

**Bailey v ABC**

2010 NY Slip Op 31627(U)

June 18, 2010

Supreme Court, New York County

Docket Number: 100015/2010

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 100015/2010  
**BAILEY, VIKI DREM**  
vs.  
**ABC, ROBERTS, ROBIN, APPLE**  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for dismiss

PAPERS NUMBERED  
1, 2  
3

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 to dismiss by defendant

Song Corp of America & Howard Stringer  
is granted in accordance with the attached  
memorandum decision

(motion consolidated for disposition with motion  
Seq. 002 + 003)

**FILED**  
JUN 29 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/18/10

  
JUDGE DORIS LING-COHAN 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: IAS PART 36

-----X

VIKI DREM BAILEY,  
Plaintiff,

-against-

Index No.  
100015/2010

ABC, ROBIN ROBERTS, APPLE, STEVE JOBS,  
XM SIRIUS, MEL KARMAZIN, SONY, HOWARD  
STINGER, CANASTA, and JAMES SPARE,

Motion Seq. No.:  
001, 002 & 003

Defendants.

-----X  
LING-COHAN, J.:

Motion sequence numbers 001, 002, and 003 are consolidated  
for disposition.

Plaintiff Viki Drem Bailey, proceeding pro se, brings this  
action against defendants ABC, Robin Roberts, Apple, Steve Jobs,  
XM Sirius, Mel Karmazin, Sony, Howard Stringer, Canasta, and  
James Spare, to recover damages allegedly caused by defendants'  
wrongful conduct.

Defendants Sony Corporation of America and Howard Stringer,  
Sony's Chairman, Chief Executive Officer, and President, move,  
pursuant to CPLR 3211 (a) (7) and (a) (8), to dismiss plaintiff's  
complaint for lack of personal jurisdiction and for failure to  
state a cause of action (Motion Seq. No. 001). Defendants Sirius  
XM Radio Inc. and its Chief Executive Officer, Mel Karmazin, and  
defendants Apple Inc. ("Apple") and its Chief Executive Officer,  
Steve Jobs ("Jobs"), also move to dismiss the complaint on these  
same grounds (Motion Seq. Nos. 002 and 003). The motion by

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defendants Apple and Jobs is not opposed, as no opposition papers were filed by plaintiff.

#### **BACKGROUND**

According to her complaint, plaintiff is "an innovator of designs engaged in the development of electronic product designs, having a home office at 351 44<sup>th</sup> Street NW" in Manhattan (Complaint, ¶ 1). Plaintiff alleges that, between January 1, 2007 and December 31, 2009, defendants ABC, Apple, Sirius XM, Sony, Canasta, and other unmentioned companies, which she refers to in her complaint collectively as "ABC," subjected her to, inter alia, mental abuse, insults, humiliation, terror, retaliation, intimidation, and discrimination, which caused plaintiff to suffer not only extreme emotional distress and mental anguish, but loss of economic gain and property, which has rendered her indigent and homeless. In her "six" causes of action, plaintiff seeks to recover \$2.5 million in damages from each of the defendants for the alleged harm caused by their tortious conduct. Plaintiff also seeks to enjoin "ABC" and all further known and unknown individuals, from continuing to engage in this tortious conduct and thereby inflict further harm.

Specifically, plaintiff alleges that "ABC" was negligent and failed to exercise due care, acted with reckless disregard, and violated a duty owed to plaintiff, which caused her injury. Plaintiff further asserts claims against "ABC" for intentional

infliction of emotional distress, in the form of race, sexual orientation, gender, and ethnic discrimination, and mental anguish causing plaintiff to file for disability. Plaintiff alleges that "ABC" also tortiously interfered with plaintiff's contractual or other business relationships; provoked racial discrimination and abusive conduct by others; and engaged in anti-competitive practices. In addition, plaintiff alleges that she has suffered impairment of her reputation and standing in the community, as well as personal humiliation, from defendants' defamatory falsehoods.

While the complaint does not identify any particular tortious acts or conduct allegedly engaged in by the moving defendants, plaintiff does set forth a list of approximately 60 statements that she alleges were made to, or about, her by "ABC" or Robin Roberts, a reporter/morning anchor at ABC. The complaint does not, however, particularize or identify when, by whom, or in what context any of these statements were made.

Although plaintiff brought this action pro se, plaintiff alleges that between December 23, 2009 and December 31, 2009, she was forced to retain the assistance of an attorney, for which she incurred \$106,525.00 in legal fees. Plaintiff alleges that none of these fees has been paid to date.

The record reflects that plaintiff filed the complaint in this action on January 4, 2010. Plaintiff then attempted to

serve the complaint on the Sony defendants by sending one copy of the summons and complaint via U.S. certified mail to "Sony, Howard Stringer" at the address of Sony's headquarters in New York, and on the Apple defendants by sending another copy of the summons and complaint via U.S. certified mail to "Apple, Steve Jobs" at the address of Apple's headquarters in California. Neither of these mailings included a statement of service by mail or an acknowledgment of receipt, as required by CPLR 312-a.

It is not quite clear how plaintiff attempted to serve the summons and complaint on the Sirius XM defendants. Plaintiff's affidavit of service, which she filed in this court on January 6, 2010, states only that her summons and complaint were served upon all of the named defendants by personal service at 77 West 66<sup>th</sup> Street, New York, N.Y., the corporate headquarters of defendant ABC. While the affidavit of service states that such service was made on December 10, 2009, i.e., before the complaint in this action was filed, the summons includes the January 4, 2010 filing date and 2010 Index Number.<sup>1</sup> Further, although the affidavit of service states that service was made by plaintiff, "Viki D. Bailey," the affidavit is signed by "Catherine Bailey."

#### **DISCUSSION**

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<sup>1</sup>In her opposition papers, plaintiff indicates that she filed a federal court action against these same defendants in the United States District Court for the Southern District of New York on December 10, 2010, which could be the source of the apparent confusion regarding the date in the affidavit.

A complaint is subject to dismissal, pursuant to CPLR 3211 (a) (8), in cases where a defendant is improperly served and, as a result, the court lacks personal jurisdiction over such defendant. In order to establish that personal jurisdiction was obtained over the defendants in this action, plaintiff must show that she complied with one of the legally-prescribed methods of service authorized by the CPLR (see *Bennett v Acosta*, 68 AD3d 910 [2<sup>nd</sup> Dept 2009]).

Plaintiff contends that dismissal of her complaint for lack of jurisdiction due to defective service is not warranted, because she was unable to make personal service on either Sony or Sirius XM, as security at both of their business addresses would not accept service on their behalf or allow entry without proper authorization.<sup>2</sup> Additionally, although plaintiff now acknowledges that her attempted service of the complaint by the alternative process of mailing was defective, plaintiff contends that any defects in such service can be excused pursuant to CPLR 2001.

All three motions to dismiss the complaint for failure to obtain personal jurisdiction are granted, as plaintiff can produce no evidence that her summons and complaint were served on the moving defendants in any of the legally-prescribed methods of

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<sup>2</sup>As noted by defendants Apple and Jobs, plaintiff has only served papers in opposition to the motions by defendants Sony and Sirius XM defendants.

service authorized by the CPLR. Nor can plaintiff establish that she complied with the alternative procedure to personal service set forth in CPLR 312-a, as she can present no evidence that copies of the summons and complaint were sent to these defendants, by first-class mail, together with, inter alia, two copies of a statement of service by mail and acknowledgment of receipt (CPLR 312-a [a]). In the absence of proper service of the summons and complaint, personal jurisdiction was not acquired (see *Bennett*, 68 AD3d at 910 [complaint dismissed where pro se plaintiff failed to establish compliance with requirements of CPLR 312-a]). The fact that plaintiff is proceeding pro se, and that these defendants appear to have received actual notice of this action, does not alter this result (see *Maddox v State University of New York at Albany*, 32 AD3d 599 [3<sup>rd</sup> Dept 2006]; *Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144 [1<sup>st</sup> Dept 1996]; see also *Macchia v Russo*, 67 NY2d 592, 595 [1986][the fact that these defendants may have received notice by means other than those authorized by statute does not bring them within the jurisdiction of the court]).

Nevertheless, plaintiff argues that any defect in her attempted service can be excused by this court under CPLR 2001, which provides that,

[a]t any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure

to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid

(*id.*).

Our courts have held that a defect in service can be disregarded, under this provision, where it does not implicate personal jurisdiction (see *Deans v Sorid*, 56 AD3d 417 [2<sup>nd</sup> Dept 2008] [disregarding defect in envelopes erroneously bearing the legend "privileged + confidential" instead of "personal and confidential," as the defect did not implicate personal jurisdiction and no prejudice resulted from the mislabeling]). However, because personal jurisdiction over these defendants is implicated, CPLR 2001 is not applicable here, to excuse plaintiff's defects in service.

In any event, even if these defendants had been properly served and personal jurisdiction obtained, their motion to dismiss the complaint for failure to state a cognizable cause of action would be granted. In determining a motion to dismiss made pursuant to CPLR 3211, the factual allegations in the complaint are assumed to be true, the plaintiff is to be accorded "the benefit of every possible favorable inference," and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, allegations consisting of bare legal

conclusions are not entitled to such consideration (see *Maas v Cornell University*, 94 NY2d 87 [1999]).

Here, the complaint offers no allegations of fact nor identifies any specific or actual conduct engaged in by these defendants, which might support plaintiff's wholly legal conclusions that defendants were negligent and/or had committed the other torts listed in the complaint. Plaintiff also never alleges the existence or basis of any relationship she might have had with the moving defendants, upon which a duty to plaintiff might have arisen.

Nevertheless, plaintiff argues that dismissal on this basis would not be warranted, as her exhibits will show that defendants conspired to infringe on plaintiff's designs. In support of this contention, plaintiff submits an exhibit that she claims shows defendants' infringement of various of her 2000-2003 copyright and patent filings. Even if plaintiff's submissions were sufficient to sustain a claim that defendants conspired to infringe on plaintiff's designs and copyrights, dismissal would still be warranted, as this court cannot entertain a dispute in which exclusive jurisdiction has been conferred by Congress on the federal courts (see 28 USC § 1338 [a]).

Accordingly, it is

ORDERED that the motions by defendants Sony and Howard Stringer (Motion Sequence No. 001), XM Sirius and Mel Karmazin

(Motion Sequence No. 002), and Apple and Steve Jobs (Motion Sequence No. 003) to dismiss the complaint pursuant to CPLR 3211 (a) (7) and (a) (8) are granted, and the complaint is dismissed against these defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff with notice of entry.

DATED: 6/18/10

  
Hon. Doris Ling-Cohan, J.S.C.

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