SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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PNR PROPERTIES, LLC,

Plaintiff

Index No. 652732/2016

v

DECISION AND ORDER

DVIR MOG 18, INC., f/k/a and as successor in interest to DVIR MOG, INC.

Defendant. MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for breach of contract, the defendant moves pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that the action is barred by res judicata (CPLR 3211[a][5]), documentary evidence provides a complete defense to the action (CPLR 3211[a][1]), the complaint fails to state a cause of action (CPLR 3211[a][7]), and the court lacks personal jurisdiction over it by virtue of the plaintiff's failure properly to effect service of process (CPLR 3211[a][8]). The defendant also seeks an award of sanctions, and seeks dismissal on the ground that the plaintiff's attorney failed to sign the complaint, as required by 22 NYCRR part 130. While the motion was pending, the plaintiff served and filed an amended complaint, and thereafter opposed the motion. The motion is granted only to the extent that the court shall conduct a

traverse hearing to determine the validity of service of process, and the motion is otherwise denied.

II. BACKGROUND

The plaintiff and DVIR MOG, Inc. (MOG), entered into an agreement on April 8, 2010, pursuant to which MOG agreed to undertake a construction and renovation project for the plaintiff (the construction agreement). After a dispute over the quality of MOG's work, the plaintiff commenced an action against MOG in the Supreme Court, New York County, under Index No. 653293/11 (the 2011 action), seeking to recover damages for breach of contract, among other things. In a written agreement dated October, 2014, that action was settled, with MOG agreeing to pay the plaintiff the sum of $20,000 per month in 10 installments, beginning in January, 2015 (the settlement agreement). The 2011 action was discontinued, with prejudice, on December 2, 2014.

On May 20, 2016, the plaintiff commenced this action against DVIR MOG 18, Inc. (MOG 18), alleging that MOG 18 was formerly known as, and/or is the successor in interest to, MOG. Process was purportedly served upon MOG 18 by personal delivery of a copy of the summons and complaint to a "Mrs. Himami" on May 26, 2016. The recipient of process was identified by the plaintiff's process server in his affidavit of service as an "authorized party/managing agent" of MOG 18. The complaint alleged that MOG

18 had breached the 2010 construction agreement, negligently performed the construction work, and caused the plaintiff to forego rental income as a result.

MOG 18 moved pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that (1) res judicata or collateral estoppel barred the action, since the issues of whether the construction contract was breached or the work was negligently undertaken were fully litigated in the 2011 action, the 2011 action was settled, and the plaintiff discontinued the 2011 action with prejudice, (2) documentary evidence, consisting of MOG 18's certificate of incorporation, provides a complete defense to the action, since it demonstrates that MOG 18 was not incorporated until January 15, 2014, and thus could not have obligated itself under or breached the 2010 construction agreement, (3) the complaint fails to state a cause of action against MOG 18, since it (a) concededly did not enter into the 2010 construction agreement and, hence, could not be responsible for its breach, and (b) is not MOG's successor in interest and was not formerly known as MOG in any event, and (4) service of process was improper because the recipient of process was not in fact an authorized party or managing agent of the corporation.

In support of its motion, MOG 18 submitted an attorney's affirmation, as well as affidavits of its corporate treasurer, Navit Gamliel, and Michal Hamami, both of whom assert that Hamami

was neither a managing agent of MOG 18 nor a party authorized by MOG 18 to accept service of process on its behalf. Hamami further asserts that she never informed the plaintiff's process server, Alan Sobel, that she was either an authorized party or a managing agent.

While the motion was pending, the plaintiff filed and served an amended complaint, which omitted all of the prior substantive allegations set forth in the complaint, and instead asserted that MOG 18 was formerly known as MOG, and/or was its successor in interest, and breached the 2014 settlement agreement by failing to make the installment payments required thereunder. The plaintiff annexed the settlement agreement to the amended complaint, and thereafter opposed the motion with an attorney's affirmation, which annexed the amended complaint and Sobel's affidavit of service. The plaintiff contends that the service and filing of the amended complaint cures any deficiencies in the pleading or in the execution of the pleading, the mere denial that MOG 18 was formerly known as MOG, or was its successor in interest, is insufficient to warrant dismissal at the pleading stage, and documentary evidence does not establish MOG 18's contention in this regard. The plaintiff further contends that Gamliel's affidavit should be disregarded since she is neither the president of MOG 18 nor the recipient of process, and notes that, in his affidavit of service, Sobel expressly averred that

Hamami "stated (s)he was authorized to accept legal papers for the corporation." After purportedly rejecting the amended complaint on the ground that the plaintiff needed leave of court to serve and file it, MOG 18 submitted an attorney's reply affirmation, annexing documents demonstrating that MOG was dissolved by proclamation on July 27, 2011, while MOG 18 was not incorporated until January 15, 2014. Counsel argues that this establishes that MOG 18 was not formerly known as MOG, and that it cannot be held responsible for the October, 2014, settlement agreement in any event, since the new corporation did not adopt the name of the old one.

III. DISCUSSION

A. RES JUDICATA AND COLLATERAL ESTOPPEL

A plaintiff may amend the complaint as of right while a pre-answer motion to dismiss the initial complaint is pending. See CPLR 3205(a); 3211(f); D'Amico v Correctional Med. Care, Inc., 120 AD3d 956, 957 (4th Dept. 2014); Union State Bank v Weiss, 65 AD3d 584, 585 (2nd Dept. 2009); STS Mgmt. Dev. v New York State Dept. of Taxation & Fin., 254 AD2d 409, 410 (2nd Dept. 1998). An amended complaint supersedes the initial complaint, leaving it the only complaint in the action. See Pomerance v McGrath, 104 AD3d 440, 442 (1st Dept. 2013); Plaza PH2001 LLC v Plaza Residential Owner L.P., 98 AD3d 89, 99 (1st Dept. 2012).

Hence, the operative pleading here was properly signed by the plaintiff's attorney, there is thus no basis for the imposition of sanctions upon the plaintiff, and the only substantive allegations remaining before the court are that MOG 18 is formerly known as MOG and/or that MOG 18 is the successor in interest to MOG, MOG 18 thus assumed the obligations of MOG under the settlement agreement, and MOG 18 breached those obligations by failing to make required installment payments. Since this claim and these issues were not litigated in the 2011 action, neither res judicata nor collateral estoppel bars their consideration here. See Salazar v Pantoja, 137 AD3d 511, 511-512 (1st Dept. 2016).

Therefore, dismissal pursuant to CPLR 3211(a)(5) is not warranted.

B. DEFENSE BASED ON DOCUMENTARY EVIDENCE

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994); see Ellington v EMI Music, Inc., 24 NY3d 239, 249 (2014). Although the documentary evidence submitted by MOG 18 conclusively establishes that it was not formerly known as MOG, inasmuch as it shows that MOG and MOG 18 were and are two separate corporations, that evidence does not conclusively establish that MOG 18 is not MOG's successor in interest or did

not assume MOG's obligations under the settlement agreement. A successor in interest is "one who takes over the obligations or rights of another." ETF Intl. Assoc., Inc. v American Stock Exch. LLC, 87 AD3d 464, 464 (1st Dept. 2011). Although the documentary evidence is completely silent as to whether MOG 18 actually assumed the MOG's obligations it does show that MOG 18 was, in fact, already in existence when the settlement agreement was executed, that the 2011 action was commenced against MOG four months after MOG had already been dissolved, and that MOG nonetheless executed the settlement agreement in 2014 despite having been dissolved three years earlier, all of which suggest that the converse of MOG 18's contention may be plausible.

Consequently, there is no basis for dismissal pursuant to CPLR 3211(a)(1).

C. FAILURE TO STATE A CAUSE OF ACTION

When assessing the adequacy of a complaint in the context of CPLR 3211(a)(7), the court's role is "to determine whether plaintiffs' pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a complaint adequately states a cause of action, the court must "liberally construe the complaint," accept the facts alleged in it as true, and accord the plaintiff "the benefit of every possible favorable inference." Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881, 887 (2013);

Simkin v Blank, 19 NY3d 46, 52 (2012); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra, at 87; Guggenheimer v Ginzburg, 43 NY2d 268 275 (1977).

Where the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one." Guggenheimer v Ginzburg, supra, at 275. "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [plaintiff] has no cause of action." Sokol v Leader, 74 AD3d 1180, 1182 (2nd Dept. 2010) (internal quotation marks omitted). "Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" Id., quoting Guggenheimer v Ginzburg, supra, at 275.

The amended complaint states a cause of action to recover for breach of the settlement agreement arising from the defendant's failure to pay installments when due (see Burgdorf v Kasper, 83 AD3d 1553, 1156 [4th Dept. 2011]), based MOG 18's

status as MOG's successor in interest. See generally State Farm Fire & Cas. Co. v Main Bros. Oil Co., 101 AD3d 1575, 1576-1577 (3rd Dept. 2012); cf. Perrotti v Becker, Glynn, Melamed & Muffly, LLP, 82 AD3d 495, 499 (1st Dept. 2011) (no successor liability where, unlike here, the plaintiff was not in privity with the predecessor corporation). The affidavits and exhibits submitted by MOG 18 do not definitively demonstrate that the operative material fact asserted by the plaintiff—that MOG 18 is MOG's successor in interest—is not a fact at all or that there is no significant dispute regarding it. "Rather, such evidence merely addressed various fundamental factual issues in dispute." State of New York v Grecco, 21 AD3d 470, 477 (2nd Dept. 2005).

Hence, dismissal pursuant to CPLR 3211(a)(7) is not warranted.

D. IMPROPER SERVICE OF PROCESS

CPLR 311(a)(1) permits service of process upon a corporation to be effected by personal delivery of the summons and complaint to a corporate "officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or law to receive service." Contrary to the plaintiff's contention, Gamliel's status as MOG 18's treasurer makes her an "officer" of that corporation (see Business Corporation Law § 715[a]), who presumably has some knowledge of the operation of the corporation. Absent proof that Gamliel

somehow lacks knowledge of the identities, titles, duties, and responsibilities of MOG 18's directors, officers, employees, and agents, there is no basis for rejecting the assertions in her affidavit that Hamami was neither a managing agent nor a person authorized to accept service on behalf of MOG 18. In any event, Hamami herself asserted in her own affidavit that she was neither a managing agent nor a person authorized to accept service.

Nonetheless, the plaintiff correctly contends that process upon a corporation may be personally delivered to a person who has apparent authority to accept service on behalf of that corporation, and that such authority may be based on the process server's reasonable belief of the recipient's status and reasonable reliance on a corporate employee's representations, even where the recipient does not hold one of the corporate titles enumerated in CPLR 311(a)(1). See Fashion Page v Zurich Ins. Co., 50 NY2d 265, 273 (1980); Arvanitis v Bankers Trust Co., 286 AD2d 273, 273-274 (1st Dept. 2001); American Home Assur. Co. v. Morris Indus. Bldrs., 176 AD2d 541, 543 (1st Dept. 1991). Where, as here, there is a sharp factual dispute as to whether the process server Sobel asked Hamami whether she was authorized to accept service of process on behalf of MOG 18, and, if so, whether she responded in the affirmative or the negative, a traverse hearing is required to determine whether service of process was properly effected upon MOG 18. See Dunn v Pallett,

42 AD3d 807, 809 (3rd Dept. 2007).

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted only to the extent that the parties are directed to appear for a traverse hearing to determine the validity of service of process on May 17, 2017, at 2:30 p.m., and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: 2-16-17

ENTER: _____

J.S.C.

HON. NANCY M. BANNON