

Kinzelberg v Design Quest, Ltd.

2007 NY Slip Op 33593(U)

November 8, 2007

Supreme Court, Nassau County

Docket Number: 3783-07/

Judge: Kenneth A. Davis

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

STEVEN KINZELBERG,

Plaintiff,

SUBMISSION DATE: 10/1/07
INDEX No.: 3783/07

-against-

DESIGN QUEST, LTD. and
RICHARD RUBENS, individually

MOTION SEQUENCE # 2

Defendants.

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... X
- Answering Papers..... X
- Reply..... X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's..... X

Motion by the attorneys for the defendants Design Quest, Ltd. and Richard Rubens, individually for an order pursuant to CPLR 3211(7) and CPLR 3211(8) dismissing the complaint and imposing sanctions on the plaintiff and awarding attorney's fees is denied.

On March 6, 2007 plaintiff served a summons and complaint on defendant Design Quest, Ltd. at 575 Madison Avenue, New York, N.Y. by delivering same to the "managing agent" at defendant's place of business. Another copy of the summons and complaint was mailed to 575 Madison Avenue, New York, N.Y., 10th Floor. (Affidavits of Service, Exhibit D, Affirmation in Opposition). The attorney for the plaintiff asserts that on two prior occasions, attorneys representing the defendants contacted him requesting an extension

of time to interpose an answer and agreeing to his request that they waive any jurisdictional defects. In an affirmation in support dated April 25, 2007, Richard Metli, of counsel to the law firm of L'Abbate, Balkan, Colavita & Contini, LLP, "a firm retained by Richard Rubens to defend him and his corporate entity sued herein as Design Quest Ltd. in the within action" stated that "[d]efendant's time to answer had apparently run prior to defendants consulting with this firm. Rubens advised that he or other counsel had obtained an oral extension of time to answer but did not know for how long. On April 16, 2007, defendants retained this firm. On or about April 17, 2007, the undersigned spoke with the attorney for plaintiff and requested an extension of time to answer for two weeks, which extension was granted orally based upon our waiving any jurisdictional defenses to the service of process." The L'Abbate, Balkan firm was relieved as attorney for defendants by order of this Court dated May 2, 2007.

Rather than interpose an answer, the defendants by their third and present attorney have now brought the within motion pursuant to CPLR 3211(a)(7) and (8) to dismiss the complaint.

The Agreement dated May 11, 2006, and the Addendum to Agreement that is the basis of the within action was executed between Steven Kinzelberg, plaintiff and Richard Rubens, as President of Design Quest, Ltd., the named defendants. Defendant Richard Rubens in his affidavit in support sworn to June 14, 2007 admits that he failed to pay the franchise taxes for Design Quest, Ltd. and allowed it to be dissolved well before the transactions at

issue. Defendant Rubens claims that since 1992 he has been President of an interior design firm which has been operated through a New Jersey corporation named "Messardiere Design Quest, Inc. with its New York business address listed at 575 Madison Avenue, New York, N.Y. Plaintiff asserts that during his entire dealings with defendants he was led to believe that he was doing business with "Design Quest Limited," a New York corporation and not "Messardiere Design Quest Ltd." Checks were payable to Design Quest Ltd. and endorsed by Design Quest Ltd. (Exhibit E Affidavit in Opposition).

A dissolved corporation has no existence, either *de jure* or *de facto*, except for a limited *de jure* existence for the sole purpose of winding up its affairs. Generally, a person who purports to act on behalf of a corporation that has neither a *de jure* nor a *de facto* existence is personally responsible for the obligation that he incurs. An individual with no actual knowledge of the dissolution and who has not fraudulently represented the corporate status of the dissolved entity will not be held personally liable for the obligations undertaken by the entity while it was dissolved. See *Lodato v Greyhawk North America, LLC*, 39 AD3d 496 citing *Brandes Meat Corp. v Cromer*, 146 AD2d 666; *Bedford Hills Supply v Hubert*, 251 AD2d 438; *Flushing Plaza Assoc. #2 v Albert*, 31 AD3d 494.

Plaintiff has satisfied the service requirements of CPLR 302(2) by delivering the summons to a person of suitable age and discretion at defendant's place of business (575 Madison Avenue,

New York, N.Y.) and by mailing a copy to defendants' place of business. The application to dismiss the complaint pursuant to CPLR 3211(a)(8) on the grounds that the Court lacks jurisdiction is denied.

The agreement between the plaintiff and defendants provided for the performance of interior design services for the plaintiff by the defendants. The complaint sets forth viable causes of action sounding in breach of contract, fraudulent concealment, fraud and restitution. The specificity of the allegations in the complaint are more than adequately amplified and expanded upon in the affidavit in opposition. Plaintiff alleges defendants inflated invoices, added "bogus" charges, and failed to deliver goods for which payment was made. A complaint will be sustained where supporting affidavits are sufficiently detailed to apprise the defendants of the conduct upon which the claim is based. See *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409. The application to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) is denied.

Attorney for plaintiff agreed to accept late service of an answer upon defendants agreeing to waive any jurisdictional defects. The response to the plaintiff's attorney's request was to be served with this motion. The attorney for the defendants states that he had conversations with plaintiff's attorney explaining that the wrong corporate entity was named and that he would accept service of the amended complaint naming the "proper parties," thereby curing the alleged "errors in connection with the actual

parties in interest and service." Curiously he does not expressly indicate he would waive any jurisdictional defects. Moreover, there is no motion now before the Court by the defendants to amend the caption to substitute Messardiere Design Quest, Inc. as the proper party defendant and consent to jurisdiction. See CPLR 1002; CPLR 1003; CPLR 8020(a). Until further order of the Court, or stipulation by the parties, the defendants in this action are Design Quest Ltd. and Richard Rubens, individually.

The Court has considered defendants' request for sanctions and finds it to be baseless.

Counsel familiar with this action shall appear at the Preliminary Conference previously scheduled for November 1, 2007. Also, counsel are admonished that the bringing of further motions shall not stay discovery, which is to proceed in an expeditious manner.

This decision is the order of the Court.

Dated: OCT 31 2007



 KENNETH A. DAVIS J.S.C.

ENTERED
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 NASSAU COUNTY
 COUNTY CLERK'S OFFICE