

One Stone Lending LLC v Alta Operations, LLC

2020 NY Slip Op 30722(U)

March 6, 2020

Supreme Court, New York County

Docket Number: 850039/2019

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 850039/2019

ONE STONE LENDING LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALTA OPERATIONS, LLC, GARY FLOM, SVITLANA FLOM,
AMERICAN EXPRESS NATIONAL BANK, ATLANTIC
SPECIALTY INSURANCE COMPANY, VENIAMIN NILVA,
625 W 55 LLC, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, JOHN DOE, JANE DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for SUMMARY JUDGMENT/ C-M to DIMISS

The motion by plaintiff for summary judgment is denied and the cross-motion by defendants Alta Operations, LLC, Gary Flom and Svitlana Flom (collectively "Defendants") to dismiss is granted.

Background

In this foreclosure action, plaintiff seeks summary judgment and the appointment of a referee. Plaintiff contends it loaned \$499,000 to Alta in 2017.

In opposition and in support of its cross-motion, Defendants argue *inter alia* that plaintiff failed to comply with Limited Liability Company Law § 206 and, therefore, lacks the capacity to

maintain this case. They claim that plaintiff's disregard of this provision—which directs an LLC to publish its articles of organization—compels the Court to dismiss this case.

In reply, plaintiff admits it did not publish in accordance with the Limited Liability Company Law but contends that this is not a jurisdictional defect that warrants dismissal. Plaintiff argues that it began the publication process (after receiving Defendants' cross-motion) and, at oral argument on March 3, 2020, contended that it had completed the publication requirements.

Discussion

“Section 206 of the Limited Liability Company Law requires each limited liability company to publish its articles of organization or comparable specified information for six successive weeks in two local newspapers designated by the clerk of the county where the limited liability company has its principal office, followed by filing an affidavit with the Department of State, stating that such publication has been made. If the publication requirement of section 206 is not completed within 120 days of the company's formation, the limited liability company will be precluded from maintaining any action or special proceeding in any New York court unless and until it complies with that requirement. Section 206 further specifies that the company's failure to file the required proof of publication shall not impair the validity of any of its contracts or impair the right of any other party to maintain any action or proceeding against the company or prevent the company from defending any such action or proceeding” (*Barklee Realty Co., LLC v Pataki*, 309 AD2d 310, 311, 765 NYS2d 599 [1st Dept 2003]).

The question for this Court is whether it can overlook the fact that when plaintiff started this case, it had not complied with section 206. Defendants rely on *Small Step Day Care, LLC v*

Broadway Bushwick Builders, L.P. (137 AD3d 1102, 26 NYS3d 872 (Mem) [2d Dept 2016]), where a plaintiff's case was dismissed because plaintiff failed to comply with the publication requirements. Plaintiff points to two Supreme Court cases for the proposition that its failure to comply with the publication requirements can be overlooked. In a 2003 Nassau County case, the court found that the failure to publish was a "procedural defect" that did not preclude plaintiff from bringing a case nor did it "constitute a jurisdictional defect warranting dismissal" (*Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, 13 Misc3d 1230(A), 831 NYS2d 357 (Table) [Sup Ct, Nassau County 2006]). The Court in *Willoughby* also noted that plaintiff's belated publication of the notice satisfied the Limited Liability Company Law (*id.*).

Plaintiff also relies on another case in which a court held that "subsequent compliance with Limited Liability Company Law § 206 warrants nunc pro tunc application averting dismissal of the action" (*2004 McDonald Ave. Realty, LLC v 2004 McDonald Ave Corp.*, 25 Misc3d 1204(A), 901 NYS2d 911 (Table) [Sup Ct, Kings County 2007]).

Plaintiff is correct that some trial courts have permitted a plaintiff to maintain an action where it complied with the requirements of Limited Liability Company Law § 206 after starting a case. But there are few appellate cases on this issue. In fact, a case from the Civil Court of the City of New York noted that "there appears to be no New York authority on whether a limited liability company can cure a publication defect after having commenced a proceeding" (*Acquisition Am. VI, LLC v Lamadore*, 5 Misc3d 461, 462, 784 NYS2d 329 [Civ Ct, New York County 2004] [finding that petitioner was entitled to cure publication defect after starting a case]).

This Court finds that it cannot ignore the purpose of Limited Liability Law § 206 and will not permit a plaintiff to maintain a case where it failed to comply with the publication

requirements when the case began. A review of the most recent amendment to this provision shows that the legislature *increased* the number of publication days from four to six and *reduced* the time frame for an LLC to publish from eighteen months to twelve months (New York Bill Jacket, 2006 S.B. 6831, Ch. 44). The goal was to make information about LLCs “available to the public in a manner which reinforces the public’s right to know the entities with which they are dealing” and “to the benefit of consumers and other persons who do business in this state” (*id.*).

Clearly, the legislature requires LLCs to publish with the intent to provide the citizens of this state with potentially helpful information about the entities with which they might be dealing. The Court finds that these technical and cumbersome requirements cannot be overlooked simply because plaintiff decided to comply with the law *only after* Defendants pointed out plaintiff’s failure to meet its obligations. Under those circumstances, it would make a mockery of the statute to allow plaintiff to maintain its case by complying with the law *after* starting a lawsuit and *after* Defendants pointed out this glaring omission.

The fact is that plaintiff started a case when it did not have the capacity to do so. It does not matter that plaintiff later may have rectified this error. Simply put, what would be the purpose of the legislature creating strict statutory requirements for LLCs to publish only for the courts to give a plaintiff a chance to comply if and when a defendant raises it as a defense? This court cannot condone the LLC’s practice of ignoring the statute, unless and until it is caught, and then pretending it shouldn’t make a difference.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied and the cross-motion by defendants Alta Operations, LLC, Gary Flom, and Svitlana Flom to dismiss is

granted, the Clerk is directed to enter judgment accordingly and to cancel the notice of pendency (NYSCEF Doc. No. 7) filed in connection with this case.

3-6-2020

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE