

**ASB Prods, LLC v Njibaloh**

2014 NY Slip Op 31325(U)

May 21, 2014

Supreme Court, New York County

Docket Number: 152602/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
ASB PRODUCTIONS, LLC d/b/a ASB  
COMMUNICATIONS,

Plaintiff,

Index No. 152602/2014

-against-

**DECISION/ORDER**

OLLIA NJIBALOH, FATOU DIOUF AND ROUGE  
AGENCY, LLC d/b/a ROUGE PR & CREATIVE  
AGENCY,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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This action arises out of a dispute between an employer and two former employees. Defendants now move for an Order pursuant to CPLR § 3211(a)(1) and (3) dismissing plaintiff's complaint based on documentary evidence and on the grounds that plaintiff lacks capacity to sue. Additionally, defendants move for an Order pursuant to BCL § 1321 dismissing plaintiff's complaint on the ground that it was not authorized to conduct business in the State of New York when this action was commenced. For the reasons set forth below, defendants' motion is denied.

The relevant facts are as follows. Plaintiff is an "international multi-cultural public relations, advertising and marketing company." Defendants Ollia Njibaloh ("Njibaloh") and

Fatou Diouf (“Diouf”) worked as Account Executives for plaintiff. At the time they were hired, both Njibolah and Diouf signed a Non Disclosure Agreement (the “NDA”). Each NDA included a restrictive covenant which provided that “for a period of one year after the Employee ceases to be employed by the Employer for any reason whatsoever,” the employee would not, among other things,

Offer to render any public relations, advertising, event management, marketing or other promotional services or solicit the rendition of any such services to any clients, customers or accounts of the Employer who were such at any time during the one-year period immediately preceding such cessation of the Employee’s employment with the Employer to or for the benefit or account of Employee or to or for the benefit or account of any other person or entity.

According to plaintiff’s complaint, on or about January 15, 2014, plaintiff terminated Njibolah’s employment “because it believed it did not have work for her to do sufficient to justify her salary.” Thereafter, plaintiff alleges that Diouf, who was still employed, secretly emailed confidential documents and computer files to Njibolah. On or about February 5, 2014, Diouf quit her employment with plaintiff.

Thereafter, on or about March 21, 2014, plaintiff commenced the instant action by filing a summons and complaint. Plaintiff’s original complaint listed plaintiff as “ASB Communications, Inc.” However, on or about April 21, 2014, after defendants filed the instant motion, plaintiff filed and served an amended summons and complaint identifying plaintiff as “ASB Productions, LLC d/b/a ASB Communications.” The amended complaint is otherwise identical to the original and asserts the following causes of action against defendants: (1) breach of fiduciary duty; (2) breach of contract; (3) computer trespass; (4) violations of the Penal Law of the State of New York §§ 156.10, 156.30; (5) conversion; (6) unfair competition (7) unlawful

interference with contract; (8) unlawful interference with reasonable expectations of economic gain; and (9) civil conspiracy.

In the present case, as an initial matter, defendants' motion for an order pursuant to CPLR § 3211(a)(3) and BCL § 1312 dismissing plaintiff's complaint on the grounds that plaintiff lacks standing to bring the instant action and was not authorized to do business in the State of New York at the time this action was commenced is denied as moot. The sole basis for defendants' motion to dismiss on these grounds is that plaintiff was named as "ASB Communications, Inc." in the original complaint, which was not Njibaloh and Diouf's actual employer and was not a corporation duly authorized to conduct business in the state of New York at the time this action was commenced. However, this issue is now moot as plaintiff, realizing it had made a mistake by conflating plaintiff's corporate and assumed names, filed an amended summons and complaint on April 21, 2014, properly naming "ASB Productions, LLC d/b/a ASB Communications," as the plaintiff. It is undisputed that ASB Productions, LLC is the proper name of Njibaloh and Diouf's former employer. Additionally, plaintiff has included a report from the Secretary of State website confirming that ASB Productions, LLC was duly organized, formed and registered with the Secretary of State of the State of New York in 1997, and remains in "active status. To the extent defendants' contend in their reply that plaintiff's filing of the amended complaint without leave of court was improper, such contention is without merit. Pursuant to CPLR § 3025(a), "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." When a party makes a pre-answer motion to dismiss pursuant to CPLR § 3211(a), its time to respond to the complaint is

extended until ten days after service of notice of entry of the order disposing of the motion.

CPLR § 3211(f). Here, as defendants made the instant motion to dismiss, its time to respond to plaintiff's complaint was extended and has not expired. Thus, as plaintiff filed its amended complaint prior to any order being rendered on this motion, its amended summons and complaint is timely and proper.

Additionally, plaintiff's motion for an order pursuant to CPLR § 3211(a)(1) dismissing plaintiff's complaint on the ground that the one year restrictive covenant in the NDA has expired is denied. In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Here, the only documentary evidence relied upon by defendants is the NDA itself, which does not definitively dispose of any of plaintiff's claims. As an initial matter, contrary to defendants' assertion, the NDA explicitly states that the one year period begins to run from the date "Employee ceases to be employed by the Employer." Thus, as it is undisputed that both Njibaloh and Diouf ceased to be employees in early 2014, the one year period has not yet expired. Further, plaintiff asserts several claims against defendants besides breach of the restrictive covenants provision in the NDA and defendants fail to make any arguments demonstrating how the NDA definitively disposes of those claims.

Finally, defendants' motion for an order dismissing plaintiff's complaint as against Diouf on the ground that plaintiff failed to use her correct legal name in the caption is denied. Defendants present absolutely no authority for the assertion that failure to use a party's full legal name in the caption divests this court with jurisdiction over the party. Indeed, Diouf does not dispute that she is the person plaintiff identifies in the complaint, nor does she argue that she is

