

Marrero v Braccolino Pools

2008 NY Slip Op 32176(U)

July 18, 2008

Supreme Court, Richmond County

Docket Number:

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.101718/07
Motion No.:001, 002,
003, 004**

WILLIAM MARRERO,

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**BRACCOLINO POOLS, and
MIKULAS ROHAL,**

Defendants

The following items were considered in the review of these motions to: strike defendant's answer, summary judgment, and amend the complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1,2,3, 5
Answering Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

This action produced numerous motions and cross-motions. For the purpose of clarification the parties made the following motions for consideration before this court. In a motion dated March 11, 2008 and returnable April 28, 2008 plaintiff moved this court for an order striking defendant's answer or in the alternative compelling the defendants to produce discovery. Subsequent to the April 28, 2008 return date plaintiff withdrew this motion. Defendant Braccolino Pools ("Braccolino") cross-moved for an order directing summary judgment by a motion dated March 18, 2008 made returnable April 15, 2008. In response to defendant, Broccolino's cross-motion, plaintiff cross-moved in papers dated May 27, 2008 made returnable June 27, 2008 for an order permitting him to amend his complaint. Defendant, Braccolino opposed this motion by an affirmation in opposition dated June 11, 2008. Defendant, Braccolino then moved again for an order granting summary judgment in their favor by a motion dated June 11, 2008 and made returnable June 27, 2008. Plaintiff did not respond.

Currently motions designated 002, 003 and 004 are before this court for consideration.

Facts

This is an action to recover for personal injuries sustained by plaintiff. Plaintiff commenced this action by filing and serving a summons and complaint on Broccolino Pools located at 15 Jewett Avenue, Staten Island, NY 10302; on or about April 23, 2007. Defendant, Braccolino, appeared in this action by serving an answer on plaintiff on or about June 25, 2007. At that time defendant failed to raise an affirmative defense as to jurisdiction over Braccolino. Braccolino argues that this court does not have jurisdiction over it and therefore this action must be dismissed as to it. According to Braccolino, a legal entity known as “Braccolino Pools” never existed. In support of this argument, Braccolino submits a New York Certificate of Authority indicating that only legal entity located at 15 Jewett Avenue, Staten Island, NY is LB Pools, Inc. d/b/a Braccolino Swimming Pools.

Discussion

The court will discuss Bracolino’s motions for summary judgment first. In its first motion for summary judgment designated as 002, Bracolino argues that this court should grant it summary judgment based on the fact that plaintiff failed to serve it properly as prescribed by the CPLR.¹ In so moving, defendant is bound by the criteria set forth in CPLR §§ 3211(a)(8) and (e) that state in pertinent part:

(a) A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that: . . . (8) the court has not jurisdiction of the person of the defendant . . . (e) At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. . . An objection based upon grounds specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if,

¹ See, CPLR § 308.

having made no objection under subdivision (a), he or she does not raise such objection the responsive pleading.

Alternatively, if an objection for improper service is raised in the responsive pleading the CPLR states:

. . .an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.²

In this case Braccolino's answer fails to raise improper service as a defense. As such, said defense is deemed waived and summary judgment cannot be granted based on such a theory.

The court now turns its attention to the plaintiff's motion dated May 27, 2008 appearing as 003 labeled as a notice of cross motion. Broccolino argues that this court should disregard this motion because the CPLR does not provide authority for a party to oppose a cross motion with a cross motion. This court does not agree. While the CPLR does not specifically anticipate a cross-motion in response to a cross-motion it is essentially an issue of labeling. Absent any case law to the contrary this court does not find this defective labeling fatal to the plaintiff's motion.

Plaintiff argues that pursuant to CPLR § 305(c) the court should allow him to amend the summons to read "LB Pools, Inc., d/b/a Braccolino Swimming Pools." In support of his position plaintiff cites the Appellate Division, Second Department's opinion in *Kingalarm Distributors v. Video Insights, Corporation*.³ The Second Department held:

[w]here the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the

² CPLR § 3211(e)

³ *Kingalarm Distr. v. Video Insights, Corp.*, 274 AD2d 416 [2d Dep't. 2000].

defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that: (1) the intended but misnamed defendant was fairly apprised that he was the party the action was intended to affect, and (2) the intended but misnamed defendant would not be prejudiced. . . (internal citations omitted)⁴

In this case this court has jurisdiction over Broccolino pursuant to its waiver of its jurisdictional defense. Based on the facts before this court it is clear the two prong test set forth in *Kingalarm* is met. As is evident from Broccolino's Certificate of Authority it held itself out to the public as "Broccolino Swimming Pools," rather than "LB Pools, Inc." It is therefore not surprising that plaintiff served Broccolino as "Broccolino Swimming Pools."

In addition, it is clear that Broccolino will not be prejudiced in this action, as counsel represented it in all court conferences and in answering plaintiff's complaint. The claims against it do not amount to litigation by ambush. Assuming *arguendo* that defendant did not waive its jurisdictional defense to plaintiff's claim, this court would grant plaintiff opportunity to amend its complaint and serve the proper entity.

The court now turns its attention to defendant's motion for summary judgment designated as 004. A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."⁵ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the

⁴ *Id.*

⁵ CPLR §3212[b].

party opposing the motion.”⁶ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.⁷ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁸ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁹ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion. Plaintiff failed to offer any opposition to this motion. However, at this stage in the litigation it would be improvident for this court to deny plaintiff his day in court on the basis of such a scant record. Absent deposition testimony for either party regarding the circumstance surrounding the altercation this court must rule that Brocollino’s motion is premature.

Conclusion

This court finds that based on this record there are numerous issues of fact outstanding that must be resolved. As such, summary judgment is premature and will not be granted.

Accordingly, it is hereby:

ORDERED, that Braccolino’s motion designated as 002 is denied in its entirety; it is

⁶ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

⁷ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁸ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁹ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

further

ORDERED, that plaintiff's motion designated as 003 is granted in its entirety, the Clerk of the Court is directed to amend the caption in this action to the following:

WILLIAM MARRERO,

Plaintiff

against

**LB POOLS, INC., d/b/a BRACCOLINO SWIMMING POOLS,
and
MIKULAS ROHAL,**

Defendants

it is further;

ORDERED, that Braccolino's motion designated as 004 is denied in its entirety as being premature; and it is further

ORDERED, that the parties shall return to DCM Part 3 for a status conference on **September 22, 2008 at 9:30 A.M.**

ENTER,

DATED: July 18, 2008

Joseph J. Maltese
Justice of the Supreme Court