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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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IRWIN SEEMAN,

Plaintiff(s),

-against-

LORRAINE WAGENKNECHT,

Defendant(s).

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Index No. 12892/05

Motion Submitted: 6/1710
Motion Sequence: 005, 006

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant moves this Court for an Order pursuant to CPLR § 3211(a)(2), (5) and (8) dismissing the complaint on the grounds that the Court does not have subject matter jurisdiction of the cause of action, and that the cause of action may not be maintained because of *res judicata*. Defendant also maintains that the cause of action should be dismissed because she was improperly served with the Summons and Complaint and thus, the Court does not have jurisdiction of her person. Plaintiff opposes the requested relief.[1]

Plaintiff cross moves this Court for an Order, pursuant to CPLR § 3212, granting him summary judgment in the sum of $19,500, together with costs and interest from April 8, 2005. Defendant opposes the requested relief.

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[1]Plaintiff's opposition to defendant's motion was submitted to the Court as part of his motion for summary judgment, which is discussed below.

This action[2] follows the break-up of a twenty-seven-year relationship between the parties, who apparently owned various properties together in Florida and Pennsylvania, may have lived together, but who were never legally married. Since the dissolution of the relationship, there have been a number of lawsuits between plaintiff and defendant. Plaintiff claims that he is a resident of Suffolk County, New York. Plaintiff also claims that defendant was a resident of Suffolk County, and that she was a resident of Nassau County at the time of service of the summons and complaint. Defendant claims that she was, and still is, a resident of Pennsylvania at the time of service.

In this particular action before the Court, plaintiff seeks $19,500, plus interest, on a note purportedly signed by defendant and dated April 8, 2005. In that note, defendant allegedly agreed to pay plaintiff the aforementioned sum representing defendant's credit card bills. This note is also apparently related to a property settlement involving the parties' real estate located at 801 Paddle Court, Pike County, Pennsylvania. According to plaintiff, the property settlement/partition action, which was resolved by stipulation before a Pennsylvania court in 2007, was a condition precedent to the note becoming due. Defendant contends that the Pennsylvania stipulation is a complete settlement of all claims between the parties, including the obligation allegedly owed by defendant on the note. Furthermore, defendant claims that she was "physically forced" by plaintiff to sign the note in question, and that plaintiff also made threats against defendant, her children, and her property in order to compel her to sign thereon.

With respect to defendant's motion to dismiss the complaint for lack of personal jurisdiction, defendant alleges that she is a domiciliary of Pennsylvania and that she was lured into Nassau County District Court on a small claims matter filed against her by plaintiff. Defendant claims that, on June 24, 2008, while she and her counsel were conferring in the District Court, Nassau County, plaintiff's process server attempted to serve her with the summons and complaint for this action. Defendant rejected the attempt and the papers fell to the courthouse corridor floor. Defendant notes that immediately after the attempted service on defendant, plaintiff withdrew the Nassau County small claims action, with prejudice. Thus, defendant alleges she was lured to Nassau County District Court by plaintiff solely for the purpose of obtaining personal jurisdiction over her for purposes of this action.

Plaintiff alleges that defendant was a resident of New York when service upon her

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[2]The action was originally brought in Suffolk County, New York, where the parties made the same motions. Pursuant to stipulation entered into by the parties in 2010, the entire matter was transferred to Nassau County, as were the instant motions.

was made.

A New York State resident is subject to the court's jurisdiction and receives no immunity simply for appearing in response to process (***Dept. of Housing Preservation & Development v. Koenigsberg***, 133 Misc.2d 893, 509 N.Y.S.2d 270 [1986]). It is not unlawful to effect service of a summons on a resident defendant in a courthouse building unless it is done under such circumstances as to constitute a disturbance directly tending to interrupt the proceedings of the court or impair the respect due its authority (***Baumgartner v. Baumgartner***, 273 A.D. 411, 77 N.Y.S.2d 668 [1st Dept., 1948]).

It is well settled that a non-resident of the state, while here in attendance upon a court as a party or witness, cannot be arrested or served with process in a civil action (***Parker v. Marco***, 136 N.Y. 585, 32 N.E. 989, [1893]). The doctrine of immunity from service protects non-residents from civil process when they voluntarily appear in New York to participate in legal proceedings either as parties or as witnesses (***Thermoid Co. v. Fabel***, 4 N.Y.2d 494, 151 N.E.2d 883, 176 N.Y.S.2d 331 [1958]). Furthermore, where a defendant is enticed into a jurisdiction by fraud and deceit, service of process thereby effectuated will be vacated (*see* ***Garabettian v. Garabettion***, 206 A.D. 502, 201 N.Y.S. 548 [1st Dept., 1923]).

In order to determine whether a defendant is entitled to immunity, an evidentiary hearing is required on the issue of whether the defendant is, indeed, an out-of-state resident and immune from service of process (*see* ***Weichert v. Kimber***, 229 A.D.2d 998, 645 N.Y.S.2d 674 [4th Dept., 1996]).

To avail oneself of the doctrine of immunity, a defendant must prove that 1) he or she is in fact a non-resident, 2) whose sole purpose in appearing is to attend the legal proceedings, and 3) there were no other means of acquiring jurisdiction over his or her person other than personal service in New York (*see* ***Brause 59 Co. v. Bridgemarket Associates***, 216 A.D.2d 200, 628 N.Y.S.2d 660 [1st Dept., 1995]).

A credibility determination needs to be made, and defendant is thus entitled to a hearing to resolve the issue. (*See* ***Lattingtown Harbor Property v. Agostino,*** 34 A.D.3d 536, 825 N.Y.S.2d 86 [2d Dept., 2006]). The Court does not find that defendant has waived her jurisdictional defense by raising a counterclaim related to the same piece of property in Pennsylvania, which property is inextricably intertwined with this action (*see* ***Textile Technology Exchange, Inc. v. Davis***, 81 N.Y.2d 56, 611 N.E.2d 768, 595 N.Y.S.2d 729 [1993]).

As to that branch of defendant's motion to dismiss plaintiff's action pursuant to CPLR § 3211(a)(5), based on *res judicata*, defendant claims that the stipulation between the parties

dated November 20, 2007 represents a full and complete settlement of all claims in the Commonwealth of Pennsylvania, including the alleged $19,500 debt at issue here. In support of her claim, defendant has supplied an affidavit from her Pennsylvania attorney who states that the issues addressed by the stipulation did not exclusively relate to the partition action regarding the real property, but included, *inter alia*, credit card bills and the $19,500 debt forming the basis of this action. On the other hand, defendant has also submitted the minutes of the stipulation conference held before the Pennsylvania court, which do not support her claim that the credit card debt at issue was part of that stipulation. The minutes concern the transfer of various pieces of real estate between the parties, a check for counsel fees, payment of transfer taxes related to the real estate, a gas tank, and a sink.

Pursuant to the doctrine of *res judicata*, a final judgment precludes reconsideration of all claims that could have or should have been litigated in the prior action or proceeding against the same party (*see* ***Wissell v. Indo-Med Commodities, Inc.***, 74 A.D.3d 1059, 903 N.Y.S.2d 116 [2d Dept., 2010]). Here, there is no evidence that the money allegedly owed was a "claim in the Commonwealth of Pennsylvania," and no mention was made of the note, or the existence of that $19,500 debt. Thus, defendant's motion to dismiss the complaint on the grounds of *res judicata* is denied.

As to the issue of subject matter jurisdiction (CPLR § 3211[a][2]), defendant's motion is denied. The New York State Supreme Court is a court of general jurisdiction, and the plaintiff in this action is a New York State domiciliary. Thus, the Court has subject matter jurisdiction of this action.

Turning now to plaintiff's summary judgment motion, the Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendant (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

Also, issues of credibility generally require the denial of summary judgment and are to be resolved by the trier of fact. ***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:6***, at 14; ***Donato v. ELRAC, Inc.***, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); ***Frame v. Markowitz***, 125 A.D.2d 442, 509 N.Y.S.2d 372 (2d Dept., 1986).

As outlined above, there exist many issues of fact, and the credibility of the parties is critical to the determination of this action. Plaintiff has failed to establish his entitlement to summary judgment pursuant to the note at issue. Plaintiff's summary judgment motion is denied.

All parties and counsel shall appear at the Calendar Control Part on the first floor of the Supreme Court on October 28, 2010 at 9:30 a.m. for a traverse hearing on the issue of defendant's residency and the propriety of the alleged service on defendant in the Nassau County District Court, subject to the approval of the Justice there presiding and provided a note of issue has been filed at least ten (10) days prior thereto.

The parties, in preparing for the traverse hearing, shall provide their respective adversaries with all documentation the respective parties intend to produce at the traverse hearing five (5) business days prior thereto.

A copy of this order shall be served on the Calendar Clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

The foregoing constitutes the Order of this Court.

Dated: September 9, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED

SEP 15 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE