Memorandum of Decision on Motion

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Paventia, Inc.
v.
Harold Wilbert, et. als.

Docket No. HNT-L-118-11

Motion for Summary Judgment

Opposed

Argued: April 29, 2011
Decided:
The Honorable Peter A. Buchsbaum, J.S.C.

This matter is a contract action to recover for the defendants' nonpayment for gardening supplies received from the plaintiff. The plaintiff, Paventia, Inc., is a Canadian business incorporated in the province of Quebec. On or about September 26, 2006, the defendant placed its first order to the plaintiff for wholesale garden supplies, which the defendants sold in their nursery store. (See Def.'s Exh. C.) The Complaint alleges that the defendants are delinquent on their account payments to the plaintiff in the amount of $41,532.14. (Id.) On or about February 16, 2011, the plaintiff filed suit in this Court to recover on said debt. (Id.)

Defendants file the instant Motion for Summary Judgment asking that the Court dismiss this action. A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential

materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 530 (1995). Accordingly, "when the evidence is 'so one-sided that one-party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

Defendants' argument centers around the fact that the plaintiff does not maintain a certificate of authority to transact business in New Jersey, and thus does not have standing to sue in the New Jersey courts. The New Jersey Corporation Act, N.J.S.A. 14A:13-11, provides that "[n]o foreign corporation transacting business in this State without a certificate of authority shall maintain any action or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority." The policy undergirding this rule embodies the classic quid-pro-quo arrangement, namely

> A corporation [transacting business] within this State should not be permitted to take advantage of the laws of this State which promotes its business ... and yet not comply with reasonable regulatory provisions of our Corporation Act. As is noted [in legal scholarship], many corporations selling products in the several states act, with a studied purpose, to avoid the necessity of conforming to state laws or becoming subject to service of process.

Eli Lilly and Co. v. Sav-On Drugs, Inc., 57 N.J. Super. 291, 300 (App. Div. 1959), aff'd o.b., 31 N.J. 591 (1960), aff'd 366 U.S. 276 (1961).

Thus, the certificate of authority is only a prerequisite for standing to sue in the event that a foreign corporation *transacts business* in New Jersey. There is no uniform definition of "transacting business, as same "is a term that is not susceptible of precise definition automatically resolving every case." Id. at 300.

The Appellate Division in *Eli Lilly* likened the test for transacting business to that used in determining whether a state has personal jurisdiction over a corporate defendant, and extrapolated that, if

> in order to subject a foreign corporation to a judgment *in personam*, if it be not present within the territory of the forum, it have 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice,"'" so the plaintiff here, in the interest of fair play and substantial justice, should not object to complying with the requirements of the Corporation Act and securing a certificate to do business here, thus enabling it to maintain its suit. This, however, the plaintiff refuses to do. It has been held that such a certificate is secured timely if taken out pending an action ... It has been stated that the effect of the *International Shoe Co.* case was to establish a rule that, where a foreign corporation is present within the State, the court looks not only to the regularity, continuity and extent of the corporate activity within the State, but also to whether the cause of action asserted resulted from the corporate activity within the State and the convenience to the parties.

Id. at 300-01. The court then concluded that the plaintiff was transacting business in New Jersey such that its failure to procure a certificate of authority barred it from maintaining a lawsuit against the defendant. This finding was based on the following facts: (paragraph breaks and material added in breaks for clarification)

> **[Office]** Plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building. (The September 1959 issue of the Newark Telephone Directory lists the plaintiff, both in the regular section and in the classified section under "Pharmaceutical Products," as having an office at 60 Park Place, Newark.)
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> **[Employees – number]** The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its

marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino "for all expenses incidental to the maintenance and operation of said office."

There is a secretary in the office, who is paid directly by the plaintiff on a salary basis. There are 18 "detailmen" under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commissions. Many, if not all of them, reside in the State of New Jersey.

[Employees - activities in New Jersey] It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is "promotional and informational only." On an occasion, these detailmen, "as a service to the retailer," may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material.

[Stores] When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield store. Plaintiff says that all of its fair trade contracts and orders for its products are subject to acceptance in Indiana, and therefore none of them constitutes a contract made, or order taken, in this State.

Id. at 298-99.

The *Eli Lilly* Chancery Division decision was affirmed on direct appeal on the opinion below by the New Jersey Supreme Court. On certiorari, the United States Supreme Court, in *Eli Lilly and Co. v. Sav-On Drugs*, 366 U.S. 276 (1961), then upheld the Chancery Division's ruling, and, critically, added clarification to its broad constitutional definition of "transacting business." The court stated that

> It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers ... On the other hand, it is equally well settled that if Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business.

Id. at 278-79. The Court found that the plaintiff promoted intrastate commerce when its New Jersey "sales engineers" solicited business from wholesalers and retailers in New Jersey.

By contrast, the New Jersey Supreme Court declined to find that the plaintiff was transacting business in New Jersey in *Materials Research Corp. v. Metron, Inc.*, 64 N.J. 74 (1973). The Court in that case followed the United States Supreme Court's holding in a series of cases known as the "drummer" decision that "the bare solicitation of orders [does] not constitute the transaction of business for qualification purposes." Id. at 82. The Court then concluded that the plaintiff's contacts with New Jersey amounted to "bare solicitation," as the plaintiff had no address or office in New Jersey and, most significantly, the only contact with New Jersey was the solicitation of the sales engineer who

> lives in New Jersey and his sales region includes this State. He is paid on a salary and commission basis and visits the home office once a week to complete his paper work. MRC denies that the sales engineer uses his residence as an office on the corporation's behalf and says it does not reimburse him for the use of his home. Orders are telephoned to the New York office

> and most of them are received on customer order forms. Invoicing and receipt of payment takes place in New York. Goods are shipped f.o.b Orangeburg, New York. MRC maintains a listing in the white pages of the Bergen County telephone directory, with the address listed as Orangeburg, New York; the telephone is a tie line to the New York office maintained, says MRC, as a device for the convenience of its customers so that they can avoid toll charges.

Id. at 78.

Plaintiff submits that this case is akin to *Metron* in that Paventia's online order system constitutes mere solicitation, without more. Defendant in effect argues that this case goes beyond mere solicitation, citing *Metron,* supra, at 83:

> Solicitation with some additional elements may take a case across the threshold of intrastate commerce. Without attempting to catalogue all those "additional elements," we suggest weight might be given to such factors a salesman's having binding authority or approving contracts himself rather than forwarding them to a sales office or home office for approval[.]

In fact, the law holds "solicitation" and "transacting business" can be one-and-the-same where "a party induces 'one local merchant to buy a particular class of goods from another.'" *Bonnier Corp. v. Jersey Cape Yacht Sales, Inc.*, 416 N.J. Super. 436, 443 (App. Div. 2010) (citing *Eli Lilly and Co. v. Sav-On Drugs*, 366 U.S. 276, 282 (1961).

The Law Division found such inducement-via-solicitation in *Davis & Dorand v. Patient Care Medical Services, Inc.*, 208 N.J. Super. 450 (Law Div. 1985). In that case, the plaintiff was a business incorporated in New York that contracted with the defendant to publish advertisements in New Jersey newspapers. Id. at 453-54. When the plaintiff sued for nonpayment, the defendant argued that the plaintiff, who had not procured a certificate of authority, did not have standing to sue in New Jersey. Id. The court agreed, finding that the plaintiff had transacted business in New Jersey and therefore violated the Corporation Act. Id. at 456. The court likened the facts before

it to those in *Eli Lilly*, wherein the plaintiff had sent its New Jersey "sales engineers" to solicit wholesale and retail customers to purchase medicines. The court analogized the two cases based on the facts in the case before it, namely:

> Plaintiff's representatives came into New Jersey and offered its advertising services to a New Jersey corporation which desired to advertise only locally in New Jersey newspapers. Then, on a regular basis over a two-year period, plaintiff worked with defendant and with various New Jersey newspapers to have the defendant's advertisements placed in New Jersey media.

Id. at 455.

However, as these facts are absent here, this case therefore more resembles *Bonnier*, supra, the key 2010 advertising case. The plaintiff in *Bonnier* was an advertising agency incorporated in Delaware with no New Jersey office, telephone number or employees. *Bonnier*, 416 N.J. Super. at 438. The plaintiff published a magazine entitled "Saltwater Sportsman" and sold the magazine in many states, including New Jersey. Id. The defendant contracted to advertise in the magazine, and the plaintiff sued the defendant when the defendant defaulted on its payments. Id. at 438-39. As here, the plaintiff did not maintain a certificate of authority, and the defendant argued that the plaintiff thus did not have standing to sue. Id. at 440. As here, contracts were not finalized in New Jersey.

The court found that the plaintiff's conduct did not amount to transacting business in New Jersey. The court reviewed the cases from *Eli Lilly* to *Davis & Dorand*, and then observed that:

> Although the record before us is limited, it is apparent that defendant, as the moving party invoking what are, in essence, the windfall benefits of N.J.S.A. 14A:13-11, has failed to sustain its burden by demonstrating that plaintiff has engaged in intrastate commerce within this State. It is undisputed that Saltwater Sportsman and the other magazines published by plaintiff are national publications not purely local in nature. There is no indication in the

> record that the ads placed by defendant were selectively inserted only in New Jersey editions or versions of the magazine.

Id. at 444. Thus, the plaintiff could sue in New Jersey even without a certificate of authority.

In this case, it does not appear from the record that the plaintiff maintains any of its own offices or sales representatives in New Jersey. Nor does it specifically target New Jersey customers, or advertise in New Jersey media, or finalize contracts here. The plaintiff's website does provide a search feature for customers to locate retailers which carry their products, which has the effect of promoting the sale of its products by New Jersey retailers to consumers in New Jersey. However, this advertising is not New Jersey specific, but targets the whole world. The scene thus resembles the nationwide interstate commerce *in Bonnier* and *Metron* rather than the local activity pictured in *Eli Lilly* and *Davis & Dorand*.

Moreover, defendant Wilbert's bare and mysterious statement, Cert. ¶4, that in 2006 plaintiff "contacted me to see if I would purchase product from it to sell at Daub's Garden Center" appears to refer to nothing other than the advertising. No other contact is mentioned -- not even a phone call.

The Court thus cannot find that the plaintiff in this case had engaged in intrastate commerce based on the holding in *Bonnier*. The plaintiff in *Bonnier* arranged for a New Jersey corporation to advertise in New Jersey and in other states. Similarly, the plaintiff in this case has allowed for all of its retailers, wherever located, to be identified and contacted by customers for the purposes of purchasing its products. Further, there is no showing of inducing sales from one New Jersey merchant to another. The Court finds this situation involves only the type of "bare solicitation" found by the New Jersey Supreme Court in *Metron*, and the Appellate Division in *Bonnier* to be non-local.

Finally, defendant suggests that there should be further discovery on the issue. It has, however, provided no threshold showing that would justify further discovery. Without such a threshold showing defendant should not be permitted to undertake further discovery on the hope, as Mr. Micawber stated in David Copperfield, that "something will turn up".

Finally, the Court wishes to note the receipt of the plaintiff's "sur-rebuttal," which is really a sur-reply. As plaintiff was not permitted to file this without leave of Court, the Court has not considered it in issuing the herein Opinion. R. 1:6-3(a).

For the reasons discussed above, defendants' Motion for Summary Judgment is **DENIED.**