

**Armenante v Nationwide Commercial Indus.  
Surfaces Inc.**

2021 NY Slip Op 30932(U)

March 23, 2021

Supreme Court, New York County

Docket Number: 152671/2020

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. DAVID BENJAMIN COHEN **PART** **IAS MOTION 58EFM**

*Justice*

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ANDREW ARMENANTE,

Plaintiff,

- v -

NATIONWIDE COMMERCIAL INDUSTRIAL SURFACES  
INC., NATIONWIDE COMMERCIAL GROUP INC., and  
THOMAS NISSEN,

Defendants.

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NATIONWIDE COMMERCIAL GROUP INC.

Third-Party Plaintiff,

-against-

CAMPBELL DESIGN AND CONSTRUCTION INC.

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57

were read on this motion to/for DISMISSAL.

Third-party defendant Campbell Design and Construction Inc. (“CDC”) moves, pursuant to CPLR 3211(a)(1) and (3) and General Business Law § 130, to dismiss the third-party complaint with prejudice, plus the costs of this motion. Nationwide Commercial Group (“NCGI”) opposes the motion in its entirety. For the reasons set forth below, the motion is denied.

**FACTUAL AND PROCEDURAL BACKGROUND**

On or about March 6, 2019, Plaintiff Andrew Armenante (“Armenante”) hired CDC as a general contractor to perform certain work and provide certain labor and materials in connection

with a renovation of the property that he owned at 21 Mercer Street, New York, New York (the “premises”).

In or about the Spring of 2019, CDC subcontracted the manufacturing and installation of tile flooring to defendants Nationwide Commercial Industrial Surfaces Inc. (“NCISI”); Nationwide Commercial Group Inc. (“NCGI”); and Thomas Nissen (“Nissen”), a principal of NCGI, (collectively “Defendants”). Pursuant to the subcontract, Defendants were to be paid a deposit in the total sum of \$42,977.43. Armanente paid the deposit to CDC, which in turn paid it to Defendants.

On or about March 11, 2020, Armenante commenced the instant action against Defendants (the “main action”) alleging conversion, breach of contract on a third-party beneficiary theory, unjust enrichment, and fraud, claiming that Defendants failed to provide the materials called for by the subcontract and wrongfully retained \$37,077.43 of the \$42,977.43 security deposit.

On or about July 21, 2020, Defendants filed and served an Answer denying the allegations and asserting affirmative defenses and a counterclaim.

On or about July 21, 2020, NCISI commenced a third-party action against CDC (the “third-party action”) alleging indemnification, breach of contract, and termination of the contract without cause.

On or about July 29, 2020, counsel for CDC allegedly alerted counsel for NCISI that NCISI was dissolved. On August 1, 2020, NCISI filed an Amended Third-Party Summons and Complaint, correctly naming NCGI, as the Third-Party Plaintiff, and also placing d/b/a<sup>1</sup>

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<sup>1</sup> “An assumed name is a name, other than its real name or fictitious name, under which an organization conducts business in this State. An assumed name is commonly referred to as a d/b/a” (19 NYCRR 156.4).

Nationwide Commercial & Industrial Surfaces (“NC&IS”) in the caption. This filing was rejected by the County Clerk and returned for correction (Doc. 9).

On or about August 2, 2020, counsel for CDC allegedly alerted counsel for Third-Party Plaintiff that “[o]n line [sic] searches conducted on August 2, 2020 reveal[ed] that no certificate of assumed name was ever filed in Suffolk County or New York County by [NCGI] ... [so] the third-party pleading ... signed and filed on August 1, 2020 [was] defective and frivolous.” (*see* Doc. 31).

On or about August 4, 2020, counsel for NCGI sent opposing counsel a copy of NCGI’s Certificate of Assumed Name, which was filed in New York State, reflecting the assumed name of “Nationwide Commercial Industrial Surfaces” (“NCIS”) (*see* Doc. 32).

On August 29, 2020, NCGI refiled the Amended Third-party Summons and Complaint with the party name: “[NCGI] d/b/a [NCIS].” This filing was also returned for correction. On or about September 23, 2020, NCGI refiled the Third-party Summons and Complaint without the term “Amended” but with the ampersand back in the d/b/a (Doc. 16). These documents were accepted by the Clerk. NCGI’s name in the caption then read: “[NCGI] d/b/a [NC&IS].”

On September 11, 2020, CDC filed the instant motion to dismiss. CDC argues that (1) the third-party action must be dismissed under General Business Law § 130 because NCGI has not filed a certificate of assumed name for NC&IS in New York County, where the subject work was performed; (2) Nissen is estopped from curing this defect due to his unclean hands, specifically that the assumed names/name changes in the company name of NCGI have been made to avoid paying corporate franchise taxes; and (3) neither NCGI nor its d/b/a entity NCIS has the standing to sue CDC since it neither contracted, nor had any dealings, with CDC, and that the only entity with which CDC contracted was NC&IS.

In opposition, NCGI argues that it has standing to sue, is a bona fide, active New York corporation, with a registered assumed name, and contracted with CDC, and that neither NCGI nor Nissen have perpetrated any fraud or deception on CDC or anyone else (Doc. 51; *see also* Doc. 47 [Nissen Aff.]).

In reply, CDC argues, *inter alia*, that Nissen has unclean hands insofar as he has multiple tax warrants against him (Doc. 54).

Nissen, a principal of NCGI, submits an affidavit in opposition to CDC's motion. Nissen states that NCGI is company consisting of “[n]ational [f]actory [t]rained [p]olished [s]urface and [o]verlay [f]loor and [w]all [s]ystem [a]pplicators, specializing in [s]urface [p]reparation, [p]olished [c]oncrete, [o]verlay, [r]esinous, and [t]errazzo” (Doc 47).

Nissen represents that he was principal of NCISI, a flooring company, which was dissolved by proclamation of state in 2016; that in 2016, before the dissolution of the corporate entity NCISI and before moving the company, at the advice of his accountant, he re-incorporated under the name NCGI; that NCGI is an active New York State corporation, a flooring company in good standing, with a principal and only place of business in Suffolk County, and does business under the assumed name “NCIS.” Nissen further states that the assumed name change NCIS is primarily so that customers will recognize the relation to the former company and the newly formed company can build on [the former company's] reputation and years of expertise in the flooring business as NCISI.

Nissen states that he sought to file a Certificate of Assumed Name of “NCIS” using the entity LegalZoom.com to fill out and file the necessary paperwork with the New York Department of State; that since Suffolk County is its one place of business, where its headquarters and warehouse are and where it manufactures and displays its flooring surfaces,

that was the county designated on the form; and that he did not file the d/b/a in New York County because NCGI had no facility there.

Nissen further represents that he has learned during the course of this action that the banner logo design at the top of the letterhead of his company has an ampersand between the words “Commercial” and “Industrial,” reading “Nationwide Commercial & Industrial Surfaces;” that this banner with the ampersand was created by someone at the company years ago and no one attributed much significance to it; and that he assumed it was an alias, although most people, including himself, referred to the company as “Nationwide Commercial Industrial” or the shortened form “NCI” in communications.

Additionally, according to Nissen, CDC transferred the deposit under the subcontract into an account in the name of “Nationwide Commercial Industrial;” that NCGI’s accounts were in the name NCGI and the d/b/a NCIS; and that CDC wired the first payment of \$42,968.88 on the subcontract to the account of NCIS.

## LEGAL CONCLUSIONS

### 1. Legal Standard for Motion to Dismiss

CPLR 3211(a), entitled “Motion to dismiss cause of action,” states, in relevant part, that:

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence; or ...
- (3) the party asserting the cause of action has no legal capacity to sue[.]

(CPLR 3211[a][1], [3]).

On a motion to dismiss under CPLR 3211(a), the pleadings are afforded a liberal construction and the facts as alleged in the complaint are accepted as true. Moreover, the plaintiff is to be accorded the benefit of every possible inference (*Hsu v Liu & Shields LLP*, 127 AD3d 522, 523 [1st Dept 2015] [internal citations omitted]).

A CPLR 3211(a)(1) motion “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence—namely, the pre-discharge inspection report showing that the delivered fuel oil was in compliance with contract specifications—refuted the plaintiff’s allegations for breach of contract]).

CPLR 3211(a)(3) permits this Court to dismiss an action when the party bringing the action lacks legal capacity to bring the action. “Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review.” (*Town of Riverhead v. New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41 ([2005])). “Business corporations, for example, are creatures of statute and, as such, require statutory authority to sue and be sued.” (*Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 ([1994])).

## 2. General Business Law Section 130

Section 130(1) of General Business Law (“GBL”) provides, in relevant part, that:

No person shall thereafter (i) carry on or conduct or transact business in this state under any name or designation other than his or its real name . . . unless . . . (b) [s]uch person, if a corporation, limited partnership or limited liability company, shall file, together with the fees as set forth in subdivision five of this section, in the office of the secretary of state a certificate setting forth the name or designation under which business is carried on or conducted or transacted, its corporate, limited partnership or limited liability company name, the location including number and street, if any, of its principal place of business in the state, the name of each county in which it does business or intends to do business, and the location including number and street, if any, of each place where it carries on or conducts or transacts business in this state.

(GBL § 130[1]).

GBL Section 9 provides, in relevant part, that:

Any person or persons carrying on, conducting or transacting business as aforesaid, who knowingly fails to comply with the provisions of this section or who knowingly makes a false statement in a certificate filed thereunder shall be guilty of a misdemeanor. Any person ... who fails to comply with the provisions of this section shall be prohibited from maintaining any action or proceeding in any court in this state on any contract, account or transaction made in a name other than its real name until the certificate required by this section has been executed and filed in accordance with the provisions set forth herein.

(GBL § 130[9]).

A person is defined under the statute as an “individual, partnership, limited partnership, corporation, limited liability company and unincorporated association” (GBL § 130 [b][1-a][a]).

Pursuant to GBL § 130(1), “[a] corporation may transact business under another name only if it files a certificate indicating this name, the counties in which it conducts business, and the address of its principal place of business and other locations where it transacts business in New York. The purpose of this provision is to protect the public through affording it information as to the identity of the persons conducting the business, thereby preventing deception and confusion” (*G & G Seafood, Inc. v MS Fish Corp.*, 2019 N.Y. Slip Op. 31006[U], 4 [N.Y. Sup Ct, New York County 2019] [internal quotations and citations omitted]).

However, a failure to file the certificate of doing business “is not jurisdictional and can be cured at any time prior to judgment (*Robert v Ringerjeans, LLC*, 165 AD3d 609, 609-10 [1st Dept 2018]; *Cohen v OrthoNet New York IPA, Inc.*, 19 AD3d 261 [1st Dept 2005]).

### **3. Application**

NCGI, a domestic business corporation (Doc. 31), filed a Certificate of Assumed Name for the d/b/a NCIS (Doc. 32), whereas NCGI’s banner logo contained an ampersand between “Commercial” and “Industrial,” as in NC&IS, which was how the d/b/a was also listed in the

caption.<sup>2</sup> The appellation d/b/a NCIS “only serves as an additional identification of” NCGI, “and accords no basis for dismissal or for alteration of the caption” (*Lopinyukelis II, LLC v Merchant Capital Funding, LLC*, 38 Misc 3d 1226(A) [Sup Ct 2013] [internal citations omitted]).

Moreover, this Court notes that there is no indication that NCGI attempted to or did deceive CDC. Further, a search for “Nationwide Commercial & Industrial Surfaces” on the Department of Consumer Protection Website reveals the dissolved entity “Nationwide Commercial Industrial Surfaces Inc.” (*see Marraccini v Ryan*, 17 NY3d 83, 85 [2011] [holding that plaintiff, a licensed home improvement contractor whose license was issued only under the name of his company, was not barred from enforcing a contract entered into with defendant property owners under only his individual name where the defendants were neither deceived nor otherwise prejudiced by the misnomer]).

However, it is undisputed that the certificate does not indicate New York as a county in which NCGI d/b/a NCIS conducts business, whereas the third-party complaint alleges that NCGI has conducted business in New York (Doc. 33 ¶ 3). In opposition to the instant motion, NCGI has sought leave to amend the certificate (Doc. 52 ¶ 35; *see also* Doc. 47 ¶ 32). This Court grants NCGI leave to amend the certificate to correct the above-mentioned errors. “Absent a showing of an intent to deceive, the court may grant a party leave to amend its certificate to correct an inaccuracy at any point prior to entry of judgment” (*Robert*, 165 AD3d at 609-10; *cf. Clove Rd. Deli, Inc. v C & V Italian Gourmet, Inc.*, 5 Misc 3d 137(A) [App Term 2004]). Based on a review of the motion papers and the affidavit of Nissen, that there is no indication that NCGI attempted to or did deceive CDC.

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<sup>2</sup> As explained in detail in the background section, the d/b/a was listed without the ampersand on the Amended Third-party Summons and Complaint dated August 29, 2020, which was returned for a filing error.

Additionally, to the extent that CDC argues that NCGI does not have standing to sue because, in effect, “[NC&IS] is not a party to the main action” (*see, e.g.*, Doc. 26 ¶ 2), this argument is unpersuasive since NCGI, an active New York corporation (Doc. 32), is a party to the main action and, as noted above, alleged deficiencies with regard to its certificate of doing business are not jurisdictional and may be cured at any time prior to judgment.

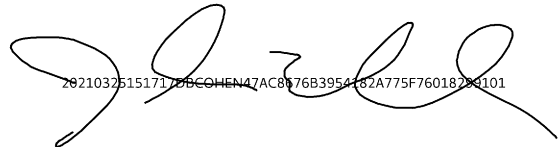
**CONCLUSION**

Accordingly, it is hereby:

ORDERED that the motion by Third-party defendant Campbell Design and Construction (“CDC”) for an order, pursuant to CPLR 3211(a)(1) and (3), dismissing the Third-Party Complaint as against it with prejudice is denied; and it is further

ORDERED that Nationwide Commercial Group Inc. is granted leave to amend its certificate within twenty (20) days of the date of this order; and it is further,

ORDERED that the parties shall appear for a preliminary conference in this matter on April 12, 2021 at 10:00 AM, which will be held by Microsoft Teams. A link to the conference that has already been sent via a court notice. If, prior to that day, the parties meet and confer in order to complete a bar coded preliminary conference form to be provided by the Part 58 Clerk at [SFC-Part58-Clerk@nycourts.gov](mailto:SFC-Part58-Clerk@nycourts.gov), the conference will be cancelled.



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DAVID BENJAMIN COHEN, J.S.C.

3/23/2021  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE