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Fictitious Entitites Can Be Denied Standing

Attorneys should double check formal business names before filing suit

By DAVID DOBIN

A pair of recent Connecticut Appellate Court decisions issued this past summer highlights the pitfalls of doing business using trade names in Connecticut and the importance of naming the proper party as plaintiff in litigation.

In *Coldwell Banker Manning Realty Inc. v. Cushman and Wakefield of Connecticut Inc.*, 136 Conn. App. 683 (2012), the plaintiff filed suit in 2002 under the name "Coldwell Banker Manning Realty Inc." No corporation with that name, however, had filed with the Connecticut Secretary of the State's Office; the name of the corporation on file was "Manning Realty Inc."

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After eight years of litigation that included an appeal to the Connecticut Supreme Court, the defendant moved to dismiss the lawsuit for lack of subject-matter jurisdiction "because the plaintiff had never existed as a corporate entity and, therefore, lacked standing." The trial court granted the motion and the Appellate Court affirmed.

The Appellate Court was not moved by the fact that years of litigation had been completed without the issue having been raised or that the defendants failed to show any prejudice from the mis-naming of the plaintiff. Instead, the court cited *America's Wholesale Lender v. Pagano,* 87 Conn. App. 474, 480 (2005) in concluding that "where a plaintiff uses a fictitious name for itself, the consideration of prejudice is eliminated properly from our analysis" and agreed with the trial court that "the plaintiff in this action used a fictitious name and, therefore . . . it lacked standing."

In the other decision, *Greco Construction v. Edelman,* 137 Conn. App. 514 (2012), the plaintiff filed an action to foreclose a mechanic's lien in 2007 under the name "Greco Construction." According to the court ruling, "Greco Construction" was the "trade name or assumed business name of Brian Greco doing business as Greco Construction." After several years of litigation including a trial before an attorney trial referee, the trial court

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dismissed the lawsuit for lack of subject-matter jurisdiction because "Greco Construction" did not have a separate legal existence. In this case, as in *Coldwell Banker Manning Realty Inc.*, the Appellate Court affirmed, based, in part, on *America's Wholesale Lender v. Pagano,* holding that "in order for a court to have jurisdiction, the plaintiff must have an actual legal existence, and, because the trade name of a legal entity does not have a separate legal existence, a plaintiff bringing an action solely in a trade name cannot confer jurisdiction on the court."

In both of these decisions, the Appellate Court rejected the plaintiffs' arguments that the errors were mere "misnomers" and refused to allow the plaintiffs to amend their pleadings under Connecticut General Statutes § 52-123, which forgives "circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court."

Disastrous Consequences

The first lesson from these cases is that it is imperative to conduct due diligence before commencing any lawsuit to ensure that you name a legally-existing entity as the plaintiff. Moreover, you should not blindly rely on the name provided by the client or the name under which the client is doing business when drafting the complaint.

In both of the cases discussed above, the complaints described the plaintiffs by reference to the names that the real legally-existing entities used to conduct business. These decisions by the Appellate Court show that doing so can have disastrous consequences.

The second lesson from these cases is that, even long after an action has been commenced, a party can raise the failure to name a legal entity as plaintiff on a motion to dismiss. In both of these cases, several years of litigation had been conducted without anyone raising the issue of the plaintiffs' standing. Nonetheless, the Appellate Court affirmed the dismissal of the cases by reasoning that the trial court never had jurisdiction over the plaintiffs in the first instance.

The third lesson is that these cases provide cautionary tales that businesspeople and the attorneys advising them must be mindful of the laws governing the transacting of business in Connecticut.

In *Coldwell Banker Manning Realty Inc.*, the court supported its decision that the trial court had no jurisdiction over the lawsuit brought in the name of a fictitious entity by pointing to C.G.S. § 35-1, which "requires legal entities doing business in this state under an assumed or fictitious name to file a trade name certification in the town in which such business is to be conducted prior to engaging in such business."

As the court explained, C.G.S. § 35-1 is "primarily intended to protect [those doing business with the trade name] by giving them constructive notice of the contents of the trade name certificate . . . . The object [of the registration requirement] is to enable a person dealing with another trading under a name not his own, to know the man behind the name, that he may know or make inquiry as to his business character or financial responsibility . . . . As court filings are a matter of public record, we cannot conclude that no harm would come to the public by permitting legal entities to commence actions under fictitious names, as court documents are another means by which the public may ascertain the identity and the character of those with whom they do business."

In conclusion, advise your business clients to comply with C.G.S. § 35-1 — the violation of which "shall be deemed to be an unfair or deceptive trade practice under" the Connecticut Unfair Trade Practices Act — and avoid the unintended and severe consequences of bringing an action in your client's trade name. ■■