

Seldon v Crow

2013 NY Slip Op 33709(U)

April 9, 2013

Sup Ct, New York County

Docket Number: 105200/2011

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 4/11/2013
SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon. DORIS LING--COHAN, Justice
PART 36

PHILIP SELDON,

Index No.: 105200/2011

-against-

Motion Seq. No.: 007

CHEYENNE CROW, "JOHN 'MIKE' DOE"
"JOHN 'DOCTOR' DOE", "JOHN 'IRINA'
DOE",

The following papers, numbered 1 to 4 were considered on this motion by defendant to dismiss this case:

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Notice of Motion/Order to Show Cause - Affidavits - Exhibits | 1,2 |
| Answering Affidavits - Exhibits (Memo) | 3 |
| Reply Affirmation | 4 |

FILED

Cross-Motion: [] Yes [X] APR 10 2013

Upon the foregoing papers, it is

NEW YORK COUNTY CLERKS OFFICE
ORDERED that this motion by defendant Cheyenne Crow ("Crow") to dismiss is granted, as detailed below.

This action, which seeks \$25 million for alleged "defamation, libel, slander, invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, alienation of affection and friendship" (as provided in the summons with notice), is just one, of more than 100 lawsuits in this court, commenced by pro se plaintiff Philip Seldon ("Seldon"), against over 160 defendants, as reflected in the court's computer records.

Significantly, by decision/order dated October 11, 2012, in the case of Seldon v. Lewis, Brisbois, Bisgaard & Smith, LLP, Index number 1119156/2010, the Hon. Paul Wooten determined that plaintiff was "a vexatious litigator", and plaintiff was enjoined "from commencing any further litigations against anyone within the State of New York without first obtaining leave of the Court". While the within case was commenced, on or about May 2011, prior to the issuance of such injunction against the commencement of any further

of any further lawsuits, without permission of the court, the court notes that, in addition to the within case commenced by plaintiff against defendant Crow, plaintiff has also commenced two additional cases against Crow, for virtually the same relief.¹

The court further notes that, this case was only recently transferred into this Part's inventory, on or about January 8, 2013, after the Hon. Eileen Rakower granted plaintiff's motion for recusal, by order dated January 2, 2013. Further, by orders date July 21, 2011 and September 21, 2011, Justice Rakower denied plaintiff's two (2) motions for a default judgment against defendant Crow, based upon plaintiff's failure to establish that Crow was properly served with the pleadings in this case.

Presently before this court is defendant Crow's motion which seeks, *inter alia*, to dismiss this allegedly frivolous lawsuit, based upon defective service of process and that this case seeks the same relief sought in other cases commenced by plaintiff against defendant.

In opposition, plaintiff has failed to supply proof of service of the pleadings and has not established personal jurisdiction over defendant Crow. Rather, plaintiff merely asserts in a conclusory manner that defendant's motion "is totally without merit and frivolous as he provides no valid basis [to] this court for the dismissal". ¶2, Affidavit in Opposition.

It is well settled law that "the burden of proving jurisdiction is upon the party who asserts it", specifically, the plaintiff.

¹ The case of *Seldon v. Crow*, Index number 101656/2012, was dismissed by order dated July 31, 2012, by the Hon. Eileen Rakower, for improper service of the pleadings. In the case of *Seldon v. Crow*, Index number 103760/2012, pending before this court, defendant Crow has filed an order to show cause seeking, *inter alia*, dismissal, which is returnable on April 4, 2013, in the Motion Submission Part; both such cases seek virtually identical relief as sought herein.

Lamarr v. Klein, 35 AD2d 248, 250 (1st Dept 1970); *In the Matter of 72A Rlty. Assoc. v. New York City Envl. Control Bd.*, 275 AD2d 284 (1st Dept 2000). Here, despite being served with defendant's motion to dismiss based upon improper service, plaintiff has failed to come forward to establish that defendant was in fact properly served.

Notably, plaintiff was unable to establish proper service of the pleadings, in conjunction with his two (2) prior motions in this case, for the entry of a default judgment against defendant Crow. The court notes that in her decision dated September 21, 2011, Justice Rakower determined that "there is insufficient evidence that [p]laintiff was ever properly served with the summons and complaint...[as] it appears that Crow no longer resided at the Virginia address where he was purportedly served on May 11, 2011". Thus, the within motion to dismiss is granted, as plaintiff has failed to establish that this court has personal jurisdiction over defendant Crow, which is a condition precedent to the ability to maintain this lawsuit.

Moreover, the within claims asserted against defendant Crow, appear to be duplicative of the claims asserted against defendant Crow in the case of *Seldon v. Crow et al.*, Index Number 103760/2012, also pending before this court. Thus, dismissal is warranted on such basis as well.

The portion of defendant's motion which seeks an injunction against plaintiff, preventing him from commencing future cases of a frivolous or harassing nature is deemed moot. As indicated above, by order dated October 11, 2012, the Hon. Wooten, granted an even broader injunction, prohibiting plaintiff Seldon from commencing any further lawsuits against anyone in the State of New York, without obtaining prior court permission. However, should

* 4]
plaintiff seek to commence an action against Cheyenne Crow, it is

ORDERED that plaintiff must attach a copy of this order and Justice Wooten's October 11, 2012 order, to any application for permission.

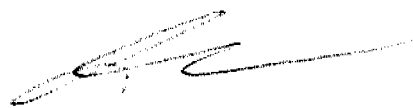
That portion of defendant's motion which seeks a monetary award for, inter alia, travel expenses, is denied, as no basis for such relief has been supplied.

Based upon the above, it is further

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that, within 30 days of entry of this order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: April 9, 2013


Doris Ling-Cohan, JSC

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Check if Appropriate: DO NOT POST

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