

CO-OPS AND CONDOMINIUMS

If You're an LLC and Reading This, Make Sure You're Published

By Gary M. Rosenberg and Alex M. Estis

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Any commercial tenant or landlord reading this may be surprised to realize that no matter what your contract says is or the facts supporting any potential claim you may have are, your claim in any litigation may be lost before it starts.

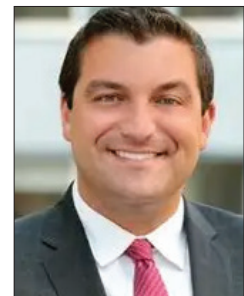
This is especially the case if any such litigation is commenced by a party that is a limited liability company (LLC) authorized to do business in New York that failed to file a commonly overlooked form called a certificate of publication.

The failure to file a certificate of publication before commencing any litigation in the State of New York deprives the LLC of standing to maintain any such action or proceeding and is a fatal flaw in violation of Limited Liability Company Law §206.

This may be a surprise to some, but sometimes the decision is intentionally made to not file certificates of publication, as it is viewed by some as an unnecessary expense when forming the LLC. However, the cost of having to defend



Gary M. Rosenberg



Alex M. Estis

against a motion to dismiss or potentially start a litigation all over again, could far exceed the cost of filing for a certificate of publication.

Some find it unnecessary as it often gets overlooked at the significance of the importance of filling by formation specialists. Limited Liability Company Law §206 requires LLCs to publish their articles of organization or comparable specified information for six successive weeks in at least two local newspapers designated by the clerk of the county where the limited liability company has its principal office followed by the filing of an affidavit with the Department of State, stating that such publication has been completed.

When forming an LLC, there must also be a filing of an affidavit with the Department of State, stating that such publication has been

GARY M. ROSENBERG is the founding member of Rosenberg & Estis and is presently the chairman of the firm. **ALEX M. ESTIS** is a member with the firm's litigation department.

completed. The failure to comply with these requirements precludes a limited liability company from maintaining any action or special proceeding in New York and must be dismissed pursuant to CPLR 3211(a)(3), as the plaintiff would lack standing to maintain this action. (see, e.g., *Barklee Realty Co., LLC v. Pataki*, 309 AD2d 310, 311 [1st Dept 2003], *Small Step Day Care, LLC v. Broadway Bushwick Builders, L.P.*, 137 AD3d 1102 [2d Dept 2016], *Hopkins Hawkley LLC v. Yarrow Two LLC, et. al.*, Index No. 652477/2025, Patel J. [Sup Ct, NY County 2025], *1001 Sixth Associates LLC v. Central Entertainment Group, Inc.*, Index No. 654926/2022, Billings, J. [Sup Ct, NY County 2023], and *One Stone Lending LLC v. Alta Operations, LLC*, 2020 NY Slip Op 30722[U], 3-4 [Sup Ct, NY County 2020]).

If any petitioner, claimant and/or plaintiff was not in compliance with Section 206 of Limited Liability Company Law on the day litigation has commenced, such flaw is fatal and cannot be cured later in the litigation. Even if the plaintiff would try to “fix” its standing issue mid-litigation, it has been pointedly held by the courts that:

The question for this court is whether it can overlook the fact that when plaintiff started this case, it had not complied with section 206... The Court finds that these technical and cumbersome requirements cannot be overlooked simply because plaintiff decided to comply with the law only after Defendants pointed out plaintiff's failure to meet its obligations. Under those circumstances, it would make a mockery of the statute to allow plaintiff to maintain its case by complying with the law after starting a lawsuit and after defendants pointed out this glaring omission.

The fact is that plaintiff started a case when it did not have the capacity to do so. It does not matter that plaintiff later may have rectified this error. Simply put, what would be the purpose of the legislature creating strict statutory requirements for LLCs to publish only for the courts to

give a plaintiff a chance to comply if and when a defendant raises it as a defense? This court cannot condone the LLC's practice of ignoring the statute, unless and until it is caught, and then pretending it shouldn't make a difference (emphasis added). One Stone Lending LLC v. Alta Operations, LLC, 2020 NY Slip Op 30722.

In fact, in *Small Step Day Care, LLC v. Broadway Bushwick Builders, L.P.*, 137 AD3d 1102, 1103 (2d Dept 2016), the Appellate Division held that failure to comply with LLC §206 “precludes a limited liability company from maintaining any action or special proceeding in New York”. The court concluded that “... as the defendants correctly contend, since the plaintiff failed to comply with the publication requirements of [LLC §206], it is precluded from bringing this action” (*Id.*).

Then, in *Three Egg Studios LLC v. FJH Realty Inc*, 2019 NY Slip Op 30805(U), 2 (Sup Ct, Kings County 2016), the Court cited to *Small Step*, holding that “[t]he Second Department has... held that the language of §206 requires that where a plaintiff has failed to comply with the publication requirement, the action must be dismissed...”

The intent behind the court's long-standing barring of court actions and/or proceedings by limited liability companies that fail to comply with publication and filing requirements was rationally related to legitimate state interest in ensuring that those companies actually made required disclosure.

The Appellate Division concluded this in *Barklee Realty Co., LLC v. Pataki*, 309 AD2d 310 (First Dept. 2003) where the constitutionality of §206 was challenged, but ultimately upheld, finding, that the New York Constitution did not grant limited liability companies a general right of access to civil courts, but at most permitted such companies to exercise the same rights and to be subject to the same limitations as natural persons.

Given there is no natural general right of access to civil courts, in order for an LLC to avail itself

of the court system, it must be in full compliance with applicable statutes such as §206.

In *109 Equities LLC v. Smit*, 2022 WL 17589545 [Civ Ct, Queens County 2022] the Court cited to both *One Stone* and *Small Step*, concluding that “[i]t is undisputed that petitioner was not in compliance with §206 at that time. Petitioner admits that they were not in compliance until August 2022. As such, they did not have authority to operate as a fully registered LLC in January 2020 and thus did not have standing to commence this proceeding at that time” (emphasis added).

Most recently in the action entitled *Cornerstone Group Real Estate Services LLC v. Sunset LG Realty LLC*, Index No. 161122/2025 (NY County Supreme Court), the court dismissed the plaintiff’s lawsuit on the exact same grounds as discussed herein notwithstanding the plaintiff filed a certificate of publication after the litigation was commenced and before the motion was orally argued before the courts.

Nonetheless, the lawsuit was dismissed as the plaintiff did not have standing and the statute and case law is unequivocally clear, that if the plaintiff did not have standing upon commencement of the case, it cannot be cured.

It is important to note that failure to file such certificate of publication does not impair the ability of an LLC to be sued as a defendant in such actions. The statute expressly provides that the failure to file a certificate of publication “shall not impair or limit...the right of any other party to maintain any action or special proceeding” against such LLC. The failure to file a certificate of publication does not impair or impact on the LLC’s ability to enter into a contract or to enter into or carry out business in the state of New York.

Notably, some practitioners may confuse this defect to be curable as is the case with foreign corporations in accordance with New York Business Corporation Law §1312, which allows such defect to be curable as a matter of law.

For instance, New York Business Corporation Law 1312 maintains that a foreign corporation doing business in the state without authority shall not maintain any action in the state until it has been authorized to do business in this state and has paid all fees, penalties and franchise taxes for the years it did business in this state without authority. It has been widely held, however, that if the foreign corporation is in breach of New York BCL §1312 when it begins an action, but then duly complies while the action is pending, the action may be validated *ab initio* and may proceed unhindered. See *Siegel New York Practice Section 30*, 6th edition, citing to *ARP Films, Inc. v. Marvelent. Grp. Div. of Cadence Indus. Corp.*, 645 F Supp. 876, 879 (SD NY 1986).

Foreign corporations can cure this defect without risk of dismissal of a lawsuit; however limited liability companies cannot. In the event a lawsuit is dismissed on this basis of failure to comply with LLC Law 206, the dismissal shall be without prejudice and the plaintiff shall then be free to file a new lawsuit once the publication requirements have been met and a certificate of publication has been filed with the Department of State.

Simply put, any members of limited liability companies that read this article should go back and take a look at their formation documents and check on the New York State Department of State website to see if a certificate of publication is on file.