

**NYRU, Inc. v Forge, L.L.C.**

2011 NY Slip Op 30994(U)

April 8, 2011

Supreme Court, New York County

Docket Number: 603178/2009

Judge: Louis B. York

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

**LOUIS B. YORK**

PRESENT: \_\_\_\_\_  
**J.S.C.**  
*Justice*

PART 2

*Nyru, Inc.*

INDEX NO.

603178/09

MOTION DATE

2/9

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -  
*Forge, L.L.C.*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion ~~to~~ for summary judgment

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 IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

APR 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/8/11

*Ly*

**J.S.C.**  
**LOUIS B. YORK**  
*J.S.C.*

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----X

NYRU, INC.,

Plaintiff,

Index No.  
603178/2009

-against-

FORGE, L.L.C.,

DECISION/ORDER

Defendant.

-----X

LOUIS B. YORK, J.:

**FILED**

Facts

APR 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

1. Plaintiff's story

According to the Complaint and the affidavit in support of plaintiff's current motion, plaintiff owned and operated a restaurant at 134 Reade Street in Manhattan from mid-2004 until January 2008. In 2008, defendant purchased certain assets of and rights to the space from plaintiff so that defendant could operate a restaurant there. In connection with this purchase, the parties signed an Asset Purchase and Sale Agreement (the Sales Agreement) for \$400,000; the Sales Agreement is dated April 1, 2008. By the time of closing, defendant had paid plaintiff \$169,881 of the amount due, so the agreement recognized that defendant owed plaintiff a balance of \$230,119. Accordingly, defendant agreed to a schedule of payments which partially covered this amount, apparently including a commitment from defendant to cover plaintiff's American Express rewards card balance; and defendant also signed a promissory note (the Note) for \$96,000. In addition, defendant signed a security

agreement relating to the Note. Plaintiff alleges that defendant agreed to pay the remaining \$80,119 “soon after the closing.” Uwe Goehring Aff, at ¶ 9.

Plaintiff claims that the Sales Agreement only covered 40% of the \$1,000,000 purchase price for the restaurant. Plaintiff alleges that in addition to the above, the parties entered into a consulting agreement (the Consulting Agreement) which required defendant to make monthly payments to plaintiff equal to 3% of defendant’s gross monthly sales at the restaurant. The payments would continue under the Consulting Agreement until defendant had paid plaintiff a total of \$600,000. According to plaintiff, the structure of the parties’ arrangement, which defendant requested, enabled defendant to pay plaintiff the balance of the \$1,000,000 purchase price in affordable increments.

In support of the current motion, plaintiff annexes an unsigned, undated copy of the Consulting Agreement. Though it is not signed, plaintiff’s owner states that he “distinctly recall[s] . . . executing the agreement” at closing. Uwe Goehring Aff, at ¶ 12. However, he adds, the parties rushed to complete the closing and the landlord’s attorney would not let them make copies of the documents at his office. Therefore, plaintiff alleges, defendant retained the executed Consulting Agreement and promised to make a copy for plaintiff. Plaintiff’s counsel claims that defendant did not keep this promise despite plaintiff’s repeated requests for a copy of the executed Consulting Agreement.

It appears the parties continued to communicate amicably for some time despite any mixup involving the Consulting Agreement. Moreover, it is undisputed

that defendant paid off at least \$72,000 of the \$96,000 debt under the Note and made two additional payments, totaling \$9,198.08, which plaintiff alleges were made under the Consulting Agreement. Also in support of its argument that a Consulting Agreement existed, plaintiff submits copies of two checks – one dated July 6, 2008, for \$2659.55; and the other dated August 15, 2008, for \$5339.20 – which are labeled “3% of gross net receipts – June 2008” and “July 3%,” respectively.

Plaintiff also annexes several email communications in which defendant appears to acknowledge that it owed some money in addition to the amount due under the Sales Agreement. Defendant’s managing partner, Christopher M. Blumlo, wrote on October 6, 2008 that “[w]ith regard to the monthly (3%), I am aware of the outstanding payments . . .” The email, as well as other emails, refer to a lawsuit – not the one before this Court – involving defendant and impeding its ability to make timely payments. It appears that other financial difficulties also caused defendant to fall behind in its monthly payments to plaintiff. Defendant sent emails to plaintiff between October 2008 and April 2009, at least some of which plaintiff annexes to this motion, and which acknowledge that defendant owed plaintiff some money in 3% gross receipts and in “key money.”

Then, as both of their financial positions seemingly worsened, difficulties arose between the parties. An email from Blumlo dated June 9, 2009 stated that defendant owed \$52,892.90 in 3% gross receipts through April 2009, but that defendant had paid \$20,974.74 of this amount. This left a balance of \$31,918.16.

Two days later, plaintiff sent defendant a letter from its attorney, which stated that defendant owed \$24,000 under the promissory note, plus interest, and \$52,892.90 in gross receipts, by defendant's own accounting. The letter does not refer to defendant's statement that it paid \$20,974.74 of the \$52,892.90, a contention plaintiff apparently disputed; but it does indicate that under the Consulting Agreement defendant owed late charges of 1.5% per month on the unpaid balance.

Additional communications are annexed, and indicate that in addition to the dispute over the alleged \$20,974.74 payment defendant challenged the assessment of interest charges and penalties. Of particular note are two communications from Blumlo. First, a June 20, 2009 letter states:

I understand your troubles, but we need to resolve this without getting additional parties involved otherwise nothing good will come from it. Us going out of business is not going to help your money issues as you would be sacrificing \$550k for \$30k. Which we can't {sic} really understand why you would want to. We were able to survive through the first quarter which is historically the worst, why move in this direction now.

(emphasis supplied). In addition, a September 4, 2009 email from Blumlo states:

What I do know for a fact is that the total payments to you as of June 1, was \$420,974.74, which would mean that the \$400k is paid in full and I have been working on the \$600k over time.

(emphasis supplied). According to plaintiff, these two emails show that defendant acknowledged the legitimacy and force of the Consulting Agreement.

The parties continued to negotiate but ultimately their efforts to resolve their dispute were unavailing. Plaintiff asserts that defendant's failure to meet its

obligations under the various agreements and the Note strained plaintiff's already difficult financial situation and, as a result, plaintiff began to assert more pressure on defendant to pay off the Note in full and bring his payments under the Consulting Agreement current. When defendant made no further payments, around October 16, 2009, plaintiff commenced this action. The current and full caption of this action is NYRU, Inc. v. Forge LLC, Index No. 603178/09 (Sup. Ct. N.Y. County). In the complaint, plaintiff asserts three claims: 1) defendant still owes \$24,000 under the Note; 2) defendant has not made payments due under the Consulting Agreement, and based on defendant's own accounting, plaintiff is owed \$44,000;<sup>1</sup> and 3) defendant owes plaintiff attorney's fees and other legitimate collection expenses.

2. Defendant's variations on plaintiff's story.

Defendant answered the complaint on March 10, 2010. Initially defendant notes that its correct name is "Forge Restaurant LLC" and not "Forge LLC." However, defendant does not raise a defense or request any relief based on the misnomer. Defendant acknowledges the existence of the promissory note, but asserts that it has paid the amount due under the note in full. On this basis, it rejects plaintiff's first and third causes of action as baseless. Defendant denies all the allegations in the complaint relating to the Consulting Agreement and raises numerous affirmative defenses; among these, as a fifteenth affirmative defense, defendant asserts the statute of frauds as a bar to any oral agreements.

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<sup>1</sup> The Court notes that, as to the second cause of action, plaintiff asserts that the outstanding debt under the Consulting Agreement now totals \$89,605.38.

In addition, in its current submissions, defendant asserts that plaintiff has not acquired jurisdiction over it. For one thing, through the affidavit of Blumlo, defendant points out that its name is Forge Restaurant, LLC, but it is referred to in the complaint as Forge LLC. Defendant states that it pointed out this flaw consistently and has never consented to the lawsuit under the improper moniker.

More significantly, defendant challenges plaintiff's statement of the underlying facts in several respects. First, defendant states that it purchased the assets of the restaurant that plaintiff owned but not the restaurant itself. Instead, defendant opened its own restaurant in the space. In support, defendant points to provisions of the Sales Agreement which specifically refer to the sale of assets rather than the sale of a physical property. Presumably, this demonstrates that the \$400,000 Sales Agreement was a fair transaction. Second, defendant states it paid plaintiff in full satisfaction of the Note. Defendant states that "the pre and post closing payments" establish this fact, though defendant submits no evidence of these payments. Third, defendant states that there was no \$600,000 Consulting Contract. It contends that plaintiff sought to sell the restaurant and/or assets for \$1,000,000, but that defendant adamantly rejected the price and purchased it for \$400,000 instead.

According to defendant, the parties did speak of a possible consulting arrangement with Uwe Goehring, plaintiff's owner, in which Goehring was to help defendant to develop a computer software program for the restaurant. Defendant's obligation to pay 3% of its gross receipts would have been part of this arrangement.

However, defendant states, plaintiff did not provide any consulting services.

Defendant states that defendant advanced the 3% payments “as an advance payment for a consulting agreement to be executed in the future.” Blumlo Aff. ¶ 39

(emphasis in original). Defendant notes, in support of this contention, that the checks are payable to Mr. Goehring and to Unit Consulting instead of to plaintiff.<sup>2</sup>

Defendant alleges that each of its emails refer to Mr. Goehring only, and make no mention of plaintiff or its purported debt to plaintiff.

Though it denies that the two payments were intended for plaintiff and contends that they were an advance on Mr. Goehring’s consulting fees, defendant simultaneously states that it sent the two checks which bore the notation “3% gross sales” by mistake, because its accountant believed the parties had entered into the Consulting Agreement. *Id.* ¶ 49. When defendant and accountant realized the accountant’s error, defendant treated the two checks, which totaled \$7998.75, as payments on the Note instead. There is no indication, in the emails or elsewhere, that defendant notified plaintiff of this decision to reallocate the funds. Defendant also states that, pursuant to the parties’ agreement, defendant was to pay plaintiff’s American Express rewards card balance. According to defendant, this would cover \$54,000 of the amount due under the Sales Contract. However, defendant asserts that the balance on the card was actually \$76,114.50. Allegedly, defendant also incurred an unexpected \$40,000 remedying an undisclosed problem with the heating

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<sup>2</sup> As to this point, Mr. Goehring states that he asked for payment in this fashion as he anticipated closing plaintiff NYRU and opening a consulting company.

and air conditioning (HVAC) system. Defendant states that it determined to bring counterclaims to the lawsuit based on the two unanticipated expenses, but that it did not do so because it was not properly named as a defendant. Though defendant did not assert a counterclaim, it did raise 15 affirmative defenses to the complaint, some of which were substantive.

Defendant also claims that plaintiff's president, Goehring, harassed defendant through his daily emails, phone calls, and unscheduled visits to defendant's restaurant. Defendant alleges that it had agreed to take on a rewards card debt which was higher than represented and had discovered problems with the HVAC,; and that this exacerbated its existing cash flow problems. However, defendant asserts that plaintiff, through Goehring, was insensitive to defendant's financial troubles and brought this lawsuit.

#### **Motion and Cross Motion**

Currently plaintiff moves to amend the complaint, *nunc pro tunc*, to change the name of defendant to "Forge Restaurant, LLC." In addition, plaintiff seeks a declaration that the Agreement is valid. Plaintiff also asks for partial summary judgment, in the sum of \$89,605.38, in partial payment of the debt allegedly due under the second cause of action, which rests on the alleged violation of the Agreement; and plaintiff requests a hearing to determine what if any additional fees are owed under the Agreement. Defendant opposes the motion in its entirety and also cross moves for an order dismissing the second cause of action on a few bases, dismissing the complaint based on the alleged lack of personal jurisdiction and on

related grounds, and dismissing the complaint on the ground that NYRU was dissolved on January 27, 2010 and has no capacity to sue.

For the reasons below, the Court grants leave to amend the Complaint *nunc pro tunc*, rejects defendant's arguments based on personal jurisdiction, denies summary judgment dismissing the cause of action based on the Consulting Agreement under the Statute of Frauds as an issue of fact remains as to whether the contract is capable of being performed within one year, denies the cross motion for summary judgment, but grants the prong of the cross motion seeking leave to answer the amended complaint to assert a counterclaim.

#### Analysis

1. Prong of Motion Seeking to Amend Caption and Related Prong of Cross-Motion Asserting Lack of Personal Jurisdiction.

A motion to amend a caption to correct a misnomer is appropriate if the defendant was served with the complaint, actually realized or should have realized that it was the intended defendant, and suffers no prejudice from the amendment. See Rodriguez v. Dixie N.Y.C., Inc., 26 A.D.3d 199, 200, 810 N.Y.S.2d 34, 35 (1<sup>st</sup> Dept. 2006). Here, as the Court already indicated, defendant answered the complaint and asserted that the complaint used the wrong name. It also has appeared at discovery conferences and, without objecting that it was not a proper defendant in the action, agreed to the exchange of discovery. Thus, it is clear that defendant was served and that it knew that it was the intended defendant.

Moreover, defendant has not pointed to any cognizable prejudice in the section of its brief purportedly relating to prejudice. Its references to the complex ownership structure of Forge or its printout of various companies with "Forge" in the title are unexplained and, moreover, are not compelling; and its comments on the illegality of the deal and absence of side agreements do not relate to the issue. Finally, defendant's related argument based on lack of personal service utterly lacks merit, as its answer is dated March 7, 2010 and it did not make this cross-motion to dismiss until September 15, 2010, well over 60 days later. See CPLR 3211(e); Aretakis v. Tarantino, 300 A.D.2d 160, 160, 751 N.Y.S.2d 481, 482 (1<sup>st</sup> Dept. 2002). Therefore, the amendment of the caption, *nunc pro tunc*, is proper. See Rivera v. The Beer Garden, Inc., 51 A.D.3d 479, 479, 857 N.Y.S.2d 557, 558 (1<sup>st</sup> Dept. 2008).

Defendant states that it did not assert counterclaims based on the extra rewards card debt and the unanticipated HVAC repair costs, *see infra* p. 5-6, despite their existence, due to the fact that it was not named properly. In addition, defendant states, without elaboration, that it would have asserted more affirmative defenses had it been named properly. Accordingly, it asks that, if the Court grants plaintiff leave to amend the caption *nunc pro tunc*, it also requires plaintiff to serve the amended caption and complaint on defendant and allow it the opportunity to serve an amended answer.

The Court finds that defendant's position is neither well argued nor persuasive as to the affirmative defenses. For one thing, although defendant

asserted no counterclaims it asserted a total of 15 affirmative defenses, many of which refer to plaintiff's duties to defendant and deal with the substantive allegations in the complaint. Thus, it appears that defendant asserted those affirmative defenses applicable to it. For another, defendant states that it deliberately did not include all proper counterclaims and defenses in its answer, but it gives no concrete examples of an affirmative defense it would have added but-for the misnomer; and, it does not explain why it could assert 15 affirmative defenses but not the alleged additional ones.

However, the Court directs plaintiff to serve the amended caption with the summons and complaint, and directs defendant to answer the amended pleadings with an amended answer. Defendant has referred to the alleged inequities in the sales transaction with respect to the size of plaintiff's American Express rewards card balance with specificity, and also has elaborated the basis of the counterclaim as to the HVAC system. Plaintiff challenges these arguments but does not refute them beyond all question. Therefore, defendant has raised triable issues of fact. Defendant does not explain why it was possible to include 15 affirmative defenses but no counterclaims in the initial answer; however, in acknowledgment of the importance of allowing the parties to litigate their claims as fully as possible, the Court shall allow this portion of defendant's application to the limited extent of allowing defendant to assert the two counterclaims it has described. See generally Breco Environmental Contractors, Inc. v. Town of Smithtown, 307 A.D.2d 330, 332, 762 N.Y.S.2d 822, 823 (2<sup>nd</sup> Dept. 2003)(leave to amend pleadings freely given

absent prejudice or surprise, but there must be evidence that amendments are not palpably lacking in merit).

2. Dissolution of Plaintiff Corporation.

Defendant also alleges that plaintiff lacks capacity to sue because plaintiff, a corporation, was dissolved on January 27, 2010. Defendant annexes evidence that the corporation was dissolved. Moreover, plaintiff does not challenge this assertion. However, plaintiff correctly notes that the claims in question arose prior to the company's dissolution and that it commenced the action prior to the dissolution as well. Therefore, defendant's argument lacks merit. See Business Corporation Law § 1006(b); J. Sakaris & Sons, Inc. v. Onekey, LLC, 60 A.D.3d 733, 733, 873 N.Y.S.2d 919, 919 (2<sup>nd</sup> Dept. 2009).

3. Statute of Frauds.

Next, plaintiff argues that although it cannot submit a copy of the signed Agreement, there is sufficient written and other objective evidence to establish that the agreement existed. Therefore, summary judgment is proper as to the second cause of action, based on the agreement. Defendant denies that the Agreement ever existed and states that, at best, the parties entered into a tentative consulting arrangement which never materialized as plaintiff failed to provide consulting services. Defendant presents a number of arguments in opposition to plaintiff's application and in support of its own cross-motion to dismiss the second cause of action:

Under the statute of frauds, a contract must be in writing if it is not capable of being performed within a year. Gen. Oblig. L. § 5-703. However, the courts of this State have interpreted this provision liberally in order to give weight to legitimate contracts. As long as there is the possibility that the contract can be performed within this period, the statute of frauds does not apply. “The fact that full performance within one year [is] unlikely or improbable does not make the agreement subject to the statute of frauds.” Financial Structures Ltd. v. UBS AG, 77 A.D.3d 417, 418, 909 N.Y.S.2d 45, 47 (1<sup>st</sup> Dept. 2010).

The parties dispute whether the contract can be performed within a year. To perform the alleged contract within a year, 3% of the gross monthly sales at defendant restaurant would have to total \$600,000 in that time frame. The “certified calendared gross monthly sales” as set forth in Exhibit A of the Consulting Agreement include but are not limited to sales generated from the business and assets that defendant purchased from plaintiff. To reach \$600,000 in payments, this amount would have to total over \$21 million in its first calendared year. No party has provided evidence informing the Court of whether it is possible for a restaurant like Forge to earn that much in gross monthly, or whether it is so unlikely that it falls outside of the exemption from the statute. Indeed, no party has provided evidence as to the type of restaurant, the cost of dishes, the size of the restaurant, or any other indicators which could help the Court evaluate the issue and reach a fair conclusion. Moreover, the Court has no expertise on that issue and therefore cannot render an opinion. Accordingly, the Court finds an question of fact as to whether

the agreement could have been performed within a year within the meaning of the law, and this precludes an order of summary judgment in favor of either party on the issue of whether the statute of frauds applies.

Even where there is not a single signed contract, the agreement is enforceable if there is sufficient “evidence of electronic communication (including, . . . the tangible written text produced by computer retrieval), admissible in evidence under the laws of this state, sufficient to indicate that in such communication a contract was made between the parties.” Gen. Oblig. L. § 5-703. To satisfy this latter standard, “[the] communications must be sufficiently clear and concrete to constitute an enforceable contract.” Al-Bawaba.com, Inc. v. Nstein Technologies Corp., No. 45550/07, 2009 WL 4927157, at \*9 (Sup. Ct. Kings County Dec. 18, 2009)(citing Williamson v. Delsener, 59 A.D.3d 291, 291, 874 N.Y.S.2d 41, 41-22 (1<sup>st</sup> Dept. 2009)). In particular, the writings must include all of the agreement’s essential terms, including the fee, or other cost, involved. See Mark Bruce Intern, Inc. v. Blank Rome LLC, 60 A.d.3d 550, 551, 876 N.Y.S.2d 19, 19 (1<sup>st</sup> Dept. 2009); see also MP Innovations, Inc. v. Atlantic Horizon Intern., Inc., 72 A.D.3d 571, 572, 899 N.Y.S.2d 213, 214 (1<sup>st</sup> Dept. 2010) (exception did not apply where product, time frame or rate of compensation were not described in email). Courts conduct a case-by-case analysis to see whether there is sufficient clarity and specificity to rule that an enforceable contract exists. See Tompkins v. Jackson, No. 104745/08, 2090 WL 513858, at \*15 (Sup. Ct. N.Y. County Feb. 3, 2009). An unsigned copy of the agreement, or even an unexecuted agreement, can be found to be binding where

based on partial performance, supplemental correspondence, or other objective evidence, the fact finder can conclude that the parties intended to be bound. See Geha v. 55 Orchard St., LLC, 29 A.D.3d 735, 736, 815 N.Y.S.2d 253, 254 (2<sup>nd</sup> Dept. 2006).

Plaintiff argues that even if the contract cannot be performed within a year, the emails which plaintiff has annexed to its motion and its supporting affidavit, and which the Court describes above, are sufficient to show that the Consulting Agreement existed. The checks, by themselves, are insufficient to show the existence of a contract, as part performance cannot be used to evade the statute of frauds. Kocourek v. Booz Allen Hamilton, Inc., 71 A.D.3d 511, 512, 900 N.Y.S.2d 1, 2 (1<sup>st</sup> Dept. 2010). The unexecuted contract coupled with the emails arguably admit the existence of the additional debt even the emails alone suggest some debt owed by defendant. Some of defendant's explanations – that the accountant wrote checks because it mistakenly believed there was a Consulting Agreement – lack credibility; and, defendant also fails to address its alleged admissions in the emails. This militates in favor of finding that a contract exists.

On the other hand, plaintiff has not explained satisfactorily why it does not possess an executed copy of the Consulting Agreement. Counsel's statement that he was not allowed to make copies of the \$600,000 contract is suspicious, especially as plaintiff was able to obtain an executed copy of the Sales Agreement, into which the parties entered that day. Moreover, the two checks in question were not written to plaintiff but to Goehring and to his personal consulting business; and plaintiff's

explanation of this fact also is not entirely convincing. Therefore, issues of fact remain and summary judgment is denied to both parties on this issue. See Flores v Lower East Side Serv. Center, Inc., 4 N.Y.3d 363, 368-70, 795 N.Y.S.2d 491, 495-96 (2005).

### Conclusion

Finally, the Court notes that, as indicated, defendant has asserted 15 affirmative defenses. Also, in its cross-motion, it has asserted repetitive and occasionally unexplained arguments. For example, it asserts, without elaboration, that collateral estoppel and “illegality” bar the action, and that the second cause of action is “illegal.” As these and other arguments raised by the parties are patently without merit, the Court considers and rejects them without discussion.

Based on the above, therefore it is

**ORDERED** that plaintiff’s motion is denied except as to the prong which seeks to amend the complaint; and it is further

**ORDERED** that defendant’s cross-motion is denied except to the extent that it seeks to answer the amended complaint; and it is further

**ORDERED** that the plaintiff’s motion for leave to amend the complaint to correct defendant’s name is granted; and it is further

**ORDERED** that plaintiff shall formally serve defendant with the amended complaint; and it is further

**ORDERED** that defendant shall serve its amended answer to the amended complaint within 20 days from the date of service, with the understanding that

defendant may add one or two of the counterclaims it discussed in its papers; and it is further

**ORDERED** that plaintiff has 10 days from the date of service to reply to the counterclaim or counterclaims; and it is further

**ORDERED** that the new caption shall read as follows:

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

-----X  
NYRU, INC.,

Plaintiff,

Index No.  
603178/09

- against -

**FORGE RESTAURANT, LLC,**  
Defendant.

-----X

All further papers in this action shall use this new caption; and it is further

**ORDERED** that plaintiff shall file a copy of this order with notice of entry with the Clerk of the Court and the Trial Support Clerk, who are directed to mark their records to reflect the amended caption.

Dated: 4/8/11

ENTER:

*LY*

LOUIS B. YORK, J.S.C.

**FILED**

APR 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**LOUIS B. YORK**  
J.S.C.