



## 'Know Thy Enemy and Know Thyself.'

*Misnaming and Mischaracterizing Parties Can Be Fatal in Litigation.*

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An ancient Chinese general said, "Know thy enemy and know yourself; in 100 battles, you will never be defeated. When you are ignorant of the enemy but know yourself, your chances of winning or losing are equal. If ignorant both of your enemy and of yourself, you are sure to be defeated in every battle."

Whatever its accuracy in the military context, the proverb has definite implications for litigation. As a recent decision by the Illinois Appellate Court demonstrates, **failure to know – and properly name – your party-opponent can have drastic and even fatal consequences.**



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In *Capital One Bank v. Czekala*, 370 Ill.App.3d 737, 884 N.E.2d 1205 (2008), plaintiff filed a complaint captioned against "Joseph Czekala DBA SEALAND FOODS". However, an affidavit attached to the complaint alleged that the party indebted to plaintiff was "Sealand Foods, Inc." The process server purported to make service on Mr. Czekala by abode service on his wife. Mr. Czekala attended court on the return day and told the judge an attorney had been retained to file a bankruptcy for Sealand Foods, Inc. No further appearance was made, and no responsive pleading was filed. Some 6 weeks later the court entered a default judgment against "Joseph Czekala". Five years later, plaintiff had a wage deduction summons issued against Mr. Czekala's then-employer. Mr. Czekala moved to vacate the judgment, but the trial court refused to do so, and Mr. Czekala appealed.

The Appellate Court noted that a threshold issue was whether the name discrepancy was the result of *misnomer* or of *mistaken identity*. *Misnomer*, it noted, occurs when you use the technically wrong name for the defendant but actually serve the right party with the summons and complaint. In such a case, personal jurisdiction is obtained and the error can be corrected later – even after judgment if need be.

In cases of mistaken identity, however, the plaintiff is incorrect about whom it should be suing and the proper defendant is not served. Applying that distinction, the Court noted that abode service does not apply to corporations, so service was good only if the intended defendant was Mr. Czekala personally. "Joseph Czekala DBA SEALAND FOODS" was ambiguous on this point, but the affidavit attached to the complaint (and other evidence submitted by Mr. Czekala) showed that Sealand was in fact a corporation, not an unincorporated business being operated by Mr. Czekala under an assumed name.

Reasoning that the affidavit attached to the complaint controlled over the ambiguous language in the complaint, the Court ruled that **this was a case of mistaken identity, not misnomer.** Because the intended defendant was the corporation, not Mr. Czekala individually, and there was no such thing as

“Joseph Czekala dba Sealand Foods”, the abode service did not confer jurisdiction under the doctrine of mistaken identity. As to the corporation, it was not served (Mrs. Czekala had no affiliation with it, and one cannot serve the agent of the corporation by abode service), so judgment could not be construed as properly entered against it either.

Because the errors meant service was defective, the issue was jurisdictional, and a judgment void for lack of jurisdiction may be attacked at any time. Hence, **the attack on the 5-year-old judgment was not barred. The judgment was void “ab initio”** (from the beginning). See also *Sarkissian v. Chicago Bd. of Ed.*, 201 Ill.2d 95, 776 N.E.2d 195 (2002).

*Czekala* may be criticized for exalting form over substance, since Mr. Czekala, a proper agent for service of process for the corporation and its president, in fact had notice of the suit. However, the Court felt that the rule that a corporation “is a legal entity unto itself,” apart from its shareholders, directors and officers, was an important one which plaintiff ignored in suing “Joseph Czekala d/b/a Sealand Foods”. “D/b/a” (“doing business as”) properly refers to a mere assumed name – not a separate legal existence. Rebuking litigation sloppiness which has become common in recent years, the Court said no person, “not even the president of the corporation, ‘does business as’ a corporation.” See also *Barbour v. Fred Berglund & Sons, Inc.*, 208 Ill.App.3d 644, 567 N.E.2d 509 (1990) (“where a suit is brought against an entity which is legally non-existent, the proceedings are void *ab initio*”).

**And Know Thyself:** While *Czekala* and the cases upon which it relies addressed misnaming and mischaracterizing *defendant* businesses, the relevant doctrine is not always so limited. In *Alton Evening Telegraph v. Doak*, 11 Ill.App.3d 381, 296 N.E.2d 605 (1973), a newspaper which was in fact incorporated as the Alton Telegraph Printing Co. obtained a judgment under its colloquial name. Although the judgment had become final, the Appellate Court affirmed vacation thereof because “Alton Evening Telegraph” was not the name of any “person having the capacity to sue.” “A suit brought in a name which is not that of a natural person, a corporation or of a partnership is a mere nullity” and “the whole action fails”. Interestingly, the Court did not allow an exhibit to the complaint (which contained the correct name) to control over and cure the defect in the complaint itself.



Errors in *plaintiffs’* names can be distinguished in that service-of-process, due-process and statute-of-limitations concerns which are at issue in most misnomer-mistaken identity cases do not apply in that context. A plaintiff voluntarily submits to jurisdiction, it has notice of the case whether properly named or not, and limitations statutes protect defendants, not claimants. Accordingly, a different result might be reached if *Alton Evening Telegraph* arose today. Yet, along with *Czekala* and other cases, it sends a sobering message that properly naming and characterizing business entities can be important.

Shakespeare is widely quoted as saying that a rose by any other name is still a rose. But he led into that proposition with the question, “What’s in a name?” *Czekala* demonstrates that in some legal contexts, the answer to the bard’s question might indeed be “Everything”. Compare Combs, “A. Rose by any other name is not A. Rose,” *Sharp Thinking* No. 4 (Feb. 2008) (discussing hypertechnical approach being applied to names in Uniform Commercial Code filings).

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