

Wilhelmina Models, Inc. v Next Model Mgmt., Inc.

2011 NY Slip Op 32498(U)

September 12, 2011

Sup Ct, NY County

Docket Number: 115065/10

Judge: Emily Jane Goodman

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

DECEASED. **EMILY JANE GOODMAN**

PART 17

Index Number : 115065/2010

WHILHELMINA MODELS, INC.

vs

NEXT MODEL MANAGEMENT, INC.

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is denied
for attached*

AS ordered

FILED

SEP 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/12/11

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 17

-----X
WILHELMINA MODELS, INC. et al

Plaintiffs,

Index No. 115065/10

-against-

NEXT MODEL MANAGEMENT, INC.

FILED

Defendant.

SEP 19 2011

-----X

EMILY JANE GOODMAN, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendant moves to dismiss Plaintiffs' complaint based on (1) purported documentary evidence (i.e., Defendant's counsel's statement that it took "great care" to obtain affirmative statements from the models that no other contract would be breached); (2) failure to state a claim for tortious interference, because Plaintiffs' did not provide the relevant contracts or state the periods at issue¹ and did not state how Defendant induced any breach; (3) the failure to sue Defendant as Next Management LLC. and to properly effectuate service on it, where Plaintiffs was sued Next Model Management, Inc. a non-existent entity. Defendant also moves to strike the requests for punitive damages and attorneys fees, and further seeks security for costs.

CPLR 305 (c) provides that "[a]t any time...the court may

¹The contracts were attached in opposition.

allow any summons ...to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced."² An amendment correcting a misnomer relates back to the date that the summons was filed, and the Court can grant this relief at anytime. Although Plaintiffs failed to cross move for such relief, merely filing opposition papers, the Court finds that a formal cross motion is unnecessary. Where amendment is sought under CPLR 1024 (which provides that a party should be designated by so much of its name as is known), no formal motion is necessary. *Woodburn Court Assoc. I v Wingate Mgt. Co.*, 243 AD2d 1043, 1045 (3d Dept 1997) (no motion was required under CPLR 1024 to add Hartford Fire Insurance Company as a defendant after its identity was ascertained); see also Siegel, NY Prac § 188 (4th ed.). Accordingly, as there is no reason why a formal motion should be required here, but not under CPLR 1024, and the court will disregard Plaintiffs' failure to cross move for relief.

The decision on whether to permit amendment under CPLR 305 (c) is based upon two factors-whether jurisdiction was obtained

²CPLR 2001 (not cited by Plaintiffs) similarly authorizes the court to permit the correction of a mistake, omission or defect, or to disregard such defect if a substantial right of a party is not prejudiced thereby. Courts have held that mistakes relating to the name of a party fall within this category, and where the misnomer did not mislead the defendant concerning whom the plaintiff was seeking to sue, dismissal is not warranted. See *Suarez v Shorehaven Homeowners Assn., Inc.*, 202 AD2d 229, 231 (1st Dept 1994); *Covino v Alside Aluminium Supply Co.*, 42 AD2d 77, 80 (4th Dept 1973).

over the intended defendant and the lack of prejudice, meaning that the papers fairly apprised the intended defendant that it was the subject of the lawsuit. See e.g., *Holster III v Ross*, 45 AD3d 640 (2d Dept 2007). The Practice Commentaries to CPLR 305 (c) note that the issue of whether to permit such amendment is complicated when the intended defendant is a business organization sued in the wrong name, i.e., as when the lawsuit names a corporation when in fact the business is a partnership. See Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:4 at 70-71. The Commentaries further note that most cases disallowing amendment thereunder are based primarily on the absence of any effective service of process on the intended defendant, thus depriving the court of jurisdiction over the party sought to be named. See *id.* at 71.

Here, the papers fairly apprise the defendant that it was the intended recipient, in light of the fact that the named defendant was a non-existent modeling agency, and because the intended defendant does not dispute that it received notice of the lawsuit and was served with the summons and complaint at its actual business address, which is also the address listed in the model contracts. See *Holster III v Ross*, 45 AD3d at 641 (amendment was permitted where defendant did not dispute that it received notice of the lawsuit and was served with the summons and complaint at the actual business address).

However, the issue of whether personal jurisdiction was obtained is referred to a Special Reference to hear and report. The remainder of the motion is held in abeyance pending a decision on a separate motion to confirm or reject that decision. Plaintiffs state in their memorandum of law in opposition, and attach the affidavit of the process server, indicating that service was made allegedly made on the receptionist Michelle Adell at 15 Watts Street New York, who informed the process server that she was authorized to accept service at that address.³ Although no cases were cited by either side, and although Plaintiffs do not even identify the relevant statute, effective service might have been obtained under CPLR 311-a. Cases have upheld service on an individual not authorized in writing or by position to accept service, where that individual has represented his or her authority to accept service to the process service. See e.g., *Aguilera v Pistilli Const. & Dev. Corp*, 63 AD3d 765 (2d Dept 2009) (applying CPLR 311). Given that Defendant has submitted the affidavit of Ms. Adell, stating that she is not an officer, is not authorized to accept legal service and never informed the process server that she was so authorized,

³Plaintiffs do not contend that the receptionist was a member or manager of the LLC, or was actually authorized by written appointment to accept service, or that service was made Limited Liability Company Law Section 303 (a), (service on the secretary of state).

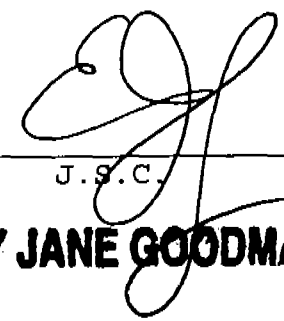
Defendant is correct in stating that a traverse must be held.⁴

Accordingly, it is hereby

ORDERED that the issue of whether personal service was properly effected under CPLR 311-a, via service on Ms. Adell, including but not limited to whether she informed the process server that she was so authorized, is referred to a Special Referee to hear and report; and it is further

ORDERED that the remainder of the motion to dismiss is held in abeyance pending a decision on a separate motion to confirm or reject the decision of the Special Referee.

Dated: September 12, 2011

ENTER: 

J.S.C.

EMILY JANE GOODMAN

FILED

SEP 19 2011

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⁴Although this affidavit was submitted in reply and generally new issues raised in reply papers must be disregarded, the affidavit is accepted because Plaintiffs will have the opportunity to address the issue at the traverse and because the need to submit the affidavit did not arise until after the opposition papers raised the issue of service on the receptionist.