

319 Smile Corp. v Forman Fifth LLC

2005 NY Slip Op 30608(U)

June 30, 2005

Supreme Court, New York County

Docket Number: 601413/05

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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319 SMILE CORP.,

Index No. 601413/05

Plaintiff,

OPINION

-against-

FORMAN FIFTH LLC,

Defendant.
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RICHARD F. BRAUN, J.:

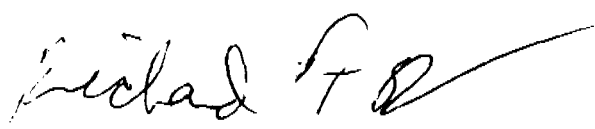
This is an action for a declaratory judgment and a preliminary injunction. Plaintiff moves for a preliminary injunction. Defendant cross-moves to dismiss the action, pursuant to CPLR 3211 (a) (3).

Plaintiff was dissolved by the State of New York Department of State on June 27, 2001, pursuant to the Tax Law and as of April 21, 2005 that dissolution was not annulled. Although plaintiff's president asserts that, after the dissolution, he had his accountant prepare late tax returns, and issued checks to the "New York State Corporation Tax" (some of the check stubs state that the checks were to the New York City Department of Finance), there is no showing that plaintiff was reinstated or even sought reinstatement by the State of New York Department of State. Thus, plaintiff did not have legal capacity to commence the action and cannot be granted a preliminary injunction, but rather the action should be dismissed (*Metered Appliances v 75 Owners Corp.*, 225 AD2d 338 [1st Dept 1996]; *B&O Realty Corp. v Chong-Yau Jeng*, 201 AD2d 439 [1st Dept 1994]). Dismissal of the first cause of action is appropriate rather than a declaration for defendant, under the circumstances (*see Automated Ticket Systems v Quinn*, 90 AD2d 738, 739 [1st Dept 1982]; *Bartley v Walentas*, 78 AD2d 310, 312-313 [1st Dept 1980]). Furthermore, the second cause of action for

a preliminary injunction does not lie because that is not a cause of action but rather a provisional request for relief (CPLR 6001, 6301).

Therefore, the cross motion has been granted by this court's separate decision and order, dated June 29, 2005, to the extent of dismissing the complaint in this action. Thus, the motion was denied.

Dated: New York, New York
June 30, 2005



RICHARD F. BRAUN, J.S.C.

FILED
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