SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

NATIONAL ALLIANCE NEW YORK, LLC,

Plaintiff,

Index No.: 6508989/2018
Motion Sequence No.: 001, 002

- against -

DECISION/ORDER

RYOJI FURUYA, QB HOUSE USA, INC., QB NET CO., LTD., AND INTEGRAL CORPORATION,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In motion sequence 001, defendants Ryoji Furuya (Furuya) and QB House USA, Inc. (QB USA) bring a pre-answer motion to dismiss under various subsections of CPLR § 3211, based on untimeliness, the statute of frauds, failure to state a claim, lack of personal jurisdiction, failure to plead libel or slander with particularity, and, under CPLR § 3211 (c), for summary judgment. In motion sequence 002, the remaining defendants, QB NET Co., Ltd. (QB) and Integral Corporation (Integral) move to dismiss as against them based on plaintiff's purported failure to serve them in a timely fashion (CPLR § 306-b). The Court consolidates these motions and decides them below.

QB USA was formed in 2016 to bring popular Japanese haircutting and styling products, as well as the service of its stylists, to the United States. Furuya is the president of QB USA, and a former employee of QB, the parent corporation in Japan on which the QB USA business model is based. The products and services are sold in retail stores owned by the QB companies. While still at QB, prior to the formation of QB USA, Furuya prepared to contract with designers/contractors who would build the first of QB USA's proposed retail stores. Plaintiff National Alliance New York, LLC (NANY), is a designer/contractor which submitted

documentation and plans, and whose president (MR Sakamoto) wrote lengthy emails about the proposed project. According to plaintiff, it provided valuable services and documents without charge with the understanding that it would have the right to bid on the construction contract. Plaintiff asserts that defendants improperly refused to accept plaintiff's bid to perform the construction work, and that Furuya "spread defamatory statements about Plaintiff" and its work ethic (Complaint ¶ 34). Plaintiff seeks $105,775 plus late fees on express and implied breach of contract as well as quantum meruit theories, and damages due to the alleged defamation.

In motion sequence 001, Furuya and QB USA raise substantive challenges to the complaint in support of their request for relief under CPLR § 3211 (c), but the Court turns to the threshold jurisdictional argument, which is determinative. These movants allege this Court lacks personal jurisdiction over them because plaintiff served an employee who did not have the authority to accept service on their behalf. They submit the affidavits of service, which allege service on March 16, 2018 on "Jane Smith" at 151 East 43rd Street in Manhattan.[1] Movants point out that this is not the correct address of QB USA's offices, which is 501 5th Avenue, Room 500, in Manhattan. Instead, it is the address of a QB retail store. Moreover, they state, Akiko Takeuchi, the stylist with whom plaintiff left the papers, is not an authorized agent to accept service (citing CPLR § 311 [a] [1]), and she merely left the pleadings in a folder containing mail and other items from which it was retrieved three days later (*see Jiggetts v MTA Metro-North Railroad*, 121 AD3d 414, 414-15 [1st Dept 2014]). In addition, Furuya, who was sued in his individual capacity, asserts that he has never worked in the retail store where he was purportedly served, and therefore service was improper at this location (*see* CPLR § 308 (2); *1136 Realty, LLC v 213 Union St. Realty Corp.*, 130 AD3d 590, 591 [2nd Dept 2015]).

[1] Movants allege that service was attempted at another of its retail stores as well.

Plaintiff opposes the arguments directed at the complaint's substance and cross-moves for leave to amend. It argues that because this litigation is at such an early stage there is no prejudice and because of the judiciary's liberal policy supporting amendments, the Court should grant its application (citing *Centrifugal Assoc., Inc. v Highland Mental Ind., Inc.*, 193 AD2d 385 [1st Dept 1993]). In reply, movants note, among other things, that plaintiff did not address the jurisdictional defects on which they base their threshold argument.

The Court concludes that, on the facts at hand, the action should be dismissed against these defendants and leave to amend should be denied.[2] As the movants note, plaintiff has not challenged their arguments as to personal jurisdiction. Furthermore, movants have set forth valid arguments on this issue and included evidentiary support. Accordingly, the Court determines that plaintiff did not properly serve QB USA or Furuya. Where, as here, there is no personal jurisdiction over the defendants, the court "lack[s] the authority to grant leave to amend the summons and complaint" (*Kinder v Braunius*, 63 AD3d 885 [2nd Dept 2009]). Instead, under such circumstances, dismissal is proper (*see Henriquez v Inserra Supermarkets, Inc.*, 68 AD3d 927, 928 [2nd Dept 2009]; *Zaleski v Mlynarkiewicz*, 255 AD2d 379, 379-80 [2nd Dept 1998]).

In plaintiff's reply papers in further support of its cross-motion, plaintiff argues that it has now served both QB USA and Furuya at the proper place of business. It annexes a copy of the affidavit of service on QB USA though it does not support its statement as to Furuya. However, "[t]he purpose of a reply affidavit or affirmation is to respond to arguments made in opposition to the movant's motion" (*Gelaj v Gelaj*, 164 AD3d 878, 879 [2nd Dept 2018]). Here, plaintiff's new

[2] The notice of cross-motion does not comply with the CPLR in that it does not give proper notice of the relief sought in the cross-motion. Instead, it asks "for an order dismissing the counter claim joining Kana Kakihara as an individual and not in her capacity as Chief Executive Officer" (Notice of Cross Motion for Leave to Amend Complaint and Opposition to Motion). The Court overlooks this error, which could have been fatal to plaintiff's request for affirmative relief, as the moving defendants, who responded to the arguments that plaintiff raised, were not prejudiced by the mistake.

argument is a belated response to defendants' motion. As such, it should have been contained in its original opposition papers. It was improper to assert it in a reply as it does not relate to the substance of its cross-motion. Therefore, as the Court indicated at oral argument, it considers the argument on personal jurisdiction to be unopposed. Because the action against these two defendants is dismissed on this threshold issue, it is unnecessary to consider the additional arguments of either party.

In motion sequence 002, the remaining defendants, QB and Integral, jointly seek dismissal under CPLR § 306-b, which states that a plaintiff has 120 days after the date of filing to serve the complaint. The complaint was filed on March 1, 2018 and, as of the date of the motion, July 27, 2018, these defendants state, they have not been served. Using these dates, the defendants argue, plaintiff did not serve them within the requisite 120 days. Therefore, they state, dismissal against them is proper (citing *Posada v Pelaez*, 37 AD3d 168, 168 [1st Dept 2007]). Furthermore, they argue that the action has no merit against QB and Integral. As QB USA and Furuya argue, they state, there is no written agreement as required under the statute of frauds where, as here, the purported contract was to bid on the construction contract at some undefined point in time; there is no valid quantum meruit claim because plaintiff voluntarily did the work it allegedly performed because it wanted to secure a contract with QB USA; there is no valid defamation claim because the complaint does not specify the allegedly defamatory statements and, even if the reference to alleged comments that plaintiff had a bad work ethic were specific, the comments were true.[3]

Plaintiff does not oppose the motion as it relates to Integral, and it cross-moves to extend the time for service upon QB. It stresses that CPLR § 306-b expressly gives courts this discretion.

[3] Specifically, defendants submit emails from plaintiff stating that defendants should hire white people as staff and that these individuals should be American citizens. As these comments are racist and endorse unlawful practices, defendants state, any statements they made to this effect were valid.

It argues that because it has moved to amend the complaint in motion sequence 001, CPLR § 3211 (f) gives plaintiff 10 days after the Court issues this decision to serve the amended complaint upon QB. Here, where the litigation is at such a preliminary stage and case is timely, plaintiff argues, there is no prejudice to QB if the Court allows late service. It points out that in *Posada*, on which QB relies, the court denied an extension where the plaintiff moved for relief three years after the accrual of the claim. In support of its argument that it has shown good cause for the extension, plaintiff states that QB is in Japan and therefore "service of process against this defendant is more complex" (Aff in Support of Cross-Motion, ¶ 22). Plaintiff states that the process is expensive and that because of its pending application to amend its complaint, it decided to wait until its application is resolved, thus avoiding the possibility of serving QB twice.

Furthermore, plaintiff argues, the interests of justice warrant the extension because there is merit to its causes of action against QB. It annexes the affidavit of Kanaka Kakihara, its chief executive officer, points out that plaintiff initially provided services to Furuya when he still worked for QB. Specifically, plaintiff began providing analysis and design plans around February 25, 2016, and QB USA was not incorporated until September 12, 2016. Kakihara contends that it only provides free assistance, such as the support it provided to defendants, "when a commitment has been made by the client to engage [plaintiff] to perform the construction or invite [plaintiff] to submit its bid for construction" (Kakihara Aff, ¶ 9). Furthermore, Kakihara states, even though there was no guarantee QB USA would select its bid, the opportunity to bid still had value – not only because of the possibility that the bidder will attain the contract but because even the losing bidders are placed on a list which enables them to bid for future projects. Kakihara denies that there were any discriminatory comments and asserts, without explanation, that the emails defendants submitted "are completely taken out of context" (*id.*, ¶ 17). The affidavit further states

that there were numerous discussions by telephone and in-person between plaintiff and defendants and this shows that an agreement existed. On November 21, 2016, the affidavit states, Furuya emailed plaintiff and asked to purchase plaintiff's design plans, but plaintiff declined the offer.

In addition, plaintiff argues that QB's arguments for dismissal of the complaint lack merit. The statute of frauds is inapplicable, plaintiff states, because the work was capable of being performed within a year. Even if the Court finds to the contrary, plaintiff argues, the verified original and proposed amended complaints are enough to constitute written evidence of the agreement. The emails to which the complaints refer, it states, creates a binding contract (citing *Eastern European Trading Corp. v Knaust*, 128 AD3d 589 [1st Dept 2015] [written agreement existed because defendant's emails acknowledged its debt to plaintiff, defendant made payment of $10,000 of the $50,000 owed, and defendant did not object to plaintiff's invoice]).

QB replies that plaintiff's opposition and cross-motion lack merit. It contends that plaintiff's explanation that it doesn't want to have to serve QB twice is not a justification for its continued failure to serve the pleadings. QB states that by plaintiff's own admission Furuya allegedly made the defamatory statements in June 2017 (citing Plaintiff's Mem of Law in Opp, motion sequence 001, p 15). As the statute of limitations for defamation is one year (CPLR § 215 [3]) and QB has not been served, therefore, the defamation claim is untimely as against QB.

After careful consideration, the Court grants the motion, denies the cross-motion, and dismisses the action against Integral and QB. Plaintiff already has stated that it does not oppose the dismissal of Integral, and plaintiff has not justified any extension of time to serve QB under CPLR § 306-b. The fact that plaintiff asked for quotes for service in Japan does not qualify as the sort of diligent efforts showing good cause for its delay. Furthermore, the interests of justice do not warrant an extension here as plaintiff has not set forth a viable claim against QB. Although

Furuya began communicating with plaintiff while he still worked at QB, any breach of contract or quantum meruit claim still would be against QB USA, which did not invite plaintiff to bid on the contract. Plaintiff does not provide any legal support or even a thorough explanation concerning how QB, in Japan, is liable for any purported contract with QB USA, which was formed to build the retail stores in question. The defamation claim is not against QB and it also is untimely under the applicable one-year statute of limitations. Plaintiff's argument that its own pleadings show that a contract exists lacks merit and, additionally, refers to a purported agreement with QB USA and not QB.

The Court has considered the parties' remaining arguments and they do not alter this decision. Accordingly, it is

ORDERED that motion sequence numbers 001 and 002 are granted, and the cross-motions in motion sequence numbers 001 and 002 are denied; and it is further

ORDERED that the action is dismissed.

Dated: 2/22/19

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.