

Oshry v Paulis

2007 NY Slip Op 33916(U)

November 27, 2007

Supreme Court, Nassau County

Docket Number: 8207-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

BARBARA OSHRY,

Plaintiff,

INDEX No. 8207/07

MOTION DATE: Nov. 2, 2007
Motion Sequence # 001

-against-

GERALD PAULIS, GAIL LETTICK and
AMERICANA CAPITAL CORP.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X

This motion, by defendants Gerald Paulis and Americana Capital Corp., for an order:

- a. Pursuant to CPLR 3211(a)(8) dismissing the Complaint, and each and every cause of action asserted against defendants Paulis ("Paulis") and Americana Capital Corp. ("Americana"), for lack of jurisdiction and improper service;
- b. Pursuant to CPLR 306-b for failure to serve the Summons and Complaint on Paulis or Americana within 120 days after this action was commenced;

- c. Pursuant to CPLR 7503(a), compelling arbitration of the claim(s) asserted against Americana in accordance with the applicable rules of the American Arbitration Association (“AAA”);
- d. Pursuant to CPLR 7503(a) staying all proceedings herein as against Americana, pending the AAA arbitration; and
- e. Granting Paulis and/or Americana such other and further relief as this Court may deem just and proper,

is determined as hereinafter set forth.

FACTS

The plaintiff invested \$100,000 on March 23, 2001, another \$100,000 on November 27, 2001 and a third \$100,000 on February 15, 2002 in early American antique furniture under the advice of the defendant Gerald Paulis. In each instance, Paulis presented the plaintiff with an investment contract to be executed by the plaintiff with Americana Capital Corp. (“Americana”), which was solely owned and operated by the individual defendants Paulis and Gail Lettick. On March 5, 2002, the plaintiff and Americana signed another agreement that combined the three earlier investment contracts and extended the date on which the plaintiff’s principal would be repaid to March 1, 2005. The plaintiff is alleging, *inter alia*, breach of fiduciary duty and negligence, which resulted in the loss of her investment.

DEFENDANTS’ CONTENTIONS

The defendants Paulis and Americana assert that they both were not served properly with a copy of the Summons and Complaint and that neither defendant were served prior to the expiration of 120 days from the date the action was commenced. The defendant Americana also states that, in accordance with the Investor Agreement dated February 15, 2002, entered into between the plaintiff and Americana, the plaintiff must be compelled to arbitrate any dispute she has with Americana. The arbitration agreement clause, contained on page 2 of the Investor Agreement states:

“By signing below, Investor agrees to waive its right to a trial by jury and agrees to settle any disputes by submitting them to the American Arbitration for binding arbitration.”

PLAINTIFF’S CONTENTIONS

The plaintiff contends that service was both proper and timely as to all defendants. The plaintiff states that service was made upon defendant Americana was proper by serving the Secretary of State on August 31, 2007, which is permissible because Americana is an active New York corporation.

The plaintiff also states that service upon Paulis was made pursuant to CPLR 308 (4) and CPLR 313. The plaintiff’s process server attempted service upon this Paulis at 994 Main Street South, Woodbury CT on four separate occasions before resorting to nail and mail action. This address was identified as Paulis’ business address on various letters addressed to the plaintiff and to the undersigned dated as late as March 2007 signed by the defendant Paulis and setting forth as his business address the identical premises mentioned above. Additionally, the plaintiff introduced documentation bearing Paulis’ handwriting and dated as late as August 2007 and referencing the above address as his own. The process server attempted service on four separate occasions: August 24, 2007 at 5:05 p.m.; August 29, 2007 at 7:00 a.m.; August 29, 2007 at 5:30 p.m.; August 30, 2007 at 10:45 a.m., and on September 1, 2007 at 8:55 p.m. (Friday, Wednesday, Thursday, and Saturday). This final service attempt was made within 114 days of filing the complaint.

The plaintiff also contends that the arbitration provision is binding only as to Americana.

DECISION

A party may move for a motion to dismiss pursuant to CPLR § 3211(8) if “the court has not jurisdiction of the person of the defendant.” This can occur if a copy of the summons and complaint were not properly served.

Under CPLR § 306-b, “service of the summons and complaint...shall be made within one hundred twenty days after the filing of the summons and complaint...” Therefore, if service “is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant...” (CPLR § 306-b). The service of the summons and complaint was made on

the corporation on August 31, 2007 and on Paulis on September 1, 2007, which are both within 120 days of the filing of the summons and complaint. With respect to service upon Paulis, "compliance with the timing requirements of CPLR 306-b in Supreme Court and County Court actions is satisfied if the service steps are both performed prior to the expiration of the 120 days from the initial filing of process". (Alexander Practice Commentaries McKinney's Cons Laws of N.Y., Book 7B, CPLR 308, p.28).

The plaintiff in this case decided to utilize the so-called "nail and mail" provisions of CPLR § 308(4). Under CPLR § 308, a plaintiff is entitled to serve the defendants in this manner only if "personal service cannot be effected under subdivisions 1 and 2 thereof by the use of 'due diligence'" (Reed v. Domenech, 90 AD2d 844, 845, 456 NYS2d 90, 2nd Dept., 1982). Under the "nail and mail" service, the process server must "seek to serve [the individual defendant] at his place of employment before resorting to affix and mail service" (Zambelli v. Dillon, 242 AD2d 353, 661 NYS2d 268, 2nd Dept., 1997).

The plaintiff made a total of five attempts at personal service and varied the time of day as well as the day of the week that service was attempted and therefore exercised due diligence, especially since the plaintiff attempted service at the defendant's place of business during business hours. (see, Moss v. Corwin, 154 AD2d 443, 546 NYS2d 15, 2nd Dept., 1989; citing Barnes v. City of New York, 70 AD2d 580, 416 NYS2d 52, 2nd Dept., 1979, aff'd 51 NYS2d 906, 434 NYS2d 991, 1980).

Pursuant to BCL § 306(b), service of process is proper upon a corporation if the plaintiff serves the summons and complaint on the secretary of state "as an agent of a domestic...corporation" and "[s]ervice of process on such corporation shall be complete when the secretary of state is so served." The plaintiff submitted evidence that she utilized this method of serving Americana and, therefore, this service of process was also proper.

CPLR § 7503 states, in pertinent part, that "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration [and] [w]here there is no substantial question whether a valid agreement was made...the court shall direct the parties to arbitrate" (CPLR § 7503(a)). Additionally, if the motion to compel is granted, "the order shall operate to stay a pending or subsequent action..." (Id.).

New York public policy favors arbitration as long as an agreement to arbitrate is

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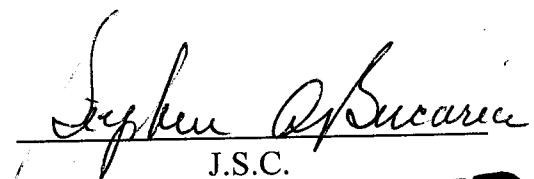
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clear and unambiguous (In re Level Export Corp., 305 NY 82, 1953). Upon a proper and timely motion by the defendants, pursuant to CPLR 7503(a), the court may stay the action and direct the parties to arbitrate (Nachman v. Jenelo Corp., 25 AD3d 593, 807 NYS2d 408, 2nd Dept., 2006). The agreement that contained the arbitration clause was a valid agreement that compels the granting of arbitration between Americana and the plaintiff only. The plaintiff concedes that there is a binding arbitration clauses that mandates arbitration between the plaintiff and Americana.

The court notes the lack of a reply by the defendants.

Accordingly, that part of the motion pursuant to CPLR 3211(a)(8) and CPLR 306-b is denied as to both Gerald Paulis and Americana. The motion pursuant to CPLR 7503(a) is granted as to Americana only. In the discretion of the court, the action against Paulis is also stayed.

Dated November 27, 2007


J.S.C.

ENTERED

NOV 30 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**