

Novak v Abelson

2008 NY Slip Op 32281(U)

August 13, 2008

Supreme Court, New York County

Docket Number: 0104034/2008

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK LOUIS B. YORK PART 2

~~J. Justice~~
J.S.C.

Index Number : 104034/2008
NOVAK, ARI S.
VS.
ABELSON, BARBARA
SEQUENCE NUMBER : # 001
DECLARATORY JUDGMENT

INDEX NO. 104034-08
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motlon/ 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 IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/13/08

Luy
LOUIS B. YORK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

-----X
ARI S. NOVAK a/k/a ARI S. ABELSON,

Plaintiff,

Index No. 104034/08

-against-

**BARBARA ABELSON a/k/a LANA NOVAK
a/k/a BARBERA KURTZMAN,**

Defendant.

-----X
LOUIS B. YORK, J.:

In this action, Plaintiff alleges that Defendant, his mother, engaged in a scheme to wrongfully obtain student loan disbursements that should have been paid to the educational institutions he attended for college. SallieMae Servicing Corporation ("SallieMae") issued the loans to Plaintiff between February 1999 and August 2001, while Plaintiff attended college. Plaintiff alleges that Defendant converted these disbursements for her personal use. In addition, Plaintiff alleges that Defendant used Plaintiff's social security number and forged his signature in order to obtain her son's loan payments.

Plaintiff, who has been the subject of collection efforts by Sallie Mae, has submitted letters purportedly from SallieMae. These letters indicate that to be relieved of his payment obligations, Plaintiff must submit a copy of a judgment indicating that he was the victim of identity theft. Presumably for this reason, Plaintiff seeks a declaration from this Court that Defendant has stolen his identity and that she is responsible for all payments to Sallie Mae. Plaintiff also seeks to recover \$38,000, plus interest; he claims he gave Defendant this loan money so that she could pay for his educational expenses

but she converted it to her personal use. Finally, he seeks \$64,269.53, plus interest, allegedly due SallieMae as of July 2007.¹ Currently, Plaintiff moves for an order declaring that Defendant has stolen Plaintiff's identity and is responsible for the loan payments to SallieMae, and for an order granting him judgment in the amounts of \$38,000 and \$64,269.53, plus interest, costs and disbursements. Because the court has determined that this action may not proceed without a necessary party, SallieMae, the court denies Plaintiff's motion.

CPLR § 1001(a) provides:

Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

As for parties who "might be inequitably affected," the possibility that a judgment rendered without an absent party might have an adverse effect on that party is enough to mandate joinder. See New York County Lawyers' Ass'n v. State, 192 Misc.2d 424, 427, 745 N.Y.S.2d 376, 381 (Sup. Ct. N.Y. County 2002). Here, if Plaintiff is successful in obtaining a declaration that Plaintiff is the victim of identity theft and Defendant, rather than Plaintiff, is responsible for the loan payments to SallieMae, SallieMae's rights will obviously be affected because of its promise to then excuse Plaintiff from liability. For example, SallieMae may find it more difficult to collect from Defendant if she is substituted for Plaintiff as SallieMae's debtor.

¹ Exhibit 3 to Plaintiff's supporting affidavit is a letter from Sallie Mae to Plaintiff dated June 6, 2007. The letter includes a table of outstanding loans showing a total original principal of \$47,582 and a total amount outstanding of \$57,440.76. The court is unsure how Plaintiff obtained the \$64,269.53 figure.

Therefore, the Court orders Plaintiff to join SallieMae in this action by amending the complaint to include it as a defendant, and serving SallieMae with a copy of the amended complaint and a summons. If Plaintiff does not join SallieMae in this action within 60 days of notice of entry of this order, the Court will dismiss this action pursuant to CPLR § 1003.

Based on the above, therefore, it is

ORDERED that Plaintiff's motion is denied, and it is further

ORDERED that Plaintiff shall amend the summons and complaint in this action to include SallieMae Servicing Corporation as a party defendant; and it is further

ORDERED that Plaintiff shall serve the summons and amended complaint and a copy of this order on SallieMae Servicing Corporation within 60 days of notice of entry of this order or the action shall be dismissed, and it is further

ORDERED that Plaintiff shall serve the summons and amended complaint and a copy of this order on defendant Barbara Abelson a/k/a Lana Novak a/k/a Barbara Kurtzman within 60 days of notice of entry of this order, and it is further

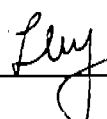
ORDERED that Plaintiff's attorney file (1) a copy of this order with notice of entry, (2) the summons and amended complaint, and (3) proof of service of the summons and amended complaint upon the new defendant and existing defendant, with the Clerk of the Court and the Clerk of the Trial Support Office, both of whom are also directed to amend their records to reflect such change in the caption; and it is further

ORDERED that the new defendant and the existing defendant have 30 days from the service of the amended complaint to serve and file their answers, including cross-claims or counter-claims; and it is further

ORDERED that the parties shall appear in Part 2, 71 Thomas Street, room 205,
at 2:00 p.m. on Wednesday November 19, 2008 for a preliminary discovery conference.

Dated: August 13, 2008

ENTER:



LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.