

Kelleher v Sol Melia

2008 NY Slip Op 30817(U)

March 17, 2008

Supreme Court, New York County

Docket Number: 0104827/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Justice

Index Number : 104827/2006
KELLEHER, MARIE D.
 VS.
MELIA, SOL
 SEQUENCE NUMBER : 002
 DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAR 24 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 03/17/08

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Marie D. Kelleher,

Plaintiff,

-against-

Sol Melia d/b/a Sol Hotel Paradisus
Punta Cana Resort,

Defendant.
-----X

DECISION/ORDER

Index No.: 104827/2006

Seq. No.: 002

Present:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
MDH n/m 3215 w/KJQ affirm, exhs	1
Sol x/m 3211 w/RMG affirm	2
MDH n/m EBT etc, MFW affirm, exhs	3
Sol reply/ opp w/RMG affirm	4
MDH reply w/ MFW affirm	5

FILED
MAR 24 2008
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action by plaintiff against a resort located in the Dominican Republic. Previously plaintiff brought a motion to have a default judgment entered against defendant pursuant to CPLR § 3215 because it had not answered the complaint, appeared nor moved to dismiss it within the time provided in the CPLR. At that time, defendant cross moved to dismiss this action on the basis that it had not been properly served. The court denied plaintiff's motion without prejudice, extending by 120 days her time to serve defendant in the manner provided under the Business Corporation Law (BCL § 307). Defendant's cross motion was granted only to the extent that the court found it did not have personal jurisdiction over defendant due to improper service. See: Transcript 3/8/07.

Plaintiff has now re-served the complaint. She has provided proof of service upon the Secretary of State dated April 3, 2007. Such service was effectuated March 30, 2007. Plaintiff also provides proof she complied with the requirements of BCL § 307 (c)(2) allowing for an additional copy of the summons and complaint to be sent to a foreign corporation by registered mail, return receipt requested to the corporation's last known address. The certified mailing was on April 26, 2007.

By motion sequence number 2, plaintiff seeks to renew her application for entry of a default judgment on liability against the defendant, with an assessment of damages at an Inquest. By separate motion (sequence number 3) plaintiff seeks permission to file the affidavit of service, *nunc pro tunc* because she admittedly failed to do so within time provided under BCL § 307, which is thirty (30) days. Plaintiff also seeks an order from the court directing that defendant depose her immediately because of her advanced age (89 years), and to preserve her testimony for trial. CPLR § 3102 (c).

Defendant opposes both motions and separately cross moves to dismiss this action for improper service and failure to state a cause of action. Although initially contending that defendant had not been properly served, based upon plaintiff's failure to include proof of service upon the Secretary of State, defendant has refined its argument in its opposition and reply. Defendant contends that even assuming plaintiff served the Secretary of State and sent a copy of the pleading by certified mail, she has not only failed to timely file her affidavit of compliance/ proof of service, she has named the wrong party as defendant. Defendant argues that the owner of the resort is really "Inversions Agra, S.A.," and "Sol Melia" is not a d/b/a for the owner, nor is it the owner. Defendant contends further that because plaintiff did not timely file the affidavit of

compliance/ proof of service as required under BCL § 307 (c) (2), she has not complied with the court's order, that re-service of the summons and complaint be made within 120 days of the court's March 8, 2007 order. Finally, defendant argues that because no action is pending, there is no reason to depose plaintiff.

Discussion

The court has examined the affidavits of service and other proof provided by plaintiff in support of its claim that it complied with the requirements set forth not only in the court's prior order of March 8, 2007, but also with the requirements of BCL § 307. It appears that plaintiff personally served the summons and complaint upon the Secretary of State [BCL § 307 (b)] and she also sent a copy of the summons and complaint by certified mail, return receipt requested [BCL § 307 (b) (2)]. In order for service of process to be complete under BCL § 307, proof of service must be made by filing an affidavit of compliance which shall include "either the return receipt signed by such foreign corporation or other official proof of delivery . . ." She now provides the affidavit, albeit late, and asks the court to accept it for filing *nunc pro tunc*. Plaintiff's counsel admits that he did not file the affidavit, attributing this oversight to law office failure.

Defendant's argument, that this action must be dismissed because plaintiff did not file the affidavit of compliance within the time provided under BCL § 307 (c) (2), is offered without any legal authority. Since plaintiff complied with the notice requirements of BCL § 307 (b) and (b) (2), which is personal service followed by certified mailing, return receipt requested, the actual filing of the affidavit of compliance, is a ministerial act, not a jurisdictional defect. Sorrento v. Rice Barton Corp., 286 A.D.2d 873 (4th Dep't 2001) (completion of service distinguished from filing of the affidavit of compliance).

Moreover, defendant has not established any prejudice to it, were the court to accept the late filing. Therefore, plaintiff's motion for permission to file the affidavit of compliance *nunc pro tunc* is hereby granted and the Clerk shall accept the original for filing as if it had been made timely.

The court has considered defendant's argument and cross motion that this case must be dismissed because the wrong party has been named, therefore plaintiff has failed to state a cause of action. On a motion to dismiss, the facts as alleged in the complaint must be accepted by the court as true, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). Where complex corporate relationships are involved, the opposing party may defeat a motion to dismiss by convincing the court that facts may exist to defeat the dismissal motion, but they can only be further developed after there is discovery. Banham v. Morgan Stanley & Co., Inc., 178 A.D.2d 236, 238 (1st Dept., 1991). Plaintiff has presented the court with facts that state a cause of action against the defendant she has sued, including a letter regarding the accident from "Paradises Punta Cana a Sol Melia All Inclusive Resort" and a page from its website. Therefore, defendant's motion, to dismiss this case at the pleading stage is denied. Defendant shall serve its answer no later than ten (10) days after service of notice of entry of this order. CPLR § 3211 (f).

Plaintiff's counsel asks that his client be deposed without further delay because she is 89 years old, and to preserve her testimony for trial. CPLR § 3102 (c) allows for discovery to take place before an action is commenced so as to preserve information for trial. It has been invoked to allow, for example, the videotaped testimony of an

elderly or infirm plaintiff, in order to preserve it for trial. Stanco v. Steinberg, 254 A.D.2d 363 (2nd Dept. 1998). This action however, has already been commenced and therefore CPLR § 3102 (c) is inapplicable. The court will, however, order that the preliminary conference in this case be held on **MAY 1, 2008 at 9:30 a.m.** so that an expedited discovery schedule can be set at that time.

Finally, plaintiff's motion, for entry of a default judgment pursuant to CPLR § 3215 is denied because defendant's time to answer has been extended by the court.

Conclusion

Plaintiff's motion to file her affidavit of compliance is granted and the original affidavit may be accepted by the clerk for filing, *nunc pro tunc*. Plaintiff's separate motion for entry of a default judgment is, however, denied. Plaintiff's motion for an order directing defendant to take her deposition is granted to the extent that the preliminary conference will be held on **MAY 1, 2008 at 9:30 a.m.** at which time an expedited discovery schedule will be set. Defendant's cross motion to dismiss this action at the pleading stage is denied for the reasons that have been provided in this decision/order.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 17, 2008

So Ordered:

Hon. Judith J. Gische, JSC

FILED
MAR 24 2008
NEW YORK
COUNTY CLERK'S OFFICE