

**Jantek, Inc. v Jaymar Mktg., Inc.**

2008 NY Slip Op 32779(U)

October 1, 2008

Supreme Court, Nassau County

Docket Number: 23208/07

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**JANTEK, INC., d/b/a JANTEK COMPUTERS,  
Plaintiff,**

**Motion Sequence #1, #2  
Submitted July 29, 2008**

**-against-**

**INDEX NO: 23208/07**

**JAYMAR MARKETING, INC. and CRESCENT  
BEACH CLUB, INC.,**

**Defendant.**

**The following papers were read on these motions:**

<b>JANTEK Notice of Motion.....</b>	<b>1</b>
<b>JAYMAR Notice of Cross-Motion.....</b>	<b>2</b>
<b>Affirmation in Opposition to Cross-Motion and in Support.....</b>	<b>3</b>
<b>Affidavit in Support of Motion in Chief.....</b>	<b>4</b>
<b>Reply Affidavit.....</b>	<b>5</b>
<b>Sur-Reply Affirmation.....</b>	<b>6</b>
<b>Sur-Reply Affidavit.....</b>	<b>7</b>

Plaintiff, JANTEK, INC. d/b/a JANTEK COMPUTERS (hereinafter referred to as "JANTEK"), moves for an order permitting it to amend the caption of the complaint to correctly identify defendant as 333 BAYVILLE AVENUE RESTAURANT CORP. (hereinafter referred to as "BAYVILLE") d/b/a THE CRESCENT BEACH CLUB (s/h/a CRESCENT BEACH CLUB, INC and hereinafter referred to as "CRESCENT"), and to amend the original complaint with respect to the computation of the charges for goods and services alleged to be due and owing in this breach of contract cause of action.

Defendant, JAYMAR MARKETING INC. (hereinafter referred to as "JAYMAR"), does not oppose that part of the motion that seeks to amend the caption to correctly name BAYVILLE as the defendant, but opposes the request to increase its demand for damages. Additionally, JAYMAR cross-moves for an order dismissing plaintiff's complaint for willful failure to comply with disclosure or, in the alternative, for an order directing JANTEK to respond to JAYMAR's Notice for Discovery and Inspection, dated February 22, 2008. The motion and cross-motion are determined as follows:

As to the Cross-Motion

Counsel for JAYMAR states, without challenge, that counsel for JANTEK advised him that a response to JAYMAR's Notice For Discovery and Inspection, dated February 22, 2008, was forthcoming. Counsel for JAYMAR relates that he sent a letter and then telephoned JANTEK in late March or early April seeking a response from plaintiff. In response to the letter, counsel for JANTEK advised that the principal of JANTEK was out of the country and that, upon his return in a few weeks, a written response to the Notice for Discovery and Inspection and responsive documents would be produced, by the end of April.

Notwithstanding the foregoing unchallenged representation, counsel for JANTEK now argues that the requested disclosure was not yet due. He contends that such disclosure is not due until after the complaint is amended to correctly name the additional defendant. 333 BAYVILLE AVENUE RESTAURANT, CORP. d/b/a CRESCENT BEACH CLUB. Counsel for JANTEK fails to support his argument for a stay of discovery with a citation to any authority supporting his position. It is noted that the requested disclosure is of critical significance as JAYMAR avers that plaintiff's alleged damages, including the demanded retainer charges for the years 2002-2004, are newly invented to retaliate

against JAYMAR for failing to continue the business relationship, and have never been billed before this lawsuit. JANTEK's failure to bill for the charges at the time they were incurred lends credence to defendant's allegations. Accordingly, plaintiff shall provide the requested disclosure as directed hereinafter, and in accordance with the dictates of *Wilensky v JRB Marketing & Opinion* 161 AD2d 761, 556 NYS2d 356 (2d Dept 1990), as follows:

[I]f a particular document or record specified in the . . . notices to produce . . . was never made, is no longer in existence, or is not within [plaintiff's] custody or control, and therefore incapable of being produced . . . then an officer or employee of the [plaintiff] with knowledge of the facts shall so state by detailed affidavit setting forth with respect to each such document or record the reason why it was not made, or if made and then destroyed, the date upon which it was destroyed, by whom, and the reason therefor, and if a particular document is still in existence but not within the [plaintiff's] custody or control, the place where and the person into whose custody or control it was put and when. . .

*Wilensky v JRB Marketing & Opinion, supra.*

#### As to the Motion in Chief

With respect to amending the caption, it appears that the summons and complaint for both named defendants, JAYMAR and CRESCENT, was served upon Pauline Seidel as managing agent on January 25, 2008. The answer avers that there is no such entity as CRESCENT BEACH CLUB, INC.

Relevant to a determination of this issue is a Trade Name Certificate on file with the Nassau County Clerk which reveals that "The Crescent Beach Club" is the assumed name of 333 BAYVILLE AVENUE RESTAURANT CORP. (BAYVILLE), and that BAYVILLE has been doing business as THE CRESCENT BEACH CLUB since July of 1992. It was JANTEK's belief that the management of JAYMAR and CRESCENT are one and the same. Defendants do not contest this belief, or in any manner indicate that BAYVILLE

d/b/a CRESCENT BEACH CLUB was not the entity served, i.e., that Pauline Seidel is not the general manager of BAYVILLE. The complaint was served on CRESCENT BEACH CLUB, INC. and the included invoices contain the names of employees of “the Crescent”, presumably the employees of THE CRESCENT BEACH CLUB, i.e. BAYVILLE.

Under the foregoing circumstances a two-part test is used to determine whether the misnaming of the defendant should be treated as a mere irregularity that is subject to cure under CPLR 305(c) or a jurisdictional defect warranting dismissal. The first part of the test requires that process must have been properly served on the intended defendant, and the second, that the intended defendant was “fairly apprised” that it was the party intended to be sued”. See, *Benware v Schoenborn*, 198 AD2d 710, 604 NYS2d 290 [3d Dept 1993]. “Such amendments are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue”. *Creative Cabinet Corp. of America, Inc. v Future Visions Computer Store*, 140 AD2d 483, (2d Dept 1988); see also *Abilia v Hillcrest General Hospital*, 124 AD2d 499, 508 NYS2d 10 (1st Dept 1986); *Ryan v Nationwide Mutual Ins. Co.*, 20 AD2d 270, 247 NYS2d 243 (4th Dept 1964); *Ober v Rye Town Hilton*, 159 AD2d 16, 557 NYS2d 937 (2d Dept 1990); CPLR 305(c).

As proposed defendant, BAYVILLE, has not indicated that it was not served, properly or otherwise, and as the complaint properly names the defendant sued except to the addition of an “INC.” to its assumed name, the court finds the defect to be an irregularity and grants the motion to amend the complaint and the summons. While the consequences here could have been avoided if the public record of assumed business names had been searched (see, *Hitchcock v Pyramid Centers of Empire State Co.*, 151

AD2d 837, 542 NYS2d 813 [3d Dept 1989]), nevertheless no prejudice has accrued to BAYVILLE.

Turning to the second prong of JANTEK's motion, plaintiff makes an extraordinary application. It seeks to change the originally alleged and verified contract price and allow plaintiff to ask for greater damages because the parties are no longer on cordial terms. The request is couched in terms of withdrawing a previously given discount. The actual request is to allow plaintiff to unilaterally charge more than previously agreed to. Unless plaintiff can offer grounds in the alleged agreement which permit a unilateral withdrawal of a discount or change of the agreed upon price after performance, the request is without merit. Plaintiff cannot seek more in payment than the contract price. The court's liberal attitude toward pleading amendments was not intended to encompass such disingenuous requests, or untoward results. Plaintiff does not even purport to base the request upon contract grounds, and accordingly, the application is denied.

Based on the foregoing, it is hereby

**ORDERED**, that JANTEK's motion to amend the caption of the summons and complaint is granted, without opposition, and the caption shall henceforth read, as follows:

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

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**JANTEK, INC. d/b/a JANTEK COMPUTERS**  
**Plaintiffs,**

**-against-**

**INDEX NO: 23208/07**

**JAYMAR MARKETING, INC. and 333  
BAYVILLE AVENUE RESTAURANT CORP.**  
**d/b/a THE CRESCENT BEACH CLUB,**  
**Defendants.**

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and it is further

**ORDERED**, that JANTEK's motion to amend the original complaint with respect to the computation of the charges for goods and services alleged to be due and owing is denied; and it is further

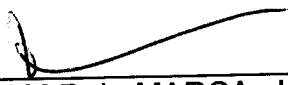
**ORDERED**, that JAYMAR's cross-motion to dismiss the complaint is denied but is granted in the alternative and JANTEK is directed to fully respond to JAYMAR's Notice for Discovery and Inspection, dated February 22, 2008, within ten (10) days after service of a copy of this order upon its counsel with notice of entry, or provide an explanation why the demanded material or any part thereof is not available in accordance with *Wilensky v JRB Marketing & Opinion Research, supra*. Failure to respond as directed may result in penalties pursuant to CPLR §3126; and it is further

**ORDERED**, that the parties shall appear for a Preliminary Conference on November 6, 2008, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 1, 2008

  
WILLIAM R. LaMARCA, J.S.C.

**ENTERED**

OCT 07 2008

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