



STATE OF NEW YORK  
SUPREME COURT CHAMBERS  
112 STATE STREET - ROOM 1360  
ALBANY, NEW YORK 12207  
TELEPHONE: (518) 285-8597  
FACSIMILE: (518) 487-5823

KIMBERLY A. O'CONNOR  
JUDGE

JUSTINA CINTRÓN PERINO, ESQ.  
LAW CLERK  
DIANE K. DEYO  
SECRETARY

January 4, 2010

Peter G. Barber, Esq.  
Murphy, Burns, Barber & Murphy, LLP  
226 Great Oaks Boulevard  
Albany, New York 12203

Re: *Frye v. Babe Ruth League, Inc., et al.*  
Index No.: 3396-09  
RJI No.: 01-09-096992

Dear Counsel:

Enclosed is a signed Decision and Order in the above-referenced matter. The original is being forwarded to you for filing. All supporting documents are being sent to the Albany County Clerk's Office for filing.

Very truly yours,

A handwritten signature in black ink that reads "Kimberly A. O'Connor". The signature is written in a cursive, flowing style.

Hon. Kimberly A. O'Connor  
Acting Supreme Court Justice

Enclosure

cc: Matthew J. Kelly, Esq.  
Roemer, Wallens & Mineaux, LLP  
13 Columbia Circle  
Albany, New York 12203

Anthony V. Cardona, Esq.  
D'Agostino, Krackeler, Maguire & Cardona, PC  
The Sage Mansion  
16 Sage Estate  
Menands, New York 12204

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

---

EDWARD FRYE, President of and upon behalf of  
EASTERN NEW YORK TRAVEL BASEBALL  
LEAGUE,

Plaintiff,

**DECISION AND ORDER**

-against-

Index No.: 3396-09  
RJI No.: 01-09-096992

BABE RUTH LEAGUE, INC.; EASTERN NEW YORK  
BABE RUTH LEAGUES, INC.; EMPIRE STATE  
BASEBALL LEAGUE, INC.; EASTERN NEW YORK  
TRAVEL BASEBALL LEAGUE, INC.; JERRY FRANCIS;  
THOMAS SWYERS; JEAL SUTHERLAND; and STEVE  
PETERSON,

Defendants.

---

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

ROEMER WALLENS & MINEAUX LLP  
Attorneys for defendants Babe Ruth League, Inc.,  
Eastern New York Babe Ruth League, Inc., Jerry  
Francis, Thomas Swyers, and Steve Peterson  
(Matthew J. Kelly, Esq., of Counsel)  
13 Columbia Circle  
Albany, New York 12203

D'AGOSTINO, KRACKELER, MAGUIRE  
& CARDONA, P.C.  
Attorneys for defendants Empire State Baseball  
League, Inc. and Jeal Sutherland  
(Anthony V. Cardona, Jr., of Counsel)  
The Sage Mansion  
16 Sage Estate  
Menands, New York 12204

MURPHY, BURNS, BARBER & MURPHY, LLP  
Attorneys for Plaintiff  
(Peter G. Barber, Esq., of Counsel)  
226 Great Oaks Boulevard  
Albany, New York 12203

O'CONNOR, J.:

Plaintiff commenced the instant action asserting causes of action in common law and pursuant to New York's General Business Law for trademark and trade name infringement, unfair competition, deceptive acts and unlawful practices, and injury to business reputation and dilution of mark or trade name. Plaintiff seeks both monetary damages and equitable relief. Defendants Babe Ruth League, Inc., Eastern New York Babe Ruth League, Inc., Jerry Francis, Thomas Swyers, and Steve Peterson have moved pursuant to CPLR 3211 to dismiss this action based upon plaintiff's failure to file a certificate of designation with the Secretary State as required by Section 18 of New York's General Associations Law ("GAL"). Defendants Empire State Baseball League, Inc. and Jeal Sutherland have crossed moved for the same relief. Plaintiff opposes both motions.

Pursuant to GAL § 18(2), "[e]very association doing business within this state shall file in the department of state a certificate . . . designating the secretary of state as an agent upon whom process in any action or proceeding against the association may be served within this state . . . ." Furthermore, GAL § 18(4) states, in relevant part, that "[a]ny association doing business within this state without having filed the certificate of designation prescribed by this section shall not maintain any action or special proceeding in this state unless and until such association has filed the certificate of designation prescribed by this section." However, GAL § 18(1) expressly provides that the term "association" for the purposes of Article 4, which includes GAL § 18, is limited to the definition set forth in GAL § 2(4). GAL § 2(4) defines the term "association" as "a joint stock association or a

business trust as defined in [that] section.” A “joint stock association” under GAL § 2(1) “ includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation or a business trust.”

In opposition to the motions, plaintiff has submitted the sworn affidavit of its president, Edward Frye (“Frye”), in which he avers that plaintiff is an unincorporated association, has never issued capital stock or certificates representative of shares, and is not a joint stock association or a business trust. As such, plaintiff contends that GAL § 18(4) does not apply. Plaintiff further contends that, as an unincorporated association, it may bring an action through its president or treasurer under both CPLR 1025 and GAL § 12, and that it has filed and served an amended complaint that complies with GAL §12 by changing the caption and paragraph 1 of the complaint to name Frye as plaintiff upon behalf of Eastern New York Travel Baseball League. In view of the provisions of the GAL and the CPLR, the record before the Court, and the amended complaint, the Court finds that a denial of the motion and cross motion is warranted.

The Court rejects defendants’ contention that the amended complaint is untimely because it was served more than 20 days after the filing of their answer. Under 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. Here, plaintiff contends that the amended complaint was served within 20 days of service of defendants’ answer. Furthermore, the twenty days within which to make the amendment pursuant to CPLR 3025(a) runs from the date of service of the responsive pleading, not the filing of the responsive as alleged by defendants.

The Court also rejects any claim that plaintiff was required to file organization documents to demonstrate that it is unincorporated association, or that it should have provided documentation of a certificate of doing business under an assumed name. The scope of the Court's review on a motion to dismiss pursuant to CPLR 3211 is limited (*see Cron v. Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]). When examining such a motion, the court must liberally construe the pleadings in plaintiff's favor, accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff the benefit of every possible favorable inference (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001] [citations omitted]; *Berry v. Ambulance Serv. of Fulton County, Inc.*, 39 A.D.3d 1123, 1124 [3d Dep't 2007]). Applying these principles, the Court finds that plaintiff has made a showing sufficient to defeat the motions, and nothing further was required.

Any remaining contentions have been considered and found to be without merit, or have been rendered moot or academic in light of the foregoing determination.

Accordingly, it is hereby

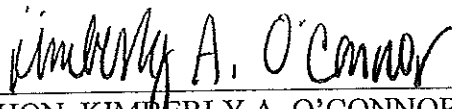
**ORDERED**, that the motion and cross-motion are denied in their entirety.

This memorandum shall constitute the Decision and Order of the Court. The original Decision and Order is being forwarded to the attorneys for the plaintiff. A copy of the Decision and Order together with all papers on the motion and cross-motion are being forwarded to the Office of the Albany County Clerk for filing. The signing of this Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to to filing, entry, and notice of entry of the original Decision and Order.

**SO ORDERED.**

**ENTER.**

Dated: January 4, 2010  
Albany, New York

  
HON. KIMBERLY A. O'CONNOR  
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated June 12, 2009;
2. Affidavit of Matthew J. Kelly, Esq., dated June 12, 2009, with Exhibits A & B annexed;
3. Notice of Motion (Cross-Motion), dated June 30, 2009;
4. Affidavit of Anthony V. Cardona, Jr., Esq., dated June 30, 2009, with Exhibits A- C annexed;
5. Affidavit of Edward Frye in Opposition to Motion, dated June 30, 2009
6. Affidavit of Peter G. Barber, Esq. in Opposition to Motion, dated July 2, 2009, with Exhibit A annexed;
7. Affidavit of Edward Frye in Opposition to Cross-Motion, dated July 8, 2009
8. Affidavit of Peter G. Barber, Esq. in Opposition to Cross-Motion, dated July 8, 2009, with Exhibit A annexed; *and*
9. Reply Affidavit of Matthew J. Kelly, Esq., dated July 9, 2009.