Ballan v Sirota
2014 NY Slip Op 33428(U)
December 12, 2014
Supreme Court, Queens County
Docket Number: 702021/2014
Judge: Timothy J. Dufficy

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE TIMOTHY J. DUFFICY IA Part 35
Justice

LENORE BALLAN, as Personal representative of ELI BALLAN et al.

-against-

HOWARD B. SIROTA et al.

Number 702021/2014

Motion Date August 25, 2014

Motion Cal. Number 14

Motion Seq. No. 5

The following papers numbered 1 to 3 read on this motion by the defendants for an order dismissing the complaint against them pursuant to CPLR 3211(a)(1), (3), and (7)

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	3

Upon the foregoing papers it is ordered that those branches of the motion which are for an order pursuant to CPLR 3211(a)(1) and (3) dismissing the complaint are granted .

The plaintiffs allege the following:

The late Eli Ballan owned stock in plaintiff Corporate Surveys & Analyses, LTD, an inactive Connecticut corporation which acted as a consultant in securities cases. Plaintiff Lenore Ballan served as the personal representative of Eli Ballan's estate.

Defendant Sirota & Sirota, LP, a law firm located at 125 Beach 128th Street, Belle Harbor, New York, engages in litigation. Defendant Howard Sirota, acting on behalf of himself and the other defendants, entered into an agreement with plaintiff Corporate Surveys whereby the latter provided the defendants with proprietary information pertaining to potential clients, investigated claims, interviewed potential plaintiffs, and otherwise provided the defendants with assistance in securities litigation.

In exchange for the services of Corporate Surveys, the defendants promised to pay 20% of the law firm's fee on a case. Corporate Surveys provided services to the defendants on hundreds of cases during the course of their business relationship. Without the specialized knowledge and efforts of Corporate Surveys, the defendants would not have been able to begin many of the lawsuits that they prosecuted over twenty-three years.

The defendants utilized the services of Corporate Surveys in connection with a lawsuit filed in the federal court for the Southern District of New York entitled *Richard Hirsch v. Priceline.com, Inc.*, which was subsequently consolidated with other cases and recaptioned *In Re: Priceline.com Initial Public Offering Securities Litigation.*

The services provided by Corporate Surveys resulted in the federal court's appointment of defendant Sirota & Sirota as one of the lead counsel in the class action litigation. The federal court ultimately awarded defendant Sirota & Sirota $12,067,377.96 in attorney's fees. However, the defendants refused to pay Corporate Surveys its twenty per cent share of the fees.

The plaintiffs brought this action seeking to recover 20% of the $12,067,377.96 fee awarded by the federal court. According to the plaintiffs: "It was not until Defendants' continued refusal to make payment to Plaintiffs upon the final resolution of the Priceline Litigation that Plaintiffs were made aware the long-standing agreement between Plaintiffs and Defendants was prohibited by both the New York and Florida Bar Rules." (Complaint, ¶74.)

The defendants have produced documents from the Connecticut Secretary of State showing that Corporate Surveys was dissolved on February 4, 1994, approximately seven years before the parties entered into the alleged transaction concerning the Priceline litigation. The defendants produced a certificate of dissolution dated February 4, 1994 which reads in relevant part: "I [the Secretary of State] hereby certify that of this notice, the following action was taken pursuant to law with respect to the above named corporation for the reason(s) indicated. Dissolution– Failure to file organization report within 2 years."

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: that:1.a defense is founded on documentary evidence ***."(*See, Galvan v. 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743.) In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see, Galvan v. 9519 Third Avenue Restaurant Corp, supra; Vanderminden v.Vanderminden,* 226 AD2d 1037; *Bronxville Knolls, Inc. v.Webster Town Center Partnership*, 221 AD2d 248.)

CPLR 3211(a) further provides that a party may move for judgment dismissing a cause of action asserted against him on the ground that "3. the party asserting the cause of action has not legal capacity to sue ***." (*See, Misek-Falkoff v. Usalliance Federal Credit Union*, -AD3d-, -NYS2d-, 2014 WL 6677185; *Pall v. McKenzie Homeowners' Ass'n, Inc.*, 121 AD3d 1446.)

The defendants argue that plaintiff Corporate Surveys lacks the capacity to sue because the corporation was dissolved prior to the commencement of the Priceline litigation. The argument has merit. Pursuant to Business Corporation Law §1006, a dissolved corporation may only begin a suit if it is related to the winding up of its affairs. With limited exceptions, a dissolved corporation does not have the right to bring an action in a court of this state. (*Weiss v. Markel,* 110 AD3d 869.) "A corporation's legal existence terminates upon dissolution and, as such, it is prohibited from carrying on new business and does not enjoy the right to bring suit in the courts of this state, except in the limited respects specifically permitted by statute ***." (*Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.* 102 AD3d 1033, 1036 [internal quotation marks and citation omitted]; *Moran Enterprises, Inc. v. Hurst*, 66 AD3d 972.) When the parties allegedly entered into the Priceline transaction, Corporate Surveys was a dissolved corporation, and the transaction was not related to the winding up of the corporation's affairs. (*See, Weiss v. Markel, supra.*) The documentary evidence in this case concerning the dissolution of Corporate Surveys is dispositive on the issue of its capacity to sue.

The plaintiffs assert that the Corporate Surveys is "currently pending reinstatement." "Upon dissolution, a corporation's legal existence terminates, and *absent subsequent reinstatement*, the corporation is legally dead, and is no longer permitted to sue or be sued, except as specifically permitted by statute ***." (*Big J Development Co., Inc. v. Big J Development Co., Inc.* 44 Misc.3d 1207[A] [Table], 2014 WL 3361180, 8 [Text] [italics added].) Conn. Gen. Stat. § 33-892 provides in relevant part: "(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative

dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred."

The plaintiffs' attorney requested in an affirmation dated July 25, 2014, that this court stay the instant action to allow the reinstatement process to continue. However, because this request was made almost five months ago and the court has not been notified of any progress, a stay is unwarranted.

Lenore Ballan, the widow of the late Eli Ballan, is the other plaintiff who brought this action. However, as evidenced by the Palm Beach County probate court's order of discharge dated September 1, 2004, she no longer serves as the personal representative of her late husband's estate. At the present time, she lacks the capacity to prosecute this action on behalf of her husband's estate. The plaintiffs assert that Lenone Ballan is "in the process of filing a petition" to reopen her husband's estate, and they request a stay of this action until the process is completed. However, because this request was made almost five months ago and the court has not been notified of any progress, a stay is unwarranted.

Finally, the fee-sharing agreement in question was unenforceable under Code of Professional Responsibility DR 2-107 (22 NYCRR 1200.12), which was the law in effect at the time of the conduct at issue (*see Hirsch v Bashian & Farber, LLP*, 79 AD3d 971 [2d Dept. 2010]; *Parker Waichman & Alonso, LLP v Ajlouny*, 76 AD3d 961 [2d Dept. 2010]).

Accordingly, based upon the foregoing, it is,

ORDERED, that this matter is dismissed pursuant to CPLR §3211.

This is the decision and order of the Court.

Dated: December 12, 2014

TIMOTHY J. DUFFICY, J.S.C.