from the specified bank account all while still conducting regular business operations. The Company Defendants have paid a total of \$193,499.99 to the plaintiff leaving a balance due and owing the amount of \$119,998.11.

In addition, pursuant to the Subject Agreement, the Company Defendants incurred NSF fees in the amount of \$105.00 and other default fees in the amount of \$2,500.00 and attorney's fees in the amount of \$11,662.80. Despite the demand, the Company Defendants have failed to remit the purchased amount due and owing to plaintiff under the Subject Agreement.

The Company Defendants have breached these provisions by selling the plaintiff's encumbered future receipts and by encumbering those future receivables and through the sale of those same receipts, cash deposits and/or future sale proceeds to Slate Advance, thereby incurring a collective non-stacking fee in the amount of \$60,288.10 (calculated at 25% of the Agreements purchase price of the Agreement. Additionally, the Guarantor is responsible for all amounts incurred because of any default by the Company Defendants. There remains a balance due and owing to the plaintiff on the Subject Agreement in the amount of \$185,286.21 plus interest from September 16, 2021, costs, disbursements, and attorney's fees.

By notice of motion filed on November 14, 2022, under motion sequence number three, Parkview sought an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on all the claims asserted in its complaint against all the defendants.

On February 27, 2023, the date scheduled for oral argument of Parkview's motion under sequence three and the instant motion by the defendants under sequence four, the Court issued a decision and order as follows.

By decision and order dated February 27, 2023, the Court denied the motion for summary judgment filed by Parkview under motion sequence number three and determined that the instant motion required further briefing from the parties. The Court directed the parties to address whether Business Corporation Law §1314 applied to the Subject Agreement; whether any of the statute's exceptions applied; and whether there is jurisdiction over the Guarantor. The parties were directed to submit their briefs on or before April 26, 2023, and the matter was adjourned for oral argument to May 18, 2023.

LAW AND APPLICATION

In this action to recover damages resulting from a breach of contract, the moving defendants seek an order pursuant to CPLR 3211(a)(2) dismissing the action for lack of subject-matter jurisdiction pursuant to Business Corporation Law § 1314 and General Obligations Law §5-1402.

On October 29, 2021, Parkview, a foreign limited liability company formed under the laws of Delaware² authorized to do business in the State of New York, commenced the instant

² The defendants annexed a web page search result of the New York State Department of State which showed that Parkview was formed in the State of Delaware. This Court has discretion to take judicial notice of material derived from official government web sites such as those generated by the New York State Department of State (*LaSonde v Seabrook*, 89 AD3d 132, 137 [1st Dept 2011], citing *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19–20 [2009]).

action to recover monies owed pursuant to an agreement for the purchase and sale of future receivables against the defendants. Parkview's verified complaint alleges in paragraph two that the Company Defendants are companies organized and existing under the laws of State of Massachusetts. Parkview's verified complaint alleges in paragraph three that William A. Gildea Jr is a resident of the State of Massachusetts. The defendants do not dispute these allegations of fact. Facts admitted in a party's pleadings constitute formal judicial admissions and are conclusive of the facts admitted in the action in which they are made (*DeSouza v. Khan*, 128 AD3d 756 [2d Dept 2015], citing *GMS Batching, Inc. v TADCO Const. Corp.*, 120 AD3d 549, 551 [2d Dept 2014]).

CPLR 3211(a)(2) refers to motions to dismiss a causes of action and provides in pertinent part as follows: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court has no jurisdiction of the subject matter of the cause of action." Subject matter jurisdiction refers to objections that are fundamental to the power of adjudication of a court (*Garcia v. Gov't Emps. Ins. Co.*, 130 AD3d 870, 871 [2nd Dept 2015]). Lack of jurisdiction should not be used to mean merely that elements of a cause of action are absent but that the matter before the court was not the kind of matter on which the court had power to rule (*id.*).

The defendants now move, pursuant to CPLR 3211(a)(2) to dismiss the action for lack of subject-matter jurisdiction pursuant to Business Corporation Law § 1314 and General Obligations Law § 5-1402. Business Corporation Law § 1314 governs actions or proceedings

LaSonde v. Seabrook, 89 A.D.3d 132, 137, 933 N.Y.S.2d 195, 199 (2011)

against foreign corporations and specifies what actions the Court has subject-matter jurisdiction over.

As plaintiff and defendants are foreign companies and residents, Business Corporation Law § 1314 (b), rather than Business Corporation Law §1314(a) which is applicable only to residents or domestic corporations of this state, governs, and the action must fall within one of the categories listed under Business Corporation Law § 1314(b) or within the statutory exception to Business Corporation Law § 1314 found in General Obligations Law § 5-1402.

Under Business Corporation Law § 1314(b), “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.

The affirmation of defendant’s counsel averred the following allegations of fact.

Defendant High Purity was never registered or authorized to do business in New York. The only address of High Purity and every other defendant has been in State of Massachusetts, where all the defendants reside. Under the contract form that plaintiff used and required defendants to sign, plaintiff was not obligated to do anything unless and until it funded the agreement by wiring funds into defendants’ bank account located in State of Massachusetts. Until this bank account, located outside of New York, received the loan proceeds, there was nothing between the

parties. The parties' agreement was DocuSigned in Massachusetts and transmitted by internet. The contract was not in any actual way made in New York. The parties' contract was not to be performed within New York, nor related to any property situated within State of New York. The only jurisdictional basis is the forum selection clause in the parties' contract. The parties' agreement did not involve any transaction of at least \$1,000,000.

In support of the motion, the moving defendants did not submit an affidavit from anyone with personal knowledge setting forth where the subject contract was made, signed, or to be performed. On the other hand, Parkview did not deny any of the allegations of fact made by the moving defendants' counsel. Nor did it proffer an affidavit from someone with personal knowledge controverting them. Parkview's verified complaint was verified by Mathew Walsh, an authorized officer of Parkview. A verified pleading is the equivalent of a responsive affidavit for purposes of a motion for summary judgment (*Travis v Allstate Ins. Co.*, 280 AD2d 394, 395 [1st Dept 2001], citing *Hladczuk v Epstein*, 98 AD2d 990 [4th Dept 1983]; *see also* CPLR 105[u]). The verified complaint also did not address these allegations. In fact, Parkview's argument focused on the dubious constitutionality of the Business Corporation Law § 1314(b), notwithstanding the arguments and allegations of the moving defendants' counsel. The Court deemed the moving defendants' allegations as uncontroverted. As such, the Court lacks personal jurisdiction pursuant to CPLR 302.

Absent personal jurisdiction under CPLR 302, the Court is deprived of subject-matter jurisdiction under Business Corporation Law § 1314(b)(4). While New York recognizes consent as a basis for personal jurisdiction, it does not recognize consent as a basis for long-arm jurisdiction (*see Techo-TM, LLC v Fireaway, Inc.*, 123 AD3d 610 [1st Dept 2014]), and the Court otherwise lacks personal jurisdiction over defendants under CPLR 302. Subject-matter

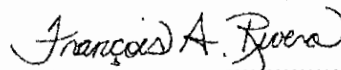
jurisdiction cannot be conferred on the court, even if stipulated by the parties (*MHC Greenwood Vill. NY, LLC v United States Sec'y of Hous. & Urb. Dev.*, 64 Misc3d 870 [Sup Ct, Suffolk County 2019]). Therefore, the parties' consent to submit to jurisdiction to the Courts of New York State as set forth in the Subject Agreement does not confer subject matter jurisdiction over the parties' dispute. Finally, General Obligations Law § 5-1402 is not implicated here as the instant matter does not involve at least one million dollars. Accordingly, the moving defendants' motion for an order pursuant to CPLR 3211(a)(2) dismissing the complaint of the plaintiff Parkview Advance LLC pursuant to Business Corporation Law §1314(b) on the basis that the court lacks subject matter jurisdiction is granted.

CONCLUSION

The motion by defendants High Purity Natural Products, LLC, Eibhir, LLC, FFT Holdings, LLC, Future Farm Technologies, Inc and William A. Gildea Jr for an order pursuant to CPLR 3211(a)(2) and Business Corporation Law §1314(b) dismissing the complaint of the plaintiff Parkview Advance LLC for lack of subject matter jurisdiction is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.