

Biscuits & Bath Cos., LLC v Canciglia

2008 NY Slip Op 30691(U)

March 5, 2008

Supreme Court, New York County

Docket Number: 0602765/2007

Judge: Richard B. Lowe

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

PRESENT:

PART 56

HON. RICHARD B. LOWE, III Justice

Index Number : 602765/2007

BISCUITS & BATH COMPANIES

VS.

CANSIGLIA, JOSEPH

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 1/28/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

d 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

FILED
MAR 12 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III

Dated: 3/5/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

DEFERENCE

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

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

..... X
BISCUITS & BATH COMPANIES, LLC,

Plaintiff,

Index No.: 602765/07

-against-

JOSEPH CANCIGLIA, LYNNE PALMIERI and
CELEBRITY DOG WALK, INC.,

Defendants.

FILED
MAR 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Richard B. Lowe, III:

Defendants Celebrity Dog Walk, Inc ("Celebrity") and Joseph Canciglia ("Canciglia")
move to dismiss the causes of action against them pursuant to CPLR § 3211 (a)(4)¹, because
there is a pending action between these parties in another court, and CPLR § 3211 (a)(7), for
failing to state a cause of action as to eleven of the twelve counts against them.

BACKGROUND

The following statement of facts are taken from the Complaint. On October 1, 2005,
Bisuits & Bath Companies LLC ("B&B") purchased certain of the assets of Celebrity for
\$15,000, with the possibility of revenue sharing with Canciglia, based on B&B reaching certain
profit levels from revenue generated by Celebrity's client list. The details of the purchase were
confirmed in an unexecuted Term Sheet that included the obligations of the parties under this
agreement. The Term Sheet provides that B&B will purchase Celebrity's entire client list, its
name, logo, and trademarks, client contact information, and all of Celebrity's accounts

Defendants initially raised the argument that B&B's complaint should be dismissed pursuant to §
3211 (a)(5), because the complaint was twice voluntarily discontinued, which constitutes an
adjudication on the merits pursuant to § 3217 (c). However, in Celebrity's reply affirmation in
further support of defendant's motion to dismiss, it withdrew this argument and relies upon its §
3211 (a)(4) dismissal argument (*Reply Affidavit* p 5, FN3).

receivable. It also states that Celebrity will provide personal introductions, and relationship maintenance with clients, employees, and 3rd parties; respond to Celebrity inquiries for a period of six months; help with scheduling until a transition is complete; ensure that no employees are solicited for other employment; and execute a non-compete agreement with B&B. (Complaint Exhibit 1.)

Within several months of B&B's purchase of Celebrity's assets, relations between the parties began to sour. Lynne Palmieri ("Palmieri"), one of Celebrity's employees who was picked up by B&B, decided to leave after consultation with Canciglia. Canciglia also purportedly contacted several former Celebrity clients now with B&B and told them that B&B was incapable of providing the dog-walking services they sought, and that Palmieri would in the future be walking their dogs.

One of the central points of tension between the parties was whether quarterly revenues that failed to meet revenue-sharing marks carried over into the following quarter. Once the parties agreed to the sale of Celebrity's assets, B&B did not meet revenue-sharing marks in even one quarter. Because B&B believed those revenues did not carry over, Canciglia received no further payments from B&B. As a result, an action pending before this court, *Celebrity Dog Walk, Inc. v Biscuits & Bath Pet Services, Inc et al* (Index No 601254/06 (the "Celebrity Action")) was brought for *inter alia*, breach of contract, unjust enrichment, and fraud.

There are currently three related cases pending on this matter, two of which are pending before this court: this instant action and the Celebrity Action. There is also one currently pending in the Civil Court of New York County, *Biscuits & Bath Companies, LLC v. Joseph Canciglia and Celebrity Dog Walk, Inc.* (601755/06; 300359 TNS 2007) (the "Civil Court Action"), for fraud in the inducement, wrongful and unjust acts, and breach of contract.

Canciglia and Celebrity now move to dismiss the claims against them on two separate grounds. First, Defendants argue that eleven of the twelve counts against Canciglia and Celebrity should be dismissed pursuant to CPLR § 3211 (a)(7), for failure to state a cause of action. Defendants also argue this instant matter should be dismissed under CPLR § 3211 (a)(4), because the Civil Court Action is currently pending between these parties.

DISCUSSION

Motion to Dismiss Pursuant to § 3211 (a)(7)

On a CPLR § 3211 (a)(7) motion to dismiss, the facts alleged in the complaint must be accepted as true, and the court may freely consider additional facts contained in affidavits submitted by the plaintiff to remedy any defects in the complaint. (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The plaintiff must be afforded the benefit of every possible favorable inference, as the court's function is limited to determining whether the facts alleged fit within any cognizable legal theory. (*see Goldfarb v Schwartz*, 26 AD3d 462, 463 [2d Dep't 2006]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Piercing the Corporate Veil

B&B seeks to hold Canciglia liable alleging he exercises complete domination over Celebrity.

In New York, it is well settled that piercing the corporate veil requires showing that 1) the owner exercised "complete dominion of the corporation in respect to the transaction attacked; and 2) that such domination was used to commit fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dep't 1995]). Further, an action to pierce the corporate veil requires a particularized statement

detailing fraud or other corporate misconduct. (*Walkovszky v Carlton*, 18 NY2d 414, 417 [1966]).

Here, accepting the Plaintiff's allegations as true for purposes of this motion, B&B has alleged particularized facts sufficient to show that Canciglia dominated Celebrity as his own, but has failed to sufficiently allege that such domination was used to commit fraud against B&B which resulted in its injuries. B&B alleges that Canciglia disregarded corporate formalities, treated himself and the corporation as one, and commingled funds. The plaintiff submits an email from Canciglia to B&B's chief executive officer, Scott Smith ("Smith"), whereby he states that the "Company [Celebrity] currently pays expenses of car, garage, apartment rent, insurance (both liability/car) and phone." (Complaint Exhibit 6.) Further, while discussing the possible payment options B&B could employ in purchasing Celebrity's assets, Canciglia told Smith that the check could be issued to Canciglia personally. (Complaint Exhibit 7.) B&B also alleges Canciglia implied that he would refer between 3-5 clients per week to B&B primarily from the then existing Celebrity website and Celebrity telephone number posted thereon. (Complaint ¶ 17).

While B&B does sufficiently plead allegations which, if proven true, may establish a domination of Celebrity Dogwalk by Canciglia, it fails to show how the domination was used to defraud the plaintiff. Plaintiff seems to rely on the representations by Canciglia that he would refer clients to B&B. This is not sufficient to connect his domination over the Celebrity to fraudulent purposes. Therefore, B&B's allegations seeking to pierce the corporate veil are not viable.

Fraud in the Inducement

To establish a cause of action for fraud in the inducement, at the very threshold, plaintiff must allege a misrepresentation or material omission by defendant, on which it relied, that

induced plaintiff to enter the contract. (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim. (*Id.*). Additionally, any claim of fraud that also accompanies a breach of contract claim must seek damages that would not be recoverable under the contract measure of damages. (*see 34-35th Corp. v 1-10 Industry Associates, LLC*, 2 AD3d 711, 712 [2d Dep't 2003]). Finally, where a cause of action or defense is based on misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail. (CPLR § 3016 [b]).

Here, B&B alleges that while B&B and Celebrity were negotiating the sale of Celebrity's assets to B&B, Canciglia represented that Celebrity got between 3-5 new clients per week, and implied that B&B would get the same amount of client referrals per week if it purchased all of Celebrity's assets. However, B&B fails to show how it relied on these statements to its detriment. Moreover, this is nothing more than a claim for damages stemming from Celebrity's failure to refer clients to B&B. This fits within an action for breach of contract, but falls well short of satisfying the high standard for fraud. Accordingly, Defendant's motion to dismiss the claims of fraud in the inducement against Canciglia and Celebrity must be granted.

Wrongful and Unjust Acts

Plaintiff alleges Celebrity and Canciglia committed the tort of wrongful and unjust acts by failing to abide by the terms and conditions of the Term Sheet for minimum periods of time during which they were to refer clients to Plaintiff, establish employee retention accounts, engage in relationship management with former Celebrity employees who became employees of Plaintiff and aid in dog walk scheduling. (Complaint ¶ 43.) These claims must be dismissed because they are predicated on the same occurrences and transactions as the claims for breach of

contract and fraud in the inducement, and are therefore duplicative of those causes of action.

(see *Sergeants Benev. Ass'n Annuity Fund v Renck*, 19 AD3d 107, 118 [1st Dep't 2005]).

Breach of Contract

Defendants move to dismiss breach of contract claim against Canciglia.² The first issue that has to be addressed is whether the Term Sheet applies at all to Canciglia in his individual capacity, or whether the Term Sheet was only binding against Celebrity. The Term Sheet itself specifically refers only to the agreement between Celebrity and B&B. Nowhere is there a reference to Canciglia in his individual capacity, or to Canciglia at all.

The only executed document between B&B and Canciglia is a non-compete agreement that is signed by Canciglia in his individual capacity and internally references the Term Sheet. Specifically it states "You [Canciglia] have agreed that for a period of 18 months from the closing date or October 1, 2005, you will work with Biscuits & Bath on the terms and conditions in the "Term Sheet" between us, dated October 1, 2005, and shall be paid a percentage of the revenue generated by the client list, also as stated in the Term Sheet." (Complaint Exhibit 4.) Therefore, the only way the Term Sheet can be binding on Canciglia, individually, is if the non-compete agreement he signed in his individual capacity incorporated the terms of the Term Sheet into that non-compete agreement. For the following reasons, this Court finds the Term Sheet was not incorporated into the non-compete agreement and is therefore only binding on Celebrity.

In *Salzman Sign Co. v Beck* (10 N.Y.2d 63, 66-7 [1961]), the Court of Appeals stated that "[i]n modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice once as an officer and again as an

² Defendants do not make any arguments for dismissing the breach of contract claim against Celebrity, therefore that count of B&B's complaint remains.

individual.” Further, it is a well “settled rule that an agent for a disclosed principal ‘will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal.’” (*id.*, citing *Mencher v Weiss*, 306 NY 1, 4 [1951]).

Here, the only signed document by Canciglia is the non-compete agreement. B&B argues that because he signed this document in his individual capacity he bound himself in his individual capacity to the Term Sheet as well. However, the Court of Appeals is quite clear that in order for an individual acting on behalf of a corporation to become personally liable for the obligations of the Corporation, there must be a clear intent to create such liability by the individual seeking to become bound. It would have made no sense for Canciglia to sign the non-compete agreement in any manner but his individual capacity, because the primary purpose of that document was to secure Canciglia’s loyalty, essentially as one of the assets purchased by B&B, to B&B for the next 18 months. Although the non-compete agreement clearly says that Canciglia “will work with Biscuits & Bath on the terms and conditions in the ‘Term Sheet’ between us,” this says nothing more than what was already understood by the parties, namely, that because Canciglia was Celebrity’s principal, he was going to be doing most of the work to facilitate the smooth transition discussed in the Term Sheet. This language fails to demonstrate Canciglia’s intent to bind himself individually to the Term Sheet. Instead, the clear intention of this language is that Canciglia, as owner and employee of Celebrity, will work with B&B during the coming months to ensure that the transition of Celebrity’s assets to B&B occurs smoothly and profitably for both sides. Further, because Canciglia only signed the non-compete agreement, and because the Term Sheet was left unexecuted, B&B fails to satisfy the standard for individual liability. Therefore, because the Term Sheet does not apply to Canciglia, the only breach claim that can survive against him is the breach of the non-compete agreement.

Accordingly, Defendants motion to dismiss the breach of the Term Sheet claim brought against Canciglia is granted.

Unjust Enrichment

B&B paid Celebrity and Canciglia \$15,000 to purchase certain Celebrity assets, and now B&B claims that Celebrity and Canciglia were unjustly enriched by retaining the \$15,000 when they failed to perform certain obligations arising from the Term Sheet and non-compete agreement.

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. (*Blanchard v Blanchard*, 201 NY 134, 138 [1911]). Briefly stated, a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. (*Bradkin v Leverton*, 26 NY2d 192, 196 [1970]). The law creates it, regardless of the intention of the parties, to assure a just and equitable result. (*Id.*) As the Court of Appeals has stated,

The essential inquiry in an action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent.

(*Paramount Film Distributing Corp. v State*, 30 NY2d 695, 698 (1972) [internal citations omitted]).

Here, B&B alleges that because it paid \$15,000 pursuant to the conditions of the Term Sheet, and never received any of the client referrals it expected from the Celebrity website and phone number, Celebrity and Canciglia were unjustly enriched.

The \$15,000 was paid to Celebrity pursuant to the Term Sheet between the parties. This court has already found that the piercing the corporate veil claim holding Canciglia personally liable for Celebrity cannot stand. The money was received by Celebrity and not Canciglia individually and the unjust enrichment claim is dismissed as to him. Furthermore, because it was paid pursuant to the Term Sheet, the unjust enrichment claim is precluded by the breach of contract cause of action which remains against Celebrity.

Trade Defamation

“Trade defamation is the knowing publication of a false matter derogatory to the plaintiff’s business calculated to prevent or interfere with relationships between the plaintiff and others to its detriment.” [*Jurlique, Inc. v Austral Biolab Pty., Ltd.*, 187 AD2d 637, 638 [2d Dep’t 1992)]. The communication must play a material and substantial part in inducing others not to deal with the plaintiff. *Id.* Additionally, under CPLR § 3016 (a), in an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally. The Appellate Division held in (*Gardner v Alexander Rent-A-Car, Inc.*, 28 AD2d 667, 667 [1st Dep’t 1967]), that this requirement is strictly enforced and the exact words must be set forth. Any qualification in the pleading thereof by use of the words ‘to the effect’, ‘substantially’, or words of similar import generally renders the complaint defective. (*Id.*)

Here, Canciglia purportedly told clients of B&B that it could not perform its dog walking services competently. Specifically, the complaint itself merely states that Canciglia “as an officer of and on behalf of Celebrity contacted certain of Plaintiff’s clients and falsely disparaged them.” (Complaint ¶ 73.) The complaint does not indicate when these statements were made, or to whom they were made, and does not even come close to addressing what Canciglia told the clients. The Plaintiff’s complaint fails to state a cause of action for trade

defamation because it fails to meet its pleading standard as required by § 3016 (a). This failure to plead facts sufficient for a trade defamation claim requires granting Defendant's motion to dismiss the trade defamation claims against Canciglia and Celebrity.

Canciglia's Breach of Non-Compete Agreement

B&B alleges that Canciglia breached the non-compete agreement that he executed on or about October 1, 2005. B&B refers specifically to the catch-all provision at the end of the paragraph discussing non-competition with B&B where it says that Canciglia will not compete with B&B "in the dog walking business either on your own, by hiring employees, in any sort of partnership or joint venture, in the guise of any corporate entity *or any other way.*" (Complaint Exhibit 4.)

B&B's theory is that Canciglia solicited Palmieri by encouraging her to leave B&B and to take clients with her, thereby entering into competition with B&B. Assuming these allegations are true, this competitive conduct is sufficient to establish a triable issue of fact as to whether Canciglia breached his non-compete agreement with Celebrity. As a result, Celebrity's motion to dismiss this count of the complaint is denied.

Canciglia's Tortious Interference with At-Will Contract

In a claim for tortious interference with contractual relations, four elements must be shown: 1) the existence of an enforceable contract, 2) the defendant's knowledge of the existence of that contract, 3) the intentional procurement by the defendant of the breach of the contract, and 4) resultant damages to the plaintiff. (*Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 111 [1st Dep't 2002]). Additionally, the Court of Appeals has stated that in the context of contracts terminable at will, tortious interference claims have been sustained where the interference resulted from wrongful means, such as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of

economic pressure. (*Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190-91 [1980]). However, the Court of Appeals has made an exception to this rule where “a defendant engages in conduct ‘for the sole purpose of inflicting intentional harm on plaintiffs.’” (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

Here, the contract at issue between Lynne Palmieri and B&B expressly states that it is terminable at will. Canciglia admitted supporting Palmieri’s decision to quit B&B. However, in Palmieri’s affidavit attached to Celebrity’s motion to dismiss, she states that “neither Joseph Canciglia nor anyone at Celebrity encouraged me to resign from my employment with Biscuits & Bath.” (Palmieri Affidavit ¶ 2.) In Smith’s affidavit attached to Plaintiff’s affirmation in opposition of the motion to dismiss, Palmieri admitted to the President of B&B at a lunch meeting that Canciglia encouraged her to leave B&B and would support her taking former Celebrity clients with her. (Smith Affidavit ¶ 24.) Assuming this is true, this does not amount to “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure,” as required by the Court of Appeals in *Guard-Life Corp.*, in order to sustain a tortious interference claim for an employment contract at will. Therefore, Celebrity’s motion to dismiss this count of B&B’s complaint is granted.

Motion to Dismiss Pursuant to § 3211 (a)(4)

Defendants also argue that B&B’s complaint should be dismissed pursuant to § 3211 (a)(4), which states that “a party may move for judgment dismissing one or more of the causes of action asserted against him on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States.” To dismiss pursuant to § 3211 (a)(4), the causes of action need not be identical (*McKinney’s Practice Commentary C3211:15*). It need not even be shown that they are pursuing the same theories (*Id*). The test to determine if the same cause of action is involved in two separate cases is

whether: “(1) both suits arise out of the same actionable wrong or series of wrongs, and (2) as a practical matter, is there any good reason for two actions rather than one being brought in seeking the remedy?” (*Id.*). Further, “neither the difference in the amounts demanded in the two causes nor the characterization of a portion of the sum sought in the federal action as ‘punitive’ creates, in and of itself, a substantial difference between the actions.” (*Stanley Electric Service, Inc. v City of New York*, 26 AD2d 951, 950 [2d Dep’t 1966] citing *Berman v Medical Soc. of State of New York*, 23 AD2d 98, 100 [1st Dept 1965]).

Despite its tortured history, the Civil Court Action is pending and active. It was originally filed as related to the Celebrity Action pending before this court. It sought damages in the amount of \$30,000.00 and this court, deeming it not substantially related, transferred it to a non commercial part.³

Shortly thereafter, B&B filed an amended complaint based on essentially the same factual allegations as the initial complaint but added Celebrity as a defendant and asserted additional causes of action, including fraud claims. All of the causes of action filed pursuant to the amended complaint sought damages in the identical amount of \$15,000. After Celebrity and Canciglia filed a motion to dismiss the Amended Complaint and while such motion was pending, the Presiding Justice to whom the action had been reassigned, removed the action to the Civil Court pursuant to CPLR 325(d) on May 15, 2007 (Notice of Motion Exhibit F). The Presiding Justice also went on to deny the motion to dismiss with leave to renew in the Civil Court (*Canciglia Reply Aff* Exhibit B).

On or about May 29, 2007, B&B represented to Defendant that it filed Notice of Withdrawal pursuant to which it sought to withdraw the Civil Court Action (Notice of Motion Exhibit E). The Defendant accepted this representation. However, the Notice of Withdrawal

³The monetary threshold for a matter to be heard in the Commercial Division is \$100,000.00 (§ 202.70 (a) Uniform Rules of the Supreme and County Courts).

was never filed and the action is still pending in Civil Court (*Canciglia Reply Aff* ¶ 9; see also Exhibit C to the Canciglia Reply Aff).

The Amended Complaint in the Civil Court action includes counts against Celebrity and Canciglia for fraud in the inducement, breach of contract, and wrongful and unjust acts (Notice of Motion Exhibit D). The complaint in this instant matter involves substantially the same parties in Celebrity and Canciglia and involves the same underlying events and transactions. The primary difference between this action and the Civil Court Action is the amount of damages sought respectively.

Defendants argue the only reason this instant action was brought was because B&B wanted its claims to be heard in the Commercial Division of the New York County Supreme Court, and thus it simply filed a complaint and increased the damages sought to the requisite levels for the Commercial Division to have jurisdiction over the case. It appears there is merit to this argument. Indeed, upon review of the two complaints, it is plainly evident the plaintiff has raised the same allegations and without explanation increased the amount of damages sought for each cause of action. The damages sought in the Civil Court action are \$15,000 and in this instant action \$750,000. One difference is that this matter, unlike the Civil Court Action, has a claim for trade defamation, however this court has determined it to not be viable. Furthermore, as previously discussed, the fraud claims are not viable. What remains in this action is the breach of contract claim against Celebrity and a claim against Canciglia for breach of the non compete agreement; both of which are pending concurrently in the Civil Court Action.

Therefore, the motion to dismiss B&B's complaint pursuant to § 3211 (a)(4) is granted.

CONCLUSION

Therefore, based on the foregoing, it is hereby


ORDERED that the motion to dismiss pursuant to CPLR § 3211(a)(7) is granted to the extent that the first, second, third, fourth, fifth, seventh, eighth, ninth, twelfth, and thirteenth causes of action are dismissed and it is further

ORDERED that Celebrity's motion to dismiss B&B's complaint pursuant to § 3211 (a)(4) is granted and the remainder of the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the court; and it is further

ORDERD that the Clerk is directed to enter judgment accordingly.

This shall constitute the Order and Decision of the Court.

Dated: March 5, 2008

ENTER


J.S.C.

FILED
MAR 17 2008
NEW YORK
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FILED
MAR 12 2008
NEW YORK
COUNTY CLERK'S OFFICE