

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

2023 NY Slip Op 33119(U)

August 24, 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,

August 24, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #6

The defendant has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated May 22, 2023 denying the defendant's motion seeking summary judgement. The defendant has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

In the prior order the court held that even though the corporate plaintiff Zomongo was dissolved it could still pursue claims during the wind-up period. The defendant has now moved to reargue that determination. Specifically, the defendant asserts that since the individual owners of Zomongo declared bankruptcy in Canada therefore only the Canadian Trustee is empowered to pursue claims on behalf of Zomongo not the individual plaintiffs who have no such authority. The defendant further argues that the three year wind-up period does not even apply in this case. As noted the motion is opposed.

Conclusions of Law

A motion to reargue may be granted upon the showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (Bethel Springvale Nursing Home Inc., v. Gleason, _AD3d_, 192 NYS3d 692 [2d Dept., 2023]). Thus, the party must demonstrate that the court overlooked some point of law or fact and consequently made a decision in error.

First, there is no merit to the argument that only dissolved corporations are allowed a three year winding-up period but that corporations where their charter has been revoked are denied a winding-up period. The relevant statute that governs the three year winding-up period is 8 Delaware Corporations Law §278 entitled "Continuation of corporation after dissolution for purposes of suit and winding up affairs" (id). It states that "all corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution..." (id). In First Staffing Plus Inc., v. Montgomery Mutual Insurance Company, 2005 WL 2173993 [Court of Chancery of Delaware 2005] the court clearly held that a void corporation maintains standing to pursue claims during a winding-up period. Moreover, in Carolyn S. Storey Inc., v. Accounting Solutions Holding Company Inc., 2008 WL 762238 [Middle District of Georgia 2008] the court stated that

"Delaware case law suggests that §278 applies to void corporations. In *Sanders v. Vari*, 143 A.2d 275, 276 (Del. Ch.1958), the Court of Chancery applied §278 to a corporation declared void for non-payment of franchises taxes. More recently, although not expressly citing to §278, the Court of Chancery concluded that the general rule which authorizes dissolved corporations to close their affairs, applies to void corporations. *First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co.*, No. Civ. A. 2100-S, 2005 WL 2173993, at *7 (Del. Ch. Sept. 6, 2005) (unpublished op.). Additionally, the Court of Chancery has held that a corporation whose charter is void because of failure to pay franchises is "dissolved" for purposes of Del.Code Ann. tit. 8, §279, which authorizes the appointment of receivers for dissolved corporations. *Wuerfel v. E.H. Smith Co.*, 13 A.2d 601, 602 (Del. Ch.1940)" (*id.*, see, also, Congdon v. Cheapcarribean.com Inc., 2017 WL 5069960, Footnote 3 [Northern District of Illinois 2017]).

Further, the decision in *Jay Dees Inc., v. Defense Technology Systems Inc.*, 2008 WL 4501652 [S.D.N.Y. 2008] clearly equates void corporations with dissolved corporations for purposes of the three year winding-up period ("while the Delaware Supreme Court has stated that a corporation whose certificate of incorporation has been revoked "has lost any standing to appeal and be heard," a later decision of the Court of Chancery noted

that this statement was unpublished, unsupported dicta that—if enforced—would represent a departure from longstanding principles of Delaware corporate law. Therefore, Delaware law remains that “a dissolved Delaware corporation has the power to close its affairs but not to carry on the business for which it was established.” “As a result, a Delaware corporation may bring a lawsuit or counterclaim during the three-year statutory winding up period. After that period, the corporation lacks both standing to sue and capacity to be sued” (id). Furthermore, the rule espoused and affirmed above that a void corporation maintains the same winding-up period as a dissolved corporation was also favored in SunTrust Banks Inc., v. Robertson, 2011 WL 13237797 [Eastern District of Virginia 2011]), Café La France Inc., v. Schneider Securities Inc., 281 F.Supp2d 361 [District of Rhode Island 2003] and Rockout Inc., v. Sgarlat, 1997 WL 798244 [Eastern District of Pennsylvania 1997]).

In light of the above support for this rule the defendant’s reliance upon Juma Technology Corp., v. Servidio, 2017 WL 2303855 [Supreme Court New York County 2017] that a void corporation’s right to a three year winding-up period is “unavailing” is wholly unpersuasive.

Therefore, the plaintiff maintains standing to proceed with this action.

Next, the defendant argues that in any event the corporation

cannot possibly pursue any claims since the individual shareholders have declared bankruptcy and thus have no ownership interest in the corporation. While that might be the case pursuant to Canadian bankruptcy law, the country where the individuals declared bankruptcy, that law does not govern this proceeding. Rather, this proceeding is governed by the jurisdiction where the corporation was formed, namely the state of Delaware. 8 Delaware Corporations Law §279 entitled "Trustees or receivers for dissolved corporations; appointment; powers; duties" states that "when any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the directors of the corporation to be trustees, or appoint 1 or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the


trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid" (id). Thus, it is Section 279 that governs the future of Zomongo and not a Canadian bankruptcy trustee. The defendant wondered "on what basis and whose authority has Zomongo been restored?" (see, Memorandum of Law, page 5 [NYSCEF Doc. No. 152]). The answer to this question, upon which the motion to reargue largely rests, is the individual shareholders or anyone that can satisfy the 'good cause' requirements of Section 279. Any such individual has the right to apply as the trustee or receiver of the corporation. To be sure, evidence must be presented that there has been compliance with Section 279 and that a Court of Chancery has approved the restoration of the corporation and pursuit of this lawsuit, even on a nunc pro tunc basis. The court awaits that confirmation.

Therefore, at this time, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: August 24, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC