

<b>In Line One Corp. v Long Is. Indoor Lax League, Inc.</b>
2010 NY Slip Op 32141(U)
July 8, 2010
Supreme Court, Suffolk County
Docket Number: 06-7859
Judge: Peter Fox Cohalan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 12-9-09  
ADJ. DATE 2-26-10  
MNEMONIC: # 004 - MotD

-----X	:	
IN LINE ONE CORP.,	:	FRIEDMAN HARFENIST KRAUT
	:	& PERLSTEIN LLP
Plaintiffs,	:	Attorneys for Plaintiff
	:	3000 Marcus Avenue, Suite 2E1
- against -	:	Lake Success, New York 11042
	:	
LONG ISLAND INDOOR LAX LEAGUE, INC.,	:	MICHAEL G. WALSH, ESQ.
MICHAEL J. GONGAS d/b/a LONG ISLAND	:	Attorney for Defendants
INDOOR LAX LEAGUE and JAMES	:	860 Montauk Highway, Unit 4
McALEAVEY d/b/a LONG ISLAND INDOOR	:	Water Mill, New York 11976
LAX LEAGUE,	:	
	:	
Defendants.	:	
-----X	:	

Upon the following papers numbered 1 to 75 read on this motion for joinder and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 34; Notice of Cross-Motion and supporting papers     ; Answering Affidavits and supporting papers 35 - 47; Replying Affidavits and supporting papers 48 - 50; Other 51-64; 65 - 75; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by the defendants for an order pursuant to CPLR §1001 directing that L.I. Lax, Inc. be joined as a necessary party to this action and for an order pursuant to CPLR §3212 (e) granting partial summary judgment dismissing the complaint as against the individual defendants Michael Gongas and James McAleavey is determined herein.

This is an action to recover the unpaid balance allegedly due on a licensing agreement, dated October 15, 2005, between the plaintiff and the defendant Long Island Indoor Lax League, Inc. (hereinafter Lax League). On said date, the plaintiff was a tenant of a building located at 265 Route 25A in Mount Sinai, New York and agreed to allow Lax League to use a portion of the building for the operation of an indoor lacrosse league, clinic and training camp from October 19, 2005 to March 31, 2006 in return for the payment of a license fee of \$175,000.00 based on a payment schedule. The agreement was signed by James Aracri from the plaintiff (hereinafter Aracri) and by the individual defendants on behalf of Lax League.

The complaint contains causes of action for breach of contract alleging an unpaid balance of \$41,167.00 together with late charges and interest as of January 15, 2006, unjust

enrichment and reasonable attorneys' fees as against Lax League and the individual defendants. In their answer, the defendants assert affirmative defenses of failure to state a cause of action and lack of personal jurisdiction.

The defendants now move for joinder of L.I. Lax, Inc., allegedly formed at or about the time that the agreement was executed, as a necessary party and for partial summary judgment dismissing the complaint as against the individual defendants because L.I. Lax, Inc., not the individual defendants, transacted business with the plaintiff and that L.I. Lax, Inc. must be joined for the parties to obtain complete relief. The defendants assert that the plaintiff has been fully aware since the execution of said agreement that the individual defendants intended to transact business and enter into the agreement solely in their corporate capacities such that the plaintiff is estopped from denying the corporation's validity.

In their affidavits, dated October 20, 2009 and October 9, 2009, respectively, the defendants James McAleavey (hereinafter McAleavey) and Michael Gongas (hereinafter Gongas) state that they are the vice president and president, respectively, of L.I. Lax, Inc. d/b/a Lax League and that the plaintiff is well aware that each executed the agreement solely in their respective capacities as corporate officers of Lax League, particularly since each refused to sign a personal guarantee or drafts of the agreement as individual licensees. They explain that they intentionally formed a corporation to run the indoor lacrosse league pursuant to the agreement; that they filed a certificate under the name L.I. Lax, Inc. because there were too many other corporations with names similar to Lax League; and that at no time did the plaintiff's president claim any confusion concerning the identity of the transacting parties or prejudice due to the difference in corporate names in the agreement and by incorporation. McAleavey and Gongas add that neither obtained any personal benefit from the licensing agreement and that the corporation actually suffered a loss. The March 9, 2009 deposition testimony of Gongas indicates that although the agreement is dated October 15, 2005, the agreement was not actually signed until late December 2005 or early January 2006 and L.I. Lax, Inc. was formed on December 22, 2005. According to Gongas' testimony, Aracri was with him when Gongas opened a bank account on behalf of L.I. Lax, Inc. at the same bank that the plaintiff maintained a bank account for the efficient transfer of funds between accounts.

The plaintiff opposes the instant motion because the amended notice of motion is not procedurally correct and renders the motion that was served on the 120th day untimely and that the individual defendants are personally liable for the outstanding debt inasmuch as they admitted that Lax League had neither a de jure nor a defacto existence at the time of the signing of the agreement or thereafter, the agreement was never amended to reflect the correct name of their corporation, and L.I. Lax, Inc. did not adopt, ratify or accept the agreement. In addition, the plaintiff contends that inasmuch as there are issues concerning the validity of the agreement, the plaintiff may assert a claim for unjust enrichment as an alternative to the breach of contract claim. The plaintiff also contends that joinder of L.I. Lax, Inc. is not necessary to accord complete relief between the parties inasmuch as it was not a party to the agreement, the plaintiff was unaware of its existence, and it will not be inequitably affected by any judgment since it ceased operation after expiration of the agreement and is now defunct.

In an affidavit, dated December 15, 2009, the plaintiff's vice-president Aracri stated that he never knew that Lax League had no de jure or de facto existence and that he was completely unaware of the formation of L.I. Lax, Inc. by the individual defendants. He adds that L.I. Lax, Inc. never succeeded to the obligations of either Lax League or the individual defendants because it would have required an assignment of rights under paragraph 13 of the agreement and written consent of the plaintiff, which consent was never requested or given. Aracri testified at his deposition on April 21, 2009 that he was unsure of the date that he signed the agreement together with Gongas but thinks that he inserted the date of the agreement at signing. In addition, Aracri testified that he believed that the defendants did not turn over to the plaintiff all the checks and cash payments they received.

The defendants submitted with the amended motion the affidavits of the individual defendants that were submitted with the original motion seeking summary judgment dismissing the complaint as against them based on the lack of personal liability, which affidavits explained the formation and existence of L.I. Lax, Inc. as a substitute of the proposed or intended corporation of Lax League in the agreement. The plaintiff submitted opposition papers to the original motion addressing the defendants' assertions concerning L.I. Lax, Inc. and contending that the plaintiff lacked knowledge of its formation and existence. Thus, the plaintiff "was fully apprised of the nature of the motion and had every opportunity to contest it" and thus "cannot claim any prejudice as a result" of the defendants' service of an amended notice of motion seeking to add L.I. Lax, Inc. as a necessary party (see, **Lanzisera v Miller**, 289 AD2d 1015, 1015, 735 NYS2d 282, 283 [4th Dept 2001] quoting **Bennett v First Natl. Bank of Glens Falls**, 146 AD2d 882, 885, 536 NYS2d 591 [3rd Dept 1989]). Nor does the amended notice of motion render the original timely motion untimely (see generally, **Lennard v Khan**, 69 AD3d 812, 893 NYS2d 572 [2nd Dept 2010]).

Parties seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (see, **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (see, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

Here, the license agreement expressly indicated the licensee to be Lax League, a non-existent principal; the individual defendants signed the agreement on behalf of Lax League; and there is no evidence that the individual defendants ever agreed to be personally liable under the agreement (see, **BCI Constr., Inc. v Whelan**, 67 AD3d 1102, 1103, 888 NYS2d 272, 273 [3rd Dept 2009]). "One who signs an agreement on behalf of a nonexistent principal may himself be held liable on that agreement" (**San Sung Korean Methodist Church v Professional USA Constr. Corp.**, 14 AD3d 501, 503, 789 NYS2d 65 [2nd Dept 2005] quoting **Grutman v Katz**, 202 AD2d 293, 294, 608 NYS2d 663 [1st Dept 1994]). Since no corporation existed when the individual defendants signed the agreement with the plaintiff, the legal status of the individual defendants was that of promoters of Lax League (see, **Clinton Investors Co., II v Watkins**, 146 AD2d 861, 862, 536 NYS2d 270 [3rd Dept 1989]). Generally, a promoter who executes a pre-incorporation contract in the name of a proposed corporation is himself

personally liable on the contract unless the parties have otherwise agreed (*see, id.* at 862-863; ***Universal Indus. Corp. v Lindstrom***, 92 AD2d 150, 151, 459 NYS2d 492 [4th Dept 1983]).

The purported principal, Lax League, which had neither *de facto* nor *de jure* existence at the time the agreement was entered into, cannot be bound by the terms thereof “unless the obligation is assumed in some manner by the corporation after it comes into existence by adopting, ratifying, or accepting it” (*see, Metro Kitchenworks Sales, LLC v Continental Cabinets, LLC*, 31 AD3d 722, 723, 820 NYS2d 79 [2nd Dept 2006] *quoting* 14 NY Jur 2d, Business Relationships § 97; *see also, Universal Indus. Corp. v Lindstrom*, 92 AD2d at 152). However, corporate adoption of a contract “gives rise to corporate liability in addition to any individual liability” so that the promoter nevertheless remains obligated unless there has been a novation between the corporation and the plaintiff (*see, Clinton Investors Co., II v Watkins*, 146 AD2d at 863 *quoting Universal Indus. Corp. v Lindstrom*, 92 AD2d at 152). For the individual defendants to be relieved of their personal liability as promoters it must appear that in dealing with them, the plaintiff knew it was contracting with an as yet non-existent principal (*see, Clinton Investors Co., II v Watkins*, 146 AD2d at 863). Here, the individual defendants failed to establish that a novation had occurred (*see, Kleet Lumber Co., Inc. v Saw Horse Remodelers, Inc.*, 13 AD3d 414, 787 NYS2d 64 [2nd Dept 2004]).

Since a nonexistent entity cannot acquire rights or assume liabilities, a corporation which has not yet been formed normally lacks capacity to enter into a contract (*see, Rubenstein v Mayor*, 41 AD3d 826, 828, 839 NYS2d 170 [2nd Dept 2007]; ***442 Decatur St., LLC v Spheres Realty, Inc.***, 14 AD3d 535, 536, 787 NYS2d 669 [2nd Dept 2005]; ***Farrell v Housekeeper***, 298 AD2d 488, 489, 748 NYS2d 410 [2nd Dept 2002]; ***183 Holding Corp. v 183 Lorraine St. Assoc.***, 251 AD2d 386, 386-387, 673 NYS2d 745 [2nd Dept 1998]). A corporation, however, may also be deemed to exist, and thus possess the capacity to contract, pursuant to the doctrine of incorporation by estoppel (***Rubenstein v Mayor***, 41 AD3d at 828 *citing Boslow Family Ltd. Partnership v Glickenhau & Co.*, 7 NY3d 664, 827 NYS2d 94 [2006]).

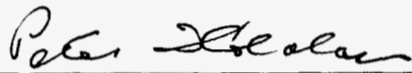
Here, the plaintiff is not estopped to deny the corporate existence of Lax League inasmuch as the doctrine of estoppel may not be invoked unless the corporation has at least a *de facto* existence (*see, Puro Filter Corp. of America v Trembley*, 266 AD 750, 41 NYS2d 472 [2nd Dept 1943]). As for the corporate entity L.I. Lax, Inc., it came into existence when the individual defendants filed a certificate of incorporation with the Department of State on December 22, 2005 (*see, Business Corporation Law* § 403). Although the deposition testimony of the parties fails to elucidate the date that each of the parties actually signed the agreement, whether in October 2005 or December 2005 or January 2006, it is clear that the licensee named in the agreement, Lax League, never came into existence and that the corporation that was actually formed, L.I. Lax, Inc., is not similar in name to Lax League so as to be able to characterize Lax League as a mere misnomer (*compare, BCI Constr., Inc. v Whelan*, 67 AD3d at 1103).

Thus, the adduced evidence fails to demonstrate that the individual defendants are free from personal liability for the alleged outstanding fee under the agreement. In addition, the

conflicting testimony of the parties concerning the plaintiff's knowledge of the existence of L.I. Lax, Inc. and receipt and deposit of monies made payable to L.I. Lax, Inc. raises issues of fact as to whether the plaintiff is estopped from denying the existence of L.I. Lax, Inc. and whether L.I. Lax, Inc. is also liable under the agreement. Moreover, at this juncture, the plaintiff may proceed upon a theory of quasi-contract as well as breach of contract (see, **Halliwell v Gordon**, 61 AD3d 932, 934, 878 NYS2d 137 [2nd Dept 2009]; **Hochman v LaRea**, 14 AD3d 653, 654-655, 789 NYS2d 300 [2nd Dept 2005]). Therefore, the request for summary judgment is denied.

However, the request by the defendants for joinder of L.I. Lax, Inc. as a necessary party defendant is granted inasmuch as it appears that "complete relief" may not be accorded between the parties to this action without its joinder (see, CPLR §1001 [a]; **Allsafe Tech., Inc. v Benz**, \_\_\_ AD3d \_\_\_, 902 NYS2d 462, 463 [4th Dept 2010]). In addition, although the deposition testimony of the individual defendants indicates that L.I. Lax, Inc. is no longer active, there is no clear evidence that it is now defunct such that its joinder would be futile (compare, **Feder Trading Corp. v Hoffman**, 1984 WL 376 [SDNY 1984]). Therefore, the Court directs the plaintiff to join L.I. Lax, Inc. as a defendant in this action and to serve an amended summons and complaint upon it within twenty (20) days after notice of entry of the instant order.

Dated: July 8, 2010

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

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION