

AGA Ad Media, LLP v Moskowitz

2016 NY Slip Op 31661(U)

August 31, 2016

Supreme Court, New York County

Docket Number: 160886/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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AGA AD MEDIA, LLP,

Plaintiff,

- v -

ANDREW MOSKOWITZ, BLUEMEDIA PPC, LLC
and 2BLUE MEDIA GROUP, LLC,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

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**DECISION
and ORDER**

Mot. Seq. 002

Plaintiff AGA Ad Media, LLP (“AGA”) commenced this action against entity defendants BlueMedia PPC, LLC (“BlueMedia”), 2Blue Media Group, LLC (“2Blue Media”) (collectively, the “BlueMedia Defendants”), and individual defendant Andrew Moskowitz (“Moskowitz”) (together with the BlueMedia Defendants, the “Defendants”) to collect on alleged unpaid invoices totaling \$68,292.00 for “services related to tracking and reporting for advertisers and pay-per-click payment models for publishers.” In the complaint filed on October 23, 2015, plaintiff asserts claims for breach of contract, account stated, and piercing the corporate veil.

Plaintiff served BlueMedia and 2Blue Media with the summons and complaint on October 28, 2015. Moskowitz was served on November 4, 2015, and proof of service was filed on November 10, 2015.

On January 29, 2016, Moskowitz filed a motion to dismiss the complaint and defendants BlueMedia and 2Blue Media filed a joint answer.

On March 4, 2016, plaintiff attempted to file an amended complaint and supplemental summons, which was subsequently rejected by the Court Clerk on March 7, 2016.

On March 11, 2016, plaintiff and defendants entered a stipulation withdrawing defendant Moskowitz’s motion to dismiss, and setting the deadline for Moskowitz

to answer or otherwise respond to any pleading for either (a) 20 days after the filing of an amended complaint following the resolution of plaintiff's motion to amend and add TwistFire Media, LLC; or (b) 20 days after the denial of such motion.

Plaintiff now moves for an order, pursuant to CPLR 1001(a), 1002(b), 1003, and 3025(a), to amend the complaint and to add Twistfire Media, LLC as a defendant.

Plaintiff submits the attorney affirmation of Emily Burgess, Esq., dated March 31, 2016, with the following exhibits annexed thereto: (a) the summons and complaint; (b) the proposed supplemental summons; (c) the proposed amended complaint; (d) a document showing the changes and additions to be made to the original complaint, pursuant to CPLR 3015(a); and (e) a copy of an email from the Court Clerk, dated March 7, 2016, rejecting the proposed amended complaint and supplemental summons.

Defendants oppose the amendment of the complaint as to defendant Moskowitz, but do not oppose the amendment of the complaint as to the BlueMedia defendants.

Pursuant to CPLR 3025(a), "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it."

A motion to dismiss extends the movant's time to answer and thus extends the time in which the opposing party may amend his pleading as of right. CPLR 3025(a); *see Johnson v. Spence*, 286 A.D.2d 481, 483 (2d Dept. 2001) (noting that "the plaintiff could have amended her complaint as of right, since the defendant's motion to dismiss the complaint, which extended his time to answer the complaint, also extended the plaintiff's time to amend the complaint"); *STS Mgmt. Dev. v. New York State Dept. of Taxation & Fin.*, 254 A.D.2d 409, 410 (2d Dept. 1998) (finding that the Supreme Court improperly found that the plaintiffs could not amend their verified complaint "as of right"; defendants' motion to dismiss the complaint extended the defendants' time to answer and thus extended the time in which the plaintiffs could amend their complaint as of right); *Polish Am. Immigration Relief Comm., Inc. v. Relax*, 172 A.D.2d 374, 375 (1st Dept. 1991) ("A motion to dismiss a cause of action pursuant to CPLR 3211(a) operates to extend the time in which to serve a pleading in response thereto until 10 days after service of notice of entry of the order disposing of the motion.").

Here, the BlueMedia Defendants filed an answer and defendant Moskowitz filed a pre-answer motion to dismiss. Though the First Department has not directly addressed the issue, where there are “multiple defendants, some of whom have answered and some of whom have moved to dismiss,” several New York County Supreme Courts have held that the time to amend as of right has not expired while the outstanding motions to dismiss are still pending. *Hadar v. Hadar*, No. 101961/2009, 2011 WL 11072769, at *3 (Sup. Ct. N.Y. Cty. May 3, 2011) (“[W]hen one or more defendants have answered and one or more defendants have moved to dismiss, the movants’ time to respond, and thus the pleading party’s time to amend the pleading once as of right, is extended in light of the motions to dismiss.”); *Kverel v. The Town of Southampton*, 2015 WL 5283302, at *1 (Sup. Ct. N.Y. Cty. Aug. 25, 2015) (“CPLR 3025 permits amendment of a pleading as of right and without leave of court in a multi-party action within twenty days after service of the last responsive pleading[.]”); *The Bd. of Managers of the 30 East 76th Street Condominium v. Sands*, 2015 WL 5330321, at *2 (Sup. Ct. N.Y. Cty. Sept. 9, 2015) (“[A] pre-answer motion to dismiss is not a responsive pleading, the service of which would trigger plaintiffs time to serve an Amended Complaint as of right, but instead such motion extends plaintiff’s time to amend the complaint.”); *see also Citibank v. Suthers*, 68 A.D.2d 790, 794–95 (4th Dept. 1979) (holding that “a pleader may respond as of right within 20 days after service of the last pleading responding to his pleading”). Accordingly, because defendant Moskowitz filed a pre-answer motion to dismiss the complaint, thus extending plaintiff’s time to amend the pleading, plaintiff is entitled to amend the complaint once as of right under CPLR 3025(a).

CPLR 1003 provides that “[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.” “The procedure for the ex parte joinder is assimilated to the procedure of the amendment as of course allowed by CPLR 3025(a): the time periods allowed for the CPLR 3025(a) amendment are adopted as the time periods within which the additional joinder can be accomplished unilaterally under the new statutes.” Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3025:3A.

Here, because plaintiff is entitled to amend the complaint as of right under CPLR 3025(a), plaintiff is entitled to add an additional party pursuant to CPLR 1003.

Wherefore, it is hereby

ORDERED that plaintiff's motion to amend the complaint to add Twistfire Media, LLC as a defendant is granted; and it is further

ORDERED that the amended complaint in the proposed form annexed to plaintiff's moving papers shall be deemed served on defendants upon service of a copy of this Order with notice of entry thereof and shall be served upon Twistfire Media, LLC in accordance with the CPLR.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: AUGUST 31, 2016

AUG 31 2016



EILEEN A. RAKOWER, J.S.C.