Bonzy, Inc. v XL Specialty Ins. Co.
2009 NY Slip Op 32883(U)
December 9, 2009
Supreme Court, New York County
Docket Number: 601331-09
Judge: Carol R. Edmead
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[* 1]
SCANNED ON 12/9/2009

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. CAROL EDMEAD

PART _____

Justice

Index Number : 601331/2009

BONZY, INC.

VS.

XL SPECIALTY INSURANCE COMPANY

SEQUENCE NUMBER : # 001

OTHER

INDEX NO. 601331-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/9/09.

J.S.C.

HON. CAROL EDMEAD

Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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BONZY, INC.

Petitioner,

-against-

XL SPECIALTY INSURANCE COMPANY and
ROANOKE TRADE SERVICES, INC.,

Respondents.

CAN-MED LINES (USA), INC.,

Judgment Debtor.

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Index No. 601331/09

DECISION/ORDER
Motion #001

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this action, petitioner, Bonzy, Inc. ("petitioner" or "Bonzy") seeks a Judgment pursuant to CPLR §§5225 and 5227 directing the respondents XL Specialty Insurance Company ("XL Specialty") and/or Roanoke Trade Services, Inc. ("Roanoke") to turn over and pay petitioner $1,188,838.16, the sum of the judgment obtained against Judgment-Debtor Can-Med Lines (USA), Inc. (the "Judgment-Debtor" or "Can-Med").

Factual Background[1]

Bonzy, a New Jersey corporation, is an importer, exporter and wholesale distributor and vendor of consumer products. Can-Med arranges for the shipment of cargo to various international destinations. According to Can-Med's website, it is a "Fully Bonded Non-Vessel-Operating-Common-Carrier" ("NVOCC"). Respondent XL Specialty is an

[1] The Factual Background is taken in large part from the petition.

insurance company that bonded Can-Med under Bond No. 8395076 (the "Bond").[2] Respondent Roanoke is an international insurance broker, which issued the Bond for Can-Med.

In 2006, Bonzy obtained a default judgment against Can-Med in an action entitled *Bonzy, Inc. v Can-Med Lines (USA), Inc. and Hapag-Lloyd (America), Inc.*, Index No. 602386/05, wherein Bonzy alleged that Can-Med failed to comply with the terms of two Carrier Agreements calling for the delivery of two shipments to Bonzy's customers. Bonzy allegedly delivered the first shipment of watches, valued at $464,760, to Can-Med on or about August 5, 2003, which was loaded in container CLHU8745748; the second shipment of fashion handbags, valued at $335,124, was delivered to Can-Med on or about September 22, 2003 and loaded in container HLXU2254705. Can-Med thereafter delivered both containers to Hapag-Lloyd, a maritime shipping line company, who accepted said cargos for maritime shipment. However, neither container was delivered to Bonzy's customers and Can-Med failed to account for said cargos, valued at $799,884. When Bonzy defaulted in the action, the Court (Lowe, III, J.) granted summary judgment against Can-Med for $1,188,838.16[3] ($799,884, plus interest from September 14, 2003, and costs and disbursements).

Thus, Bonzy now seeks indemnification from XL Specialty and its broker Roanoke for the amount of the judgment against Can-Med, based on the language of the Bond, which specifically states that "This bond shall inure to the benefit of any and all persons who have

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[2] The Bond is entitled "Federal Maritime Commission-Ocean Transportation Intermediary (OTI) Bond (Section 19, Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998)."

[3] The resulting judgment was entered against Can-Med on February 3, 2009. Petitioner's action against Hapag-Lloyd America, Inc., was discontinued.

obtained a judgment . . . made pursuant to a claim under 46 CFR § 515.23(b) for damages against the Principal arising from its transportation-related activities . . . ."

Bonzy argues that as it is undisputed that Can-Med took possession of petitioner's merchandise to transport them to the destination requested, Bonzy is entitled to seek enforcement of its judgment against the Judgment Debtor, Can-Med in the sum of $1,188,838.16, and entitled to a judgment pursuant to CPLR §§ 5225 and 5227 against respondents, XL Specialty and Roanoke in the sum of $1,188,838.16. Bonzy has been a creditor of Can-Med, and XL Specialty, as bonding company, knew that a claim existed against Can-Med. XL Specialty should have turned over, but refused, on behalf of Can-Med, the sum owed to Bonzy. Bonzy claims that such sum is the property of Can-Ed, and it is just and equitable that this amount be paid to Bonzy on account of the judgment recovered against Can-Ed.

Opposition

Respondents initially argue that Bonzy lacks the capacity to sue. Prior to this proceeding, and prior to entry of the default judgment, Bonzy had its corporate status revoked by New Jersey for not filing an annual report for two years. Under New Jersey law (N.J.S.A. 14A:4-5(5)), such a revocation causes "all powers conferred by law upon [the corporation to] thereafter be inoperative and void." Under N.J.S.A. 14A:3-1(b), such powers include the power to sue in its corporate name. In New York, the status, nature and functions of a foreign corporation are determined by the state of its incorporation, which includes the foreign corporation's capacity to sue. Since New Jersey has voided Bonzy's power to sue, this Court should dismiss the petition.[4]

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[4] In light of this Court's decision on the issue of petitioner's standing to maintain this action, the Court does not include the parties' remaining arguments as to the substantive merits of plaintiff's motion.

Reply

Respondents' contention that the revocation of Bonzy's corporate status deprives it of standing is not the law in New York and the caselaw respondents cite are inapplicable. Pursuant to BCL §1006(a)(4), a dissolved corporation may "sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it." In any event, Bonzy has since filed for reinstatement and paid its past due annual report and reinstatement fees.

Sur-Reply

Respondents argue that petitioner's revocation of its corporate status by New Jersey is not a dissolution, but a suspension of its charter, and any acts by petitioner during the period of its revocation can only be validated retroactively upon its reinstatement. Nothing in the petition indicates that petitioner is a dissolved corporation; the petition st petitioner is not winding down, and is still doing business. Thus, petitioner cannot pursue this case until its reinstatement. Further, the caselaw relied upon petitioner is distinguishable.

Analysis

Capacity to Sue

It is uncontested that as of May 20, 2009, and at the time this action was commenced, New Jersey revoked Bonzy's corporate status, effective November 16, 2006, for failing to file an annual report for two consecutive years.

Pursuant to New Jersey law, once the New Jersey State Treasurer issues a proclamation declaring that the certificate of incorporation of the corporation has been revoked, "all powers conferred by law upon it shall thereafter be inoperative and void" (NJSA 14A:4-5(5)). *In re New*

Jersey Window Sales, Inc. (189 Misc 2d 528, 735 NYS2d 724 [Sup Ct New York County 2001] recalled on reargument, 190 Misc 2d 654, 741 NYS2d 387 [Sup Ct New York County 2002]) is instructive. In *In re New Jersey Window Sales*, Precision Specialist Metal & Glass, Inc. ("Precision"), a New Jersey entity which was "dissolved" in 1990 by the New Jersey Secretary of State "for failure to pay taxes, and which has never qualified to do business in New York," filed a mechanic's lien by for labor performed at Columbia University pursuant to a contract with New Jersey Window Sales, Inc. ("Sales"). Sales moved to discharge the lien on the grounds that at the time of the lien filing Precision was not in existence because it was dissolved in 1990, and because the notice of lien did not comply with the Lien Law. At the time of the oral argument on the motion, Precision still had not obtained reinstatement of its New Jersey charter. In discussing whether the lien was valid, the Court turned to the issue of whether Precision constituted a "de facto" corporation with authority to validly file a lien on real property located in New York:

> If the lien had been filed after a dissolution for the purpose of winding up the business of the corporation, the lien would be valid as a "dissolved corporation ... may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place" (Business Corporation Law § 1006 [a]). However, after dissolution a "corporation shall carry on no business except for the purpose of winding up its affairs" (Business Corporation Law § 1005 [a] [1]; see Matter of Schenectady Mun. Hous. Auth. v Keystone Metals Corp., 245 AD2d 725, 727 [3d Dept 1997] [which authorized the filing of a mechanic's lien by a corporation that was found "not engaging in prohibited new business, but rather was seeking to collect its assets in the winding up of its affairs through remedies which existed prior to the time of dissolution"]). Such authority is of no aid to Precision which filed its lien *in connection with its ongoing business activities*. . . . [H]aving been nonexistent in its state of organization for a decade and having never sought permission to do business in this State, I find that it lacked the power and authority to file the lien and may not take advantage of the de facto corporation doctrine.
> (Emphasis added).

Consequently, the Court discharged the lien. However, on reargument (190 Misc 2d 654)

(which the Court converted to a motion to renew), Precision contended the New Jersey Department of the Treasury reinstated Precision on August 28, 2001, upon the consent of the New Jersey Secretary of State and Attorney General, who issued a certificate "authorizing it to continue business and resume the exercise of its functions," and that on November 9, 2001, petitioner received a certificate from the New York Secretary of State authorizing it to do business here, which certificate was granted after the issuance of consent by the New York State Department of Taxation and Finance on November 7, 2001.

The Court held that upon qualifying after obtaining consent of the State Tax Commission by proving payment of all outstanding taxes, Precision retroactively had its filing of the mechanic's lien validated. Continuing, the Court stated:

> While I originally declared the lien invalid for the reasons set forth in my above-cited opinion, that decision is recalled as the new developments require a finding that the lien is valid by reason of the retroactivity of the corporate actions referred to herein. From a public policy standpoint, I agree with the above-quoted statement of Judge Vanderbilt that Sales, who is a "stranger to the dealings" between Precision and the State "should not be allowed to take advantage" of Precision's corporate qualification delinquencies to escape its own obligation to Precision after Precision satisfied all statutory corporate obligations to the New Jersey and New York authorities. To do otherwise would result in a benefit to Sales which was not harmed by the prior failures of Precision to follow state mandated corporate requirements, which the affected states have now forgiven.

Therefore, the Court recalled its previous decision, and denied the motion of Sales to summarily discharge the notice of lien.

The Court notes that Bonzy's submissions in reply are inconclusive as to whether Bonzy's corporate status was reinstated. The receipt of payment of its reinstatement application indicates that Bonzy's application was in the process of being completed, and that additional steps were required of Bonzy to complete reinstatement:

> . . . .Your reinstatement request is now in process. To complete the process . . . *fill out the application for tax clearance* that has been prepared for you and return it to the Division of Taxation at the address indicated with the appropriate fee (if applicable). *Failure to complete this step will result in the cancellation of your reinstatement* and the forfeiture of all filing fees. The Division of Taxation will contact you directly after your file has been assigned to an auditor. *Once the tax review is complete, the auditor will notify you that the tax clearance has been issued and will send us the Tax Clearance Certificate directly. Once we receive the Tax Clearance Certificate, we will complete the reinstatement transaction and mail you a Certificate of Reinstatement.* (Emphasis added).

To date, New Jersey has not reinstated petitioner's corporate status.[5] "A corporation during its delinquency and until it receives retroactive de jure status, is essentially legally dead" (*In re New Jersey Window Sales, Inc.*, 190 Misc 2d at 656-657 citing *De George v Yusko*, 169 AD2d 865, 866-867, 564 NYS2d 597 [3d Dept 1991]). The Court notes that "a corporation's *de jure* existence is removed for the very purpose of securing compliance with the tax statute ... (and) [r]ecognition of *de facto* status would directly subvert the effectiveness of the sanctions for franchise tax delinquency, removing all incentives for a dissolved corporation to seek reinstatement" (*In re New Jersey Window Sales, Inc.*, 190 Misc 2d at 656-657). Therefore, since petitioner's corporate status remains revoked, and there is no showing that petitioner is authorized to do business in New York, petitioner lacked the power and authority to commence this action, and continues to lack the power and authority to maintain this action.

Petitioner's reliance on *Cava Const. Co., Inc. v Gealtec Remodeling Corp.* (58 AD3d 660, 871 NYS2d 654 [2d Dept 2009]), *In re Artura*, 230 BR 236 [EDNY 1999]), *Tedesco v A.P. Green Indus.* (8 NY3d 243 [2007], and *Park Realty Corp. v Hydrania, Inc.* (17 AD3d 898, 793 NYS2d 611 [3d Dept 2005]) for the proposition that a dissolved corporation may maintain court

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[5] Based on a telephonic conference with all counsel on December 1, 2009, petitioner's reinstatement application is still pending.

actions is misplaced. *Cava* held that "A corporation continues to exist after dissolution for the winding up of its affairs, and a dissolved corporation may sue or be sued on its obligations, including contractual obligations and contingent claims, until its affairs are fully adjusted" (58 AD3d at 661). However, petitioner is a not a dissolved corporation, "winding up its affairs" (*cf. In re Artura*, 230 BR 236 [corporation was dissolved by proclamation of the Secretary of State of New York]; *Tedesco*, at 247 [corporation had capacity to bring its third-party claim so long as that activity was part of "winding up its affairs"]; *Park Realty Corp. v Hydrania, Inc.*, 17 AD3d 898, 793 NYS2d 611 [3d Dept 2005] [petitioner is not precluded from prosecuting this proceeding or its appeal despite its posttrial dissolution in Chancery Court]; *Vinlis Const. Co. v Roreck*, 67 Misc 2d 942, 325 NYS2d 457 [Sup Ct Nassau County 1971 [holding that where corporate plaintiff was dissolved by proclamation for failure to pay taxes, that dissolution did not affect either its right to collect and distribute its assets or to sue in its corporate name]). Instead, petitioner's status as a corporation has been revoked, and petitioner is actively seeking to be reinstated in furtherance of conducting its business.

Therefore, as petitioner lacks authority to maintain this action, the petition is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Bonzy, Inc. for a Judgment pursuant to CPLR §§5225 and 5227 directing the respondents XL Specialty Insurance Company and/or Roanoke Trade Services, Inc. to turn over and pay petitioner $1,188,838.16, the sum of the judgment obtained against Judgment-Debtor Can-Med Lines (USA), Inc. is denied; and it is further

ORDERED that the petition is hereby dismissed, without prejudice; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 9, 2009

Hon. Carol Robinson Edmead, J.S.C.

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