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

PRESENT: HON. EILEEN BRANSTEN Justice

PART 3

Index Number : 650837/2011
OUTDOOR MEDIA CORP.
vs.
DEL MASTRO, RICK
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 650837/11

MOTION DATE 10/3/11

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 11-16-11

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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OUTDOOR MEDIA CORP., on its own and on behalf and derivatively on behalf of National Promotions Associates, LLC, a New York Limited Liability Company,

Plaintiff,

-against-

RICK DEL MASTRO, GARY SHAFNER, PETER ZACKERY, NATIONAL PROMOTIONS ASSOCIATES, LLC, CONTEST PROMOTIONS-NY LLC, OUTDOOR INSTALLATIONS, LLC (d/b/a Spring Scaffolding), CITY OUTDOOR, INC., NATIONAL PROMOTIONS & ADVERTISING, INC., "JOHN DOE COMPANIES 1-10", and "JANE DOE COMPANIES 1-10",

Defendants.

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Index No. 650837/11
Motion Date: 10/3/11
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BRANSTEN, J.

In motion sequence number 001, defendants Rick Del Mastro, Gary Shafner, Peter Zackery, National Promotions Associates, LLC, Contest Promotions-NY LLC, Outdoor Installations, LLC (d/b/a Spring Scaffolding), City Outdoor, Inc. and National Promotions & Advertising, Inc. (collectively, "Defendants") move to dismiss the complaint of plaintiff Outdoor Media Corp., on its own and on behalf and derivatively on behalf of National Promotions Associates, LLC, a New York Limited Liability Company ("Plaintiff" or "OMC") pursuant to: (1) CPLR 3211 (a) (3) and N.Y. B.C.L. § 1312; and (2) CPLR 3211 (a) (1) and (7).

Background

Plaintiff Outdoor Media Corp. is a New Jersey Corporation. Affidavit of James G. Rogers in Opposition to Motion to Dismiss ("Rogers Opp. Aff."), ¶ 13, Ex. B. James Rogers is Plaintiff's president and sole shareholder.

Plaintiff filed the instant complaint on March 29, 2011. Plaintiff brings suit against the eight named Defendants and twenty "John Doe" and "Jane Doe" companies directly for breach of contract, derivatively for unjust enrichment, money had and received and breach of fiduciary duties. Plaintiff further moves for judicial dissolution of defendant National Promotions Associates, LLC ("NPA LLC"). *See* Affirmation of Thomas P. Battistoni in Support of Defendants' Motion to Dismiss ("Battistoni Affirm."), Ex. A ("Complaint").

On March 30, 2011, Plaintiff filed an Application for Authority to conduct business in New York. The application was granted under the filing name "Outdoor Media of New Jersey." Rogers Opp. Aff., ¶ 14, Ex. C.

Plaintiff's causes of actions largely arise out the NPA LLC Operating Agreement. Battistoni Affirm., Ex. C ("Operating Agreement"). NPA LLC was formed effective January 1, 2000 upon the consolidation of: (1) James Rogers, Inc., owned by Plaintiff's president, James G. Rogers; (2) the New York business operations of defendant National Promotions & Advertising, Inc. ("NPA Inc."), owned by defendants Gary Schafner and Pete Zackery; and (3) sales and marketing operations allegedly owned by defendant Rick Del Mastro,

individually and through his company, Defendant City Outdoor, Inc. Rogers Opp. Aff., ¶ 2; Complaint, ¶¶ 24, 25.

Analysis

I. Dismissal Pursuant to CPLR 3211 (a) (1) and (7)

A. CPLR 3211 (a) (1)

Defendants first move to dismiss the complaint pursuant to CPLR 3211 (a) (1). Defendants assert that Plaintiff is not a party to the Operating Agreement nor a member of NPA LLC, that these facts are supported by the Operating Agreement and therefore the Complaint must be dismissed. Memorandum of Law in Support of Defendants' Motion to Dismiss ("Defendants Memo."), pp. 5-7.

Defendant states that the Operating Agreement's preamble shows that it is made among four natural persons: James Rogers, Rick Del Mastro, Peter Zackery and Gary Shafner. Article 1 of the agreement, Definitions, defines "Members" of NPA LLC as these four individuals, with no mention of company names. Defendants further paraphrase Sections 2.7(ii), 2.11, 2.13 and 9.2 of the Operating Agreement in support of their argument. Section 2.7(ii) states that "this Agreement has been duly executed and delivered by such Member and constitutes the valid and binding obligation of such Member in accordance with its terms. Section 2.11 states, in relevant part, that the "Company shall be managed by Managers, who shall be natural persons." Section 2.13 states, in relevant part, that each

Member had the right to designate a Manager to represent his interests, and that such "Managers shall initially be the persons identified in Article 1 of this Agreement." The founding Members further agree not to designate a Successor Manager (defined term) absent the Member's Incompetence (defined term) or a transfer pursuant to Article 13 of the Operating Agreement. Section 9.2 states Rogers' personal responsibilities with regard to NPA LLC.

Defendants assert that the NPA LLC Operating Agreement is conclusive documentary evidence showing that Plaintiff is not a proper party to the Operating Agreement or a defined member of NPA LLC. Defendants argue that Plaintiff is therefore without basis to assert direct or derivative claims and the Complaint must therefore be dismissed.

In opposition, Plaintiff asserts that OMC has owned a one-third interest in NPA LLC from NPA LLC's formation. Rogers Opp. Aff., ¶ 3. Plaintiff asserts that paragraph 27 of the Complaint supports his position. Paragraph 27 states:

> In or about 2007, Rogers, Del Mastro, Shafner and Zackery executed an Operating Agreement for NPA LLC . . . which was deemed to be effective as of January 1, 2000 and has at no time been revoked or terminated. Although it was Rogers, rather than plaintiff, who was named in the NPA Operating Agreement, it was understood among the parties that Rogers was executing the document on plaintiff's behalf, and that plaintiff, not Rogers, was a one-third interest-holder in the company, while Rogers was a manager representing that interest. Consistent with that understanding, it has been plaintiff, not Rogers, that has since 2000 been identified as a one-third interest-holder in all federal, state and local tax filings made by that company.

Plaintiff asserts that "Shafner, Zackery and Del Mastro have at all times treated OMC, and not Rogers, as the sole owner of the on-third membership interest in NPA LLC," including arranging to issue membership forms to the Internal Revenue Service and state and local tax authorities that represented OMC, and not Rogers, as the one-third interest-holder. Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pl. Opp. Memo."), p. 2-3. Rogers asserts that OMC owns a one-third interest in NPA LLC, (Rogers Aff., ¶ 3) and that it was Del Mastro's brother, through the brother's accounting firm, that prepared the documents showing OMC as a one-third partner in NPA LLC. *Id.*, at ¶ 8, Ex. A ("OMC/NPA tax documents").

> On a motion to dismiss pursuant to CPLR 3211 (a) (1), the court must
>
> > determine whether plaintiff[']s pleadings state[s] a cause of action. The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. In furtherance of this task, we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiff[] the benefit of every possible favorable inference. Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law

511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 151-52 (2002) (internal quotations and citations omitted).

Providing all inferences in favor of Plaintiff, as this court must do on a motion to dismiss, and considering all submissions by the Plaintiff, the court does not find that

Defendants' allegations conclusively establish a defense as a matter of law. Plaintiff has alleged that individual defendants considered OMC a "member" of NPA LLC, and that, as a result, allowed NPA LLC tax documents to be prepared showing OMC as an NPA LLC member. Complaint, ¶ 27; Rogers Aff., Ex. A. While Plaintiff may have issues of fact to overcome to further its allegations, it has sufficiently pled a basis for its status as plaintiff in this action and for its claims. Based upon the actions of the parties and the pleadings before this court, the Operating Agreement is not conclusive proof negating Plaintiff's causes of action. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) is denied.

B. CPLR 3211 (a) (7)

Defendants also move to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. Defendants base this portion of their motion to dismiss solely upon its argument that Plaintiff is not a party to the NPA LLC Operating Agreement. Plaintiff asserts that Plaintiff has no right to assert a derivative action, claim it is owed fiduciary duties or to assert direct claims.

As stated in Section I.A., *supra*, Plaintiff has properly pled facts sufficient that it may bring this case. Providing Plaintiffs every favorable inference and presuming that the allegations in the complaint are true , (*WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259 [1st Dep't 1992]), the court finds that the facts as alleged do fit within

cognizable legal theories. *Leon v. Martinez,* 84 NY2d at 87–88. Defendants' argument to the contrary therefore fails.

II. Dismissal Pursuant to CPLR 3211 (a) (3) and N.Y. B.C.L. § 1312

Defendants assert that the Complaint must be dismissed pursuant to CPLR 3211 (a) (3) and New York Business Corporation Law § 1312 (a). Defendants argue that Plaintiff was a foreign corporation unlicensed to do business in New York when it filed suit. Defendants, citing *Dixie Dinettes, Inc. v. Schaller's Furniture, Inc.*, a 1972 New York City Civil Court case (71 Misc. 2d 102 [N.Y. City Civ. Ct. 1972]) further argue that they are entitled to proof that Plaintiff has paid taxes in New York for the past eleven and a half years, the time that Defendants allege Plaintiff has conducted business in New York. Defendants Memo., pp. 7-8.

CPLR 3211 (a) (3) states that a motion to dismiss may be brought if the party asserting the cause of action does not have the legal capacity to sue in New York. New York Business Corporation Law § 1312 (a) states, in relevant part, that:

> (a) A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties . . . .

Defendants, relying on NY B.C.L. § 1312, have the burden of showing that Plaintiff was conducting business in New York without authorization. A case-by-case fact-based

inquiry is used to determine whether a foreign corporation is actually doing business in New York. *See Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 (2d Dep't 2008). In order to meet the required standard, Defendants may show proof that, *inter alia*, Plaintiff maintained an office in New York, received mail in New York, had or has a bank account in New York or that it currently engages in commercial transactions in New York – all of which are indicia of regularly doing business in New York. Plaintiff's business conducted in New York must be "so systematic and regular as to manifest continuity of activity in this jurisdiction." *See Airline Exchange, Inc. v. Bag et al.*, 266 A.D.2d 414, 415 (2d Dep't 1999). If no proof is adduced that Plaintiff conducted business in New York, "it is presumed that the plaintiff is doing business in its State of incorporation and not in New York." *Id.*

If Plaintiff is shown to be conducting business in New York without having qualified to do so, the court is not denied jurisdiction over the matter. The defect is curable, within the pendency of this action. *See Intermar Overseas, Inc. v. Argocean S.A.*, 117 A.D.2d 492, 497 (1st Dep't 1986) (citation omitted).

Plaintiff is a New Jersey corporation. Complaint, ¶ 2. Defendants, citing paragraph 14 of the Complaint, assert that Plaintiff has been systematically and regularly doing business in New York. However, paragraph 14 of the Complaint refers not to Plaintiff, but to a company named James Rogers, Inc., ("JRI"), which, as per paragraph 14 of the Complaint, was owned by Plaintiff's principal, Rogers, and which provided outdoor advertising services

in New York during the 1980s and 1990s. Further contrary to Defendants' argument, Rogers avers that Plaintiff's sole contact with the State of New York is through its alleged one-third membership interest in NPA LLC.

Defendants's argument, based on paragraph 14 of the Complaint, that Plaintiff has regularly conducted business in New York is contradicted both by a plain reading of the cited paragraph and by sworn testimony of Plaintiff's principal. Defendants' argument therefore fails. *See S & T Bank v. Spectrum Cabinet Sales, Inc.*, 247 A.D.2d 373, 373 (2d Dep't 1998).

Further, even if the court were to find that Plaintiff had been systematically and regularly doing business in New York without authorization through its membership in NPA LLC, Plaintiff is now fully qualified to conduct business in this state (*see* Battistoni Affirm., Ex. B) and has paid all applicable taxes and fees. *See Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994); Rogers Aff., ¶ 15. The issue, if it had existed, has therefore been cured and Plaintiff may bring suit in this state. *Intermar Overseas, Inc.*, 117 A.D.2d at 497.

The court does not find merit to Defendants' contentions that: (a) Plaintiff has not shown that it paid taxes during the time it was involved with NPA LLC and (b) that Defendants are entitled to that proof. Defendants' reliance on *Dixie Dinettes, Inc., et al. v. Schaller's Furniture*, 71 Misc. 2d 102 (N.Y. Civ. Ct. 1972) is ill-placed. Therein, the plaintiff was never licensed to do business in New York, and was no longer in existence, having merged with a corporation properly licensed to conduct business in New York. The

court held that in order to bring the action, in that case plaintiff must present proof of properly paid New York taxes. *Id.*, at 103-04. In this case, Plaintiff exists in corporate form and is in good standing to conduct business in New York. The court will give deference to the State of New York's determination thereof.

Defendants' motion to dismiss the Complaint pursuant to CPLR 3211 (a) (3) and New York Business Corporation Law § 1312 (a) is denied.

(Order on following page.)

Order

Accordingly, it is hereby

ORDERED that defendants Rick Del Mastro, Gary Shafner, Peter Zackery, National Promotions Associates, LLC, Contest Promotions-NY LLC, Outdoor Installations, LLC (d/b/a Spring Scaffolding), City Outdoor, Inc. and National Promotions & Advertising, Inc.'s motion to dismiss is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after a service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in room 442, 60 Centre Street, on January 3, 2011 at 10 a.m.

This constitutes the decision and order of th court.

Dated: New York, New York
November 16, 2011

ENTER:

Hon. Eileen Bransten, J.S.C.