M.T. Packaging, Inc. v Hoo
2014 NY Slip Op 33336(U)
December 18, 2014
Supreme Court, New York County
Docket Number: 652579/2014
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

M.T. PACKAGING, INC.,

Plaintiff,

Index No. 652579/2014

-against-

DECISION/ORDER

FUNG KAI HOO, individually and as an officer of VN K'S INTERNATIONAL JOINT STOCK COMPANY and VN K'S INTERNATIONAL JOINT STOCK COMPANY,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavit in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action asserting a claim for fraud against defendants. Defendants now move for an order granting summary judgment and dismissing the action. Plaintiff cross-moves for an order granting it costs and sanctions. As defendants do not properly identify whether their motion is one to dismiss pursuant to CPLR § 3211 or for summary judgment pursuant to CPLR § 3212, the court shall treat it as one to dismiss and, for the reasons set forth below, both motions are denied.

The relevant facts are as follows. Defendant Fung Kai Hoo ("Hoo") is the principal of defendant VN K's International Joint Stock Company ("VN International"). VN International manufactures plastic bags and other products sold by its related corporation K's International

Plybags Mfg., Ltd. ("Plybags"). Sometime prior to February 2008, plaintiff began a series of transactions with VN International to manufacture packaging and bags to be purchased by and shipped to plaintiff. In connection with these transactions, on or about February 12, 2008, Hoo, as managing director of VN International, signed a "Certificate of Compliance - Reduction of Toxins in Packaging" (the "Certificate of Compliance"), wherein he allegedly represented that all the packaging components manufactured by VN International complied with legal requirements for the level of toxins. Plaintiff alleges that this representation was false as a study conducted in 2009 by a customer of plaintiff revealed that the products provided by VN International to plaintiff contained, among other things, over four times the legal limits of chromium and lead.

Thus, on August 20, 2014, plaintiff commenced the instant action asserting a claim of fraud against defendants based on the alleged fraudulent Certificate of Compliance. On that day, Hoo was in New York to take part in a deposition for a related action entitled *K's International Polybags Mfg. Ltd. v. M.T. Packaging Inc.*, Index No. 154420/2012 (the "First Action"). As Hoo was exiting the deposition accompanied by his attorney Carol G. Morokoff ("Ms. Morokoff"), plaintiff's process server allegedly effectuated service on defendants by serving Ms. Morokoff with two copies of the summons and complaint. Specifically, according to the affidavit of service, the process server was "serving the defendant personally when Ms. Morokoff, his attorney, intervened and accepted service." Defendants now move to dismiss the present action on the grounds that: (1) there was improper service, (2) plaintiff's claims are barred by *res judicata* and/or collateral estoppel, and (3) plaintiff's complaint fails to sufficiently allege fraud as against Hoo.

As a threshold issue, the court finds that service of process was properly effectuated on Hoo as Hoo has failed to demonstrate that he was entitled to immunity from service of process at the

time he was served. Defendants sole argument in support of its motion to dismiss for improper service of process on Hoo is that Hoo was entitled to immunity at the time he was served as he undisputedly is a nonresident who was solely in New York to take a deposition. However, in order to avail himself of the doctrine of immunity, Hoo has the burden to demonstrate "that (1) he or she is in fact a nonresident, (2) whose sole purpose in appearing in New York is to attend the judicial proceedings, and (3) there were no other means of acquiring jurisdiction over his or her person other than personal service in New York." *Brause 59 Co. v. Bridgemarket Associates*, 216 A.D.2d 200, 201 (1st Dept 1995); *see also Olbi USA, Inc. v. Agapov*, 294 A.D.2d 139 (1st Dept 2002).

On the present motion, Hoo has failed to demonstrate that his sole purpose in appearing in New York was to attend the deposition and that there were no other means of acquiring jurisdiction over him other than service in New York. As an initial matter, it is disputed whether Hoo was solely in New York to attend the deposition as he testified at the deposition that he was also there conducting business. Furthermore, Hoo fails to even allege that there were no other means of acquiring jurisdiction over him in New York other than personal service here. Indeed, it is alleged in the complaint that he is subject to jurisdiction under New York's long-arm statue on the basis of having tortuously injured plaintiff within the State and on the basis that he has conducted business within the State. Thus, the court finds that service on Hoo was proper.

Additionally, the court finds that service of process was properly effectuated on VN International. CPLR § 311(a)(1) provides, in pertinent part, that personal service upon any domestic or foreign corporation shall be made by delivering the summons "to 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." Indeed, "[s]ervice of one copy of a summons and complaint upon an officer

of a corporation constitutes service upon the corporation itself as well as upon the individual officer." *Fernandez v. Morales Bros. Realty, Inc.*, 110 A.D.3d 676, 677 (2nd Dept 2013). Here, VN International was properly served pursuant to CPLR § 311(a)(1) when plaintiff's process server delivered the summons and complaint to Hoo, a principal of VN International. To the extent defendants contend that such delivery was improper as the summons and complaint was handed to Ms. Morokoff, not Hoo directly, such contention is without merit. Generally, the process server must tender process directly to an authorized corporate representative. *See McDonald v. Ames Supply Co.*, 22 N.Y.2d 111 (1968). However, service has been upheld where the delivery was made to an unauthorized person in the presence of a corporate officer to whom re-delivery immediately occurred. *See Conroy v. International Terminal*, 87 A.D.2d 858, 859 (2nd Dept 1982) ("Where the delivery is so close both in time and space that it can be classified as part of the same act service is effected."); *Green v. Morningside Heights Housing Corp.*, 13 Misc.2d 124 (Sup. Ct. N.Y. County 1958), *affirmed* 7 A.D.2d 708 (1st Dept 1958). Here, it is undisputed that Ms. Morokoff was standing directly next to Hoo when the process server delivered the summons and complaint and although she does not state that she immediately handed the papers to Hoo, such can be reasonably inferred. Indeed, the papers would have been properly delivered to Hoo if Ms. Morokoff had not intervened. Thus, under these circumstances, the court finds that service should be upheld.

Additionally, to the extent defendants contend that service of process was improper as plaintiff's affidavits of service only state that Hoo was served and not VN International, such contention is without merit. It is well settled that "[t]he defects in the affidavit of service do not defeat an otherwise properly commenced action, but are mere nonjurisdictional irregularities." *Bell v. Bell, Kalnick, Klee & Green*, 246 A.D.2d 442, 443 (1st Dept 1998). Here, this court has already

determined that service of process was properly effectuated on VN International by delivering the summons and complaint to Ms. Morokoff. Thus, it is immaterial that the filed affidavits of service do not list VN International as the party who was served.

Additionally, defendants are not entitled to an order dismissing the present action under the doctrines of *res judicata* or collateral estoppel based on the First Action. The doctrine of *res judicata* "provides that as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action." *Singleton Mgt. v Compere,* 243 A.D.2d 213, 215 (1st Dept 1998). This doctrine is applied "when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." *Id.* Collateral estoppel involves issue preclusion rather than claim preclusion and it is based on the principle that a party should not be able to relitigate an issue which was previously decided against it. *Id.* For collateral estoppel to be invoked, the identical issue must have been decided in the prior action and be decisive in the present action and the party to be precluded must have had a full and fair opportunity to contest the prior determination. *Id.* at 215-216.

In the present case, neither *res judicata* nor collateral estoppel are applicable as there has been no final decision or judgment in the First Action. While plaintiff alleges that this action should be dismissed based on the doctrines of *res judicata* or collateral estoppel as this action involves substantially the same parties and issues present in the First Action, such contention is without merit as it is undisputed that the First Action is still ongoing. Thus, even assuming, *arguendo*, that the First Action involves the same parties, claims or issues, the doctrines of *res judicata* and collateral

estoppel cannot be invoked at this time.

Finally, the court finds that the remaining portion of defendants' motion seeking to dismiss plaintiff's fraud claim as asserted against Hoo is denied. To plead a cause of action for fraud, a plaintiff must allege misrepresentation of a material fact, falsity, scienter, reliance and injury. *See Barclay v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989). Here, plaintiff's complaint sufficiently alleges, *inter alia*, that Hoo personally signed the alleged fraudulent Certificate of Compliance knowing the representations contained therein to be false and that he did so with intent to deceive plaintiff and that plaintiff relied on these representations to enter into a series of transactions with VN International to purchase the packaging and bags herein at issue and was damaged as a result. Thus, plaintiff's complaint states a cause of action for fraud against Hoo.

Additionally, to the extent defendants contend that plaintiff failed to sufficiently allege facts to pierce the corporate veil and hold Hoo individually responsible, such contention is without merit. It is well settled that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." *Peguero v. 601 Realty Corp.*, 58 A.D.3d 556, 558 (1st Dept 2009). Specifically, "[t]he 'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act." *Id.* at 559. Here, plaintiff sufficiently alleges that Hoo affirmatively signed the alleged fraudulent Certificate of Compliance, i.e. committed an affirmative act, to assert personal liability against Hoo.

Accordingly, defendants' motion is denied in its entirety. As to plaintiff's cross-motion

seeking costs and sanctions, the court finds that such relief is improper in this instance. Contrary to plaintiff's assertion, defendants' motion was neither frivolous nor completely without merit in law. Thus, both motions are denied. This constitutes the decision and order of the court.

Dated: 12/18/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.