Fanelli v Latman
2019 NY Slip Op 31833(U)
May 22, 2019
Supreme Court, Richmond County
Docket Number: 152210/2018
Judge: Jr., Orlando Marrazzo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JODIE FANELLI, THE DATING COUNCIL, LLC, and FANELLI FAMILY ROCKLAND L.P., **Present:**

Plaintiff, **HON. ORLANDO MARRAZZO, JR.**

-against – **DECISION AND ORDER**

RICHARD K. LATMAN, IMAGICLAB LLC, CRMSUITE CORPORATION, JOHN and JANE DOES 1 – 10, ABC LLC 1 – 10 and XYZ CORP. 1 – 10, **Index No: 152210/2018**

Motion Nos: 4622-001
4621-002
5009-003
334-004
500-005
978-006

Defendants.

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The following papers numbered 1 to 17 were fully submitted on the 12th day of March, 2019:

Papers Numbered

Plaintiffs' Notice of Motion for Directed Service (**Mot. Seq. No. 001**)
(Affirmation in Support, with Supporting Exhibits)
(Dated: November 1, 2018).....1

Plaintiffs' Notice of Motion for Protective Order Re: Defendants' Discovery Demands
(**Mot. Seq. No. 002**)
(Affirmation, Memorandum of Law in Support, with Supporting Exhibits)
(Dated: November 1, 2018).....2

Defendant CRMSuite Corporation's Notice of Motion to Dismiss Complaint (**Mot. Seq. No. 003**)
(Affirmation, Affidavit of Dennis Nemeth, Memorandum of Law in Support, with Supporting Exhibits)
(Dated: November 30, 2018).....3

Defendant Richard K. Latman's Notice of Motion to Dismiss Complaint (**Mot. Seq. No. 004**)
(Affirmation, Affidavit of Richard K. Latman, Memorandum of Law in Support, with Supporting Exhibits)
(Dated: January 18, 2019).....4

Affidavit of Defendant Richard K. Latman (**003**)
(Dated: January 23, 2019).....5

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Upon the foregoing papers, the motions and cross motions are decided as follows.

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This matter arises out of the alleged breach of a written agreement between plaintiff, Jodie Fanelli, (principal of The Dating Council, LLC and Fanelli Family Rockland, L.P.) and the defendant, Richard K. Latman (principal of defendants Imagiclab LLC and CRMSuite Corporation) entered on or about November 10, 2014. Following a series of email correspondences initiated by Ms. Fanelli, the two parties[1] agreed, essentially, that Mr. Latman would create a dating application (hereinafter "Dating App"[2]) for plaintiff to market and sell, for which she would pay a total of $100,000.00 in two equal installments: $50,000.00 upon finalization of the agreement, which was paid on or about December 11, 2014, and $50,000.00 upon receipt of the product. Latman's initial estimate was that the Dating App would be ready for delivery and use within six weeks, or by January of 2015. Plaintiff claims that she never received a functional Dating App and, moreover, that she was pressured by defendant to pay the second $50,000.00 instalment in advance of receiving the product (*i.e.*, on May 7, 2015 plaintiff arranged for payment of the second installment). Defendant counters that documentary evidence by way of emails between the parties confirms that defendants in fact performed all contractual obligations.

After approximately four years of dealing with each other through phone and email, plaintiff commenced this action against defendant and his companies in August of 2018, seeking compensatory and punitive damages for breach of contract, fraud and unjust enrichment, alleging that defendant used the $100,000.00 paid by plaintiff to, *inter alia*, finance funding for the payment of judgments and fines he owed, unrelated to this litigation.

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[1] It is apparent from the emails and text messages submitted in support of the relative motions that Ms. Fanelli and Mr. Latman were acquainted with each other personally, and/or through business, for some time prior to entering into the contract.

[2] According to plaintiffs' counsel, the premise of the Dating App was for singles to "check in" at a venue and then be able to chat with other singles who were checked into the same venue. The Dating App was meant to have two features, *i.e.*, the host account, which the actual venues would use to allow singles to check in, and the app itself, which was the device singles would use to chat or mingle with each other in advance of possibly meeting in person, in the venue.

At the outset this Court acknowledges both counsels' extensive briefing of their respective positions on the motions. The facts underlying the breakdown of this business agreement are heavily contested, preventing a determination at this juncture that one party over the other is the definitively "wronged" party, notwithstanding plaintiff's repeated claims that defendant's assertions were knowingly false.

MOTION SEQ. NO. 001
Plaintiffs' Motion for Directed Service – Withdrawn

Plaintiffs' motion for an order allowing service of the Summons and Complaint upon defendants Richard K. Latman and iMagicLab LLC by email to defense counsel and Federal Express Overnight delivery, and for a 60-day extension of time within which to effectuate service has been withdrawn, consistent with the parties' November 21, 2018 Stipulation.

MOTION SEQ. NOS. 002 and 005
Plaintiffs' Motion for Protective Order (002)—Denied
Defendants' Cross Motion Compelling Jurisdictional Discovery (005)—Granted

Plaintiffs move for a protective order pursuant to CPLR §§3101 and 3103 allowing them to disregard CRMSuite Corporation's (hereinafter "CRM") October 15, 2018 "Notice to Admit as to Jurisdiction" and October 15, 2018 "Interrogatories to Plaintiffs as to Jurisdiction." In support, plaintiffs maintain that CRM's discovery demands are improper as they are not designed to uncover relevant material in the case *sub judice* but rather, are an attempt to discover the citizenship of the partners and members of the limited liability plaintiffs, (*i.e.*, The Dating Council LLC and Fanelli Family Rockland L.P.), so that defendants, Richard K. Latman and iMagiclab LLC (hereinafter "iMagic") might successfully remove this matter to federal court based on

diversity of citizenship[3]. Inasmuch as service of the summons and complaint upon Latman and iMagic was accepted by defense counsel in November of 2018, plaintiffs argue that the thirty-day requirement for filing a notice of removal has lapsed, thereby rendering moot any responses to the requested discovery.[4]

Defendant CRM opposes plaintiffs' motion for a protective order and cross moves pursuant to CPLR 3124 to compel plaintiffs to respond to the jurisdictional discovery, arguing that the face of the Verified Complaint indicates complete diversity, thus properly placing this matter for adjudication by the U.S. District Court for the Eastern District of New York. CRM maintains that it has no way of obtaining plaintiffs' private company information relating to citizenship absent responses to the two discovery demands, and that since CRM remains a party at this juncture, it is entitled to the jurisdictional discovery so that it might exercise its removal right in the future, upon ascertainment of plaintiffs' citizenship.

"When diversity is not absent from a notice of removal but is defectively alleged," (as in this case, where Judge Cogan found, *inter alia*, that CRM did not possess the requisite information to remove the case), the courts typically permit the removing party to **amend its notice of removal** (*Grow Grp., Inc. v. Jandernoa*, No. 94-CV-5679, 1995 WL 60025, at 1-2 [S.D.N.Y. Feb. 10, 1995 *citing* 28 U.S.C. §1653; *Rhinehart v. CSX Transp., Inc.*, No. 10---CV-86A, 2010 WL 2388859, at 4-6 W.D.N.Y. June 9, 2010; *Johnson v. Progressive Ins. Co.*, No. 03-CV-4891, 2003 WL 21554957, at 1 S.D.N.Y. July 8, 2003; emphasis supplied]).

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[3] It is undisputed that CRM's Notice of Removal resulted in an October 5, 2018 "Order Remanding the Case" (*see* Plaintiff's Affirmation in Support of 002, Exhibit D), with the Hon. Brian M. Cogan, U.S.D.J. finding, *inter alia*, that CRM failed to allege a definitive basis for plaintiffs' citizenship (*id.*, p. 2).

[4] The language of the removal statute sets forth the deadline at thirty days "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading" 28 U.S.C. §1446(b)(1).

In this case, defendant CRM failed to allege the citizenship of plaintiff as a limited liability company, and its notice of removal concluded that complete diversity existed in the action. Since plaintiff is an LLC, the proper inquiry for determining the existence of complete diversity was whether CRM was diverse from all of plaintiff's members "because an LLC has the citizenship of each of its members for diversity jurisdiction purposes" (*Alvarez & Marshal Glob. Forensic & Dispute Servs., LLC*, 2014 WL 641440, at 2; *see Arabesque v. Capacity LLC*, No. 07 CIV. 2042 (TPG), 2008 WL 681459, at 2 (S.D.N.Y. Mar. 10, 2008). Thus, if one of plaintiff's members is a citizen of the state of Florida, for example, complete diversity would not exist in this action, and the federal Court would lack subject matter jurisdiction.

Here, while CRM's notice of removal alleges that diversity jurisdiction exists, it simply failed to sufficiently state plaintiff's citizenship as an LLC. As such, and in order to "permit the removing party to amend its notice of removal" if warranted (*see e.g., Linium, LLC v. Bernhoit*, No. 17-CV-0200 (LEK)(CFH), 2017 WL 2599944, at 3 (N.D.N.Y. June 15, 2017), this Court grants CRM's motion to compel jurisdictional discovery and denies plaintiffs' motion for a protective order.

MOTION SEQ. NOS. 003 and 004
Defendant CRM's Motion to Dismiss Complaint (003)—Denied Without Prejudice
Defendant Richard K. Latman's Motion to Dismiss Complaint (004)—Denied Without Prejudice

CRM and Latman move to dismiss the complaint pursuant to CPLR 3211(a) (1) ["a defense is founded upon documentary evidence"], (7) ["the pleading fails to state a cause of action"], (8) ["the court has not jurisdiction of the person of the defendant"], and for summary judgment pursuant to 3212(c) ["if the motion is based on any of the grounds enumerated in subdivision (a)... of Rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion"] and 3212 (e).

The motions are denied without prejudice with leave to renew upon the completion of discovery.

This Court must initially determine whether plaintiffs' complaint should be dismissed as to CRM and Latman pursuant to their CPLR 3211(a)(8) motions for lack of personal jurisdiction.

In support of its motion CRM attaches, *inter alia*, the November 30, 2018 affidavit of its "general counsel" Dennis Nemeth, who informs that CRM (1) is a Florida technology company that provides software and services to automobile dealerships; (2) was incorporated in Florida on July 16, 2015 (*i.e.*, after commencement of the contract); (3) has its principal place of business in Sarasota, Florida; (4) is not registered or authorized to do business in New York; (5) has no registered agent for service of process in New York; (6) maintains no representatives and no sales office in New York; (7) maintains no bank account in New York; (8) does not direct advertising toward New York residents; (9) is not a party to the subject contract and (10) has just one client out of its 90 clients located in New York. Thus, CRM argues that it is entitled to judgment dismissing the complaint because it lacks any nexus to New York, to the plaintiffs, or to the subject matter of the subject action.

For his part, defendant Richard K. Latman attaches, *inter alia*, his own January 23, 2019 affidavit attesting that he (1) has lived in Florida since 2014 and prior thereto, was domiciled in Maryland; (2) does not own, use or possess real property situated in New York; (3) has no ongoing contractual relationship with plaintiffs; (4) sent and responded to all text messages and emails relating to this venture from outside New York; (5) never traveled to New York to meet with plaintiffs; (6) received and deposited plaintiffs' payments outside of New York, and (8) knows that the software used for this project was developed outside of New York. Accordingly, Latman maintains that as a non-domiciliary of New York who did not transact business or commit an injury

causing tort in this jurisdiction, he is not subject to personal jurisdiction and, moreover, even if this Court exercises jurisdiction over him, he is not personally responsible for breach damages as his "company" was the entity paid and engaged on the contract, not him personally.

Plaintiffs oppose all branches of defendants' motions, maintaining, *inter alia*, that defendants' contract to deliver goods to plaintiff in New York subjects them to personal jurisdiction and, moreover, that CRM is the alter ego of the now defunct corporate defendant, iMagic, which initially began to build the product. Plaintiffs attach invoices and other documents generated by CRM which plaintiffs claim supports the alter ego theory (*i.e.*, that the two parties share many employees, etc.).

"As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden on this issue" (*Marist Coll. v. Brady*, 84 AD3d 1322, 1322-23 [2d Dept. 2011]; *see Shore Pharm. Providers, Inc. v. Oakwood Care Ctr.*, 65 AD3d 623, 624 [2d Dept. 2009]). However, "in opposing a motion to dismiss pursuant to CPLR 3211(a)(8)...plaintiffs need not make a *prima facie* showing of jurisdiction, but instead must only set forth 'a sufficient start, and show[ ] their position not to be frivolous' " (*Shore Pharm. Providers, Inc. v. Oakwood Care Ctr., Inc.*, 65 AD3d at 624, *quoting Peterson v. Spartan Indus.*, 33 NY2d 463 [1974]). "[T]he jurisdictional issue is likely to be complex. Discovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits" (*Peterson v. Spartan Indus.*, 33 NY 2d at 467).

Under these particular circumstances, this Court finds that plaintiffs have established that facts "may exist" to exercise personal jurisdiction over the defendants CRM and Latman, and have made a "sufficient start" to warrant disclosure on the issue of personal jurisdiction (*Marist Coll. v.*

Brady, 84 AD3d at 1323, *quoting Peterson v. Spartan Indus.*, 33 NY2d at 467; *see Lettieri v. Cushing*, 80 AD3d 574, 575[2d Dept. 2011]).

The remaining branches of movants' dismissal motions pursuant to CPLR 3211 (a) are likewise denied without prejudice to renew upon the completion of discovery.

In deciding a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) the allegations in the complaint must be liberally construed in favor of the plaintiff and all the facts alleged must be accepted as true (*see Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Zellner v. Odyl*, LLC 117 AD3d 1040 [2d Dept. 2014]). The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*see Dee v. Rakower*, 112 AD3d 204, 208-209 [2d Dept. 2013]). Here, the complaint alleged that plaintiff entered into a written contract with the defendant to purchase an app, and that defendant breached the contract by not delivering the app despite payment in full by plaintiff. Here, plaintiffs have sufficiently set forth allegations supporting the separate causes of action contained in their complaint.

MOTION SEQ. NO. 006
Plaintiffs' Cross Motion for an Award of Counsel Fees and Costs (006)--Denied

Plaintiffs cross move for an award of counsel fees and costs incurred in opposing motions 003 and 004 since, *inter alia*, defendants have allegedly set forth knowingly false facts warranting sanctions, particularly with respect to Latman's assertion that all contractual obligations have been fulfilled.

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This Court declines to award costs and fees to plaintiffs' counsel for defending the motions, particularly at this early stage of the proceedings, where the parties' hold drastically differing views on their conduct during the contractual relationship.

Conduct during litigation is considered frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false (*see* 22 NYCRR 130-1.1; *Greene v. Doral Conference Ctr. Assoc.*, 18 AD3d 429 [2d Dept. 2005]; *Tyree Bros. Envtl. Servs. v Ferguson Propeller,* 247 AD2d 376 [2d Dept. 1998]).

While plaintiffs set forth that defendants' statements regarding delivery of the product are knowingly false, the defendants counter with their own emails from Ms. Fanelli which may indicate to the finder of fact that at some point, she was pleased with the product.

Accordingly, it is

ORDERED, that the motions of defendants CRMSuites Corporation and Richard K. Latman to dismiss plaintiffs' complaint is denied without prejudice to renew pending the continuing course of discovery; and it is further

ORDERED, that plaintiffs' motion for a protective order relative to jurisdictional discovery is denied; and it is further

ORDERED, that defendant CRMSuite Corporation's cross motion compelling jurisdictional discovery from plaintiffs is granted; and it is further

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ORDERED, that plaintiffs shall furnish responses to the discovery demands of defendant CRMSuite Corporation within 30 days of the date of this order with notice of entry; and it is further

ORDERED, that plaintiffs' motion for an award of counsel fees and costs expended in defending defendants' dismissal motions is denied; and it is further

ORDERED, that the parties appear before IAS Part 21 located at 26 Central Avenue, Staten Island, New York, on Sept. 10, 2019 at 9:30 for a conference.

ENTER,

Dated: May 22, 2019

J. S. C.