

**WinedineNY Inc. v Cruise Link Inc.**

2009 NY Slip Op 32842(U)

December 2, 2009

Supreme Court, New York County

Docket Number: 101418/09

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justica*

PART 10

Index Number : 101418/2009

**WINEDINENY, INC.**

VS.

**CRUISE LINK, INC.,**

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

in 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

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

**motion (s) and cross-motion(s)**  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**

DEC 07 2009

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/2/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

Supreme Court of the State of New York  
County of New York: IAS 10

-----X

WinedineNY Inc. and Joseph Muariello,

Plaintiffs,

Index # 101418/09  
Decision/Order  
Mot. Seq. # 001

-against-

Cruise Link Inc., Cruise Link II, Inc.  
Celeste Gladstone and Intercruises Shoreside &  
Port Services, SA.

Defendants.

-----X

Hon. Judith J. Gische:

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court on this motion and cross-motion:

PAPERS	NUMBERED
Notice of Motion, DJC affd., CG affd., exhibits.....	1
Notice of Cross-Motion, CC affirm., exhibits.....	2

**FILED**  
DEC 07 2009  
NEW YORK  
COUNTY CLERKS OFFICE

Upon the foregoing papers the decision and order of the court is as follows:

Defendants Cruise Link II, Inc. ("Cruise Link") and Celeste Gladstone

("Gladstone") (collectively "defendants") move, pre answer to dismiss the complaint

based on: documentary evidence, lack of capacity to sue and failure to state a cause of action. CPLR § 3211(a)(1), (3) and (7). Plaintiff has cross moved for leave to serve an amended complaint. CPLR §3025.

The underlying complaint asserts six causes of action respectively for: breach of joint venture agreement (1<sup>st</sup> cause of action); breach of fiduciary duty and duty of good faith (2<sup>nd</sup> cause of action); dissipation of business opportunity of joint venture (3<sup>rd</sup> cause of action); monetary damages for misappropriation of joint venture's proprietary

information (4<sup>th</sup> cause of action); equitable relief for misappropriation of joint venture's proprietary information (5<sup>th</sup> cause of action); and usurpation of the business of the Joint venture (6<sup>th</sup> cause of action). The facts alleged in the complaint are that: WineDineNY, Inc. ("WineDineNY") is a corporation and Mauriello is its principal, Cruise Link is a corporation and Gladstone is its principal. In or about 2000, WineDineNY and Cruise Link formed a joint venture whereby "WineDine would create and arrange shore excursions for passengers of cruise lines, arrange for the provision of guides and would create shore excursions, tour descriptions and related itineraries" and Cruise Link would provide financing for bus rentals, insurance and related expenses. The co-venturers were to split the profits equally. Plaintiffs claim that, without their knowledge or consent, defendants sold the excursion business developed as part of the joint venture to Intercruises Shoreside & Port Services, SA.

In the proposed amended complaint plaintiffs now allege that Mauriello and Gladstone as well as their corporations formed the joint venture. The proposed amended complaint is verified, but by plaintiffs' attorney. No affidavit of merit is provided by the client or anyone else who may have personal knowledge of the claimed facts.

#### DISCUSSION

In its discretion the court first addresses the cross-motion to amend the complaint.

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 NY2d 934 (1978). Moreover, leave should be granted when the denial of

the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987). The moving party is required to show that the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 (1st dept. 1990). Where an amendment seeks to interpose new or additional facts, it should be supported by an affidavit from the party or by someone with personal knowledge of such new facts. Guzman v. Mike's Pipe Yard, 35 AD3d 266 (1<sup>st</sup> dept. 2006); Mohan v. Hollander, 303 AD2d 473 (2<sup>nd</sup> dept. 2003).

The cross-motion to amend the pleadings must be denied because it is not supported by an affidavit or other appropriate substantiation of the new facts that plaintiffs are seeking to introduce. Contrary to plaintiffs' contention, the proposed amendment is not simply a clarification of the existing pleading. The original complaint alleged that the WineDineNY and Cruise Link only were parties to the alleged joint venture. The proposed pleading seeks to claim that Mauriello and Gladstone were also parties to the joint venture as individuals. This change is substantive and carries with it different liabilities. Such an amendment cannot be permitted without a showing of merit.

The Court turns next to the motion in chief which seeks dismissal on a number of bases. Defendants claim that because the corporation, WineDineNY, was dissolved by proclamation in 2004, it has no standing to sue. It further claims that because the events alleged occurred after the dissolution, there is no right of action by WineDineNY. Defendants next claim that the pleadings do not allege facts on which there can be individual rights asserted by Mauriello or against Gladstone. Finally defendants argue

that because any joint venture that may have existed was terminable at will, there is no claims under the 1<sup>st</sup> and 3<sup>rd</sup> causes of action. respectively for breach of the joint venture agreement or squandering the joint venture opportunity.

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 (a) (7) "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dep't 1997). Where the motion to dismiss is based upon the existence of documentary evidence (CPLR § 3211 [a] [1]), such evidence must definitively dispose of all of plaintiff's claims. Goshen v. Mutual Life Insurance Co., 98 NY2d 314 (2002); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1<sup>st</sup> Dep't 1995).

WineDineNY was dissolved by proclamation of the New York Secretary of State on June 30, 2004. Pursuant to Tax Law §203-a the Secretary of State may dissolve a corporation by proclamation based upon the non-payment of franchise taxes. A dissolved corporation's legal existence terminates upon dissolution and it is prohibited from carrying on new business. Moran Enterprises v. Hurst, 66 AD3d 972 (2<sup>nd</sup> dept. 2009); Metered Appliances, Inc. v. 75 Owners Corp., 225 AD2d 338 (1<sup>st</sup> dept. 1996). A dissolved corporation loses the right to bring suits in the courts of the state, except in limited respects permitted by statute. Moran Enterprises v. Hurst, *supra*. Those

circumstances do not include disputes arising from new business that occurred while the corporation was dissolved. BCL §1006, see also: New Century Manufacturing Inc. v. Vacu Products, 2001 WL 699069 (SDNY). The right to sue, however, may be revived if the corporation secures retroactive *de jure* status by the payment of the delinquent taxes. Moran Enterprises v. Hurst, *supra*; Metered Appliances, Inc. v. 75 Owners Corp, *supra*.

Plaintiffs contend that they are taking steps to reinstate the corporation. Other than this bare-boned conclusory statement from their attorney, there is no proof of what, if any, action is being taken in this regard. Based upon the state of this record, the motion to dismiss must be granted with respect to WineDineNY because it has no present capacity to sue. The court does not go so far as to conclude, as otherwise urged by defendants, that if WineDineNY is retroactively reinstated, there is still no cause of action.

The complaint by Mauriello must also be dismissed. Although the complaint indicates that both plaintiffs are asserting claims, the underlying facts alleged in the complaint do not support a right of action by Mauriello personally. The joint venture, which forms the basis for all of the underlying causes of action, is alleged to have been between the two corporate parties only. For the same reason, there is no right of action against Gladstone in her individual capacity. Individual liability does not attach to corporate action absent a showing that the corporation was dominated by the individual as to the transaction attacked and that such domination was an instrument of fraud or otherwise resulted in wrongful or inequitable consequences. Do Gooder Productions, Inc. v. American Jewish Theatre, Inc., 66 AD3d 527 (1<sup>st</sup> dept. 2009).

The court does not reach the issue of whether the alleged joint venture terminated at will.

**Conclusion**

In accordance herewith it is hereby:

ORDERED that the motion to dismiss the complaint is granted in its entirety, and it is further


ORDERED that the cross-motion for leave to amend the complaint is denied in its entirety, and it is further

ORDERED that the Clerk of the court is directed to enter a judgment in favor of defendants and against plaintiffs dismissing the complaint.

Any requested relief not expressly addressed herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York  
December 2, 2009

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.C.

**FILED**  
DEC 07 2009  
NEW YORK  
COUNTY CLERK'S OFFICE