

Latimore v Fuller

2013 NY Slip Op 30680(U)

April 2, 2013

Sup Ct, New York County

Docket Number: 109456/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

SONYA WHITTEN LATIMORE,

INDEX NO. 109456/11

Plaintiff,

FILED

MOTION DATE _____

-v-

APR 08 2013

MOTION SEQ. No. 003

KIM E. FULLER, et al.,

Defendant.

**NEW YORK
COUNTY CLERK'S OFFICE**

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits-- Exhibits...

1-4

Answering Affidavits-- Exhibits _____

5-9

Replying Affidavits _____

10-14

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated:

4 (2) 13

Donna M. Mills

J.S.C.

Check one: FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
SONYA WHITTEN LATIMORE,

Plaintiff,

Index No.

-against-

109456/11

KIM E. FULLER, MIATTA HAJ SMITH, THE SMITH
HAJ GROUP, BEN SILVERMAN and ELMA KIM,

FILED

Defendants.

APR 08 2013

-----X
DONNA MILLS, J. :

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Elma Kim (Kim) moves for an order dismissing the complaint against her and for sanctions. Plaintiff cross-moves for leave to amend her complaint and for an order disqualifying Kim's counsel.

This is an action alleging causes of action in fraud, breach of contract, breach of fiduciary duty, conversion, unjust enrichment and tortious contractual interference. Plaintiff alleges that sometime in February 2004, she spoke to defendant Kim E. Fuller (Fuller), who is a partner in a promotional company, McCready & Fuller, about an idea for a television program which involved dieting, hoping that Fuller would be interested. Plaintiff alleges that she was able to contact Fuller through defendant Miatta Haj Smith (Smith).

On October 18, 2007, plaintiff commenced an action for federal copyright infringement against NBC Universal, Inc. d/b/a Universal Television Distribution (NBC), McCready & Fuller, and Fuller, individually and as a partner of McCready & Fuller, in Federal District Court, Southern District of New York (the Federal Action). Essentially, plaintiff alleged that the NBC program, The Biggest Loser, was based on a treatment she had provided to Fuller. At a pre-trial deposition, plaintiff testified that she spoke to Fuller about the treatment, but claimed not to

3] know any subsequent actions made by him concerning the treatment. At his pre-trial deposition, Fuller testified that he did not follow up with plaintiff, and did not give her a contract, or speak to her, until after the commencement of the Federal Action.

After the depositions, NBC moved for dismissal through summary judgment. The Federal District Court granted the motion, based upon the testimony of Fuller and Smith, who denied communicating with NBC prior to the suit's commencement. Plaintiff asserts that the testimony and sworn affidavits from these individuals that formed the basis of NBC's motion are fraudulent. Plaintiff claims that she is seeking an appeal in the Federal Circuit Court.

Subsequently, Smith and defendant Smith Haj Group moved for dismissal in the present action, arguing that there was improper service of process, that the claim for fraud is not actionable, that the claims for conversion and unjust enrichment are untimely, and that this case is precluded by collateral estoppel and res judicata. This court granted their motion, and dismissed the complaint as against these parties on the grounds that plaintiff failed to make out a claim for fraud and that the claims for conversion and unjust enrichment were untimely.

Now, defendant Kim is moving for dismissal on similar grounds, lack of substance in the fraud claim, and untimeliness in the conversion and unjust enrichment claims. In addition, Kim moves for dismissal on the ground of lack of personal jurisdiction.

Kim contends that she has no jurisdictional contacts with New York. She alleges the following: she owns no real property here, has no bank accounts here, has no mailing address here, has no agent for service of process and was not served here. She does not regularly do business or engage in any persistent course of conduct here, or derive any revenue for goods used or services consumed here.

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Kim argues that she did not speak to plaintiff until the commencement of the Federal Action and lacks any prior knowledge of plaintiff's treatment. She claims to have worked as an executive assistant for 3 Ball Productions (3 Ball) in 2004, but did not participate in any substantive discussions about The Biggest Loser program (3 Ball rendered some services on this series as of 2004, none of which were performed in New York).

Kim also moves for sanctions on the ground that plaintiff's counsel is bringing a frivolous suit against her. She contends that there is absolutely no merit in the claims brought against her and, like defendant Smith, an order granting dismissal as to her is inevitable.

Plaintiff opposes the motion to dismiss and for sanctions. She also cross-moves for leave to amend her complaint and for an order disqualifying Kim's counsel. A stipulation was executed by the parties wherein a second amended complaint was submitted to replace the first amended complaint.

Plaintiff argues that discovery on the issue of whether Kim is subject to New York jurisdiction is warranted and at this stage, plaintiff may take a prima facie showing of jurisdiction solely by allegations. With respect to allegations, plaintiff contends that Kim is subject to jurisdiction pursuant to this state's long-arm statute. The complaint alleges that Kim traveled to New York for several meetings to negotiate and possibly execute a contract with Fuller and/or Smith. The meetings allegedly constitute transacting business, i.e. preliminary contract negotiations, and would give this court personal jurisdiction over Kim under CPLR 302 (a) (1). If plaintiff's allegations are shown to be true, plaintiff contends that Kim's action would also constitute a commission of an act within this state, causing harm within this state, pursuant to CPLR 302 (a) (2). Plaintiff also argues that discovery could reveal whether Kim could be subject

to jurisdiction based on her being an agent of 3 Ball.

Plaintiff opposes sanctions on the ground that this action is meritorious and that there is sufficient proof to indicate Kim's possible liability.

The cross motion involves plaintiff's request for leave to serve an amended complaint which would revise the claim of fraud and withdraw the claims of conversion and unjust enrichment against Kim. Plaintiff has alleged that the dismissal of certain defendants in plaintiff's Federal Action was due, partially, to misstatements made by Kim. Kim has moved for dismissal of the fraud claim against her in this complaint because the claim was not properly pleaded. Plaintiff argues that new information relating to a Babacour Diallo, who is allegedly serving time for copyright infringement, contradicts Kim's prior statements concerning her involvement with Fuller. Plaintiff avers that amendment would not prejudice Kim, and that the alleged fraud is properly pleaded.

The cross motion also seeks to disqualify Kim's counsel from representing her on the ground that a representative of that law firm is expected to testify about an affidavit he or she drafted relating to the Federal Action, which will be challenged by plaintiff in this action. Plaintiff argues that said representative prepared a false affidavit in the Federal Action which resulted in the federal court's dismissal of certain defendants. Plaintiff states that she is currently appealing the Federal Action with respect to the dismissal.

In opposition to the cross motion, Kim states that the second amended complaint remains invalid in its failure to connect her to any actionable fraud claim. According to her, the additional information alleged in this complaint does not substantiate any acts on her part that would amount to fraud. Moreover, she asserts that none of the additional allegations are directly

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related to the issue of the Biggest Loser series. Kim states that the basis for her jurisdiction as alleged by plaintiff, the negotiations allegedly occurring in New York, is not shown to have any relationship with the series.

The court will first determine whether Kim is subject to this court's jurisdiction. Plaintiff contends that Kim is subject to long-arm jurisdiction, pursuant to CPLR 302 (a) (1). This section provides that specific jurisdiction exists where a plaintiff's cause of action arises from a defendant's transaction of business within this state or a defendant's contacts anywhere to provide goods or services in the state. "Essential to the maintenance of a suit against a nondomiciliary under CPLR 302 (subd [a], par 1) is the existence of some articulable nexus between the business transacted [in New York] and the cause of action sued upon." *McGowan v Smith*, 52 NY2d 268, 272 (1981).

In the first complaint, plaintiff originally alleged that Kim attended a single meeting in New York in May 2004, related to a discussion about the television series. The second amended complaint alleges that Kim's telephone records revealed that Kim was in New York in May 2004; that she spoke to a Boubacour Diallo, who, upon information and belief, has been incarcerated in prison for copyright infringement; and that she spoke to three entertainment entities, William Morris Company, Fox Loeber Agency and Winstar T.V. and Video, which is owned by Wellspring Media. Plaintiff avers that these calls were business-oriented. Plaintiff states that these contacts with New York are sufficient to subject Kim to long-arm jurisdiction, or to allow further jurisdictional discovery.

Kim contends that the calls made in New York are insufficient to provide a necessary nexus for jurisdictional purposes. She states that these calls were not business-oriented, but

[* 7]

personal, and even so, there is no connection between the calls and plaintiff's specific claim against her. She argues that plaintiff's jurisdictional allegations are too speculative to be acceptable, and that they do not merit the granting of jurisdictional discovery.

The court agrees with Kim that the new allegations in the proposed complaint are as inadequate as those in the earlier complaint. The calls allegedly made in New York are simply not specific with respect to whether they involved plaintiff's proposal for a television program, the basis of her action. The speculative nature of these allegations do not allow for the granting of jurisdictional discovery. Furthermore, there are no valid allegations that Kim committed a tort in New York for purposes of CPLR 302 (a) (2).

The court shall grant Kim's motion for dismissal on jurisdictional grounds. The court will deny sanctions since the action has not been dismissed on the merits. The court shall deny plaintiff leave to amend her complaint with respect to claims brought against Kim. Plaintiff's motion for an order disqualifying Kim's counsel is now moot.

Accordingly, it is

ORDERED that defendant Elma Kim's motion to dismiss the complaint is granted and the complaint is severed and dismissed as against her with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that defendant Elma Kim's motion for sanctions is denied; and it is further

ORDERED that plaintiff Sonya Whitten Latimore's motion for leave to replead the complaint is denied with respect to those claims brought against defendant Kim and is otherwise

granted, and the amended complaint in the form annexed to the moving papers shall be deemed served upon service by movant of a copy of this order with notice of entry; and it is further

ORDERED that the remaining defendants in this action shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that plaintiff's motion for the disqualification of Kim's counsel is denied as moot; and it is further

ORDERED that the remainder of this action shall continue.

DATED: 4/2/13

ENTER:



J.S.C.

WILLIAM W. MILLS, J.S.C.