

**Zomongo.TV USA Inc. v Capital Advance Servs., LLC**

2023 NY Slip Op 31734(U)

May 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 512735/2021

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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ZOMONGO.TV USA INC. D/B/A ZOMONGO.TV  
USA, JOCELYNE LISA HUGHES-OSTROWSKI and  
JEREMY GENE OSTROWSKI,

Plaintiffs, Decision and order

- against -

Index No. 512735/2021

CAPITAL ADVANCE SERVICES, LLC,

Defendant,

May 22, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5

The defendant has moved pursuant to CPLR §3212 seeking summary judgement dismissing the lawsuit. The remaining plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, the plaintiff, Zomongo a corporation involved in the advertising industry, entered into two merchant cash agreements with the defendant. The first agreement was dated February 12, 2018 whereby the defendant purchased \$449,700 of plaintiff's future receivables for \$300,000. The second agreement was dated April 11, 2018 whereby the defendant purchased \$861,925 of plaintiff's future receivables for \$575,000. The complaint alleges the defendant failed to deliver the purchased amounts pursuant to the agreements and improperly withdrew daily amounts in excess of the amounts to which the parties agreed. The court already ruled the individual plaintiffs have no standing to maintain the lawsuit

since they declared bankruptcy in Canada. The defendant now seeks to dismiss the lawsuit filed by the remaining plaintiff, the corporate entity owned by the individual plaintiffs, on the grounds that the bankruptcy entrusted the corporate entity to the bankruptcy trustee. Thus, all authority to manage and control the corporate plaintiff has been transferred to the bankruptcy trustee divesting the corporation of the ability to maintain any lawsuit. The defendant further argues the corporate entity's charter was revoked when the registered agent resigned and thus the corporate entity has no standing to maintain the lawsuit.

The corporate plaintiff opposes the motion, as noted.

#### Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

In Jay Dees Inc., v. Defense Technology Systems Inc., 2008 WL 4501652 [S.D.N.Y. 2008] the court explained that while some Delaware courts have held that a corporation whose certificate of

incorporation has been revoked maintains no capacity to sue subsequent cases relaxed that rule. Thus, in First Staffing Plus Inc., v. Montgomery Mutual Insurance Company, 2005 WL 2173993 [Court of Chancery of Delaware 2005] the court held, citing earlier authority, that "a dissolved Delaware corporation has the power to close its affairs but not to carry on the business for which it was established" (id). Thus, a Delaware corporation, even if the charter is void or has been revoked has the ability to maintain lawsuits during the three year statutory winding-up period.

The corporate charter was revoked on December 15, 2019 and the complaint in this action was filed May 26, 2021, within the three year statutory period. Thus, there can be no basis upon which to deny the corporate plaintiff standing to pursue this lawsuit. Furthermore, notwithstanding the above, there is further no argument that the individual plaintiffs had no authority to revive the defunct corporation.

The defendant's next argue that in any event as a result of the bankruptcy by the individual defendants any claims that may be pursued by the corporation are likewise under the jurisdiction of the bankruptcy court and consequently the lawsuit must be dismissed.

It is well settled that "shareholders do not hold legal title to any of the corporation's assets. Instead, the

corporation—the entity itself—is vested with the title” (see, EM Ltd., v. Republic of Argentina, 473 F3d 463 [2d Cir. 2007]). In Advanced Video Technologies, LLC v. HTC Corp., 103 F.Supp3d 409 [S.D.N.Y. 2015] the court explained that “when a Delaware corporation files a certificate of dissolution, it does not simply evaporate. Rather, it “dissolves” only for the purpose of continuing to do business. By operation of law...the corporation remains continues in existence for a period of at least three years from the date of dissolution—more, if the period is extended by the Court of Chancery—for the limited purpose of allowing it to wind up its affairs. To that end, it can sue and be sued, dispose of or convey its property and discharge its liabilities. Only after all of that is done is a Delaware corporation permitted ‘to distribute to their stockholders any remaining assets’—that is, any assets that remain after satisfaction of all liabilities—pursuant to § 281(b). Under §281, stockholders are last in line; they are entitled to receive, not all the assets of a dissolved corporation, but only “remaining assets”—the assets that are left over after all other corporate creditors have been satisfied, or provision made for them to be satisfied” (id). Therefore, “as a result, it is well-settled that assets owned by a corporation are not included in the bankruptcy estate of an individual shareholder...a debtor's shares in a corporation became part of the bankruptcy estate; the

assets of the corporation do not" (see, In re Billingsley, 338 BR 372 [United States Bankruptcy Court Central District of Illinois 2006]). Thus, the mere fact the shares of the corporation are now part of the bankruptcy estate does not mean the assets are as well or that the corporate entity cannot pursue claims.

Therefore, based on the foregoing, the motion seeking summary judgement dismissing the corporate defendant's lawsuit is consequently denied.

So ordered.

ENTER:

DATED: May 22, 2023  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC