

Hamlettte v El Mundo Dept. Store, Inc.

2009 NY Slip Op 33334(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 101635/09

Judge: Doris Ling-Cohan

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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. Doris Ling-Cohan, Justice **Part 36**

TYRONNE HAMLETTE,

Plaintiff,

-against-

**EL MUNDO DEPARTMENT STORE, INC. d/b/a
HAMILTON PALACE and ABDOULAYE
TAMBADOU,**

Defendants.

INDEX NO. 101635/09

MOTION SEQ. NO. 001

FILED

JAN 05 2010

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The following papers, numbered 1 - 6 were considered on this motion to/for dismiss.

PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____

1, 2

Answering Affidavits — Exhibits _____

5

Replying Affidavits _____

6

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion and cross motion are decided to the extent set forth below.

Defendant El Mundo Department Store, Inc. d/b/a Hamilton Palace ("El Mundo") moves for an order, pursuant to CPLR 3211, dismissing all claims against it, on the grounds that El Mundo has been dissolved by proclamation of the Secretary of State as of September 23, 1998, or, in the alternative, granting it an additional 30 days to interpose an answer. Plaintiff cross-moves, pursuant to CPLR 3215, for a default judgment in favor of plaintiff and against defendant Abdoulaye Tambadou ("Tambadou"), for his failure to timely appear or answer in this action.

This action was commenced by plaintiff to recover damages for an alleged assault and battery, false arrest and malicious prosecution, subsequent to an incident that occurred at the premises of defendant El Mundo. Plaintiff alleges that he was assaulted on January 4, 2008 by defendant Tambadou, a security guard allegedly employed by El Mundo, and then arrested after a false claim was made by

* 2] Tambadou that plaintiff had improperly taken merchandise from El Mundo. As a result, plaintiff was arrested, but the charges were subsequently dismissed.

Motion to Dismiss

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

Defendant El Mundo argues that the complaint should be dismissed as against it because it no longer does business and was dissolved by proclamation of the Secretary of State on September 23, 1998. El Mundo attaches to its motion papers, as evidence of such fact, a printout of the Secretary of State's website that shows that El Mundo was dissolved by proclamation. Jack L. Cohen Affirmation, Exh B.

Plaintiff opposes the motion, contending that El Mundo "still holds itself out as an ongoing entity conducting business at 3560 Broadway, New York, NY." Edward Sivin Affirmation ¶ 6. In support, plaintiff attaches "a few of the many internet postings and advertisements by and on behalf of El Mundo." *Id.*

New York's Business Corporation Law § 1006(a) states that a dissolved corporation "may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place." In doing so, "[t]he corporation may sue or be sued in all courts and participate in actions and proceedings." BCL § 1006(a)(4). A dissolved corporation "may be held liable on a cause of action that accrues after dissolution if the corporation continued its operations, operated its premises, and held itself out as a de facto corporation, notwithstanding its dissolution." *Bruce Supply Corp. v New Wave Mechanical, Inc.*, 4 AD3d 444, 445 (2d Dep't 2004); see also *Ludlum Corp. Pension Plan Trust v Matty's Superservice, Inc.*, 156 AD2d 339, 340 (2d Dep't 1989).

3]

At this stage, defendant El Mundo had failed to adequately demonstrate that El Mundo is no longer functioning as a corporation. Although El Mundo did submit a printout of the Secretary of State's website in support of its motion, it failed to submit an affidavit by someone with actual knowledge of the status of the dissolved corporation, such as a representative of El Mundo. Instead, defendant only submits an affirmation by its attorney, Jack L. Cohen, Esq., who presumably does not have the requisite personal knowledge of the corporation and, thus, is not the proper person to attest to its status. Furthermore, the attorney affirmation never clearly states that the corporation is defunct and no longer in business, beyond relying solely on the printout.

Simply because a corporation has been dissolved by proclamation does not necessarily mean that it no longer conducts business. Pursuant to Tax Law § 203-a, a dissolution by proclamation occurs when a corporation is delinquent in paying the requisite taxes or filing reports and after such failure, the Secretary of State deems it dissolved after proclamation. However, the court will not presume that a mere declaration of dissolution by proclamation automatically means that a corporation no longer holds itself out as a business, especially in light of El Mundo's failure to sufficiently state, by someone with personal knowledge, that the corporation no longer conducts any business.

Further, the relevant facts as to whether El Mundo is still conducting business are within the control of defendants and thus discovery is necessary. CPLR 3211(d) provides, with respect to motions to dismiss, that "[s]hould it appear . . . that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion." This subsection "protects the party to whom essential . . . facts are not presently known, especially where those facts are within the exclusive control of the moving party." *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 465-66 (1974).

Thus, the motion to dismiss is denied, without prejudice to move, if defendant so chooses, after discovery. Defendant El Mundo is granted an additional 30 days, from the date of entry of this order, to serve and file an answer to the complaint.

Cross Motion for a Default Judgment

Plaintiff cross-moves for a default judgment against defendant Tambadou, as he has failed to timely answer or appear in this action. However, a cross motion is an improper vehicle for seeking affirmative relief from a non-moving party. *Mango v Long Island Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 (2d Dep't 1986); Weinstein-Korn-Miller, NY Civ Prac ¶ 2215.01. Therefore, the cross motion for a default judgment against non-moving party Tambadou is procedurally improper and, thus, denied without prejudice, for plaintiff to move for such relief in a separate motion, within 30 days.

Accordingly, it is

ORDERED that defendant El Mundo's motion is granted solely to the extent that El Mundo has an additional 30 days, from the date of entry of this order, to serve and file its answer to the complaint and its motion to dismiss is denied without prejudice, for defendant to re-file such motion, if it chooses, following discovery; and it is further

ORDERED that plaintiff's cross motion for a default judgment against Tambadou is denied without prejudice to move for such relief in a separate motion, within 30 days; and it is further

ORDERED that, *as previously scheduled*, the parties shall appear for a preliminary conference on January 27, 2010 at 9:30 AM in Room 428, 60 Centre Street, New York, NY, at which time an expedited discovery schedule shall be set; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order upon the parties, with notice of entry.

This constitutes the decision and order of the Court.

Dated: 12/21/09


DORIS LING-COHAN, J.S.C.

FILED
JAN 05 2010
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J:\Dismiss\Hamlette.El Mundo, dismiss - denied, only atty affirm of dissolution.wpd