

**Skutnik v Messina**

2017 NY Slip Op 33233(U)

October 18, 2017

Supreme Court, Orange County

Docket Number: 0403/2016

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
**ANTHONY SKUTNIK,**

Plaintiff,

-against-

**PETER SCOTT MESSINA A/K/A SCOTT MESSINA,**

Defendant.  
-----X

**DECISION AND ORDER**  
**INDEX NO.: 0403/2016**  
**Motion Date: 08/25/2017**  
Sequence No. 5 & 6

**ORIGINAL**

The following papers numbered 1 to 28 were read on defendant's motion for an order dismissing the complaint (Seq. #5), and plaintiff's cross-motion for an order compelling defendant to appear for deposition at the office of plaintiff's attorney, upon failure to appear, precluding defendant from introducing certain evidence or, in the alternative, striking defendant's pleadings for failure to appear for deposition (Seq. #6):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion / Affirmation (Lefland) / Exhibits A - D / Amended Notice of Motion	1 - 7
Notice of Cross-Motion / Affidavit (Skutnik) / Affirmation (Gold) / Exhibits 1 - 16	8 - 26
Affirmation in Opposition and Reply (Lefland) / Exhibit A	27 - 28 <sup>1</sup>

For the reasons set forth herein, defendant's motion is granted; the complaint is dismissed, and plaintiff's cross-motion is denied as moot.

In this breach of contract action, defendant moves for a second time to dismiss the complaint

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<sup>1</sup> Plaintiff additionally submitted a Reply Affidavit in further support of his cross-motion. As Civil Practice Law & Rules § 2214 does not provide for a reply on a cross-motion, this submission has not been considered.

against him, asserting that the Court lacks jurisdiction over the person of the defendant, who is a resident of the State of Florida. Plaintiff cross-moves for an order compelling defendant to appear for deposition at the office of plaintiff's attorney or, in the alternative, precluding defendant from introducing certain evidence, or striking defendant's pleadings for failure to appear for deposition.

This action arises out of an alleged loan from plaintiff to defendant in or around June, 2002, for which there was never a written contract or promissory note. By Decision and Order dated June 23, 2016, defendant's motion to dismiss the complaint and plaintiff's cross-motion for summary judgment both were denied, upon a finding that the papers submitted raised more questions than they answered as to the issues of jurisdiction; applicability of the Statute of Frauds, and expiration of the Statute of Limitations. The parties were directed to move forward with discovery, limited to the issue of jurisdiction, with leave for defendant to move to dismiss on that ground at the conclusion of such discovery.

#### **Motion and Cross-Motion**

By Notice of Motion filed on June 21, 2017, defendant again seeks dismissal of the complaint. Although the supporting Affirmation of defendant's attorney is entirely directed to the issue of jurisdiction, and specifically to defendant's lack of contacts with the State of New York, the Notice of Motion states on its face that it seeks dismissal of the complaint pursuant to Civil Practice Law and Rules § 3211(a)(5) and (7).

After plaintiff's cross-motion was filed and served, defendant's attorney, realizing that the Notice of Motion had failed to cite the pertinent section, 3211(a)(8), filed and served an Amended Notice of Motion seeking dismissal of the complaint pursuant to that section, together with a cover letter indicating that the purpose of the Amended Notice was to clarify that defendant seeks dismissal

[\* 3]  
only on jurisdictional grounds.

In support of his motion, defendant asserts, as he did on his first motion to dismiss, that he is a resident of the State of Florida, and has been a resident of that State since 2001, prior to the time of the oral contract alleged in the complaint. Defendant points out that the complaint correctly alleges that, at all relevant times, “the defendant ... was and still is a resident of/employed (sic) in the State of Florida.” Defendant further states that he does not transact any business or own any property in New York. Therefore, defendant is not subject to jurisdiction in the Courts of this State. Defendant submits that the discovery conducted between the date of the Court’s decision on his first motion and the filing of this motion revealed no evidence by which plaintiff may establish that defendant has any contacts with the State of New York. Defendant thus concludes that the complaint should be dismissed.

Plaintiff’s cross-motion papers, insofar as they address defendant’s motion to dismiss the complaint, are devoted to pointing out deficiencies in defendant’s papers. Plaintiff asserts that no Affidavit was offered in support of the motion, and that defendant’s submissions cannot be considered because his Affidavit and his responses to plaintiff’s interrogatories were notarized in the State of Florida, and are not accompanied by a Certificate of Conformity. In addition, plaintiff argues that the complaint asserts a valid cause of action.

Finally, in support of his cross-motion, plaintiff asserts that he is entitled to depose defendant on the issue of his possible ownership of real property in the State of New York.<sup>2</sup> Plaintiff points

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<sup>2</sup>The Court notes that plaintiff seeks to depose defendant at the office of plaintiff’s attorney, in New York County. Plaintiff does not allege that defendant either resides or has an office in that County. As Civil Practice Law and Rules § 3110(1) provides for the deposition of a party only in the county in which the party resides or has an office for the regular transaction of business, or in the county in which the action is pending, denial of plaintiff’s motion would be required even if the complaint were not dismissed.

to a TransUnion credit report (Exhibit 3) and a certain deed as suggestive of defendant's possible ownership of real property in this State, and concludes that he is entitled to question defendant under oath regarding these documents. Though plaintiff fails to specify, the Court assumes plaintiff is referring to the deed appended to the cross-motion as Exhibit 15. Nothing in the cross-motion papers address the issue of jurisdiction over the person of the defendant, which was the sole issue on which the Court ordered discovery to proceed, and the sole issue to which defendant's motion to dismiss is addressed.

In reply, defendant acknowledges the error on the face of the Notice of Motion, but contends that plaintiff cannot claim any resultant prejudice as the entirety of the motion and the supporting papers was addressed solely to the issue of jurisdiction, in accordance with the Court's direction. Plaintiff and his counsel were fully apprised of the nature of defendant's motion and had a proper opportunity to oppose it. Defendant submits that the absence of a Certificate of Conformity does not prejudice plaintiff in any way, and should be disregarded in accordance with Civil Practice Law and Rules § 2001.

Defendant further asserts that, despite the production of voluminous bank records pursuant to a subpoena issued after the Court's prior decision, plaintiff has not and cannot identify any evidence in those bank records of any business or personal dealings by defendant in New York. With regard to the deed and credit report appended to plaintiff's cross-motion, defendant asserts that these documents are insufficient to satisfy plaintiff's burden. As plaintiff is unable to meet his burden of establishing personal jurisdiction, defendant's motion should be granted and the complaint dismissed.

As to plaintiff's motion to compel defendant to appear for deposition, defendant submits that

the Court instructed the parties that there would be no such deposition until such time as the jurisdictional issue was resolved, and that the Court would not direct defendant to appear for a deposition in New York in any event.

With the exception outlined in Note 1, *supra*, the Court has fully considered the submissions of the parties.

### Discussion

It remains undisputed that defendant was at all relevant times a resident of the State of Florida. Civil Practice Law and Rules § 302 enables a New York court to exercise personal jurisdiction over an out-of-state defendant if he purposefully transacts business within the state (*McGowan v. Smith*, 52 NY2d 268 [1981]). When there is no systematic course of doing business in New York, it is essential to establish a nexus between the business transacted and the cause of action sued upon (*id.* at 323).

As the party seeking to assert personal jurisdiction, plaintiff bears the ultimate burden of proof on that issue (*Marist College v. Brady*, 84 AD3d 1322 [2d Dept 2011]). Plaintiff's papers fall far short of meeting this burden. Plaintiff has failed to establish any connection between defendant and this State.

As was the case on the first motion to dismiss, and now despite the production of defendant's banking records, plaintiff has done nothing to establish that defendant conducted any kind of ongoing systematic business in New York. Plaintiff likewise has failed to demonstrate any nexus between any business conducted in New York by the defendant and the alleged loan upon which plaintiff sues. The only issue on which plaintiff offers any argument is defendant's possible ownership of real property in New York, an argument made only in conjunction with plaintiff's motion to compel

defendant to appear for deposition.

Insofar as plaintiff's argument may be deemed to address the motion to dismiss, it necessarily fails. Defendant's motion is supported by his Affidavit (Exhibit D), sworn to on April 7, 2016, in which he avers that he does not own any real property in New York, and has not since August 2001. Plaintiff has failed to submit evidence sufficient to rebut defendant's sworn statement.

Plaintiff's reliance on the argument that defendant's papers cannot be considered due to the absence of a Certificate of Conformity is misplaced. In the absence of any prejudice to plaintiff, defendant's failure to append a Certificate of Conformity is hereby disregarded in accordance with Civil Practice Law and Rules § 2001 (*see e.g. Matos v. Salem Truck Leasing*, 105 AD3d 916 [2d Dept 2013]).

Plaintiff's reference to defendant's credit report is likewise unavailing. As an initial matter, plaintiff does not allege that defendant ever authorized plaintiff or his attorney to run defendant's credit report. In any event, the deed to which plaintiff refers in conjunction with the credit report, in an attempt to raise an inference that defendant may own real property in this State, is insufficient to meet plaintiff's burden.

In his response to Interrogatory No. 22 of plaintiff's first set of Interrogatories, defendant stated that he did not own any real property in New York State from 2002 through the date thereof. The defendant attaches, as part of his response, four deeds. The four deeds, upon information and belief, were acquired through an asset search ordered by the defendant. Each deed names a Peter Messina as a grantee. Three of the deeds also designate a "wife" as a co-grantee; the wife's name on each deed is different. It should be noted that none of the female names are the same as the name reflected on the joint account statements provided by the defendant in response to interrogatories

[\* 7]

(Exhibit C).

Exhibit 15 to the cross-motion, one of the four deeds provided by the defendant, is a deed to a parcel of real property located in Suffolk County, New York. The deed lists as grantees "Peter Messina and Barbara Messina, his wife" and documents a transfer dated October 24, 2005. The grantees address is stated as 25 Links Road, Smithtown, New York. That Smithtown address is listed as a "former address" for Peter Messina on the credit report relied on by the plaintiff in motion papers. In contrast, the business address set forth on the e-mails attached to plaintiff's papers as Exhibit 2 is not listed on the credit report. Plaintiff seeks no inference from that fact, however.

The Court is unwilling to assume, and plaintiff has provided no evidence to definitively establish, that the person listed as grantee in the 2005 deed is the defendant. Furthermore, it would have to be inferred by the Court that the defendant attached the deed to his responses to plaintiff's interrogatories in contradiction to his sworn response to Interrogatories that he had not owned property in New York from 2002 on.

Because plaintiff has failed to meet his burden of proof on the issue of personal jurisdiction, defendant's motion must be granted. In light of this determination, the remaining contentions of the parties need not be reached.

The Court makes note of further motions (Seq. #s 7 and 8) filed by both parties, originally returnable on October 13, 2017, and adjourned to November 9, 2017 at the request of plaintiff's counsel. The motion filed by defense counsel seeks a protective order to prevent any further unauthorized use of defendant's Social Security Number by plaintiff or his attorney.

In the papers submitted to the Court on the motions addressed herein, it appears that plaintiff's counsel may have made unauthorized use of defendant's Social Security Number at least

once already, to obtain the TransUnion credit report appended to the cross-motion as Exhibit 3. For that reason, pending determination of the further motions (Seq. #s 7 and 8), neither plaintiff, nor plaintiff's attorneys, nor any person in the office of plaintiff's attorneys shall use or divulge defendant's Social Security Number, or any other personally identifiable information of defendant, for any purpose.

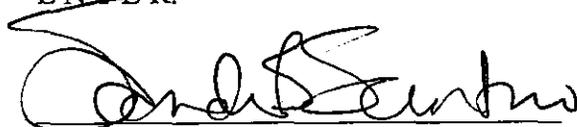
On the basis of the foregoing, it is hereby ORDERED that defendant's motion is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross-motion is denied as moot; and it is further

ORDERED that pending the Court's determination of Motion Seq. #s 7 and 8, neither plaintiff, nor plaintiff's attorneys, nor any person in the office of plaintiff's attorneys shall use or divulge defendant's Social Security Number, or any other personally identifiable information of defendant, for any purpose.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 18, 2017  
Goshen, New York

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