

**521 Broadway Holdings LLC v Christian**

2016 NY Slip Op 30328(U)

February 23, 2016

Supreme Court, New York County

Docket Number: 653118/2015

Judge: Cynthia S. Kern

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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  
521 BROADWAY HOLDINGS LLC,

Plaintiff,

Index No. 653118/2015

-against-

**DECISION/ORDER**

NATHANIEL CHRISTIAN,

Defendant.

-----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
Affirmation in Opposition.....	2
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action pursuant to Civil Practice Law and Rules (“CPLR”) § 3213 with a summons and notice of motion for summary judgment in lieu of complaint against defendant in the principal amount of \$203,061.01 with interest thereon from October 1, 2014 at the rate of 12% per annum, plus attorneys’ fees and costs. Plaintiff alleges that this action is based on four instruments for the payment of money only and that there are no defenses thereto. Defendant asserts that plaintiff’s motion must be denied and the action must be dismissed on the ground that this court lacks personal jurisdiction over him due to improper service. For the reasons set forth below, plaintiff’s motion is denied and the action is dismissed.

The relevant facts are as follows. On or about September 16, 2015, plaintiff filed a summons and notice of motion for summary judgment in lieu of complaint against defendant based on four promissory notes signed by defendant on or about June 2, 2014 (the “initial motion for

summary judgment in lieu of complaint”). According to the affidavit of plaintiff’s process server, plaintiff effectuated service on November 11, 2015 by delivering the summons and complaint to Claude Castro, Esq. (“Mr. Castro”), allegedly a person authorized to accept service, at 444 Madison Avenue, Suite 500, New York, New York. In opposition to the initial motion for summary judgment in lieu of complaint, defendant alleged that Mr. Castro was not authorized to accept service on defendant’s behalf and that defendant did not receive service of the summons and notice of motion for summary judgment in lieu of complaint, and requested that the court dismiss the action. However, plaintiff’s motion was denied for its failure to submit working copies of its motion papers, and the court made no determination as to whether plaintiff properly served defendant with process.

On or about January 4, 2016, plaintiff filed the instant notice of motion for summary judgment in lieu of complaint under the same index number as the initial motion for summary judgment in lieu of complaint (the “instant motion for summary judgment in lieu of complaint”). In opposition to the instant motion for summary judgment in lieu of complaint, defendant again alleges that Mr. Castro was not authorized to accept service on defendant’s behalf and that defendant did not receive service of the initial summons and notice of motion for summary judgment in lieu of complaint, and requests that the court dismiss the action. In addition, defendant has submitted a letter from Mr. Castro to plaintiff’s attorney dated November 11, 2015 stating that Mr. Castro was “returning the Notice of Motion for Summary Judgment in Lieu of Complaint...As I advised you, I am not authorized to accept service of this Summons and Complaint on behalf of Mr. Christian and our office has not been retained in this matter.”

The court denies plaintiff’s motion for summary judgment in lieu of complaint and dismisses the action on the ground that plaintiff has failed to make a *prima facie* showing that it

properly served defendant with process. Service may be made pursuant to CPLR § 308(2) “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served” and thereafter mailing the summons to his actual place of business or last known residence. Plaintiff claims that its process server delivered the summons and notice of motion for summary judgment in lieu of complaint to Mr. Castro, a person “of suitable age and discretion.” However, plaintiff has failed to make a *prima facie* showing that it served defendant with process pursuant to CPLR § 308(2) as the affidavit of plaintiff’s process server does not state that the address at which the process server delivered the summons and notice of motion for summary judgment in lieu of complaint to Mr. Castro was defendant’s actual place of business, dwelling place or usual place of abode, or that the summons was thereafter mailed to defendant’s actual place of business or last known residence.

Plaintiff’s argument that defendant waived any objection to the court’s personal jurisdiction by participating in the litigation by registering for Electronic Filing and opposing the initial motion for summary judgment in lieu of complaint on the merits is without merit. A party may waive its objection to the court’s personal jurisdiction by making a formal appearance, by serving an answer or a notice of appearance or by making a motion that extends its time to answer, or an informal appearance, by substantially participating in the litigation, “unless an objection to jurisdiction...is asserted by motion or in the answer...” *Sessa v. Board of Assessors of Town of North Elba*, 46 A.D.3d 1163, 1164 (3<sup>rd</sup> Dept 2007). As CPLR § 3213 allows a plaintiff to move for summary judgment without the service of a complaint and answer, defendant properly objected to the court’s personal jurisdiction through his arguments in opposition to the initial and instant motions for summary judgment in lieu of complaint, and therefore did not waive his objection to the court’s personal jurisdiction by participating in the litigation.

Accordingly, plaintiff's motion for summary judgment in lieu of complaint is denied and the action is dismissed. This constitutes the decision and order of this court.

Dated: 2/23/16

Enter: \_\_\_\_\_

CK  
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J.S.C.

**CYNTHIA S. KERN**  
J.S.C.