

Moms Smile v Bogomdny

2016 NY Slip Op 32690(U)

December 5, 2016

Supreme Court, Kings County

Docket Number: 1069/16

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of December, 2016¹

HONORABLE FRANCOIS A. RIVERA

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MOMS SMILE a/k/a VADIM KOMISSARCHUCK,

Plaintiffs,

DECISION & ORDER

Index No. 1069/16

- against -

FAINA BOGOMDNIY; 105 NEPTUNE CONDOMINIUM ASSOCIATION INC., (formerly, The 105 Neptune Avenue., Inc.); THE BOARD OF MANAGERS; 105 NEPTUNE AVENUE CONDOMINIUM ASSOCIATION, INC.; ALEX NAD; NADCOS INC; LYUBOV YAKOVLEVA; EONID BOGOMDNIY, and NATALYA SHELYAKINA,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of defendant Lyubov Yakovleva (hereinafter Yakovleva), filed on May 25, 2016, under motion sequence number three, for an order dismissing the complaint of Moms Smile, LLC a/k/a Vadim Komissarchuk (hereinafter Moms) pursuant to CPLR 3211 (a).

- Notice of motion
- Affirmation in support
- Exhibits A-E
- Statement in opposition

¹This is the date the decision and order was mailed to all parties.

- Exhibits A-D
- Reply affirmation

BACKGROUND

On January 28, 2016, Moms commenced the instant action by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk's office (KCCO). The verified complaint alleges forty two allegations of fact in support of an action for damages and injunction and declaratory relief.

The verified complaint alleges the following facts. Plaintiff is a for-profit corporation engaged in the Healthcare business with its principal place of business located at Community Facility Unit 1 (hereinafter Unit 1) of 105 Neptune Avenue Condominium Inc. (hereinafter the Condominium).

On January 29, 2010, plaintiff and the sponsor closed the sale of Unit 1 and plaintiff became the owner of same and of 26% of the shares of the Condominium. Unit 1 is located on the first floor at 105 Neptune Avenue, Brooklyn, New York 11235. In June of 2010, the sponsor and Yakovleva collaborated to construct and install an illegal porch. Neither the offering plan nor the contract of sale for Unit 1 contained or provided permission for construction of a porch on the building. The porch was negligently constructed such that it became a source of leaks into Unit 1 after every rainstorm. Although there were attempts to repair the problem, they were inadequate and the leaking continued. The continued leaking causing, among other things, structural damage and a mold infestation to Unit 1.

By verified answer and cross claim dated March 18, 2016, Yakovleva joined issue. Yakovleva's answer asserts fourteen affirmative defenses including lack of personal jurisdiction due to improper service.

LAW AND APPLICATION

When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) (*see Wachovia Bank, Nat. Ass'n v Greenberg*, 138 AD3d 984 [2nd Dep 2016]). Once the issue is properly raised, the Court must first determine whether personal jurisdiction has been obtained over a defendant before it has the power to grant that defendant any discretionary relief.

Yakovleva seeks to dismiss the instant complaint pursuant to CPLR 3211 (a) (3), (5), (7) and (8). Applying the rationale set forth in the *Wachovia* case, Yakovleva's claim that the Court lacks personal jurisdiction due to improper service should be resolved first. In support of this branch of his motion, Yakovleva has submitted, among other things, her own affidavit averring the following salient facts. Yakovleva lives in Unit 2 on the second floor of a condominium complex located at 105 Neptune Avenue, Brooklyn, New York. A neighbor who lives on the third floor of the same condominium complex brought the commencement papers to her. Yakovleva did not receive another copy of the commencement papers by any other manner or method. In particular, they were not

mailed to her nor affixed to her front door. Yakovleva also learned that Moms did not file any affidavits of service of the commencement papers with the KCCO. Yakovleva contends that based on these facts Moms did not properly effectuate service of the commencement papers upon her.

Moms' opposition papers consist solely of a statement of its counsel and five annexed exhibits. The statement of its counsel is not affirmed pursuant to CPLR 2106. Nor does it state that the facts alleged in the document are sworn under penalty of perjury or that the document is true. An unsworn declaration neither made under penalty of perjury nor stating that the document is true, is not an "affidavit" (*Taylor v Fashakin*, --- NYS3d ----, 2016 WL 6143292, [N.Y. Sup. Ct. King Cty 2016] citing *People v Penaflorida*, 34 Misc3d 420 [NY City Civ.Ct.2011]; *Lamberti v U.S.*, 22 F.Supp.2d 60 [S.D.N.Y.1998]). Consequently Moms' opposition papers are unsupported by any sworn allegation of fact and the exhibits that are annexed to it are not explained by anyone under oath.

Assuming, for the sake of argument, that the allegations of fact in the statement of Moms counsel are admissible, this is what it claims on the issue of service. First, counsel claims that it could not reach its process server before submission of its opposing papers to the instant motion. Second, counsel states that its process server did not file an affidavit of service of the commencement papers with the KCCO but intends to do so. Third, he contends that Yakovleva's receipt of the commencement papers from her

neighbor constitutes proper service and that she has otherwise already submitted to the jurisdiction of the court.

An objection that the summons and complaint was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading (*See JP Morgan Chase Bank v Muroz*, 85 AD3d 1124 [2nd Dept 2011]; CPLR 3211 [e]). Yakovleva, however, has not only asserted the affirmative defense of lack of personal jurisdiction in his answer, but also has made the instant motion to dismiss the complaint on that basis within sixty days of his answer. Accordingly, contrary to Moms' contention, Yakovleva has neither submitted to the Court jurisdiction nor waived the affirmative defense of lack of personal jurisdiction.

The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff (*Lazarre v Davis*, 109 AD3d 968, 969 [2nd Dept 2013] citing *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2nd Dept 2013]). It is the plaintiff's burden to prove, by a preponderance of the evidence, that jurisdiction over the defendant was obtained via proper service of process (*Aurora Loan Services, LLC v Gaines*, 104 AD3d 885 [2nd Dept 2013]). Generally, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service (*see Lazarre v Davis*, 109 AD3d 968, 969 [2nd Dept 2013] citing *Washington Mut. Bank v Holt*, 71 AD3d 670 [2nd Dept

2010)).

A defendant's sworn denial of receipt of service, containing specific facts to rebut the statements in the process server's affidavit, generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing (*Lazarre v Davis*, 109 AD3d 968, 969 [2nd Dept 2013]).

Yakovleva's claim of improper service of the commencement papers alleges enough facts to raise the issue of personal jurisdiction. With the issue thus raised, the burden shifts to Moms to prove by a preponderance of the evidence that jurisdiction over the defendant was obtained via proper service of process (*Aurora Loan Services, LLC v Gaines*, 104 AD3d 885 [2nd Dept.2013]). Ordinarily, this would be accomplished by the plaintiff's submission of an affidavit of service of the commencement papers in accordance with CPLR 306 (d). CPLR 306 (d) pertains to the form of proof of service and provides as follows:

(d) Form. Proof of service shall be in the form of a certificate if the service is made by a sheriff or other authorized public officer, in the form of an affidavit if made by any other person, or in the form of a signed acknowledgment of receipt of a summons and complaint, or summons and notice or notice of petition as provided for in section 312-a of this article.

However, Moms has not filed an affidavit of service of the commencement papers with the KCCO nor has it annexed a copy of same to its opposition papers. The next question presented under these circumstances is whether Yakovleva's motion papers


makes a sufficient showing to warrant dismissal of the complaint. Ineffective service upon an individual pursuant to CPLR 308 generally should result in dismissal of the complaint (see *Ben-Amram v Hershowitz*, 14 AD3d 638 [2nd Dept 2005]).

Yakovleva's affidavit, while sufficient to raise the issue of lack of personal jurisdiction, is insufficient to conclusively establish ineffective service pursuant to CPLR 308. Consequently, the issue cannot be resolved on the paper submitted without an evidentiary hearing. Therefore, Moms and Yakovleva are directed to appear in Part 52 on January 10, 2017 at 10:00 am for a traverse hearing to determine whether Moms' has obtained personal jurisdiction over Yakovleva.

Furthermore, all other branches of Yakovleva's motion are stayed pursuant to CPLR 2201 pending determination of the issue of the Court's personal jurisdiction over Yakovleva.

The foregoing constitutes the decision and order of this court.

Enter:

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J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.

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