

**J. Sackaris & Sons, Inc. v Onekey, LLC**

2007 NY Slip Op 32799(U)

September 5, 2007

Supreme Court, Nassau County

Docket Number: 0119-07/

Judge: Antonio I. Brandveen

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5

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

J. SACKARIS & SONS, INC.,  
Plaintiff,

TRIAL / IAS PART 32  
NASSAU COUNTY

- against -

Index No. 119/07

ONEKEY, LLC,

Motion Sequence No. 006, 007

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1, 2</u>
Answering Affidavits .....	<u>3, 4, 5</u>
Replying Affidavits .....	<u>6, 7, 8</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant moves, in Motion Sequence #6 for an order dismissing the complaint pursuant to CPLR 3211 which is the second motion for such relief. The defendant moves, in Motion Sequence #7 for an order directing the plaintiff and Country Bank to appear and show cause why the Court should not issue an order to confirm all discovery is stayed pending the Court's decision upon the defendant's renewed motion to dismiss the complaint pursuant to CPLR 3214 (b). The plaintiff opposes both motions.

The plaintiff, a concrete and excavating contractor, was hired as a subcontractor by Terra Firma Construction Management & General Contracting, LLC to perform work in connection

with the construction of the Hunts Point Multi-Service Center, 745 East 151 Street, Bronx, New York. The plaintiff entered into two contracts with Terra Firma Construction Management & General Contracting, LLC to perform the work for \$250,000.00 and \$170,000.00 respectively with the exception of hard rock excavation. The work was performed by the plaintiff in accord with the contract requirements, and approved and accepted by the architect of record for the project, Breger-Terjesen Associates, the Hunts Point Multi-Service Center, Inc., the project owner, the Dormitory Authority of New York State, and Terra Firma Construction Management & General Contracting, LLC, but Terra Firma Construction Management & General Contracting, LLC did not fully pay the plaintiff. The United States Fidelity and Guaranty Company a/k/a St. Paul Fire & Marine Insurance Company, as surety, paid the judgment, but the plaintiff claims only part of the judgment was paid. The plaintiff claims it is unable to collect and enforce, the interest continues to accrue without payment, and Terra Firma Construction Management & General Contracting, LLC is no longer doing business under that name, but instead diverted all of its assets into a new corporation, here the defendant Onekey, LLC. Litigation commenced by the plaintiff against Onekey, LLC.

In Motion Sequence #1, the plaintiff moved for an order to immediately effectuate a temporary restraining order on all of the bank accounts of Onekey, LLC, and on any funds due or to become due to Onekey, LLC from any and all construction projects where Onekey, LLC is due funds, and for a permanent restraint on any bank accounts, and on any funds due or to become due to Onekey, LLC from any and all construction projects where Onekey, LLC is due funds. On January 19, 2007, this Court denied Motion Sequence #1.

In Motion Sequence #2, the defendant moved for an order pursuant to CPLR 3211

dismissing the complaint, and an order pursuant to CPLR 6315 awarding damages caused to the defendant by the plaintiff and plaintiff's counsel as a result of frivolous motion practice where they wrongfully sought onerous injunctive relief, namely to prevent the defendant from conducting any business where the prior motion was denied by this Court's order dated January 19, 2007. In Motion Sequence #3, the plaintiff opposed Motion Sequence #2, and cross moved for an order pursuant to CPLR 2221 granting reargument of this Court's order dated January 19, 2007, an order granting a preliminary injunction against the defendant, an order denying the defense motion to dismiss, and an order for damages. On June 15, 2007, this Court denied Motion Sequence #2 with leave to renew should the plaintiff not fulfill its requirements with the State of New York, and granted Motion Sequence #3 for leave to reargue this Court's order dated January 19, 2007 and upon reargument the Court adhered to that prior decision.

In Motion Sequence #4, the plaintiff moved for an order pursuant to CPLR 3124 compelling the defendant to comply with outstanding discovery. The defendant opposed Motion Sequence #4, and cross moved, in Motion Sequence #5 unopposed, for an order for sanctions pursuant to 22 NYCRR § 130.01. On June 18, 2007, this Court denied Motion Sequence #4 and Motion Sequence #5.

The defense attorney states, in a supporting affirmation dated June 28, 2007, to Motion Sequence #6, the plaintiff has still not fulfilled its requirements with the State of New York, and remains dissolved and inactive. The defense attorney asserts, in accordance with the Court's prior orders, the complaint should be dismissed pursuant to CPLR 3211 (a) (3) because the plaintiff still lacks legal capacity to sue.

The plaintiff's attorney states, in an opposing affirmation dated July 2, 2007, to Motion

Sequence #6, the defendant does not have grounds to renew its previous motion to dismiss the complaint pursuant to CPLR 3211 because there are no new facts to be heard, and the defendant's position is without merits as a matter of law. The plaintiff's attorney notes not even two weeks passed since the Court's decision was rendered, so the defendant has not allowed the plaintiff any time to fulfill its requirements with the State of New York, and allow discovery to move forward on the underlying action. The plaintiff's attorney contends the defendant's motion is frivolous which justifies \$10,000.00 in sanctions, costs and reasonable fees against the defendant and its counsel.

The defense attorney states, in a reply affirmation dated July 18, 2007, to Motion Sequence #6, this Court's June 15, 2007 order deciding the plaintiff is a defunct corporation which nullifies its legal capacity to bring that motion and a lack of capacity with respect to the defendant because the plaintiff is a nonexistent corporation is still law of the case pursuant to CPLR 3211 (a) (3). The defense attorney states the plaintiff has not cured the defect of legal capacity notwithstanding the Court's prior orders. The defense attorney submits the Court should grant this motion without any requirement for leave to renew, and issue an order to dismiss the complaint with prejudice. The defense attorney contends, if the Court should not grant the instant motion, the defense will resume harassment of the defendant utilizing discovery devices. The defense attorney also reports the attorneys for Country Bank have received three court ordered subpoenas duces tecum in this matter which requested certain information and documents regarding the defendant, however, the attorney for Country Bank is unfamiliar with prior litigation. The defense attorney indicates should the Court not dismiss the complaint upon the instant motion the defendant would be compelled to file yet another motion to reargue the

Court's order denying the defendant's prior motion to dismiss. The defense attorney argues the plaintiff's opposition regarding sanctions for filing the instant motion is ludicrous in light of the Court's June 15, 2007 order, and the instant motion is not frivolous.

The plaintiff's attorney asks, in a sur-reply affirmation dated August 15, 2007, to Motion Sequence #6, the Court to accept this sur-reply affirmation, and consider it in rendering a decision on this motion albeit the sur-reply affirmation is filed after the motion was submitted to the Court for consideration and decision. The plaintiff's attorney states consideration of the sur-reply affirmation is not unreasonable nor prejudicial in light of the unique facts and circumstances of this matter, and the defendant has submitted affidavits to the Court endorsing false documents. The plaintiff's attorney asserts recent revelations of the uncovered bank documents received during the limited lifting of the stay on discovery confirm Finbar O'Neill, the sole shareholder of Terra Firma Construction Management & General Contracting, LLC is an owner and member of the defendant corporation. The plaintiff's attorney avers a review of the voluminous motion papers, affirmations and affidavits previously submitted by and on behalf of the defendants by their attorneys in this and the related matter against Terra Firma Construction Management & General Contracting, LLC revealed statements which contain material misrepresentations and perjurious statements, and leads to the conclusion other documents are false, too. The plaintiff's attorney maintains the Court denied the defendant's previous application to dismiss, and the instant motion is moot as a matter of law. The plaintiff's attorney contends the defendant has no right to renew its motion to dismiss since active status is not a prerequisite to bringing this lawsuit. The plaintiff's attorney points out, contrary to the defense allegations concerning the plaintiff's restoration of active corporate status, the defense attorney

deprived the plaintiff of any reasonable time to act so the defendant could further evade discovery. The plaintiff's attorney claims, in detail, the discovery devices utilized by plaintiff are legally permissible. The plaintiff's attorney also requests the Court take immediate action to restrain all of the defendant's assets based upon the information now before the Court, and that the plaintiff be permitted to enforce its judgment not only against the defendant, but against Finbar O'Neill individually, as well as his actions clearly serve to pierce the corporate veil. The plaintiff's attorney requests, under 22 NYCRR Part 130, § 130-1, \$10,000.00 in sanctions, including costs and reasonable attorney's fees against the defendant and its counsel be imposed for the unwarranted and frivolous defense motion to renew its motion to dismiss.

The capacity of a dissolved corporation to bring legal action is govern by Business Corporation Law §§ 1005 and 1006. Section 1005 (a) (1) provides: "After dissolution . . . [t]he corporation shall carry on no business except for the purpose of winding up its affairs." Section 1006 (a) (4) provides:

A dissolved corporation, its directors, officers and shareholders 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, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing: . . . The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitative or otherwise, in its corporate name, and process may be served by or upon it.

Business Corporation Law § 1006 (b), provides:

The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation)

A dissolved corporation may, as part of winding up its affairs, bring a claim in an action arising

out of predissolution events (*see Tedesco v. A.P. Green Industries, Inc.*, 8 N.Y.3d 243, 832 N.Y.S.2d 141 [2007]).

The defense attorney states, in a supporting affirmation dated June 28, 2007, to Motion Sequence #7, the request for the order, directing the plaintiff and Country Bank to appear and show cause why the Court should not issue an order to confirm all discovery is stayed pending the Court's decision upon the defendant's renewed motion to dismiss the complaint pursuant to CPLR 3214 (b), arises solely from the impatience and bad faith by the plaintiff and Country Bank. The defense attorney points out the defendant previously made a motion to dismiss the complaint pursuant to CPLR 3211, and while that motion was pending discovery in this matter was stayed by CPLR 3214 (b), but the plaintiff sought certain subpoenas with respect to Country Bank, other discovery demands upon the defendant, and a motion to compel discovery in contravention of the restraint of CPLR 3214 (b). The defense attorney notes this Court denied the plaintiff's motion to compel discovery, and denied the defendant's motion with leave to renew should the plaintiff not fulfill its requirements with the State of New York. The defense attorney asserts the plaintiff has not fulfill its requirements with the State of New York, and the plaintiff remains dissolved and inactive, so the underlying action should be dismissed under CPLR 3211 (a) (3). The defense attorney avers this Court previously decided in the January 19, 2007 order that the plaintiff was a defunct corporation pursuant to CPLR 3211 (a) (3) which nullified its legal capacity to bring the motion, a lack of capacity with respect to the defendant because the plaintiff was dissolved and inactive.

The plaintiff's attorney states, in an opposing affirmation dated June 30, 2007, to Motion Sequence #7, a stay of discovery is discretionary, and there are no compelling grounds to stay

discovery here. The plaintiff's attorney states the defendant is simply attempting to avoid disclosure of damaging information which, if released, would defeat its defense. The plaintiff's attorney reiterates, in detail, arguments previously advanced in prior motions regarding the status of the defendant with Terra Firma Construction Management & General Contracting, LLC. The plaintiff's attorney asserts, during the brief period where there was no discovery, the plaintiff came in possession of a bank document which conclusively draws a connection between the defendant and Terra Firma Construction Management & General Contracting, LLC, and claims, contrary to the defendant's allegations, that document was properly released to the plaintiff by subpoena on or about June 28, 2007, so there is no violation of CPLR 3214 (b). The plaintiff's attorney contends the defense request for a stay relying upon CPLR 3214 (b) and the service of the instant motion to renew its motion to dismiss is frivolous, and without merit as a matter of law. The plaintiff's attorney maintains the appellate holding in *Tedesco* confirms the plaintiff's contention that the plaintiff need not be an active corporation to have standing to sue, so the defense motion is unwarranted, frivolous, and designed to hinder the orderly process of pretrial disclosure. The plaintiff's attorney argues the instant motion should be denied.

The Compliance Officer of Country Bank states, in an affidavit dated July 2, 2007, for this non-party witness, the bank's attorneys have informally received three court ordered subpoenas duces tecum in this matter which requested certain information and documents regarding the defendant, Terra Firma Construction Management & General Contracting, LLC, and Finbar O'Neill. The Compliance Officer of Country Bank states the defendant, Terra Firma Construction Management & General Contracting, LLC, and Finbar O'Neill are direct or indirect bank customers, and other than those customer relationships, the bank has no other involvement

in the subject matter of this lawsuit or any other related predecessor lawsuit. The Compliance Officer of Country Bank points out, in detail, the different systems of record retention of particular items at bank, although there are exceptions in general records. The Compliance Officer of Country Bank requests if the bank is required to present any records in this matter in response to subpoenas or other document discovery demands, that the requesting party should be required to pay the bank the reasonable production expenses, including all amounts billed by third parties, to wit the bank's data processing servicer and off site archival storage company plus the bank's employee research time at the rate of \$40.00 per hour, which is the approximate cost of the time of the employee who would perform the work, including salary and benefits expense plus \$0.10 per page for copying expense. The Compliance Officer of Country Bank also asks that the requesting party make an advance payment equal to the bank's good faith estimate of the costs prior to commencing the document retrieval process, and that the bank receive payment of the actual costs of production prior to actual delivery of the requested items to the requesting party.

The Court has carefully reviewed and considered both motions and the parties' papers with regard to both motions, and the Court concludes Motion Sequence #6 for an order dismissing the complaint pursuant to CPLR 3211 is denied, and Motion Sequence #7 for an order directing the plaintiff and Country Bank to appear and show cause why the Court should not issue an order to confirm all discovery is stayed pending the Court's decision upon the defendant's renewed motion to dismiss the complaint pursuant to CPLR 3214 (b). The Court adheres to the ruling in *Tedesco v. A.P. Green Industries, Inc.*, 8 N.Y.3d 243, *supra*. Country Bank's request, through its legal counsel and Compliance Officer, for reasonable production


expenses by the requesting party , including all amounts billed by third parties, to wit the bank's data processing servicer and off site archival storage company plus the bank's employee research time at the rate of \$40.00 per hour, which is the approximate cost of the time of the employee who would perform the work, including salary and benefits expense plus \$0.10 per page for copying expense, and the requesting party make an advance payment equal to the bank's good faith estimate of the costs prior to commencing the document retrieval process, and that the bank receive payment of the actual costs of production prior to actual delivery of the requested items to the requesting party should be permitted in accord with the requirements of the CPLR.

Accordingly, both motions are denied in accord with this decision.

So ordered.

Dated: September 5, 2007

ENTER:

  
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J. S. C.

HON ANTONIO I. BRANDVEEN

FINAL DISPOSITION    NON FINAL DISPOSITION XXX

**ENTERED**

SEP 07 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**