

Statuto v Schuhmann's Inn, Inc.

2011 NY Slip Op 32790(U)

October 13, 2011

Supreme Court, Suffolk County

Docket Number: 3532/2006

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

STEFEN STATUTO,

Plaintiff,

-against-

SCHUHMANN'S INN, INC., KENNETH
FRANCIS SCHUHMANN, a/k/a KENNETH
FRANCIS SCHUHMANN, JR., d/b/a
SCHUHMANN'S PUB, RONALD J.
RASANEN and ROBERT TRIBUZIO,

Defendants.

ORIG. RETURN DATE: MARCH 17, 2011
FINAL SUBMISSION DATE: MARCH 31, 2011
MTN. SEQ. #: 006
MOTION: MOT D

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Upon the following papers numbered 1 to 7 read on this motion _____

TO VACATE DEFAULT JUDGMENT AND OTHER RELIEF

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers
4, 5; Reply Affirmation 6; Reply Affirmation 7; it is,

ORDERED that this motion by plaintiff, STEFEN STATUTO
("plaintiff"), for an Order: (1) vacating this Court's prior Order dated September
19, 2008, which was allegedly procured through fraud, misrepresentation, and
other misconduct on the part of KENNETH FRANCIS SCHUHMANN and denying
KENNETH FRANCIS SCHUHMANN's motion to vacate the default judgment on

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the grounds that plaintiff obtained personal jurisdiction over KENNETH FRANCIS SCHUHMANN; (2) amending the caption back from "KENNETH FRANCIS SCHUHMANN, a/k/a KENNETH FRANCIS SCHUHMANN, JR., d/b/a SCHUHMANN'S PUB" to the original caption entitled "KENNETH FRANCIS SCHUHMANN, d/b/a SCHUHMANN'S PUB," *nunc pro tunc*; (3) conforming the Inquest held on November 20, 2008 and Judgment dated April 27, 2009 and entered in the Suffolk County Clerk's Office on June 9, 2009, to have been taken against the proper intended and named defendant "KENNETH FRANCIS SCHUHMANN, d/b/a SCHUHMANN'S PUB"; or, in the alternative (4) vacating this Court's prior Order dated September 19, 2008, which was allegedly procured through fraud, misrepresentation, and other misconduct on the part of KENNETH FRANCIS SCHUHMANN and denying KENNETH FRANCIS SCHUHMANN's motion to vacate the default judgment on the grounds that plaintiff obtained personal jurisdiction over KENNETH FRANCIS SCHUHMANN, and vacating the Judgment dated April 27, 2009 and entered in the Suffolk County Clerk's Office on June 9, 2009, compelling the intended defendant, "KENNETH FRANCIS SCHUHMANN, d/b/a SCHUHMANN'S PUB" to serve a verified answer to the complaint within twenty (20) days of this Court's decision and defend this matter on the merits; and (5) costs for all legal proceedings, disbursements and fees from the date of this Court's Order dated September 19, 2008 through the present, which have all allegedly resulted from KENNETH FRANCIS SCHUHMANN's fraud, misrepresentations and other misconduct in the defense of this action, is hereby **GRANTED** solely to the extent provided hereinafter. The Court has received opposition to this application from KENNETH FRANCIS SCHUHMANN, SR. ("Senior").

This action was commenced by plaintiff with the filing of a summons and verified complaint on or about February 16, 2006, to recover damages for personal injuries allegedly sustained by plaintiff during an incident that occurred on or about February 23, 2005, at the premises known as Schuhmann's Pub located in Riverhead, New York.

By Order dated December 17, 2007, this Court granted an application by plaintiff for a default judgment against defendant "KENNETH FRANCIS SCHUHMANN, d/b/a SCHUHMANN'S PUB," and set the matter down for an Inquest against this defendant on January 17, 2008. Prior to the Inquest being held, Senior made a motion to vacate the default and Inquest Order of December 17, 2007. By Order dated September 19, 2008, this Court denied Senior's motion, holding that although not denominated in the caption, plaintiff

intended to sue KENNETH FRANCIS SCHUHMAN, JR. ("Junior"), the alleged owner of Schuhmann's Pub on the date of the subject assault. The Court noted that plaintiff's counsel had concurred with this assertion, which was based upon the sworn statements of Senior in an affidavit in support of his motion. Senior had averred therein, among other things, that on October 22, 2003, he sold the business to Junior, and that since that time he had absolutely no involvement with the tavern business and had no control of the premises. The Court further held that the Inquest against KENNETH FRANCIS SCHUHMAN, d/b/a SCHUHMAN'S PUB was to be conducted on October 30, 2008.

The Inquest was ultimately conducted on November 20, 2008. At the onset of the proceedings, the Court directed that the caption of this matter be amended to "KENNETH FRANCIS SCHUHMAN, a/k/a KENNETH FRANCIS SCHUHMAN, JR." based upon the record at that time. Subsequently, the plaintiff was awarded \$250,000 against "KENNETH FRANCIS SCHUHMAN, a/k/a KENNETH FRANCIS SCHUHMAN, JR., d/b/a SCHUHMAN'S PUB" by Judgment dated April 27, 2009 and entered in the Suffolk County Clerk's Office on June 9, 2009 ("Judgment").

Thereafter, Junior filed a motion, pursuant to CPLR 5015, to vacate the Judgment, and pursuant to CPLR 3211 (a) (8), to dismiss this action as asserted against him, alleging that this Court does not have jurisdiction over him. In the alternative, Junior sought to have this matter set down for a traverse hearing to determine the propriety of service of process upon him. Junior had indicated that plaintiff served him by "nail and mail" service on June 10, 2006, at Schuhmann's Pub located at 70 West Main Street, Riverhead, New York. However, Junior claimed that on June 10, 2006, Schuhmann's Pub was not his actual place of business. In support of thereof, Junior had submitted, among other things, a certified copy of an Amended Business Certificate, executed on August 3, 2004 and filed with the Suffolk County Clerk on even date, indicating that Kenneth F. Schuhmann Jr. was removed as a partner of the business entity known as "Schuhmann's Pub & Grill," leaving Kimberly A. Schuhmann as the sole owner thereof. Junior had informed the Court that Kimberly A. Schuhmann is his sister, and that Senior is their father and the original owner of the business. Junior further informed the Court that the liquor license for the business was always held by Senior.

In response thereto, plaintiff filed a motion seeking a stay of a decision on Junior's motion to vacate the Judgment and to dismiss the action,

and a testimonial hearing to determine whether Junior and/or Senior was the owner of Schuhmann's Pub and the holder of the liquor license at Schuhmann's Pub on February 23, 2005. Plaintiff further sought to vacate the Order dated September 19, 2008, which allegedly discontinued this action against Senior, on the grounds of fraud, misrepresentation, or other misconduct of an adverse party. Plaintiff had indicated that he relied on a Business Certificate on file with the Suffolk County Clerk on August 20, 2007, which indicated that the owner of the business was Junior. Further, plaintiff had alleged that as the liquor license for the business is in the name of "Kenneth Francis Schuhmann," it was unclear which Kenneth Francis Schuhmann is the holder thereof. Plaintiff sought to compel defendant to produce the underlying application in order to determine which Kenneth Francis Schuhmann is the holder of the liquor license.

By Order dated December 23, 2010, the Court granted the motions of Junior and plaintiff solely to the extent that the parties were directed to appear for a traverse hearing on February 10, 2011, to determine the propriety of service of the summons and verified complaint upon Junior.

Plaintiff alleges that in preparation for the traverse hearing, he caused a subpoena to be served upon the New York State Liquor Authority; he received certified copies of the Business Certificate dated October 29, 2003 and the Amended Business Certificate dated August 3, 2004 from the Suffolk County Clerk's Office; and he caused a subpoena to be served upon Senior directing him to appear at the traverse hearing. The records had not yet been received pursuant to the subpoena by February 10, 2011, so the traverse hearing was adjourned to March 17, 2011. In the interim, the records were received and plaintiff filed the instant application for the relief described hereinabove.

Based upon the documents received pursuant to subpoena, and Senior's representations to the Court in opposition hereto, it has now been established that: (1) Junior was removed as a partner of Schuhmann's Pub & Grill as of August 3, 2004, leaving Kimberly A. Schuhmann as the sole owner thereof; and (2) Senior held the liquor license for the business as of on or about June 26, 1993, and held the liquor license on the date of the subject incident, to wit: on or about February 23, 2005, as well as the date of service of process, to wit: June 10, 2006, notwithstanding the transfer of ownership of the business. Therefore, the Court finds that the Judgment against Junior must be vacated, and this action as asserted against Junior must be dismissed for lack of personal jurisdiction.

With respect to plaintiff's request to amend the caption back to "KENNETH FRANCIS SCHUHMANN, d/b/a SCHUHMANN'S PUB" in order to reflect Senior as a defendant, under CPLR 305 (c) an amendment to correct a misnomer will be permitted only if the Court has acquired jurisdiction over the intended but misnamed defendant, and provided that the intended but misnamed defendant was fairly apprised that he was the party the action was intended to affect and would not be prejudiced by allowing the amendment (*see Smith v Giuffre Hyundai, Ltd.*, 60 AD3d 1040 [2009]; *Smith v Garo Enters., Inc.*, 60 AD3d 751 [2009]; *Holster v Ross*, 45 AD3d 640 [2007]; *Pugliese v Paneorama Italian Bakery Corp.*, 243 AD2d 548 [1997]).

Here, despite Senior's arguments to the contrary, the Court finds that it has acquired personal jurisdiction over Senior. Pursuant to CPLR 308 (4), service may be effectuated "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business" (CPLR 308 [4]). The "nail and mail" provision of CPLR 308 (4) clearly requires that the "nailing" be done at a defendant's "actual place of business, dwelling place or usual place of abode" (*see Feinstein v Bergner*, 48 NY2d 234 [1979]; *Commissioners of State Ins. Fund v Khondoker*, 55 AD3d 525 [2008]).

As noted hereinabove, "KENNETH FRANCIS SCHUHMANN, d/b/a SCHUHMANN'S PUB" was served by "nail and mail" service on June 10, 2006, at Schuhmann's Pub located at 70 West Main Street, Riverhead, New York. Senior argues that on June 10, 2006, Schuhmann's Pub was not his actual place of business. However, Senior held the liquor license for the business on that date, which according to statute must be "enclosed in a suitable wood or metal frame having a clear glass space and a substantial wood or metal back so that the whole of said license may be seen therein, and shall be posted up and at all times displayed in a conspicuous place in the room where such business is carried on, so that all persons visiting such place may readily see the same" (Alcoholic Beverage Control Law § 114 [6]). In addition, within an Agreement of Sale made on November 25, 2006, Senior represented himself as the owner/seller of the business known as Schuhmann's Pub having an address of 70 West Main Street, Riverhead, New York. CPLR 308 (6) provides: "For purposes of this section, 'actual place of business' shall include any location that the defendant, through regular solicitation or advertisement, has held out as its

place of business” (CPLR 308 [6]). Based upon the foregoing, the Court finds that plaintiff has demonstrated that Senior held out the address at which he was served as his actual place of business within the meaning of CPLR 308 (6), and that service was valid upon him pursuant to CPLR 308 (4) (see *Robeck v Prasad*, 6 AD3d 690 [2004]; *Vid v Kaufman*, 282 AD2d 739 [2001]; *Gibson, Dunn & Crutcher v Global Nuclear Servs. & Supply*, 280 AD2d 360 [2001]). Moreover, Senior was apprised that it was the party the action was intended to affect in or about May of 2008, when he made the motion to vacate the default Order of this Court dated December 17, 2007. Furthermore, it appears that Senior had notice of the underlying incident as early as June 20, 2005, as a result of a “Notice of Pleading” sent to Senior by the New York State Division of Alcoholic Beverage Control, which initiated proceedings to cancel or revoke his liquor license as a result of this incident.

In view of the foregoing, plaintiff’s motion is **GRANTED** solely to the extent that the Judgment dated April 27, 2009 and entered in the Suffolk County Clerk’s Office on June 9, 2009, is hereby vacated, and the Clerk of the Court is directed to do so, and this action as asserted against Junior is dismissed. The caption of this matter shall be amended to reflect the intended defendant, to wit: “KENNETH FRANCIS SCHUHMANN, a/k/a KENNETH FRANCIS SCHUHMANN, SR., d/b/a SCHUHMANN’S PUB,” and Senior is directed to serve a verified answer to the verified complaint within twenty (20) days of service of the instant Order with notice of entry upon Senior, so that Senior may defend this matter on the merits.

The foregoing constitutes the decision and Order of the Court.

Dated: October 13, 2011



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION