

3B Assoc. LLC v Ecommission Solutions, LLC

2020 NY Slip Op 33512(U)

October 22, 2020

Supreme Court, New York County

Docket Number: 657537/2017

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

3B ASSOCIATES LLC

Plaintiff,

- v -

ECOMMISSION SOLUTIONS, LLC,

Defendant.

-----X

INDEX NO. 657537/2017

MOTION DATE 07/15/2020

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Upon the foregoing documents and for the reasons set forth on the record (10/22/2020), 3B Associates, LLC's (**3B Associates**) motion to amend is granted.

The Relevant Facts and Circumstances

This action concerns the alleged breach of an agreement (the **Agreement**; NYSCEF Doc. No. 66), dated March 20, 2006, by and between 3B Group, Inc. (**3B Group**) and eCommission Solutions, LLC (**ECS**), whereby ECS would pay a certain percentage of its net profits to 3B Group (*id.*, ¶ 1).

Pursuant to an Assignment and Assumption Agreement (the **Assignment Agreement**; NYSCEF Doc. No. 70), dated January 1, 2011, by and between 3B Group as assignor and 3B Associates as assignee, 3B Group assigned its interest in the net profits of ECS to 3B Associates. On or about

December 12, 2012, the New York State Department of Taxation and Finance consented to 3B Group's voluntary dissolution and 3B Group filed its Certificate of Dissolution on January 28, 2013 (NYSCEF Doc. No. 168).

On December 22, 2017, 3B Associates commenced this action asserting claims against ECS, including breach of the Agreement and the recovery of damages accruing from the fourth quarter of 2013 onwards (NYSCEF Doc. No. 156, ¶ 27). After the close of discovery, 3B Associates and ECS filed respective summary judgment motions in November 2019. Pursuant to a decision and order, dated May 13, 2020, summary judgment was denied because there were material issues of fact concerning whether 3B Associates could enforce the Agreement as either an assignee or a successor in interest to 3B Group (the **Decision**; NYSCEF Doc. No. 148 at 4-6). The Agreement prevented assignment except by prior written agreement between the parties, which did not occur (*id.*). Although the Agreement inured to the benefit of the parties' successors and assigns, 3B Group did not merge into 3B Associates, 3B Associates was not a successor by operation of statute, and there was no indication that a certificate of merger was filed with the Department of State (*id.*). In addition, 3B Associates failed to provide sufficient information that it was, in fact, 3B Group's successor and not merely an assignee (*id.*) or that ECS otherwise consent to the assignment to 3b Associates. Accordingly, this court denied summary judgment.

3B Associates subsequently brought the instant motion for leave to file an amended complaint to:

(i) add 3B Group as a party plaintiff and (ii) identify certain damages sought.

Discussion

Leave to amend under CPLR § 3025 (b) is committed to the sound discretion of the trial court (*Colon v Citicorp Inv. Servs.*, 283 AD2d 193, 193 [1st Dept 2001], citing *Edenwald Contr. Co. v New York*, 60 NY2d 957, 959 [1983]). Leave to amend pleadings should be freely given unless there is prejudice or surprise resulting from the delay to the opposing party or if the proposed amendment is “palpably improper or insufficient as a matter of law” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). Pursuant to CPLR § 1003, parties may be added during any stage of the action by leave of court.

3B Associates argues that it should be granted leave to amend its pleadings because this will not prejudice ECS and the proposed amendments are not devoid of merit. In their opposition papers, ECS argues that it will be prejudiced by the proposed addition of 3B Group and that this is also devoid of merit because 3B Group is a dissolved entity that does not have standing to participate in this action.

For the avoidance of doubt, ECS did not oppose the branch of the instant motion as it relates to specifying certain damages in the amended pleading (NYSCEF Doc. No. 171 at 7, fn 1).

Accordingly, the branch of 3B Associates’ motion to amend its complaint to identify certain damages as set forth in its proposed amended complaint is granted (NYSCEF Doc. No. 156, ¶¶ 22-29).

In addition, ECS cannot claim to be surprised by the proposed addition of 3B Group to this action because it has been aware of issues concerning 3B Associates' potential lack of standing since the Answer was filed in July 2018 (NYSCEF Doc. No. 37 at 6). 3B Associates also did not delay in moving to add 3B Group as a party to this action just two months after the Decision was issued, which Decision questioned the adequacy of 3B Group's purported corporate reorganization for the first time in this case. Although ECS argues that the addition of 3B Group will require further discovery, ECS sought discovery from both 3B Associates and 3B Group in its document requests and interrogatories (NYSCEF Doc. Nos. 187-188). As a result, ECS has failed to establish that it will be prejudiced by 3B Associates' proposed amendment (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981] [prejudice "requires some indication that the [opponent] has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position"]).

Moreover, 3B Associates' proposed amendment is not palpably improper or devoid of merit insofar as it seeks to add a party that has an interest. A dissolved corporation shall not carry on any business except for the purpose of winding up its affairs, and thus possesses limited powers "to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business" (*172 E. 122 St. Tenants Assn. v Schwarz*, 73 NY2d 340, 346 [1989]; Business Corporation Law § 1005 [a]). Furthermore, "dissolution of a corporation shall not affect any remedy available to or against such corporation ... for any right or claim existing ... before such dissolution" (Business Corporation Law § 1006 [b]). Business Corporation Law also does not provide a specific timeframe for winding up a dissolved corporation's affairs such that the court is to imply a

reasonable period of time (*see Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 480 [1st Dept 2011]).

As the Decision raised the issue of whether 3B Associates was the proper successor in interest to 3B Group, this action appears to involve the winding up of 3B Group's affairs insofar as 3B Group purported to discharge its rights under the Agreement to 3B Associates. Stated differently, inasmuch as ECS argues that 3B Associates was not the successor to 3B Group, 3B Group may well have rights in the Agreement which it would need to distribute to its owners as part of the winding up of its affairs. The court has considered ECS' additional arguments and finds them unavailing. Accordingly, the branch of 3B Associates' motion to amend its complaint and add 3B Group as a plaintiff is granted.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the pleadings to add 3B Group Inc. as a party and to amend the caption and papers in this action accordingly is granted; and it is further

ORDERED that the supplemental summons and amended complaint, in the form annexed to the motion papers (NYSCEF Doc. Nos. 153-154), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that the action shall bear the following caption:

3B ASSOCIATES, LLC AND 3B GROUP, INC.

Plaintiff

-v-

ECOMMISSION SOLUTIONS, LLC

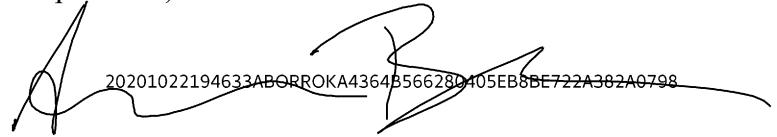
Defendant

; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (ww.nycourts.gov/supctmanh)).

10/22/2020
DATE


20201022194633ABORROKA4364B56628D405EB8BE722A382A0798

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: