

<b>Barbarz Lane Interior Design, LLC v Tisch</b>
2008 NY Slip Op 33457(U)
December 17, 2008
Supreme Court, New York County
Docket Number: 105862/08
Judge: Milton A. Tingling
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MILTON A. TINGLING**

PART 44

J.S.C. Justice

Index Number : 105862/2008

**BARBARA LANE INTERIOR DESIGN, LLC**

VS.

**TISCH, DANIEL**

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 105862-08

MOTION DATE 8/6/08

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

re read 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 *is* decided in accordance with annexed decision.

**FILED**

DEC 30 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 12/17/08

mat J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 44

-----x  
BARBARA LANE INTERIOR DESIGN, LLC,

Plaintiff,

Index No.: 105862/08

-against-

DECISION AND ORDER

DANIEL TISCH and BONNIE TISCH,

Defendants.

-----x  
TINGLING, J.

**FILED**

DEC 30 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**FACTUAL BACKGROUND**

Defendants move, pursuant to CPLR 3211 (a) (5), to dismiss the complaint upon the grounds that plaintiff does not have the legal capacity to sue. Plaintiff has cross-moved, pursuant to CPLR 305 (c), to amend the complaint to reflect a misnomer of its name in the caption.

On December 7, 2005, the defendants and an entity entitled Barbara Lane Interior Design, currently a non-party to this action, contracted for renovation, interior design and furnishing services for defendants' apartment. The contract was signed by Barbara Lane. In April of 2008, Barbara Lane Interior Design, LLC instituted the present action based on a breach of that contract. Defendants' motion is premised on the fact that Barbara Lane Interior Design, LLC, a fictitious person, does not appear as one of the contracting parties to the agreement in

question.

Barbara Lane Interior Design, LLC was formed in New York as a limited liability company on December 5, 2003. Plaintiff asserts that it does business as "Barbara Lane Interior Design," and seeks to amend the caption to so indicate. It is noted that plaintiff only filed a DBA form after the suit was commenced.

Defendants oppose the crossmotion to amend the caption, alleging that they would be unduly prejudiced because they have counterclaims against Barbara Lane individually, and to permit her to amend the caption could shield her from personal liability.

#### **DISCUSSION**

CPLR 3211 (a) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... (3) the party asserting the cause of action has not legal capacity to sue." Defendants contend that because the contract in question was between them and an individual, and the limited liability company plaintiff is not named or indicated in the agreement, plaintiff lacks standing to sue. *See Kripke v Benedictine Hospital*, 255 AD2d 725 (3d Dept 1998).

Plaintiff seeks to amend the caption to indicate that it conducts business under the name that does appear as the contracting party to the agreement.

CPLR 305 (c) provides, "[a]t any time, in its discretion

and upon such terms as it deems just, the court may allow any summons ... to be amended, if a substantial right of a party against whom the summons issued is not prejudiced."

"Mistakes relating to the name of a party, involving a misnomer or misdescription of the legal status of a party surely fall within the category of those irregularities which are subject to correction by amendment, particularly when the other party is not prejudiced ... ."

*Cutting Edge, Inc. v Santora*, 4 AD3d 867, 868 (4<sup>th</sup> Dept 2004).

Examples of instances in which courts have determined that the other party would be prejudiced by amendment are generally limited to actions that would be time-barred but for the amendment (*Neggy Travel Service, Inc. v Sabena Belgian World Airlines*, 56 AD2d 537 [1<sup>st</sup> Dept 1977]) or actions in which so much time has elapsed that necessary witnesses have died or disappeared (*Chemicraft Corp. v Honeywell Protection Services*, 161 AD2d 250 [1<sup>st</sup> Dept 1990]). The only prejudice alleged by defendants is that they may have claims against Barbara Lane in her individual capacity, and are concerned that the limited liability status of plaintiff could limit or preclude recovery. However, amending the instant caption in no way legally limits defendants from maintaining an action against Barbara Lane if such action is supported by law.

Plaintiff is actually registered as a limited liability company with the Department of State, and was so registered two years before the contract in question was executed. Under such

circumstances, plaintiff should be allowed to amend the caption to indicate that it conducts business under the name "Barbara Lane Interior Design." *Unique Laundry Corp. v Hudson Park NY LLC*, 55 AD3d 382 (1<sup>st</sup> Dept 2008). Since the action was timely commenced, defendants will not be prejudiced by the amendment. *Staheli v Aetna Ins. Co.*, 52 AD2d 754 (4<sup>th</sup> Dept 1976).

Section 2100 of the CPLR allows a court, at any stage of an action, to permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just. *Fink v Regent Hotels, Ltd.*, 234 AD2d 39 (1<sup>st</sup> Dept 1996). In the interests of judicial economy, it makes more sense to permit the amendment than to require the suit to be recommenced with the corrected caption.

#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that plaintiff's crossmotion to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the Clerk of the Court shall amend the caption of the complaint as follows:

Barbara Lane Interior Design, LLC d/b/a

Barbara Land Interior Design,

Plaintiff,

-against-

Daniel Tisch and Bonnie Tisch

Defendants.

It is hereby further

ORDERED that defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

Dated: 12/17/08

ENTER:

mat

Milton A. Tingling, J.S.C.

**HON. MILTON A. TINGLING  
J.S.C.**

**FILED**

DEC 30 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**