DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: CIVIL PART 3

----------x

JOHN and MELISSA SENICA,

INDEX NO. CV-009049-11

Plaintiff,

against

Present:

Hon. Fred J. Hirsh

EMPOWERED SHOPPERS INC.,
d/b/a DIRECT BUY OF NASSAU, AND
DAVID PENA, individually and as,
President of DIRECT BUY OF NASSAU,

Defendant.

----------x

The following named papers numbered 1 - 2
submitted on this motion on May 31, 2012

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2
Order to Show Cause and Affidavits Annexed	
Affirmation in Opposition	
Replying Affidavits	

Plaintiffs moves for summary judgment.

Plaintiffs are members of Direct Buy. Direct Buy is a franchise. Members of Direct Buy can purchase directly from the manufacturer through Direct Buy.

Plaintiffs are members of Consumers Edge, LLC which is a Direct Buy franchise in Queens County.

Empowered Shoppers, Inc. ("Empowered") is the Direct Buy franchisee in Nassau County.

On April 20, 2010, plaintiffs ordered custom kitchen cabinets through Empowered from U.S. Design. Plaintiff paid $15060 for the cabinets including installation. Plaintiff has not received the kitchen cabinets.

Ruth Pena, the vice president of Empowered, testified at deposition that U.S. Design has gone out of business. She acknowledged the cabinets ordered by plaintiff were not delivered or installed. She further acknowledged plaintiffs are entitled to a refund of their money. She testified the only reason the money has not been refunded is that defendants do not have the funds available to pay the refund.

Plaintiff's's prior motion for summary judgment was denied on the grounds plaintiff had failed to attach a copy of the pleadings to the motion papers. Plaintiff now attaches a copy of the pleadings to its motion papers.

The answer is filed by David Pena.

Empowered was served on March 23, 2011.

Except in small claims actions, a corporations must be represented by an attorney. CPLR 321(a). Empowered is an active, domestic corporation. Therefore, it had to appear in this action by attorney.

A *pro se* appearance by a corporation by the corporation's president is a nullity. Evans v. Conley, 124 A.D.2d 981 (4th Dept. 1986), *appl. dis.*, 69 N.Y.2d 822 (1987); and Boglioli v. Advantage Diagnostics Inc., 16 Misc.3d 1105(A) (Sup.Ct. Nassau Co. 2007).

A motion for summary judgment cannot be made until after issue has been joined. CPLR 3212(a). Issue is joined when an answer is served. Siegel, *New York Practice 5th* §279.

A summary judgment motion made prior to joinder of issue must be denied even in regard to parties who have appeared in the action. Matter of National Amusements, Inc., v. County of Nassau, 156 A.D.2d 566 (2nd Dept. 1989); and Garden City Center Associates v. Board of Assessors of the County of Nassau, 153 A.D.2d 667 (2nd Dept.1989). Since plaintiff has not received an answer on behalf of Empowered, issue has never been joined as to Empowered.

Since Empowered has not appeared in this action, plaintiff's properly should have moved for leave to enter a default judgment against Empowered. CPLR 3215(a). A motion for leave to enter a default judgment must be made within one year of the default. CPLR 3215(c). If the motion is not made within one year, the court should dismiss the complaint as abandoned unless plaintiff demonstrates sufficient cause why the complaint should not be dismissed. *Id.*

Plaintiff has never moved for leave to enter a default judgment against Empowered. Plaintiff offers no explanation for its failure to do so. More than a year has passed since Empowered defaulted. Therefore, the action against Empowered is dismissed without prejudice. See, Scrimenti v. Dry Harbor Nursing Home, 34 A.D.3d 439 (2nd Dept. 2006); Monzon v. Sony Motor, Inc., 115 A.D.2d 714 (2nd Dept. 1985); Finan v. Queens Transit Corp., 100 A.D.2d 951 (2nd Dept. 1984), Winkelman v. H & S Beer and Soda Discounts, Inc., 91 A.D.2d 660 (2nd Dept. 1982).

Pena's answer may serve as his answer to the complaint.

The party moving for summary judgment must make a *prima facie* showing of

entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

A corporate officer is not subject to personal liability for action taken in furtherance of the corporation's business under the well settled rule "an agent fora disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal' (citations omitted). Worthy v. New York City Housing Auth., 21 A.D.3d 284, 286 (1st Dept. 2005). See also, Metropolitan Switch Board Co., Inc. v. Amici Assocs, Inc., 20 A.D.3d 455 (2nd Dept. 2005);and Gordon v. Teramo & Co., Inc., 308 A.D.2d 432 (2nd Dept. 2004).

The Court of Appeals in Salzman Sign Co. v. Beck, 10 N.Y. 2d 63, 67 (1961) resolves the question by establishing a two prong test. In *Salzman Sign*, the Court of Appeals found: In modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporations engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice once as an officer and again as an individual.

Pena did not sign the contract in any capacity.

In the absence of any indicia Pena an intended to be personally liable, the claim against him must fail. See, American Media Concepts, Inc. v. Atkins Pictures, Inc., 179 A.D. 2d 446, 447-8 (1st Dept. 1992), where the court, citing *Salzman Sign*, denied personal liability against a corporate officer in the absence of "some direct and explicit evidence of actual intent" to be individually bound. See also, Maranga v. McDonald & T. Corp., 8 A.D. 3d 351 (2nd Dept. 2004); Westminster Construction Co., Inc. v. Sherman, 160 A.D. 2d 867, 868 (2nd Dept. 1990); and Matter of Estate of Gifford, 144 A.D. 2d 742, 744 (3rd Dept. 1988).

If the party moving for summary judgment fails to make a *prima facie* showing of entitlement to judgment as a matter of law, the motion must be denied. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Simmons v. Pantoja, 25 A.D.3d 777, 807 N.Y.S.2d 577 (2nd Dept. 2006); and Pina v. Flik International Corp., 25 A.D.3d 772, (2nd Dept. 2006).

Plaintiff has failed to make a *prima facie* showing of entitlement to judgment as a matter of law against David Pena. Therefore, plaintiff's motion is denied.

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment is denied in its entirety; and is further

ORDERED, that the action against the defendant Empowered Shoppers, Inc. d/b/a Direct Buy of Nassau is dismissed without prejudice; and it is further

ORDERED, that the action against David Pena individually and as President of Direct Buy of Nassau is severed and continued; and it is further

ORDERED, that the attorney for the plaintiff and the defendant David Pena are to appear for a pre-trial conference at District Court, Nassau County, Civil Part 3, 99 Main Street, Courtroom 259, Hempstead, New York 11550 on September 7, 2012 at 9:30 a.m.

SO ORDERED:

Hon. Fred J. Hirsh
District Court Judge

Dated: August 1, 2012

cc: Klemanowicz, Holmquist & Vande Stouwe, LLP
Empowered Shoppers, Inc., Pro se