

**Lowell Hotel Assoc., L.P. v Jacobson**

2010 NY Slip Op 33704(U)

December 27, 2010

Supreme Court, New York County

Docket Number: 108002/2009

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

LOWELL HOTEL ASSOCIATES, L.P.  
Plaintiff,

INDEX NO. 108002/2009

-against-

MOTION SEQ. NO. 001

CAROLYN JACOBSON,  
Defendant.

MOTION CAL. NO. \_\_\_\_\_

The following papers were read on this order to show cause by plaintiff for leave to amend the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

**FILED**

PAPERS NUMBERED

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

JAN 21 2011

1

Reply Affidavits — Exhibits (Memo) \_\_\_\_\_

2

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Cross-Motion:  Yes  No

This motion arises from a case in which a hotel attempted to sue a former occupant for occupancy fees, but the wrong entity was named as plaintiff in the suit. Plaintiff now moves to amend the complaint to substitute the hotel owner as plaintiff in the place of the unrelated party.

As background, Lowell Hotel Properties LLC (hereinafter "Properties") is and was at all relevant times the owner of a certain hotel property, which was formerly owned by Lowell Hotel Associates, L.P. (hereinafter "Associates"). Associates initiated a holdover proceeding against the defendant. Kolodny P.C. (hereinafter "Kolodny") represented the defendant in that holdover proceeding. Kolodny states in its motion papers that it made a motion to withdraw as counsel in the holdover proceeding because of defendant's failure to pay legal fees, and that Kolodny withdrew the motion to withdraw because defendant tendered a check for the legal fees due. However, defendant's check bounced, and there are still outstanding legal fees. Ultimately, the holdover proceeding was dismissed because Associates, having no interest in the hotel property, did not have standing to bring the holdover proceeding.

While the holdover proceeding was pending, Associates served defendant with a complaint seeking payment of the unpaid occupancy fees. Kolodny alleges that it refused to represent defendant in the suit for occupancy fees due to non-payment of the legal fees related to the holdover proceeding. However, defendant convinced Kolodny to enter into a stipulation on her behalf extending her time to file an answer. The stipulation opens by indicating that it is made by and between "the attorneys for the plaintiff and the attorneys for defendant," and is signed by Kolodny as "Attorneys for Defendant" (Plaintiff's Order to Show Cause, Ex. 4).

Upon dismissal of the holdover proceeding, Plaintiff realized that Properties, and not Associates, is the proper owner of the subject hotel, and therefore attempted to serve an amended summons and complaint to substitute Properties as plaintiff herein. However, by that time defendant had apparently left the country, leaving no forwarding address. Plaintiff therefore attempted to serve Kolodny. Kolodny rejected service of the amended summons and complaint on grounds that it had never appeared for defendant in this action, and that amendment of the complaint was improper without leave of court.<sup>1</sup>

Plaintiff now moves to amend by order to show cause. Service of the motion papers was made upon Kolodny. Kolodny has opposed the motion, stating that it never appeared on defendant's behalf, and therefore service of the order to show cause was improper.

### **Discussion**

Generally, a motion for leave to amend is to be liberally granted provided that the delay in amending does not result in prejudice or surprise to the non-moving party (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1<sup>st</sup> Dept. 2003], citing *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given."]). Here, the substitution of Properties for Associates will not result in a surprise upon

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<sup>1</sup>At the time of the service of the amended summons and complaint upon Kolodny, it appears that plaintiff could still amend the summons and complaint as of right, as the time in which to respond to the complaint had been extended upon mutual agreement (see CPLR 3025[a]).

defendant, who was adequately advised by the original complaint of the nature of and transactions underlying the action.

Article 21 of the CPLR may prevent amendment here, as it requires that motion papers be served upon the opposing party. CPLR 2103(b) provides that papers shall be served upon a party's attorney, but CPLR 2103(c) states that, if a party has not appeared by attorney, the papers must be served upon the party. Kolodny maintains that it is not the party's attorney, and that the motion is therefore procedurally defective without serving the motion papers directly upon the defendant. As Kolodny has not argued that defendant was not initially served properly, or that the Court lacks personal jurisdiction, plaintiff's arguments regarding personal jurisdiction are ostensibly irrelevant.

The question therefore becomes whether Kolodny has appeared as an attorney in the action for non-payment of occupancy fees, either by reason of Kolodny's status as attorney of record in a separate case, or by representing the defendant for purposes of the stipulation extending the time to file an answer. The CPLR does not provide for an "automatic" appearance by an attorney for a defendant, even if that same attorney is the attorney of record for that same defendant in a related action.<sup>2</sup>

Kolodny did appear on plaintiff's behalf in the herein action, however, as the subject stipulation qualifies as a notice of appearance for the limited purposes of CPLR 2103(c). The text of the stipulation does not expressly state that Kolodny is appearing on behalf of defendant, but it is a legal document expressly qualifying Kolodny as attorney for the defendant in the within action. Furthermore, permission for representation in this action was implicit in defendant's direction for Kolodny to enter a stipulation on her behalf. Kolodny's own motion papers seem to indicate that defendant wished for Kolodny to represent her, and Kolodny would

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<sup>2</sup>It may be worth noting that CPLR 303 is irrelevant. That section provides that, in some cases, a plaintiff's attorney may be automatically designated as agent for service of process upon the plaintiff as a defendant in a separate action, where the separate action could have been brought as a counterclaim.

have been willing had it anticipated being paid. Under the circumstances, if Kolodny did not want to appear for defendant in this action, it should either have refused to sign the stipulation, or should have written additional language into the stipulation expressly limiting the scope of representation.

To frame the above differently, the Court disagrees with Kolodny as to the strict equivalence of the term "appearance" as used in CPLR Article 3 to its use in CPLR 2103(c). CPLR 320(a) provides in pertinent part that "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." As Kolodny did not serve an answer or 320(a) notice and demand<sup>3</sup>, nor make a motion in the action herein, Kolodny maintains that it has not appeared. The requirements of CPLR Article 3 exist, however, because Article 3 appearance will confer personal jurisdiction upon the court. Where personal jurisdiction is not at issue, the Court believes that an attorney who identifies himself in legal documents as a party's attorney should be considered that party's attorney within the meaning of CPLR 2103.

As service of the motion to amend by order to show cause was effective upon Kolodny, the motion to amend should be granted. If Kolodny wishes to be removed as attorney in the herein action, then it may make a CPLR 321(b)(2) motion to withdraw. As to Kolodny's insistence that it would be subject to disciplinary action by representing the defendant herein, the Court disagrees for the same reasons stated hereinabove.

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<sup>3</sup>A notice of appearance under CPLR 320(a) is intended to be combined with a demand for complaint, and is the method by which a defendant may respond to a summons and notice, where there is no complaint to which the defendant may respond. The standard language for such a notice and demand is: "Take notice that the defendant, through the undersigned as attorney, hereby appears in the action and demands a copy of the complaint." (see Siegel, New York Practice §110 [4<sup>th</sup> ed.]

It is therefore,

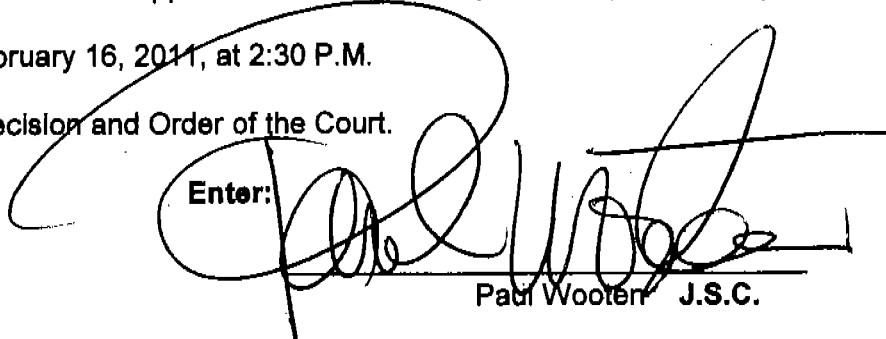
ORDERED that the plaintiff's motion for leave to amend the complaint is granted; and it is further,

ORDERED that the parties shall appear in this Part (80 Centre Street, Room 320) for a preliminary conference on February 16, 2011, at 2:30 P.M.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Enter:



Paul Wooten J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**FILED**

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