

Flower Publ. Group LLC v Serendipity 3, Inc.

2013 NY Slip Op 32420(U)

October 9, 2013

Supreme Court, New York County

Docket Number: 400876/12

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Sabann Scarpulla
Justice

PART 19

Index Number : 400876/2012
FLOWER PUBLISHING GROUP
vs.
SERENDIPITY 3
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

OCT 10 2013

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Dated: 10/9/13

SS, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
FLOWER PUBLISHING GROUP LLC D/B/A NYC
TRAVEL GUID INTERNATIONAL,

Plaintiff,

Index No.: 400876/12
Submission Date: 6/26/13

-against-

SERENDIPITY 3, INC.,

DECISION AND ORDER

Defendant.

-----X

For Plaintiff:
Meyers, Saxon & Cole
3620 Quentin Road
Brooklyn, NY 11234

For Defendant:
Law Offices of Kenneth L. Small
317 Madison Avenue, Suite 405
New York, NY 10017

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OCT 10 2013

Papers considered in review of the motion to dismiss and cross motion to amend:

Notice of Motion 1
Notice of Cross-Motion 2
Aff in Reply 3

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract, defendant Serendipity 3, Inc. (“Serendipity”) moves to dismiss the amended summons and complaint, and plaintiff Flower Publishing Group LLC d/b/a NYC Travel Guid International (“Flower”) cross moves for leave to amend the summons and complaint.

In or about April 2011, Flower commenced this action, alleging breach of an advertising agreement, and sought to recover \$25,907.35 from Serendipity. Serendipity answered the complaint, denied all material allegations, and the parties began to conduct discovery. At a compliance conference on November 14, 2012, the parties executed a

stipulation in which they agreed, in relevant part, that Flower would serve and file an amended complaint by December 14, 2012, to “allege only breach of two express written agreements.”

On or about December 14, 2012, Flower served an amended summons and complaint (1) asserting that Serendipity breached “agreements for work, labor, services, advertising” that it executed with Flower on December 11, 2008 and July 21, 2009, seeking \$25,907.35 plus attorneys fees; and (2) adding defendants Stephen Bruce (“Bruce”) and Joe Calderone (“Calderone”), asserting that they personally guaranteed all obligations owed by Serendipity to Flower. Bruce was Serendipity’s president and sole stockholder, officer and director, and Calderone was the head of Calderone Public Relations, a company that performed public relations services for Serendipity.

Serendipity now moves to dismiss the amended summons complaint, arguing that (1) Flower may not amend the complaint at this stage in the litigation to add parties to the action without first obtaining leave of court; (2) Flower did not comply with, and exceeded the scope of, the November 14, 2012 stipulation by adding a cause of action alleging that Calderone and Bruce were personally liable to Flower pursuant to a personal guarantee and by adding a claim for attorneys fees; and (3) Calderone and Bruce never executed a personal guarantee in relation to any agreement between Serendipity and Flower.

In support of the motion, Serendipity submits affidavits from Bruce and Calderone. Calderone provides that he signed the July 21, 2009 agreement on behalf of Serendipity, and Bruce provides that he signed the December 11, 2008 agreement on behalf of Serendipity. They each aver that they never executed any document that could be construed to be a personal guarantee of Serendipity's obligations to Flower, rather they only acted in a representative capacity when signing the respective agreements.

Flower cross moves for leave to amend its summons and complaint. In support of its cross motion and in opposition to Serendipity's motion, Flower's president Peter Flower ("Peter") submits an affidavit in which he explains that the July 21, 2009 agreement was executed and personally guaranteed by Calderone, and the December 11, 2008 agreement was executed and personally guaranteed by Bruce. He argues that whether Bruce and Calderone acted in a personal or representative capacity in executing those agreements presents a triable issue of fact.

Discussion

Pursuant to CPLR §3025, a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim. *See Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28 (1st Dept. 2001). Whether to grant the amendment is committed to the court's discretion. *See Heller v. Louis*

Provenzano, Inc., 303 A.D.2d 20 (1st Dept. 2003). However, such leave should not be granted when the proposed amendment is insufficient or without merit. *See Strook & Strook & Lavan v. Beltramini*, 157 A.D.2d 590, 591 (1st Dept. 1990).

Here, in the November 14, 2012 stipulation, the parties agreed that Flower would amend its pleadings to allege the breach of two written agreements. The parties did not agree, however, that Flower could amend its complaint to add two new defendants to the action or add a claim for attorneys fees. As such, Flower was required to have first obtained leave of court to make such amendments. Serendipity now moves to dismiss that amended complaint because of the improperly added defendants and the improperly added claim for attorneys fees, and Flower, in its cross motion, is now seeking leave to make those amendments.

The court has reviewed the proposed amendments as well as the evidence submitted in support of the motion and cross motion, and finds that Flower exceeded the scope of the November 14, 2012 stipulation by amending its complaint to add claims against Bruce and Calderone and a claim for attorneys fees. The court denies Flower's cross motion for leave to amend the complaint to include claims against Bruce and Calderone. Bruce and Calderone both submitted affidavits in which they averred that they signed the subject agreements in their representative capacities, and did not sign the agreements to effectuate personal guarantees. The language of the agreements does not purport to ascribe personal guarantee obligations on Bruce or Calderone, and Flower has

submitted no documentary or other evidence sufficient to justify the insertion of a claim that Bruce and Calderone executed personal guarantees when signing the agreements.

However, the court will permit Flower to amend its complaint to include a claim for attorneys fees based on the clauses in the July 21, 2009 agreement and December 11, 2008 agreement relating to attorneys fees.

In accordance with the foregoing, it is hereby

ORDERED that defendant Serendipity 3, Inc.'s motion to dismiss the amended summons and complaint and plaintiff Flower Publishing Group LLC d/b/a NYC Travel Guid International's cross motion for leave to amend the summons and complaint are resolved as follows: plaintiff Flower Publishing Group LLC d/b/a NYC Travel Guid International is directed serve an amended complaint within 30 days of the date of this order, asserting claims for breach of the December 11, 2008 and July 21, 2009 agreements against defendant Serendipity 3, Inc. only, and asserting a claim for attorneys fees against defendant Serendipity 3, Inc. only.

This constitutes the decision and order of the court.

Dated: New York, New York
October 9, 2013

FILED

OCT 10 2013

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Samuel Scarpulla
J.S.C.