SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 32

Index No.:157191/2016
Motion Seq. 001

Kristen Endraske,

Plaintiff,

-against-

American University of Antigua, College of Medicine,

Defendant.

DECISION/ORDER

ARLENE P. BLUTH, JSC

Defendant's motion to dismiss this action on the grounds, inter alia, that the Court lacks personal jurisdiction over defendant is granted.

Summons with Notice

On August 26, 2016, plaintiff e-filed a Summons with Notice; no affidavit of service was e-filed until plaintiff opposed this motion. The Summons with Notice states:

> This is a civil action arising from Article 78 of the New York CPLR, breach of contract, breach of covenant of good faith and fair dealing, negligence, intentional and/or negligent infliction of emotional distress, violation of New York GBL §349, and/or fraud, in connection with Plaintiff Kristen Endraske's tenure as a medical student at American University of Antigua, College of Medicine, and specifically with respect to her expulsion from the medical school on or about April 27, 2016.

The Summons listed defendant's address as One Battery Park Plaza 33rd Floor, New York, New York. Plaintiff stated that the basis of the designation of New York County as the place of trial is that defendant maintains its principal place of business in New York County.

Without the benefit of seeing the affidavit of service (because it was not yet filed), defendants moved to dismiss on jurisdictional grounds. In support of its motion, defendant states that it is a medical school with its only campus and offices in Antigua, West Indies, and it is a part of American University of Antigua, a university chartered and incorporated under the laws of Antigua and Barbuda, West Indies. Defendant asserts that the Court lacks personal jurisdiction

over it because (1) plaintiff's process server left the Summons with Notice with a receptionist for a non-party, Manipal Education Americas, LLC (MEA), an entity that provides office services to defendant, and (2) plaintiff never served the Summons with Notice on defendant.

To date, plaintiff has not served a complaint in this action and defendant has not served a written demand for a complaint pursuant to CPLR § 3012(b). Contrary to plaintiff's arguments, the motion is not premature. Defendant is not moving to dismiss the Summons with Notice on the grounds that it fails to state a cause of action (which might be premature); defendant is asserting that this action must be dismissed pursuant to CPLR §3211(a)(8) because it was never served with the Summons with Notice.

As the court stated in *Bojanovich v Woitach*, 39 Misc.3d 1237(A), 972 NYS2d 142 (Sup Ct, NY County 2013):

> The cases cited by plaintiff for the proposition that a CPLR 3211 motion is premature in the absence of a complaint are distinguishable in that such cases involved dismissal based on the failure to state a cause of action, which is addressed to the sufficiency of a complaint. *Petrova v Investors Capital*, 24 Misc 3d 977, 879 NYS2d 908 (Sup Ct, Kings County 2009)("because a complaint has not been served, the court has no factual allegation to review so as to permit it to determine whether plaintiffs have any cognizable causes of action"); *NGH Assoc., Ltd. v United Parcel Serv., Inc.*, 17 Misc 3d 746, 842 NYS2d 896 (Sup Ct, Nassau County 2007)(quoting CPLR 3211(a)(7) and holding that a summons with notice is not a pleading).

Similarly, in this case, defendant's motion is not premature. Through the papers submitted by both sides, the Court has sufficient information to determine the branch of defendant's motion seeking to dismiss the action on the grounds that defendant was not served.

Defendant's motion

CPLR 311(a)(1) requires that service upon any foreign corporation be made on "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 his affirmation in support of the motion, defendant's counsel states that MEA is a New York limited liability company that entered into an agreement to provide back office and administrative services to defendant. Defendant submits their agreement with MEA, dated March 19, 2012, signed by both MEA and defendant (exh C to moving papers).

Defendant's counsel states that defendant does *not* maintain an office at One Battery Park Plaza, 33rd floor in Manhattan and that Nacaola Morrison was not, and is not, an officer, director, managing agent, cashier or assistant cashier of either MEA or defendant; nor was she authorized either by appointment of MEA or defendant, or by operation of law, to receive process for or on behalf of MEA or defendant (aff., para. 4). Defendant's counsel further states that MEA was not, and is not, an officer, director, managing agent, cashier or assistant cashier of defendant, or authorized, either by appointment of defendant, or by operation of law, to receive process for or on behalf of defendant (aff., paras. 10-11).

Plaintiff's Opposition to the Motion

Attached to plaintiff's memorandum of law in opposition to this motion is a copy of the affidavit of service of Jack Johnson. He states that on October 4, 2016 he served defendant at One Battery Park, 33rd floor, New York, NY with the Summons with Notice by delivering a copy to "Nacaola Morrison (front desk reception-authorized to accept) personally; who at the time of service advised deponent that he/she was authorized to accept service of process on behalf of [defendant]".

In further opposition to the motion to dismiss, plaintiff 's counsel asserts[1] that this motion

[1]This assertion is set forth in a December 1, 2016 memorandum of law; plaintiff's counsel did not submit an affirmation in opposition to the motion.

is premature because plaintiff had until December 24, 2016 to effect personal service upon defendant, and defendant cannot make a proper motion challenging personal jurisdiction for lack of personal service prior to the expiration of 120 days. To date, according to New York State Courts Electronic Filing database, plaintiff still has not served a summons and complaint on defendant.

Reply

In reply, defendant submits the affidavit of Nacaola Morrison; obviously, she could not address the process server's affidavit in the moving papers because it was not filed until the opposition. Ms. Morrison states she has been employed by non-party MEA as a receptionist/administrative assistant since September 2015. Morrison states that (1) defendant is one of MEA's clients, (2) she has never been employed by defendant, and (3) she is not, and never has been, authorized to accept service of process for MEA or any of MEA's clients, including defendant. Morrison further states that on or about 11:15AM on October 4, 2016 she was stationed at the reception desk at MEA's office on the 33rd floor of One Battery Park Plaza in Manhattan. She states that a man, who did not identify himself as a process server, placed papers on the reception desk; he did not ask her if she was authorized to accept service of process on either MEA or defendant. She states that she signed for the papers, indicating that she was doing so only as MEA's receptionist. When Ms. Morrison signed for the papers she wrote "receptionist" under her signature (Morrison, aff. in supp, para. 10-14).

Defendant also submits the reply affirmation of defendant's Executive Dean of the Basic Sciences, Dr. Robert Mallin. Dr. Mallin states that MEA and defendant are separate entities with separate offices, and that defendant never had an office in New York; he also notes that MEA was never known as "American University of Antigua" (aff., paras 48-50).

Sciences, Dr. Robert Mallin. Dr. Mallin states that MEA and defendant are separate entities with separate offices, and that defendant never had an office in New York; he also notes that MEA was never known as "American University of Antigua" (aff., paras 48-50).

Discussion

In the majority of law suits, a summons is served with a complaint; in that event, it is the service of the summons which confers jurisdiction – the complaint just explains what the case is about. Service of a complaint without a summons does not confer any jurisdiction at all. It is the service of the summons (or summons with notice or notice of petition or initial order to show cause) which confers jurisdiction, and therefore it is essential that service be made properly. "Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court". *Macchia v Russo,* 67 NY2d 592, 595, 505 NYS2d 591 (1986).

It is also well-settled that plaintiff, as the party seeking to assert jurisdiction over the nondomiciliary defendant, bears the burden of proof on the issue of jurisdiction. *O'Brien v Hackensack Univ. Med. Ctr,* 305 AD2d 199, 760 NYS2d 425 (1st Dept 2003).

In the typical case, the plaintiff files an affidavit of service with the court shortly after service. Then a defendant who moves to dismiss on the grounds of CPLR §3211(a)(8) is required to submit an affidavit disputing with specificity the facts of the process server's affidavit. Significantly, because here plaintiff had not filed the affidavit of service of the Summons with Notice at the time defendant made this motion, defendant was not required to submit an affidavit from the person who the process server allegedly served because there was nothing to specifically dispute. Defendant's counsel's affirmation was sufficient to support the motion.

Faced with the information set forth in the moving affirmation (that defendant did not maintain an office at One Battery Park Plaza, that MEA was not an agent or authorized to accept process for defendant, and that Morrison was not an agent or otherwise authorized to accept process for MEA or defendant), plaintiff needed to do more than simply submit the process server's original affidavit of service, where the process server conclusorily asserted that Ms. Morrison was authorized to accept service of process on behalf of defendant because Morrison "advised deponent that he/she was authorized to accept service of process on behalf of American University of Antigua, College of Medicine." In order for plaintiff to successfully oppose the motion, it was incumbent upon plaintiff to, *inter alia*, submit an affidavit from the process server specifically addressing the facts in the moving papers.

The moving papers set forth that defendant did not have an office in New York; the process server could have described the office and indicated (if true) that defendant's name was on the front door to the office and/or in the lobby. The process server could have indicated (if true) that his copy of the papers were stamped "received" with defendant's personalized stamp. It was necessary for the process server to submit an additional affidavit detailing how he "knew" Ms. Morrison was authorized to accept service of process for defendant, especially in light of counsel's statement that defendant did not even maintain an office at One Battery Park Plaza, 33rd floor. None of this was done. The form affidavit - which even indicates "he/she" is simply not good enough to challenge the specifics of the moving papers.

No hearing is even necessary because the essential facts are undisputed: the process server went to a third party's office and left the papers with Ms. Morrison, who is an employee of a third party. Ms. Morrison is not authorized to accept service for her employer, her employer is not authorized to accept service for defendant and Ms. Morrison certainly is not authorized to

accept service for defendant. Defendant is not even located in New York.

Therefore, defendant's motion to dismiss must be granted, even without considering Ms. Morrison's affidavit which was submitted in reply[2]

Accordingly, because plaintiff has failed to sustain its burden of proof of proper service of the Summons with Notice on defendant, it is

ORDERED that defendant's motion is granted, and this action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: March 29, 2017
New York, New York

ARLENE P. BLUTH, JSC

[2] Plaintiff never moved for leave to submit a sur-reply.