Iwachiw v Tower Ins. Co.
2012 NY Slip Op 33227(U)
May 7, 2012
Sup Ct, Queens County
Docket Number: 24211/11
Judge: Augustus C. Agate

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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WALTER IWACHIW R.N.,

Plaintiff,

-against-

TOWER INSURANCE CO., ET AL.,

Defendants.

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Index No.: 24211/11

Motion Dated: January 31, 2012

Cal. No.: 16 & 17

m# 1 & 2

The following papers numbered 1 to 36 read on this motion by defendant Terry Scheiner (Scheiner) to dismiss plaintiff Walter Iwachiw's (plaintiff) complaint and to enjoin him from bringing additional actions against her; by separate notice of motion by defendant Adorno Denker Assoc. Inc. (Adorno Denker), to dismiss the complaint and to enjoin plaintiff from bringing additional actions against it; on the cross motion by defendant Michael Iwachiw (Iwachiw) to dismiss the complaint and to enjoin plaintiff from bringing additional actions against him; and on the cross motion by plaintiff to consolidate the instant action with two additional actions he has commenced.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1 - 8
Notices of Cross Motion - Affidavits - Exhibits...	9 - 25
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Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

Plaintiff commenced the instant action against defendant Tower Insurance Co., Michael Iwachiw, Adorno Denker and Scheiner for damages for various causes of action. Plaintiff has also commenced a separate action in this court under Index No. 20898/11, and another action in Supreme Court, New York County, under Index No. 401546/11.

Adorno Denker has moved to dismiss plaintiff's complaint pursuant to CPLR 3211 (a)(8), for lack of personal jurisdiction. It has argued that plaintiff failed to properly serve it pursuant to CPLR 311 (a)(1), through a person authorized to accept service, that it was not properly served by mail, pursuant to CPLR 312-a, and that it was not properly served through service upon the secretary of state as its agent, pursuant to Business Corporation Law § 306(b)(1). CPLR 311 (a)(1) provides, in pertinent part, that "[p]ersonal service upon a corporation ... shall be made by delivering the summons as follows: upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."

In support of this branch of its motion, Adorno Denker has relied upon, among other things, the affidavits of its president, James Pierce (Pierce), and Willy Fernandez (Fernandez), its employee. Pierce stated in his affidavit that a copy of the summons and complaint in the instant action was served upon an employee of the corporation, Fernandez, who did not have the authority to accept service. Fernandez stated in his affidavit that he was a customer service representative, was handed a copy of the summons and complaint as he walked into the offices of Adorno Denker, and was never authorized to accept service of process on behalf of Adorno Denker.

In opposition, plaintiff has submitted only the affidavit of his process server, which shows that plaintiff served the summons and complaint by delivering a copy to a "manager" and mailed a copy to Adorno Denker's address. This affidavit, on its face, does not set forth the circumstances of service and is insufficient to constitute prima facie evidence of proper service (CPLR 311 [a][1]). The record contains nothing to support a reasonable belief on behalf of plaintiff's process server that Fernandez was authorized to accept service on behalf of Adorno Denker (*see Covillion v Tri State Serv. Co., Inc.*, 48 AD3d 399, 400 [2008]; *Gleizer v American Airlines, Inc.*, 30 AD3d 376 [2006]). Nor does it contain evidence that plaintiff properly served Adorno Denker pursuant to CPLR 312-a, or Business Corporation Law § 306(b)(1). Therefore, Adorno Denker has demonstrated that it is entitled to the dismissal of plaintiff's complaint.

Scheiner has moved and Iwachiw has cross-moved to dismiss plaintiff's complaint pursuant to CPLR 3211 (a)(7), for failure to state a cause of action. "In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must afford the pleading

a liberal construction ... accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2010] [internal citation omitted]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Nationwide Insulation & Sales, Inc. v Nova Cas. Co.*, 74 AD3d 1297, 1298 [2010]).

The court notes that plaintiff is a *pro se* litigant. Although the courts may extend leniency to *pro se* litigants who make technical mistakes (*see Du-Art Film Labs. v Wharton Intl. Films*, 91 AD2d 572, 573 [1982]), a complaint must, nevertheless, sufficiently allege the basic facts to establish the elements of a cause of action (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Upon review of the complaint, while not artfully drawn, it does, on its face, allege sufficient facts to support plaintiff's claims for the intentional torts of assault and battery against Iwachiw (*see Holland v City of Poughkeepsie*, 90 AD3d 841, 846 [2011]; *Cerilli v Kezis*, 16 AD3d 363, 364 [2005]; *Masters v Becker*, 22 AD2d 118, 120 [1964]).

With regard to the claim against Scheiner for legal malpractice, the limited factual allegations contained in the complaint are insufficient to sustain a cause of action of this nature (*see Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 45 [2006]). Based upon the other allegations in the complaint, no cause of action is apparent from the terms inserted for negligence, harassment, stalking, insurance fraud, wire fraud, conspiracy to deny insurance coverage, conspiracy to defraud plaintiff of his property, bid rigging, medical malpractice, trespass, property damage, defamation, libel, slander, and accessory to murder (*see e.g. Schoolman Transp. Sys., Inc. v Aubrey*, 88 AD3d 863, 864 [2011]; *Donaldson v Spencer*, 39 AD3d 696, 696-697 [2007]; *see also Jackson v Bank of New York Mellon*, 33 Misc3d 1208[A], *5 [2011]). Plaintiff's numerous allegations are incomprehensible and appear to be unsupported by the facts and law. The disorganized and rambling nature of his pleading makes it difficult to find legally cognizable causes of action (*see Leon v Martinez*, 84 NY2d at 87-88; *see e.g. Reichenbaum v Cilmi*, 64 AD3d 693, 694-695 [2009]). Thus, plaintiff has failed to allege sufficient facts to support any other causes of action.

Iwachiw and Scheiner have also moved to enjoin plaintiff from commencing further actions against them. Although some courts have restricted *pro se* litigants from further litigation

where the party abuses the judicial process, at this juncture and procedural stage of the proceedings, this relief is not yet available in the instant matter (*c.f. Jordan v Yardeny, 35 Misc 3d 1214[A][2012][enjoining pro se litigant from making further motions without the approval of the court]; Cohen v City of New York*, 32 Misc 3d 1208[A][2011] [further actions enjoined after identical relief was sought and denied three times]).

Plaintiff has cross moved to consolidate the instant action with the two additional actions he commenced (Index No. 20898/11 and 401546/11), under Index No. 401546/11, in New York County. In light of the above determination, only the causes of action against Iwachiw for assault and battery remain. "A motion to consolidate two or more actions rests within the sound discretion of the trial court" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622 [2012]; *see Mattia v Food Emporium*, 259 AD2d 527 [1999]). "Where common questions of law or fact exist, consolidation is warranted unless the opposing party demonstrates prejudice to a substantial right" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d at 622; CPLR 602 [a]; *see DeSilva v Plot Realty, LLC*, 85 AD3d 422, 423 [2011]; *Fay Estates v Toys "R" Us, Inc.*, 22 AD3d 712, 714 [2005]).

However, the record has demonstrated that plaintiff has not made his cross motion on notice to all parties who would be affected by the proposed consolidation (*see Five Riverside Dr. Towers Corp. v Chenango, Ltd.*, 111 AD2d 1025, 1026 [1985]; *Siegel, Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, CPLR C602:3). Moreover, plaintiff's complaint in the instant matter does not allege the same facts and claims against Iwachiw as have been alleged in the separate action plaintiff commenced in this court (Index No. 20898/11), or in the action he commenced in New York County (Index No. 401546/11). Therefore, plaintiff's motion to consolidate the three actions is denied (CPLR 602 [a]; *see American Holdings Inv. Corp. v Josey*, 71 AD3d 927, 931 [2010]).

Accordingly, Adorno Denker's motion to dismiss the complaint is granted. The branch of Scheiner's motion to dismiss the complaint is granted, and the branch of her motion to enjoin plaintiff from bringing additional actions is denied. Iwachiw's cross motion to dismiss the complaint and enjoin plaintiff from bringing additional actions is denied. Plaintiff's cross motion to consolidate is denied.

Dated: May 7, 2012

AUGUSTUS C. AGATE, J.S.C.