

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

CASE NO. 2018-CP-10-3825

K-CON, INC.,)

Plaintiff,)

vs.)

**MEMORANDUM IN OPPOSITION TO
PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT AS TO OHIO IMAGING
ASSOCIATES, INC.’S
COUNTERCLAIMS**

KING STREET ENTERPRISES, LLC)
and OHIO IMAGING ASSOCIATES INC.)

Defendants.)

Comes now, Ohio Imaging Associates, Inc., hereinafter “OIA” by and through its undersigned attorney and serves this Memorandum In Opposition to Plaintiff’s Motion for Summary Judgment, and states the following:

- I. **By law, Plaintiff waived its argument that OIA failed to comply with SC Code §33-15-102 by not raising it in a motion to dismiss or its answer.**

The Supreme Court has specifically ruled that failure to raise § 33-15-102 as a defense at the beginning of the lawsuit is a waiver to later assert it:

Thus, we hold that a foreign corporation's failure to comply with the provisions of Section 33–15–102 does not affect a court's subject matter jurisdiction. Instead, compliance with this statute affects a foreign corporation's capacity to sue. **Further, the defense of capacity to sue can be waived by a defendant if not raised. *H & H Glass Co. v. Wynne*, 289 S.C. 389, 346 S.E.2d 523 (1986) (Where lack of capacity to sue is not timely raised by demurrer or answer, it is waived.). See also, Rule 9(a), SCRCP (In order to raise an issue as to the capacity of a party to sue, a party must have a specific negative averment to that effect.).**

Chet Adams Co. v. James F. Pedersen Co., 307 S.C. 33, 36–37, 413 S.E.2d 827, 829 (1992)(Emphasis Added).

Plaintiff did not raise the statute or OIA's capacity to sue until filing its motion for summary judgment- a year after filing its Answer on October 8, 2018- which never raised or pled the defense. On authority of the Supreme Court in the Chet Adams case, the Plaintiff has waived capacity to sue as an argument as it was never raised in its initial response to the counterclaims, and Plaintiff has been actively defending the counterclaims since they were lodged.

- II. **OIA's does not do business in South Carolina, its contacts with the state – which are *de minimus* - relate to interstate commerce, and as such it is excluded from registering.**

Even though OIA asserts that Plaintiff waived the ability to assert § 33-15-102 because OIA's capacity to sue was never plead in response to OIA's counterclaims, nor demurred in response to same, OIA was not required to register with the State of South Carolina as it does not do business in the State of South Carolina. OIA's connections with the State of South Carolina are merely passive in nature. OIA's only contact with South Carolina was the lease of the office space and improvements it made for same in the 2017/2018 time frame– improvements which are the subject of this lawsuit. Plaintiff's claims against OIA in the lawsuit are for non-payment, and OIA's counterclaims are for deficiencies and delays.

Regional Imaging, Inc. – the company that occupies and utilizes the office space at Suite 205, 484 King Street, Charleston, South Carolina - employs and pays radiologists that read scans exclusively for medical facilities in the state of Ohio. Regional Imaging Inc. has a business license with the City of Charleston to operate at the office space, and

is subject to and remits state income taxes to the State of South Carolina. However, Regional Imaging, Inc. nor OIA receive any revenues or business from any source within the State of South Carolina, nor perform for any services for persons or businesses in South Carolina. (See Affidavit of Dr. Albert Cook, attached hereto as Exhibit "A"). Accordingly, any operations of Regional Imaging, Inc. are strictly a function of interstate commerce and not **intrastate** commerce in the State of South Carolina, which could trigger registration for doing business. OIA's contacts with South Carolina are even further removed as its only relationship was to secure the lease for the building for Regional Imaging, Inc. and make improvements to the space to make it suitable for them. Moreover, OIA's leasing office space for **interstate** commerce does not trigger registration per the Official Commentary to the statute, cited below:

Authority to transact business required.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a):

(11) transacting business in interstate commerce;

S.C. Code § 33-15-101.

OFFICIAL COMMENT

Typical conduct requiring a certificate of authority includes maintaining an office to conduct local **intrastate** business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general corporate purposes.

(Emphasis added).

4. INTERSTATE TRANSACTIONS.

A corporation is not “transacting business” within the meaning of section 15.01(a) (Section 33-15-101(a)) if it is transacting business in interstate commerce (section 15.01(b)(10)) (Section 33-15-101(b)(10)) or soliciting or obtaining orders that must be accepted outside the state before they become contracts (section 15.01(b)(6)) (Section 33-15-101(b)(6)). These limitations reflect the provisions of the United States Constitution that grant to the United States Congress exclusive power over interstate commerce, and preclude states from imposing restrictions or conditions upon this commerce. These sections should be construed in a manner consistent with judicial decisions under the United States Constitution. Under these decisions, a foreign corporation is not required to obtain a certificate of authority even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. A corporation need not obtain a certificate of authority even if it also does work and performs acts within the state incidental to the interstate business, e.g., if it takes or enforces a security interest incidental to these transactions. Nor is it required to obtain a certificate of authority merely because it sends traveling salesmen or solicitors into a state so long as contracts are not made within the state. **Similarly, an office may be maintained by a corporation in a state without obtaining a certificate of authority if the office's functions relate solely to interstate commerce.**

SOUTH CAROLINA REPORTERS' COMMENTS

[t]he general rule is that the mere holding and leasing of property by a foreign corporation is an isolated incident and not the conduct of business, unless the corporation is in the business generally of buying and leasing real property.

(Emphasis Added).

Accordingly, OIA’s lease of office space for services ultimately provided for recipients of those services in Ohio, is **interstate** in nature and does not require registration. If OIA’s operations were of an **intrastate** nature (across or within the state) – which they are not – registration would be required, per the Official Commentary.

- III. **Even if OIA were required to register in South Carolina- which it is not- OIA’s Counterclaims would only be subject to stay, not dismissal which Plaintiff seeks in its motion.**

Consequences of transacting business without authority.

(a) A foreign corporation transacting business in this State without a certificate of authority may not maintain a proceeding in any court in this State until it obtains a certificate of authority.

(b) The successor to a foreign corporation that transacted business in this State without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this State until the foreign corporation or its successor obtains a certificate of authority.

(c) A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

(d) A foreign corporation is liable for a civil penalty of ten dollars for each day but not to exceed a total of one thousand dollars for each year it transacts business in this State without a certificate of authority. The Attorney General may collect all penalties due under this subsection.

(e) Notwithstanding subsections (a) and (b), the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this State.

§ 33-15-102.

OFFICIAL COMMENT

Section 15.02(e) (Section 33-15-102(e)) does not prevent a foreign corporation that has failed to obtain a certificate of authority from “defending any proceeding.” The distinction between “maintaining” a proceeding under section 15.02(a) (Section 33-15-102(a)) and “defending any proceeding” under section 15.02(e) (Section 33-15-102(e)) is determined on the basis of whether affirmative relief is sought. **A nonqualified corporation may interpose any defense or permissive or mandatory counterclaim to defeat a claimed recovery, but may not obtain an affirmative judgment or decree based on the counterclaim unless it has obtained a certificate of authority.**

As is made clear by the statute and the Official Commentary, if a corporation were to be deemed to be required to register with the state by filing a certificate of authority, the remedy would be a stay of the action- not dismissal of the action.

IV. Conclusion.

Plaintiff waived the ability to make the arguments it now makes- the South Carolina Supreme Court has spoken directly on this issue as it applies to the exact statute Plaintiff invokes dismissal under: S.C. Code § 33-15-101. Setting aside the procedural bar to

Plaintiff's motion for summary judgment, the motion substantively fails as OIA does not do business in South Carolina and its contacts are solely interstate in nature.

WHEREFORE, OIA respectfully requests this Honorable Court deny Plaintiff's motion for summary judgment for any or all of the reasons cited herein.

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