

**Coke v Beau Dietl & Assoc.**

2007 NY Slip Op 30476(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0601892/2006

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**MARTIN SHULMAN**

PRESENT: J.S.C.

PART 1

Index Number : 601892/2006

COKE, BRIAN

vs

BEAU DIETL & ASSOCIATES

Sequence Number : 002

DISMISS

INDEX NO. 601892/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Two (2) Cross-Motions +  
Answering Affidavits — Exhibits  
Opp. to Cross-Motions +  
Replying Affidavits

PAPERS NUMBERED

1, 2, 3  
4, 5  
6, 7, 8, 9

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in  
accordance with the attached  
decision/order.

**FILED**  
APR 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Seq. 003, 004, 005, 006

Dated: March 27, 2007

MARTIN SHULMAN J.S.C.  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 1

-----X  
BRIAN COKE,

Plaintiff,

-against-

BEAU DIETL & ASSOCIATES, MICHAEL  
MATARRESE, KENNETH ROSS, NORTHERN  
NIGHTS POST, MARK LITTMAN, 135 WEST  
27<sup>TH</sup> OWNERS CORP. and FAWN REALTY CORP.,

Defendants.  
-----X

Index No. 601892/06

**DECISION/ORDER**

**FILED**  
APR 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. MARTIN SHULMAN, J.S.C.:

Before the court are the following six motions and two cross-motions: 1) defendants Beau Dietl & Associates' ("BDA") and BDA employees Kenneth Ross' ("Ross") and Michael Matarrese's ("Matarrese") (collectively the "BDA defendants") motion to dismiss the complaint pursuant to CPLR 3211(a)(7) and (8); defendants Mark Littman's ("Littman"), 135 West 27<sup>th</sup> Owners Corp.'s ("Owners") and Fawn Realty Corp.'s ("Fawn")<sup>1</sup> cross-motion to dismiss the complaint pursuant to CPLR 3016 or alternatively for a more definite statement of particulars pursuant to CPLR §3013, 3014, 3015 and 3024(a);<sup>2</sup> and plaintiff Brian Coke's ("plaintiff" or "Coke") cross-motion for *inter*

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<sup>1</sup> Littman is the president of Owners and Fawn is Owners' managing agent for the building located at 135 West 27<sup>th</sup> Street, New York, New York (the "building" or "premises"). Owners and/or Fawn retained BDA to provide security guard services at the premises. Coke, who was previously employed by BDA as a security guard, was one of the guards assigned to provide such services at the building.

<sup>2</sup> It is unclear what relief is sought in the alternative, since the affirmation in support of this cross-motion contradicts the notice of cross-motion by requesting dismissal pursuant to CPLR 3016 in the alternative. Fogarty Supp. Aff. at ¶2.

*alia*<sup>3</sup> the issuance of subpoenas to depose various non-party witnesses and compel their production of documentation (Seq. 002); Coke's motion to amend his complaint (Seq. 003); Coke's motion to toll the statute of limitations pursuant to CPLR §207 as to "Beau Security & Investigations Inc." ("BSI") and to correct mistakes in the pleadings under CPLR §2001 (Seq. 004); Coke's motion to compel disclosure pursuant to CPLR 3124 (Seq. 005); and Coke's motion for discovery sanctions pursuant to CPLR §3126 (Seq. 006).<sup>4</sup> Motion sequences two through six are consolidated for disposition.

### **Motion to Dismiss**

At the outset, Ross' and Matarrese's motion to dismiss pursuant to CPLR 3211(a)(8) is granted and the complaint is dismissed as against them. The Sheriff's certificates of service of the summons and complaint upon Ross and Matarrese indicate that plaintiff attempted to effectuate substituted service under CPLR §308(2) at their place of employment. See Exhs. B & C to motion. The certificates of service are defective on their faces as they contain no indication that copies of the summons and complaint were ever mailed to Ross and Matarrese as CPLR §308(2) mandates. Indeed, Coke himself concedes in his reply affidavit dated November 20, 2006 and submitted in connection with motion sequence 003 that no mailings were made. Coke Reply Aff. at ¶K, p. 6. Under these circumstances the court must dismiss the action as to Ross and Matarrese.

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<sup>3</sup> Coke subsequently withdrew that portion of the cross-motion seeking relief pursuant to CPLR §§ 1001(a) and/or 1354. The portion of Coke's cross-motion seeking relief under CPLR 4517(a) with respect to alleged contradictory statements is not addressed as no formal motion need be made for such relief.

<sup>4</sup> Coke brings his cross-motion and each of his motions *pro se*.

BDA seeks dismissal of the complaint on the grounds of improper service and failure to state a cause of action. At the outset, the court rejects BDA's argument that the complaint fails to state a cause of action against it because BDA "is not a legal entity capable of being sued, but rather is the trade or doing business as name for a corporate entity." Here, it is apparent that plaintiff incorrectly named BDA rather than the appropriate corporate entity.<sup>5</sup> Under such circumstances, dismissal is not warranted; rather, provided that service was properly effectuated, the court will permit plaintiff to amend the summons and complaint to correct this misnomer since BDA fails to establish any resulting prejudice<sup>6</sup> and, having employed plaintiff, BDA was not misled concerning what entity plaintiff sought to sue. *Medina v. City of New York*, 167 A.D.2d 268, 561 N.Y.S.2d 768 (1<sup>st</sup> Dept., 1990); *Manocchio v. Wohlfeil*, 206 A.D.2d 908, 614 N.Y.S.2d 837 (4<sup>th</sup> Dept., 1994).

This leaves only BDA's argument that the complaint should be dismissed as to it on the grounds that service upon BDA was not properly effectuated. Specifically, BDA argues that the summons and complaint were delivered to its office by leaving a copy

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<sup>5</sup> BDA's motion papers evasively fail to identify the name of the corporate entity which conducts business under the name Beau Dietl & Associates. As best as can be gleaned from all of the papers submitted on this round of motion practice, BSI is a corporation which does business under the name Beau Dietl & Associates. Interestingly, Coke's research of court records reveals contradictions in BDA's claims as to its identity. For example, Coke unearthed a corporate verification from an action in which BDA appeared which avers that BDA is in fact a corporation (see Exh. 5 to plaintiff's cross-motion).

<sup>6</sup> In opposition to plaintiff's motion to amend (seq. 003), BDA argues that BSI should not be joined as a party since the statute of limitations has now run. However, amendment to reflect a defendant's proper name may be granted even where the statute of limitations has run. *Balderman v. Capital City/American Broadcasting Co., Inc.*, 233 A.D.2d 861, 649 N.Y.S.2d 284 (4<sup>th</sup> Dept., 1996).

with Maria Stasek, an executive assistant not authorized to accept service on its behalf. In her supporting affidavit, Ms. Stasek avers that she is not and never has been an officer, director, managing or general agent, cashier or assistant cashier for the company doing business as BDA, nor is she an agent authorized to accept service. Stasek Supp. Aff. at ¶¶ 2 & 3.

Although she does not deny receiving copies of the summons and complaint or describe the circumstances surrounding such receipt, Ms. Stasek states that she has never “stated in words or substance” that she was an agent authorized to accept service for BDA. Stasek Supp. Aff. at ¶4. Where, as here, conflicting affidavits are proffered, the court is constrained to set the matter down for a traverse hearing. *Bart-Rich Enterprises, Inc. v. Boyce-Canandaigua, Inc.*, 8 A.D.3d 1119, 778 N.Y.S.2d 818 (4<sup>th</sup> Dept., 2004), *rearg. den.* 11 A.D.3d 1053, 783 N.Y.S.2d 896 (4<sup>th</sup> Dept., 2004). Accordingly, the issue of alleged improper service shall proceed to a traverse hearing forthwith as more fully set forth below.

#### **Motion to Amend**

With respect to the amendment of pleadings, CPLR 3025(b) provides that:

A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Leave to amend pleadings is only to be freely granted absent prejudice or surprise.

*Fahey v. County of Ontario*, 44 N.Y.2d 934, 408 N.Y.S.2d 314 (1978); *Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957, 471 N.Y.S.2d 55 (1983); *Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584, 730 N.Y.S.2d 293 (1<sup>st</sup> Dept., 2001). Further,

leave to amend will be denied where the proposed amendment lacks merit. *Dos Santos v. New York City Transit Authority*, 257 A.D.2d 468, 683 N.Y.S.2d 535 (1<sup>st</sup> Dept., 1999).

Here, Coke's complaint alleges four causes of action against all named defendants for: 1) employment discrimination ("first cause of action"); 2) conspiracy ("second cause of action"); 3) violation of Article 7-A of the General Business Law (the "Security Guard Act") ("third cause of action"); and 4) "strict liability/liable" ("fourth cause of action"). In the proposed amended complaint (Exh. 12 to motion [seq. 003]), plaintiff seeks to: 1) interpose additional factual allegations in support of each cause of action; 2) add two new defendants, to wit, BSI<sup>7</sup> and Nini Ofri ("Ofri")<sup>8</sup>; and 3) to withdraw the first and third causes of action as against Owners, Littman, Fawn and non-moving defendant Northern Nights Post ("Northern").

At the outset, plaintiff's motion to amend the complaint must be denied in all respects as to Matarrese and Ross in light of the court's dismissal of the complaint against them due to lack of personal jurisdiction. As to BDA, determination of the motion to amend is held in abeyance pending the outcome of the traverse hearing directed herein.<sup>9</sup>

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<sup>7</sup> The proposed amended complaint asserts all four causes of action against BSI. As previously stated, it appears that BSI does business under the name Beau Dietl & Associates. Nonetheless, the proposed amended complaint names BDA and BSI as separate defendants.

<sup>8</sup> Ofri is alleged to be an employee of defendant Fawn. The proposed amended complaint asserts the second and fourth causes of action against Ofri.

<sup>9</sup> In the event that service of process is upheld after traverse, plaintiff shall resubmit the motion to amend to the court for further consideration.

As to Littman, Owners and Fawn, Coke's motion to amend must be analyzed with these defendants' cross-motion to dismiss or alternatively for a more definite statement of particulars (seq. 002). The motion to amend is granted to the extent that plaintiff voluntarily withdraws the first and third causes of action against Littman, Owners, Fawn and Northern, thus rendering Littman's, Owners' and Fawn's cross-motion moot as to the first and third causes of action.

The court next turns to the merits of the remaining second and fourth causes of action as to Littman, Owners and Fawn. Although plaintiff's second cause of action is entitled "conspiracy", in response to defendants' opposition to the motion to amend, plaintiff clarified that the second cause of action was in fact for gross negligence and reckless indifference. Coke Reply Aff. dated November 20, 2006 at p. 13, ¶¶ L-N (seq. 003). The second cause of action is based upon scant factual allegations that the BDA defendants, Littman, Northern, Owners and Fawn fabricated a scheme whereby they created a conflict of interest in the performance of Coke's duties at the building, which ultimately led to BDA terminating his employment. The proposed amended complaint elaborates upon Coke's alleged basis for these claims, adding the following:

- Littman, Northern, Owners, Fawn and Ofri "offered certain work to [plaintiff], then hired [plaintiff] to performed (sic) certain work to satisfy their conspiracy and plans against their second floor tenants . . . and willfully claimed that the job was according to direct Court Orders, when it was not." (Emphasis in original). Exh. 12 to motion (seq. 003) at ¶83.
- In a memorandum to the building's tenants, Littman, Northern, Owners, Fawn and Ofri advised that photo identification would be required of all visitors to the building on both weekdays and weekends; these defendants then caused the BDA defendants to claim that access to the second floor of the building was not to be permitted on weekends. Exh. 12 to motion (seq. 003) at ¶83a.

- All of the named defendants “willfully and recklessly failed and refused to reviewed (sic) all the contents of both memorandum (sic) dated July 1, 2005 and July 28, 2005, respectively, which would necessarily prevent any possible adverse or harmful action against [plaintiff].” Exh. 12 to motion (seq. 003) at ¶84.

Although the basis of Coke’s claim is far from clear in both the complaint and in the proposed amended complaint, exhibits attached to Coke’s motion to amend shed some light, to wit:

- in a memorandum dated July 1, 2005, Fawn advised all tenants and shareholders at the building to “introduce yourselves so [the security guards] can become familiar with you and your company.” Exh. 2 to motion (seq. 003).
- In a subsequent memorandum to tenants and shareholders dated July 28, 2005, Fawn reiterated the foregoing and advised that all messengers and visitors to the building must show photo ID to enter the building. Exh. 2 to motion (seq. 003).
- Matarrese instructed Coke not to allow access to the second floor on weekends. Exh. 4 to motion (seq. 003).

Coke thus appears to base his second cause of action upon what appear to be miscommunications between himself, one or more of the BDA defendants and building management which resulted in his termination.

Regardless of the name plaintiff ascribes to his second cause of action, the acts alleged therein, even if deemed true, fail to establish any actionable legal claim against any of the defendants. First, New York does not recognize a substantive tort of conspiracy. *MBF Clearing Corp. v. Shine*, 212 A.D.2d 478, 623 N.Y.S.2d 204 (1<sup>st</sup> Dept., 1995). Nor can the facts alleged establish a negligence cause of action as the court can discern no duty owed to Coke based upon these allegations, let alone a breach of any such duty. Accordingly, as the proposed second cause of action lacks merit,

Coke's motion to amend must be denied and the second cause of action dismissed *sua sponte* as to all remaining defendants.<sup>10</sup>

As the proposed fourth cause of action relates to Littman, Owners, Northern and Fawn, the only allegation pertaining to these defendants concerns their alleged non-payment of \$28,000 to plaintiff for work allegedly performed. See Exh. 12 to motion (seq. 003) at ¶¶ 3 and 97. The remainder of the proposed fourth cause of action pertains to the BDA defendants. While Coke's allegations relative to Littman, Owners, Northern and Fawn could be stated more clearly, nonetheless, the court cannot conclude that no meritorious cause of action can be asserted. Accordingly, plaintiff's motion to amend is granted to the extent that the proposed amended complaint asserts allegations establishing this claim. However, in serving the amended complaint plaintiff is directed to allege this claim as a separate cause of action against defendants Littman, Owners, Northern and Fawn. The court's determination of plaintiff's motion to amend renders moot Littman's, Owners' and Fawn's cross-motion (seq. 002) to dismiss and/or for a more definite statement of particulars as to the second and fourth causes of action.

Finally, plaintiff's motion to amend is denied to the extent that it seeks to add Ofri as a defendant. The correct procedure for adding a new party is to obtain leave of court to serve a supplemental summons. See CPLR 305; CPLR §1003; *Scaccia v. Wallin*, 99 A.D.2d 801, 472 N.Y.S.2d 137 (2<sup>nd</sup> Dept., 1984). Coke's proposed amended complaint seeks to interpose two causes of action against Ofri for conspiracy and "strict

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<sup>10</sup> In the event that service of process upon BDA/BSI is sustained after traverse, the amended complaint to be served upon BDA/BSI shall omit the second cause of action.

liability/liable". As discussed above, the second cause of action for conspiracy fails to state a cause of action. Further, with respect to the fourth cause of action for "strict liability/liable" and the claim of non-payment for work performed, the proposed amended complaint fails to allege any specific act(s) by Ofri upon which any liability to Coke might be established. Accordingly, the court must deny Coke leave to add Ofri as a party.

### **Subpoenas to Non-Parties**

Coke's motion for the issuance of subpoenas to depose various non-party witnesses and compel their production of documentation (seq. 002) is denied at this juncture. Much of the testimony and/or documentation plaintiff seeks is irrelevant or can be obtained from other sources. For instance, plaintiff seeks to obtain discovery pertaining to service of the summons and complaint upon Owners, Fawn and Northern. While these defendants have interposed affirmative defenses alleging improper service, they have not moved to dismiss the complaint on this ground. Accordingly, no basis exists for plaintiff to obtain discovery from Deputy Sheriff King, who served Owners, Fawn and Northern, or from Bella Mushekova and Beth Cummins, the individuals served.

Plaintiff may, however, submit proposed subpoenas to be so-ordered by the court, directed to Maria Stasek and Deputy Sheriff Cascio, solely to the extent of compelling their appearances and production of relevant documentation at the traverse hearing scheduled herewith. Discovery between the parties has yet to commence due to the extensive motion practice addressed here. Upon the completion of discovery amongst the parties, the court will review and so-order, if appropriate, any proposed non-party subpoenas which may be submitted to the court for signature.

**Motions to Toll Statute of Limitations, Compel Disclosure and for Sanctions**

Plaintiff's motion to toll the statute of limitations as to BSI pursuant to CPLR §207 (seq. 004) is denied. CPLR §207 is inapplicable because it is not alleged that BSI was absent from the state, nor does it appear BSI was residing within New York State under a false name.

Similarly, plaintiff's motions to compel disclosure (seq. 005) and for discovery sanctions against defendants (seq. 006) are also denied. Here, discovery was stayed by the pendency of the motion and cross-motion to dismiss. CPLR 3214(b). Discovery shall be scheduled at the preliminary conference scheduled herein. All other requests for relief not addressed herein are denied.

Accordingly, it is hereby

ORDERED that this action is dismissed as against defendants Kenneth Ross and Michael Matarrese; and it is further

ORDERED that plaintiff shall modify the proposed amended complaint consistent with this decision and order, but otherwise in the form attached to plaintiff's motion to amend (seq. 003) at Exhibit 12, and shall serve the amended complaint upon counsel for defendants Littman, Owners, Fawn and Northern on or before April 13, 2007; and it is further

ORDERED that determination of plaintiff's motion to amend (seq. 003) is held in abeyance as to defendant BDA and/or BSI pending the traverse hearing directed herein; and it is further

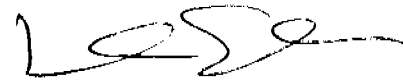
ORDERED that plaintiff and counsel for BDA/BSI are directed to appear for a traverse hearing with respect to the issue of service of the summons and complaint

upon BDA and/or BSI on May 1, 2007 at 2:15 p.m. in IAS Part 1, Room 1127B, 111 Centre Street, New York County. This is a final date and the parties shall be prepared to proceed with the traverse hearing on that date; and it is further

ORDERED that plaintiff and counsel for Littman, Owners, Fawn and Northern are directed to appear for a preliminary conference on May 1, 2007 at 2:15 p.m. in IAS Part 1, Room 1127B, 111 Centre Street, New York County.

The foregoing constitutes the Decision and Order of this Court. A copy of this decision and order has been sent to plaintiff and to counsel for defendants.

Dated: New York, New York  
March 27, 2007



Hon. Martin Shulman, J.S.C.

**FILED**  
APR 02 2007  
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