

**Bonzy, Inc. v XL Specialty Ins. Co.**

2010 NY Slip Op 30536(U)

March 5, 2010

Supreme Court, New York County

Docket Number: 601331/09

Judge: Carol R. Edmead

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

PRESENT: EDMEAD

PART 35

Index Number : 601331/2009  
**BONZY, INC.**  
 VS.  
**XL SPECIALTY INSURANCE**  
 SEQUENCE NUMBER : 002  
 REARGUE

INDEX NO. \_\_\_\_\_  
 MOTION DATE 2/17/10  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by petitioner, Bonzy, Inc. for leave to reargue this Court's decision dated December 9, 2009 is granted; and it is further

ORDERED that the branch of the motion by petitioner, Bonzy, Inc. for leave to renew is denied; and it is further

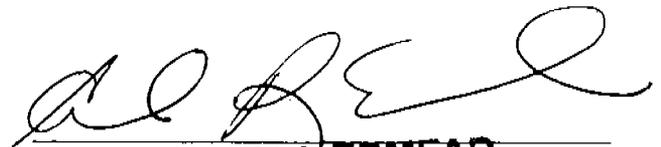
ORDERED that the branch of petitioner's motion for an order vacating the Court's decision dated December 9, 2009 upon reargument is granted, and the decision dated December 9, 2009 is hereby VACATED; and it is further

ORDERED that the petition is hereby reinstated; and it is further

ORDERED the petitioner 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: 3/5/10

  
**HON. CAROL EDMEAD** J.S.C.

PAPERS NUMBERED \_\_\_\_\_  
**FILED**  
 MAR 09 2010  
 NEW YORK COUNTY CLERK'S OFFICE

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate  DO NOT POST  REFERENCE

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

-----X  
BONZY, INC.,

Petitioner,

-against-

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

Respondents.

CAN-MED LINES (USA), INC.,

Judgment Debtor.

-----X

Index No. 601331/09

DECISION/ORDER  
Motion #002

**FILED**  
MAR 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this action to recover payment under a bond, petitioner, Bonzy, Inc. ("petitioner") moves for leave to reargue and renew this Court's decision dated December 9, 2009 in which this Court held that petitioner lacked standing to sue, and upon reargument and renewal, the Court should vacate such decision.

*Factual Background*

Petitioner, which was incorporated in New Jersey, is an importer, exporter and wholesale distributor and vendor of consumer products. Can-Med Lines (USA) ("Can-Med") arranges for the shipment of cargo to various international destinations. In 2003, petitioner allegedly contracted with Can-Med for the delivery of two shipments to petitioner's customers. Respondent XL Specialty is an insurance company that bonded Can-Med under Bond No. 8395076. Respondent Roanoke is an international insurance broker, which issued the Bond for Can-Med. When the deliveries failed to reach petitioner's customers, petitioner commenced suit against Can-Med, who failed to appear in such action. In 2006, Bonzy obtained a default

judgment against Can-Med for \$1,188,838.16.

Petitioner then petitioned this Court for an order granting it indemnification from XL Specialty and Roanoke for the amount of the judgment against Can-Med, based on the language of the Bond.

By decision dated December 9, 2009, the Court dismissed the action, stating, in relevant part:

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" . . .

\* \* \*

. . . Bonzy's submissions in reply are inconclusive as to whether Bonzy's corporate status was reinstated. The [State of New Jersey's] receipt of [Bonzy's] 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 . . . *Once we receive the Tax Clearance Certificate, we will complete the reinstatement transaction and mail you a Certificate of Reinstatement.*

\* \* \*

To date, New Jersey has not reinstated petitioner's corporate status. "A corporation during its delinquency and until it receives retroactive de jure status, is essentially legally dead". . . . 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" . . . .

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.

\* \* \*

. . . *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" . . . . However, petitioner is a not a dissolved corporation, "winding up its

affairs" . . . . Instead, petitioner's status as a corporation has been revoked, and petitioner is actively seeking to be reinstated in furtherance of conducting its business. . . .

(Internal citations omitted).

Petitioner argues that because the Court misapprehended petitioner's corporate status, the December 9, 2009 decision should be vacated. Petitioner avers that its motion is based on one fact in the Court's December 9, 2009 decision, *to wit*: the holding that "petitioner is not a dissolved corporation 'winding up its affairs . . . .' Instead petitioner's status as a corporation has been revoked, and petitioner is actively seeking to be reinstated in furtherance of conducting its business."

Petitioner contends that the Court adopted respondents' factually incorrect argument that petitioner is still a functioning company. This finding was the main reason for the Court's ruling that Bonzy did not have the right to sue until its reinstatement as a New Jersey corporation. Petitioner also argues that such finding was also the basis for not relying on caselaw that a dissolved corporation may sue while winding up its affairs. Petitioner contends that this fact is "erroneous" because petitioner has been out of business since early 2004, with no intention of conducting any further business. Petitioner argues that the Court may have been misled by petitioner's attempt to have its corporate status reinstated, an action it took solely for the purpose of ensuring that it had the unarguable right to pursue the present lawsuit.

Petitioner contends that its petition indicated that it "was a New Jersey corporation," and did not in any manner claim to be a currently functioning corporation. In respondents' opposition, respondents claimed that petitioner's status as a dissolved corporation barred it from suing. After petitioner argued that it was winding up its affairs and had the right to sue,

respondents raised, for the first time in a sur-reply, that plaintiff was continuing to do business. Therefore, because the facts before the Court included the claim that petitioner was a corporation and respondents offered no facts to the contrary, petitioner's motion to reargue should be granted.

Petitioner further argues that even if the Court finds that the facts did not demonstrate that petitioner was no longer operating as a functioning corporation, renewal based on "new facts not offered on the prior motion that would change the prior determination" is warranted. In support of renewal, petitioner submits the affidavit of its president and owner Joseph Havatian ("Havatian"), who attests that Can-Med's failure to make the deliveries in September 2003 resulted in a loss to petitioner of almost \$800,000. As a "consequence of this loss, Bonzy was unable to stay in business for more than an[] additional six to eight months." Petitioner ceased functioning in early 2004 and closed its bank account in May 2004, as reflected in an attached bank statement. Thereafter, petitioner's "existence was limited to winding up its affairs including collecting on any outstanding invoices and settling accounts receivable." Havatian no longer lives or works in the United States.

Petitioner had a valid reason for not raising these additional facts in its original papers. Respondents raised the claim that petitioner was a functioning corporation for the first time in their sur-reply. Petitioner requested permission to respond to respondents' forthcoming sur-reply but was denied that opportunity. Nor did the Court hold oral argument on the motion. Therefore, Bonzy had no prior opportunity to provide evidence that it was no longer a functioning corporation.

Petitioner further argues that once this Court accepts that petitioner is a dissolved business winding down its affairs, petitioner has a clear right to sue and maintain this suit. The

Court cited several cases which stood for the proposition that, where a Corporation's legal status has been revoked by the government, it may still sue as part of winding down its affairs.

Similarly, petitioner's corporate status has been revoked by the State for failure to pay taxes, which is the New Jersey term for being "dissolved by proclamation," and it, too, has the right to sue in its corporate name.

In opposition, respondents argue that petitioner's new facts are not determinative; nor is its failure to adduce them on the main motion reasonably justifiable within the meaning of CPLR 222i(e)(2 -3). Petitioner's argument that because it has not carried on business since 2004, it is no longer a "functioning company" and therefore qualifies as a "dissolved" corporation entitled to wind up its affairs fails to satisfy any of the four bases for dissolution under New Jersey corporate law, NJSA 14A:12-8. Although there has been a corporate suspension/revocation issued by the New Jersey Department of Revenue, there is no showing that there has ever been a proclamation of dissolution by the New Jersey Secretary of State within the meaning of N.J.S.A. 14A:12-8(b).

If petitioner had truly been dissolved, that fact would show up in the New Jersey corporate database. As of January 27, 2010, New Jersey's corporate database contains no entry showing that petitioner has ever been dissolved, *i.e.*, it does not state "dissolved without assets." Instead, petitioner's corporate status as of May 20, 2009 is described as "revoked for not filing annual report for 2 consecutive years." Petitioner's corporate status as of January 27, 2010 is described as "reinstatement procedures pending." As a result, absent any certificate, proclamation, or judgment of dissolution within the meaning of N.J.S.A. 14A:12-8, petitioner cannot claim to be a dissolved New Jersey corporation.

Respondents assert what was determinative to the Court was not whether petitioner was still carrying on business or intended to do so in the future; what the Court relied on, and correctly so, was that revocation (as opposed to dissolution) is a sanction intended by New Jersey law to secure compliance with its tax statutes by forbidding actions such as this one. Further, the caselaw cited by petitioner does not help petitioner, in that the corporations in such cases involved a New York company that was "dissolved" for nonpayment of taxes. Petitioner was, and still is, a New Jersey corporation that has not been dissolved.

Respondents argue that renewal is unwarranted as there are no determinative new facts. The only new facts presented by petitioner are that it has not done business since 2004, that it is seeking corporate reinstatement solely for purposes of recovering in this suit, that its principal now lives and works in China, and that its last 2004 bank statement showed a zero balance. However, if respondents' take on the case is correct, then these facts would not change the prior determination.

Nor is there any reasonable justification for failing to present these facts on the prior motion. Respondents did not argue in their prior opposition that a dissolved corporation cannot maintain a lawsuit. Respondents relied solely on the very suspension/revocation theory which the Court relied upon in dismissing the petition. Its argument did not mention any dissolution. It was petitioner, in its reply memorandum, who first raised the issue of dissolution. Petitioner attempted to characterize its revocation as just a dissolution that did not prevent it from maintaining the special proceeding. If petitioner was going to rely on a theory of corporate dissolution, then it should have adduced in its reply papers whatever proof was necessary to demonstrate the dissolution. If petitioner is correct that, under New Jersey law, its cessation of

business, without more, amounted to a dissolution, which respondents dispute, then it should have made a factual showing of cessation in its reply papers - a cessation known to it at the time. Its failure to do so is not justifiable, as a motion to renew must be based upon additional material facts which existed at time prior motion was made but were not then known to party seeking leave to renew and therefore not made known to court.

In reply, petitioner argues that respondents' opposition papers do not in any way support the Court's Opinion that was decided in their favor. In fact, respondents argued against it by relying on New Jersey law when it is clear that the Court, as it should, fully relied on New York law. The Court cited several New York cases that stand for the proposition that when a corporation's status is dissolved and/or revoked by proclamation, it maintains the right to sue for the purpose of winding up its affairs pursuant to BCL §1006(a). The Court, however, found that although petitioner filed for reinstatement, its status as a corporation remains revoked and it therefore lacked the power to maintain this action. Essentially, the Court held that petitioner is not "winding up its affairs." Petitioner now argues that it is a corporation winding up its affairs and its reinstatement was commenced solely for the purpose of ensuring that it had the unarguable right to pursue the present lawsuit. Although petitioner, a dissolved corporation, maintains the legal right to sue as part of winding up its affairs, Joseph's affidavit was submitted to the Court as evidence that Bonzy's reinstatement is limited to protecting its right to maintain a lawsuit.

Moreover, the First Department analyzed the above statute along with a tax statute. There the Court stated that New York law fully supports a revoked foreign corporation's right to pursue its operation for purposes of winding up its affairs, especially, as is the case here, for purposes of

collecting a debt. Petitioner should therefore be allowed to collect on the debt owed to it.

*Discussion*

A motion to renew pursuant to CPLR 2221, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d 126, 133, 751 NYS2d 707 [Supreme Court New York County 2002]; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511 [1<sup>st</sup> Dept], lv. dismissed 71 NY2d 994, 529 NYS2d 277 [1987]).

Based on the principles above, the Court denies renewal. Petitioner's claim that it did not have an opportunity to provide evidence that it was no longer a functioning corporation lacks merit. Petitioner's previous reply included the claim that it was a dissolved corporation and petitioner failed submit, as it does now, (1) the affidavit of its president and (2) the bank statement, to support its claim that it is dissolved. That respondents sur-replied that petitioner was not doing business was not an issue raised for the first time, since such argument was in direct response to petitioner's claim that it was dissolved.

A motion for leave to reargue, on the other hand, under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] lv. denied and dismissed 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714

[1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588); *William P. Pahl Equipment Corp. v Kassis*, *supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1<sup>st</sup> Dept 1981]).

Previously, in response to respondents' argument in opposition that petitioner lacked standing due the revocation of its corporate status, petitioner raised in reply the claim that it was a dissolved corporation that may "sue or be sued in all courts and participate in actions and proceedings." Petitioner added that it had also filed for reinstatement. In a sur-reply, respondents retorted 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. Respondents also argued that nothing in the petition indicates that petitioner is a dissolved corporation and that petitioner was not winding down but still doing business. Thus, according to respondents, petitioner could not pursue this case until its reinstatement. However, as petitioner points out, the Petition indicates that "at all times relevant to this action" (which the Petition explains was in 2003 when the shipments were to be delivered (§9)) petitioner "was" a New Jersey corporation and "was engaged in business. . .," (§1) and consistent with this position, petitioner argued that it was a dissolved corporation. Further, as petitioner points out, there was no evidence, except for the fact that petitioner filed a petition, indicating that petitioner was still doing business. Thus, under

the circumstances and in the interest of justice, this court will exercise discretion and grant the plaintiff's motion for leave to reargue.

As respondents point out, N.J.S.A. 14A:12-8 prescribes the manner in which a New Jersey Corporation is dissolved, and provides that:

14A:12-8. Effective time of dissolution

A corporation is dissolved

- (a) when the period of duration stated in the corporation's certificate of incorporation expires and the corporation files a certificate of dissolution in the office of the Secretary of State pursuant to section 14A:12-5.1; or
- (b) upon the proclamation of the Secretary of State issued pursuant to section 54:11-2 of the Revised Statutes; or
- (c) when a certificate of dissolution is filed in the office of the Secretary of State pursuant to section 14A:12-2, 14A:12-3, 14A:12-4 or 14A:12-5, except when a later time not to exceed 90 days after the date of filing is specified in the certificate of dissolution; or
- (d) when a judgment of forfeiture of corporate franchises or of dissolution is entered by a court of competent jurisdiction.

Notably, section 54:11-2 pertaining to proclamations of the Secretary of State in subsection (b) above provides:

Delinquents reported to secretary of state; proclamation voiding charter

. . . the Division of Taxation shall report to the Secretary of State a list of all corporations which for 2 years next preceding the report *have failed to pay the taxes* assessed against them under any law of this State as provided in section 54:11-1 of this Title. *The Secretary of State shall forthwith issue his proclamation declaring under this Title and chapter, that the charters of these corporations are repealed, and all powers conferred by law upon them shall thereafter be inoperative and void.* The proclamation of the Secretary of State shall be filed in his office.

(See also *American Sur. Co. v Great White Spirit Co.*, 58 NJ Eq 526, 43 A 579 [1899](a

corporation which had defaulted in the payment of state taxes and has been proclaimed by the governor, under the provisions of L.1896, p. 319, *was within the provisions for winding up corporations*, contained in §§ 53 to 60 of the Corporation Act of 1896, L.1896, p. 277.

(Emphasis added).

Notwithstanding the four bases outlined in N.J.S.A. 14A:12-8 under which a New Jersey corporation may be dissolved, a revocation of a corporation's charter for nonpayment of taxes may also operate to dissolve a corporation for the purpose of permitting such a corporation to wind up its affairs.

In *Lancellotti v Maryland Cas. Co.*, (260 NJ Super 579, 617 A2d 296 [1992]), plaintiffs operated a truck repair business at in Jersey City through a corporation known as J & L Diesel Repair, Inc. ("J & L"). The corporation's charter was revoked by the New Jersey Secretary of State in 1983 for nonpayment of franchise taxes, and on March 7, 1984, the insurance policy that was the subject of the suit was amended to change the name of the insured from the corporation to the name of plaintiff Carl Lancellotti, the owner of the building in which the business was conducted. On the issue of standing, the Court stated:

The Secretary of State revoked the corporate charter of J & L sometime in 1983, and the insurance policy was amended March 7, 1984. Both these events took place prior to the fire. *The effect of the revocation was to dissolve the corporation. N.J.S.A. 14A:12-8(b).* A dissolution prohibits the corporation from carrying on its business except for the purpose of winding up its affairs by (a) *collecting its assets*; (b) conveying for cash such of its assets as are not to be distributed in kind to its shareholders; (c) paying, satisfying and discharging its debts and other liabilities; and (d) doing all other acts required to liquidate its business and affairs. N.J.S.A. 14A:12-9(1). (Emphasis Added).

It has been stated that the forfeiture of petitioner's corporate charter destroys the corporation's existence as a legal entity (AmJur Corporations § 2391, citing *Lancellotti v Maryland Cas. Co.*). Thus, the effect of New Jersey's revocation was to dissolve petitioner.

The dissolution of a corporation does not extinguish debts due or owing by it (*McCarter v Ketcham*, 72 N. J. Law, 247, 62 A. 693). Upon the dissolution of the corporation, the dissolved

corporation exists solely to prosecute (and defend suits) and has standing to recover its debt from respondents (*see Lancellotti v Maryland Cas. Co.*, 260 NJ Super at 583). Therefore, upon reargument, the Court finds that revocation of petitioner's charter by the State of New Jersey for failure to file taxes is analogous to a dissolution, thereby permitting petitioner standing to pursue this action in an attempt to wind up its affairs. As such, this Court's December 9, 2009 decision dismissing the petition for lack of standing is vacated.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by petitioner, Bonzy, Inc. for leave to reargue this Court's decision dated December 9, 2009 is granted; and it is further

ORDERED that the branch of the motion by petitioner, Bonzy, Inc. for leave to renew is denied; and it is further

ORDERED that the branch of petitioner's motion for an order vacating the Court's decision dated December 9, 2009 upon reargument is granted, and the decision dated December 9, 2009 is hereby VACATED; and it is further

ORDERED that the petition is hereby reinstated; and it is further

ORDERED the petitioner 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: March 5, 2010

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

**HON. CAROL EDM EAD**

**FILED**  
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COUNTY CLERK'S OFFICE