

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.



LLC's Lawsuit Dismissed for Failure to Publish

The owner of a fruit and vegetable distributorship needed an immediate infusion of money into his business. He reluctantly turned to a company offering a merchant cash advance. A “merchant cash advance” (“MCA”) is a type of financing occasionally used by small businesses having a difficult time obtaining loans or credit lines from traditional financial institutions such as banks, in which the MCA company makes a lump-sum purchase of the business’s future sales. This type of arrangement may be helpful in the short term for a cash-strapped business but, in the long term, may

be difficult when the business struggles to repay what is seemingly a very high interest loan.¹

The lawsuit commences

As one can imagine, many businesses that enter into these MCA agreements invariably default under their onerous terms. Many of the issues which caused a business to need short-term financing sourced from this type of lender return sooner afterwards. To boot, the MCA company will usually insist on the business owner’s personal guaranty of certain representations made under the MCA agreement.

¹ Technically, a merchant cash advance is not considered a loan; rather, it is by law considered the purchase of future credit or debit sales of the business, by which the MCA company makes deductions from the business’s account. Courts enforce MCA agreements as legitimate

purchase agreements, as opposed to loans agreements (in which usury laws may be applicable).

In this case, the fruit and vegetable distributor was indebted to the MCA company for almost \$400,000. The MCA company, a foreign limited liability company (“LLC”), brought a lawsuit against the distributor for breach of contract.

New York State’s LLC publication requirements

When an LLC is formed in New York State, it is required that notice of its formation be published in two newspapers in the

² NY Limit Liab Co § 206(a) Within one hundred twenty days after the effectiveness of the initial articles of organization as determined pursuant to subdivision (d) of section two hundred three of this article, a copy of the same or a notice containing the substance thereof shall be published once in each week for six successive weeks, in two newspapers of the county in which the office of the limited liability company is located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk. When such county is located within a city with a population of one million or more, such designation shall be as though the copy or notice were a notice or advertisement of judicial proceedings. Proof of the publication required by this subdivision, consisting of the certificate of publication of the limited liability company with the affidavits of publication of such newspapers annexed thereto, must be filed with the department of state. Notwithstanding any other provision of law, if the office of the limited liability company is located in a county wherein a weekly or daily newspaper of the county, or both, has not been so designated by the county clerk, then the publication herein required shall be made in a weekly or daily newspaper of any county, or both, as the case may be, which is contiguous to, such county, provided that any such newspaper meets all the other requirements of this subdivision. A copy or notice published in a newspaper other than the newspaper or newspapers designated by the county clerk shall not be deemed to be one of the publications required by this subdivision. The notice shall include: (1) the name of the limited liability company; (2) the date of filing of the articles of organization with the department of state and, if the date of formation is not the date of filing of the articles of organization, the date of the formation of the limited liability company; (3) the county within this state, in which the office of the limited liability company is located; (3-a) the street address of the principal business location, if any; (4) a statement that the secretary of state has been designated as agent of the limited liability company upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him or her; (5) if the limited liability company is to have a registered agent, his or her name and address within this state and a statement that the registered agent is to be the

county in which its office is located. The two newspapers in which publication is to be made will be designated by the county clerk. A certificate of publication attesting to compliance with the publication requirement must be filed with the NYS Department of State.²

Motion to Dismiss Action

The fruit and vegetable distributor retained **Richard A. Klass, Esq.**, *Your Court Street Lawyer*, to defend the lawsuit. Upon

agent of the limited liability company upon whom process against it may be served; (6) if the limited liability company is to have a specific date of dissolution in addition to the events of dissolution set forth in section seven hundred one of this chapter, the latest date upon which the limited liability company is to dissolve; and (7) the character or purpose of the business of such limited liability company. Where, at any time after completion of the first of the six weekly publications required by this subdivision and prior to the completion of the sixth such weekly publication, there is a change in any of the information contained in the copy or notice as published, the limited liability company may complete the remaining publications of the original copy or notice, and the limited liability company shall not be required to publish any further or amended copy or notice. Where, at any time after completion of the six weekly publications required by this subdivision, there is a change to any of the information contained in the copy or notice as published, no further or amended publication or republication shall be required to be made. If within one hundred twenty days after its formation, proof of such publication, consisting of the certificate of publication of the limited liability company with the affidavits of publication of the newspapers annexed thereto has not been filed with the department of state, the authority of such limited liability company to carry on, conduct or transact any business in this state shall be suspended, effective as of the expiration of such one hundred twenty day period. The failure of a limited liability company to cause such copy or notice to be published and such certificate of publication and affidavits of publication to be filed with the department of state within such one hundred twenty day period or the suspension of such limited liability company's authority to carry on, conduct or transact business in this state pursuant to this subdivision shall not limit or impair the validity of any contract or act of such limited liability company, or any right or remedy of any other party under or by virtue of any contract, act or omission of such limited liability company, or the right of any other party to maintain any action or special proceeding on any such contract, act or omission, or right of such limited liability company to defend any action or special proceeding in this state, or result in any member, manager or agent of such limited liability company becoming liable for the contractual obligations or other liabilities of the limited liability



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review of the Secretary of State’s website, it appeared the Plaintiff MCA company had not filed its certificate of publication. Accordingly, a motion to dismiss the lawsuit pursuant to CPLR 3211(a)(3) was filed, asserting that the plaintiff lacked standing to bring the lawsuit. The plaintiff conceded that it failed to satisfy the publication requirement but had begun the publication process and requested time to comply with the statute.

In *Small Step Day Care, LLC v. Broadway Bushwick Builders, LP*, 137 AD3d 1102, 1103 [2d Dept. 2016], the Second Department held that the plaintiff’s failure to comply with the publication requirements contained in LLC §206 [applicable to foreign limited liability companies such as the plaintiff through LLC §802(b)] “precludes a limited liability company from maintaining any action or special proceeding in New York.”

The judge determined that, based upon the plaintiff’s failure to comply with LLC Law Sections 206 and 802(b) when the lawsuit was commenced, the complaint had to be dismissed.

— *Richard A. Klass, Esq.*

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company. If, at any time following the suspension of a limited liability company's authority to carry on, conduct or transact business in this state pursuant to this subdivision, such limited liability company shall cause proof of publication in substantial compliance with the provisions (other than the one hundred twenty day period) of this subdivision, consisting of the certificate of publication of the limited liability

**Ten Years in a Row:
Richard A. Klass selected
for New York Metro
Super Lawyers List**



We are pleased to announce that Richard Klass has been selected to the 2024 New York Metro *Super Lawyers* list. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor. Super Lawyers, part of Thomson Reuters, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer reviews by practice area. The result is a credible, comprehensive and diverse listing of exceptional attorneys. The Super Lawyers lists are published nationwide in Super Lawyers magazines and in leading city and regional magazines and newspapers across the country. Super Lawyers magazines also feature editorial profiles of attorneys who embody excellence in the practice of law. For more information about Super Lawyers, visit SuperLawyers.com.

company with the affidavits of publication of the newspapers annexed thereto, to be filed with the department of state, such suspension of such limited liability company's authority to carry on, conduct or transact business shall be annulled.