Leishman v Schulman
2019 NY Slip Op 33826(U)
December 27, 2019
Supreme Court, New York County
Docket Number: 154090/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON — *Justice* PART IAS MOTION 42EFM

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DAVID LEISHMAN,

Plaintiff,

- v -

MICHAEL SCHULMAN,

Defendant.

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INDEX NO. 154090/2019

MOTION DATE 11/20/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISSAL.

In this action to recover $45,000.00, plus interest, purportedly upon an $85,000.00 Massachusetts judgment, the defendant moves to dismiss the complaint on the grounds that the complaint fails to state a cause of action (CPLR 3211[a][7]), the action is barred by the parties' settlement agreement (CPLR 3211[a][1];[5]) and the court lacks of personal jurisdiction as a result of ineffective service of process (CPLR 3211[a][8]). The plaintiff opposes the motion..

On July 10, 2015 the Superior Court of Massachusetts entered a judgment against the defendant and non-parties Steven Graziano (Graziano) and Patient EDU, LLC, holding them jointly and severally liable to the plaintiff in the amount of $85,000.00. The following year, on December 22, 2016 the plaintiff, defendant, and Graziano entered into a settlement agreement whereby the defendant would pay $40,000.00, "to be applied to the balance owed on the judgment" and Graziano would deliver certain Veritech Corporation stock certificates to the plaintiff, to be held in escrow pending full payment of the remaining balance due on the judgment. Pursuant to the settlement agreement, if Graziano did not pay the remaining balance on or before February 15, 2017, the stock certificates would be released from escrow to the plaintiff to satisfy the remaining $45,000.00 balance. The settlement agreement did not contain any language holding any party jointly and severally liable. The settlement agreement was

negotiated by and drafted by the plaintiff's counsel; the defendant was unrepresented at the time.

The defendant timely paid the $40,000.00 as required by the agreement. On or about January 13, 2017, Graziano delivered a stock certificate representing 343,750 shares of stock in Veritech to plaintiffs' counsel, as agreed. However, Graziano did not pay $45,000.00, by February 15, 2017, entitling the plaintiff to retain the escrowed stock. Graziano died soon thereafter, sometime in April 2017. Although the plaintiff does not clearly state, it appears that the stock value was less than the plaintiff expected. On July 11, 2017, the plaintiff contacted the defendant attempting to collect the $45,000.00. The defendant refused to pay that sum, taking the position that he did not owe any further amount since the plaintiff had received $40,000.00 plus Graziano's stock certificates in lieu of the remaining $45,000.00.

Almost two years later, in April 2019, the plaintiff commenced the instant action against the defendant seeking payment of the $45,000.00. He also seeks interest of $20,363.08, representing the legal Massachusetts rate of 12% from July 10, 2019 to April 10, 2019, plus New York statutory interest of 9% from April 11, 2019. Although the one-page complaint contains no specific cause of action, the plaintiff appears to assert that, notwithstanding the parties' settlement agreement, the defendant is liable for the $45,000.00 that was to be paid by Graziano before he died. The defendant now moves to dismiss the complaint pursuant to CPLR 3211[a][5]; [7]) and [8]). The motion is granted on all three grounds.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. Applying these rules, the plaintiff's complaint asserts no cognizable cause of action. Consisting of just several sentences, it merely mentions the Massachusetts judgment and the fact that it was not stayed, acknowledges the settlement

agreement and the defendant's compliance with the agreement, and is notably silent as to the balance of the agreement which obligated Graziano to pay his negotiated share of the debt, $45,000.00, or tender stock. Nothing more is alleged.

Furthermore, as correctly argued by the defendant, the parties' settlement agreement bars this action against the defendant. It is well settled that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." W.W.W. Assoc. v. Giancontieri,77 NY2d 157 (1990). The defendant fulfilled his obligations under the terms of the settlement agreement when he paid his obligation of $40,000.00. There is no merit to the plaintiffs' contention that the parties' agreement was not intended as a full settlement agreement, as it does not contain any language expressly releasing the defendant from further payments beyond the $40,000.00. As previously noted, the agreement, which does not contain any "jointly and severally" or similar language, was drafted by the plaintiffs' counsel who presumably would have included such language if that was the parties' intent. Moreover, inasmuch as the defendant was unrepresented, it is not unexpected that he would not request express language that granted him a full release upon payment of the $40,000.00. The plaintiff's attempt to rewrite the settlement agreement with parol evidence by submitting an affidavit of his counsel is unavailing. To the extent that Graziano's failure to fully meet his obligations under the settlement agreement may constitute any cause of action, such action would more properly be brought against Graziano's estate, rather than the defendant.

The defendant has also met his burden on the branch of the motion seeking to dismiss the complaint on the ground of ineffective service pursuant to CPLR 3211(a)(8). Pursuant to CPLR 308(2), service upon a "natural person" can be made by delivering the summons to a person of suitable age and discretion at the person's "actual place of business, dwelling place or usual place of abode" and by either mailing the summons to the person's last known residence or by mailing the summons by first class mail to the person's actual place of business "in an envelope bearing the legend 'personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served."

In the affidavit of service submitted by the plaintiff, the process server merely alleges that he "could not accomplish personal service" and thus made substituted service by serving the summons and complaint on a co-tenant of the defendant named "Giovanna Doe" at the defendant's 18th floor apartment, at 3:13 pm on 5/28/19, and describes Giovanna Doe as a male, age 40, 5'11" and 175 pounds. While an affidavit of service is generally presumptive proof of service, this affidavit is insufficient. See CPLR 308(2). In any event, "[a]ny presumption of service raised by the affidavit was overcome by defendant's [affidavit] to the contrary." Holtzer v Stepper, 268 AD2d at 372 (1st Dept. 2000). In his detailed affidavit, the defendant states that the plaintiff made no attempt to serve him personally at any time or in any manner, that he was not home at the time of purported service, and that he lives alone, knows no Giovanna living or working in the building, much less a Giovanna authorized to accept service on his behalf, and that he has front desk staff in the building lobby who never contacted him to get permission to allow a process server up to his apartment and never notified him of any service attempt. Thus, at most, a traverse hearing would be warranted. See Fed. Natl. Mrtgage Assoc. v David, 172 AD3d 572 (1st Dept. 2019); NYCTL 2012 – A Trust v Colbert, 146 AD3d 482 (2017); compare Thomas v Karen's Body Beautiful, LLC, 168 AD3d 500 (1st Dept. 2019) [defendants' affidavits fail to dispute any specific allegation in affidavit of service]. Finally, no defect in service can be cured by the plaintiffs' assertion that, in any event, the defendant "is also contemporaneously receiving the pleadings with this opposition."

Accordingly, and upon the foregoing papers, it is

ORDERED that the defendant's motion to dismiss the complaint is granted and the complaint is dismissed in its entirety, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

12/27/2019
DATE

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER