

<b>Two Zelve Pugs Corp. v Kolody</b>
2019 NY Slip Op 30278(U)
February 6, 2019
Supreme Court, New York County
Docket Number: 151608/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

-----X

TWO ZELVE PUGS CORP.,

Plaintiff,

- v -

INDEX NO. 151608/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

RUSSEL KOLODY,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to \_\_\_\_\_ dismiss \_\_\_\_\_.

Defendant moves, pursuant to CPLR 3211(a)(1), (3), and (7) for an order dismissing the complaint, and pursuant to CPLR 6514, for an order cancelling the notice of pendency. Plaintiff opposes. At oral argument, defendant's motion, to the extent it sought to vacate the default, was granted. (Transcript, dated Nov. 7, 2018).

I. BACKGROUND

Defendant owns the property located at 172 Elizabeth Street in Manhattan. On December 2, 2015, he entered into a contract to sell the property for \$1,150,000 to a non-party who paid the contract deposit into escrow. (NYSCEF 25).

On June 29, 2016, plaintiff was dissolved, and its authority was annulled. (NYSCEF 32).

On February 15, 2017, the non-party assigned his interest in the sales contract to plaintiff. (NYSCEF 42). To date, defendant has neither closed on the sale nor conveyed the property. (NYSCEF 25).

On February 21, 2017, plaintiff filed its complaint, seeking specific performance, damages for breach of contract, and consequential damages. It also filed a notice of pendency on the property. (NYSCEF 25).

On July 21, 2017, in a separate action, *In the Matter of the Application of Steven Banks*, Index No. 81060/2017, defendant was granted a guardian, Michael R. Newell, for his personal needs and property management, with the power to, among other things, “[i]nitiate, defend, or maintain any administrative or civil judicial proceeding, including [...] ‘TWO 2 ELEV PUGS CORP. vs. KOLODY,’ [sic] Supreme Court of the City of New York, County of New York, Index No. [151608/2017].” (NYSCEF 31).

On November 7, 2017, “Michael R. Newell as Guardian of the person and property of Russell Kolody a/k/a Russel Kolody,” by counsel, filed an answer on Kolody’s behalf. (NYSCEF 17).

## II. CONTENTIONS

### A. Defendant (NYSCEF 22-36)

Defendant argues that plaintiff lacks capacity to sue, as the contract was assigned after plaintiff’s authority was annulled. (NYSCEF 32). He maintains that instituting this action and demanding specific performance is not consonant with winding up the affairs of a corporate entity. And, as the assignment is invalid, he claims that this action is not brought in good faith, and that the notice of pendency should be cancelled.

### B. Plaintiff (NYSCEF 39-45)

Plaintiff observes that absent substitution of defendant with his guardian pursuant to CPLR 1016, his motion must be denied. In any event, it asserts, although the corporation is dissolved, enforcement of the contract constitutes a winding up of corporate affairs. And as the

notice of pendency relates directly to the property, it ought not be canceled. In addition, it claims, the merit of plaintiff's claims is irrelevant on the issue of bad faith, and thus, cannot be used as a basis for canceling the notice of pendency.

Plaintiff's vice-president, by affidavit, states that plaintiff is in the process of being reinstated to active status through the payment of taxes (NYSCEF 40).

### III. ANALYSIS

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1<sup>st</sup> Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1<sup>st</sup> Dept 1996], *lv denied* 89 NY2d 802 [1996]).

#### A. Substitution of an incompetent party

Where a party is adjudicated incompetent, "the court shall order substitution" of his or her guardian. (CPLR 1016). Plaintiff offers no case law or support for its argument that defendant's failure to substitute in defendant's guardian as a party to this action warrants denial of his motion. Rather, the statute mandates the court to substitute a party that has been adjudicated incompetent. In the absence of prejudice for the failure to substitute, the court may *sua sponte* order substitution. (*Paul v Ascher*, 106 AD2d 619, 621 [2d Dept 1984]; *see also* Siegel, NY Prac § 186 at 326 [5th ed 2011] [procedures for substitution of incompetent party are same as that of a decedent]).

Absent any prejudice to plaintiff resulting from an earlier failure to substitute, and in light of the recent appointment of the guardian, specifically with regard to participation in this action, substitution, *sua sponte*, is warranted, and the caption is amended accordingly. (*See Aziz v City of*

*New York*, 130 AD3d 451, 453 [1<sup>st</sup> Dept 2015] [caption to be amended upon substitution of a party]). Thus, the motion to dismiss is considered.

#### B. Capacity to sue

A cause of action may be dismissed when “the party asserting the cause of action has not legal capacity to sue.” (CPLR 3211[a][3]). Capacity to sue relates to “a litigant’s power to appear and bring its grievance before the court.” (*Community. Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). On such a motion, the allegations pertaining to the plaintiff’s capacity “must be accepted as true.” (*Lazar v Merchants’ Nat. Properties, Inc.*, 45 Misc 2d 235, 236 [Sup Ct, NY County 1964], *affd* 23 AD2d 630 [1<sup>st</sup> Dept 1965]).

When a corporation is dissolved, it may conduct business with the purpose of winding up its affairs but may not carry on new business. (BCL § 1005[a]; *Greater Bright Light Home Care Servs., Inc. v Jeffries-El*, 151 AD3d 818, 820 [2d Dept 2017]; *Metered Appliances, Inc. v 75 Owners Corp.*, 225 AD2d 338, 338 [1<sup>st</sup> Dept 1996]). A dissolved corporation winding up its affairs has the “power to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its businesses.” (BCL 1005[a][2]).

Plaintiff offers no authority for the proposition that an assignment of a real estate contract to a dissolved corporation constitutes a winding up of a corporation’s affairs. Inversely, the assignment of a real estate contract by a dissolved corporation to another may constitute a winding up of the corporation’s affairs. (*See Jennings v High Farms Corp.*, 28 AD2d 693, 693 [2d Dept 1967] [permitting dissolved corporation to convey property to municipality]; *N. Properties, Inc. v Kuf Realty Corp.*, 30 Misc 2d 1, 3 [Sup Ct, Westchester County 1961] [permitting dissolved corporation to assign mortgage]).

Here, absent any explanation as to how the acquisition of the assignment effectuates the winding up of its business, plaintiff fails to demonstrate its capacity to sue. (*See e.g., Matter of Intelligent Bank Mgmt., Inc. [E. Coast Fin. Corp.]*, 207 AD2d 760, 761 [1<sup>st</sup> Dept 1994] [prohibiting dissolved corporation from entering new business relationship, as it “was not exercising a right or remedy existing as of its dissolution”]). In *A. A. Sustain, Ltd. v Montgomery Ward & Co.*, the defendant proceeded to trial without questioning the corporate status of the plaintiff and was thus estopped from doing so (22 AD2d 607, 609-610 [1<sup>st</sup> Dept 1965], *aff’d* 17 NY2d 776 [1966]), a circumstance not present here, and at the trial, the corporation’s president testified, without objection, that the dissolution of the plaintiff-corporation was the result of an error by the Secretary of State. (*Id.* at 609). That plaintiff contemplates paying overdue taxes is immaterial, especially absent any evidence of payment.

Consequently, plaintiff lacked capacity to acquire the assignment, and thus, as a non-party to the contract, lacks standing to sue thereunder. (*See Equitable Life Assur. Soc. of the U.S. v Nico Const. Co.*, 235 AD2d 222, 223 [1<sup>st</sup> Dept 1997] [non-party to contract lacks standing to enforce any rights thereunder]).

### C. Notice of pendency

When an action has been settled, discontinued, or abated, the notice of pendency must be cancelled. (CPLR 6514[a]; *Sorenson v 257/117 Realty, LLC*, 62 AD3d 618, 619 [1<sup>st</sup> Dept 2009], *lv dismissed* 13 NY3d 935 [2010]). As plaintiff lacks capacity to sue, it cannot maintain a valid claim, and thus, the notice of pendency must be cancelled. (*See Guberman v Rudder*, 85 AD3d 683, 684 [1<sup>st</sup> Dept 2011] [affirming cancellation of notice of pendency where complaint was properly dismissed for lack of capacity to sue]).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that Michael R. Newell, as guardian of Russel Kolody, incapacitated person, be substituted as defendant in the above-entitled action in the place and stead of the defendant, Russel Kolody, without prejudice to any proceedings heretofore had herein; it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Michael R. Newell, as guardian of Robert Kolody, incapacitated person, as defendant in the place and stead of said originally-named defendant, without prejudice to the proceedings heretofore had herein; it is further

ORDERED, that counsel for defendant shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; it is further

ORDERED, that such service upon the Clerk of the court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); it is further

ORDERED, that defendant's motion to vacate his default herein is granted; it is further

ORDERED, that defendant's motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendant to be taxed by the clerk upon submission of an appropriate bill of costs; and it is further

ORDERED, that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel the notice of pendency, filed in the office of the County Clerk of New York County on February 21, 2017.

  
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**BARBARA JAFFE, J.S.C.**

2/6/2019  
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**DATE**

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