

Gerschel v Christensen
2013 NY Slip Op 31370(U)
June 25, 2013
Sup Ct, NY County
Docket Number: 651561/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA JAFFE

J.S.C.

PRESENT: HON. [REDACTED]
JusticePART 12Index Number : 651561/2010
GERSCHER, ALEXANDER J.

vs

LAND BASE LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO. 651561/10

MOTION DATE _____

MOTION SEQ. NO. 001

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

16-~~31~~1719-29,32Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):Dated: 6/25/13

BARBARA JAFFE

J.S.C.

Check one: ☐ FINAL DISPOSITION☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST☐ REFERENCE☐ SUBMIT ORDER/JUDG.☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
ALEXANDER J. GERSCHEL, ANDRE F. GERSCHEL,
DANIEL A. GERSCHEL, and PHILPPE J. GERSCHEL,

Index No. 651561/10

Plaintiffs,

-against-

Subm.: 2/20/13
Motion seq. nos.: 001, 001x

DECISION & ORDER

CRAIG G. CHRISTENSEN, CHRISTENSEN CAPITAL
LAW CORPORATION, CHRISTENSEN LAW GROUP
LLP, CHRISTENSEN AND BARRUS, INC., JEFFREY
M. MORITZ, UNIVEST FINANCIAL SERVICES, INC.,
LAND BASE LLC, NATURE ISSUES, INC., STERLING
PEAK, INC., ZAMWORKS, LLC, PROPRIETARY
MEDIA, INC., JOHN DOES 1-50, JOHN DOE
CORPORATIONS 1-50,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiff:

Justin M. Sher, Esq.
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212-631-0200

For defendants:

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Himmel & Bernstein, LLP
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212-202-2600

By notice of motion dated November 22, 2011, all defendants but the John Doe
defendants move pursuant to CPLR 3211(a)(8) and (e) for an order dismissing plaintiffs' claims
against them. Plaintiffs oppose.

By notice of cross motion dated February 3, 2012, plaintiffs move for a default judgment
against certain defendants. Defendants oppose.

I. BACKGROUND

On September 15, 2010, defendants Craig G. Christensen (Christensen), Christensen
Capital Law Corporation (Christensen Capital), Christensen and Barrus, Inc. (Christensen and

Barrus), Jeffrey M. Moritz (Moritz), Sterling Peak, Inc. (Sterling), Zamworks, LLC (Zamworks), and Proprietary Media, Inc. (Proprietary) entered into a tolling agreement with plaintiffs, effective September 15, 2010 and expiring April 1, 2011. They agreed that in order “to encourage resolution and/or such further review or disposition of [plaintiffs’ claims] . . . , [and] in order to defer and postpone the commencement of litigation,” “Timing Defenses applicable to the Claims shall be tolled during the Tolling Period.” Plaintiffs additionally agreed to “forebear from filing a petition or complaint or initiating any lawsuit or other legal proceeding against [defendants] until on or after the last day of the Tolling Period that is not a Saturday, Sunday, or legal holiday.” Defendants paid plaintiffs \$100,000 as required by the agreement.

On September 21, 2010, plaintiffs filed with the court a summons with notice naming as defendants Land Base LLC (Land Base), Nature Issues, Inc. (Nature Issues), and the John Does, none of whom is party to the tolling agreement. The nature of the action is set forth therein as “conversion, aiding and abetting breach of fiduciary duty and related claims,” and the relief sought is approximately \$17 million in damages. The notice summons the appearance of those defendants by serving a notice of appearance within 20 days after service, or 30 days after service if not personally served. The summons with notice was personally served on those defendants on December 22, 2010. No responsive pleading was served.

On April 4, 2011, defendants Christensen, Christensen Capital, Christensen Law Group LLP (Christensen Law), Univest Financial Group, Inc. (Univest), Moritz, Sterling, Zamworks, and Proprietary entered into an amended tolling agreement with plaintiffs effective between April 4, 2011 and July 1, 2011, on terms similar to the first tolling agreement. Defendants did not pay plaintiffs the required \$100,000.

On July 1, 2011, plaintiffs filed with the court a summons and complaint naming the parties to the amended tolling agreement, using the same index number used with the summons of notice. Affidavits of service were filed with the court attesting to service on new party defendants Christensen, Christensen Capital, Christensen & Barrus, Moritz, Nature Issues, Sterling, Zamworks, and Proprietary. On July 7, 2011, a summons and amended complaint, including a new cause of action for breach of the first tolling agreement, was filed. Plaintiffs had not advised these defendants that they had commenced the instant action on September 21, 2010.

It is undisputed that none of the defendants have answered.

II. CONTENTIONS

Defendants complain that plaintiffs violated CPLR 1003 by adding defendants and a cause of action without obtaining leave of the court. And, relying on CPLR 305(a), they claim that the July 7 summons is jurisdictionally defective due to plaintiffs' failure to specify in the summons the pleading to be answered, instead including advice that defendants serve a notice of appearance. Defendants also maintain that the summons served on Nature Issues is defective in that it is bereft of any advice to defendant to respond to the pleading, and is fatally bare of notice concerning the nature of the claims against them. Additionally, they claim that as plaintiffs failed to serve Univest Financial Services, Inc. or Christensen Law Group, LLP, and that more than 120 days have elapsed since the filing of the summons and amended complaint, those defendants are also entitled to a dismissal.

Plaintiffs deny that they untimely or improperly joined the new defendants, having done so before the expiration of the 20-period for responding to the summons, reasoning that absent a responsive pleading from Land Base or Nature Issues, the 20-day period within which a party

may be joined without leave of court pursuant to CPLR 1003 never expired. They maintain that the absence of reference in the July 2011 summons of the amended complaint or advice that defendants answer the amended complaint is of no moment given defendants' failure to either appear or answer, and that such errors are minor and not prejudicial. They also maintain that defendants are precluded by the tolling agreements from moving for dismissal, reasoning that the time between the filing of the summons with notice on September 21, 2010 and the filing of the summons and complaint on July 1, 2011 should be excluded for the purpose of calculating the 20-day period. They cross move for a default judgment.

In reply, defendants reiterate their arguments on plaintiffs' addition of parties and the defects in the July 7 summons, and argue that the prohibition in the tolling agreements against "Timing Defenses" poses no obstacle to a defense based on improperly added parties, which they distinguish from defenses based on statutes of limitations, laches or commencing an action. They thus claim that plaintiffs have not established their entitlement to a default judgment.

III. ANALYSIS

A. Defendants' motion to dismiss

Pursuant to CPLR 3211(a)(8), a party may move to dismiss a pleading in the absence of jurisdiction over the person of the defendant, and pursuant to subdivision (e), the motion may be made at any time before service of the responsive pleading is required.

1. Adding parties

In pertinent part, CPLR 1003 provides that "parties may be added . . . once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading

responding to it.”

Here, plaintiffs could have added parties without leave of court within 20 days after December 22, 2010 when it served the summons with notice, or any time before the expiration of the 20-day period given for service a notice of appearance in the action. Because the third alternative presumes the service of a responsive pleading, the third alternative is ordinarily inapplicable where a responsive pleading has not been served.

As defendants neither served a written demand for the complaint nor a notice of appearance, plaintiffs' obligation to serve a complaint was never triggered (CPLR 3012[b]), and thus, the time for serving the response never commenced running. Consequently, “the period for responding to th[e] summons” never expired and plaintiffs were within their rights in adding parties as of right.

2. Sufficiency of July 7 summons

Pursuant to CPLR 305(a), where a new party is joined in the action as of right pursuant to section 1003 and not upon the new party's motion, “a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party.”

Having attached the amended complaint to the July 7summons, plaintiffs substantially complied with the statute. The failure to mention the complaint in the summons does not render the pleading defective.

3. Sufficiency of summons served on Nature Issues

The summons served on Nature Issues is not defective, and is sufficiently specific.

4. Claims against Univest Financial Services, Inc. and Christensen Law Group, LLP

Absent any affidavits of service showing that service was made on these specific defendants, and as the time to serve has expired, the claims against them are dismissed. That plaintiffs may have served their authorized agents in their personal capacities is irrelevant absent any evidence that the agents were informed that they were being served on behalf of these corporate entities or that they were served with an additional set of papers for the corporate defendants. (*See Raschel v Rish*, 69 NY2d 694 [1986] [finding that doctor was not properly served with pleadings, where one copy of pleadings was served on hospital administrator, who was conceivably qualified to accept service for doctor; to be sufficient, administrator had to know that service was being made on doctor as well as hospital, notify doctor, and provide doctor with copy of pleadings]; *McCormack v Gomez*, 137 AD2d 504 [2d Dept 1988] [where defendants were both named in summons and lived at same address, process server required to deliver or leave two copies of summons, one for each defendant]; *Stanley Agency, Inc. v Behind the Bench, Inc.*, 23 Misc 3d 1107[A], 2009 NY Slip Op 50626 [Sup Ct, Kings County 2009] [even if person served was appropriate person to accept service for certain defendant, service of only one copy insufficient as no evidence that person served knew or could easily have inferred that plaintiff intended to serve multiple defendants by serving her]; *Beaver Univ. Corp. v 1111 Jamaica Ave. Queens Leasing Corp.*, 163 Misc 2d 1039 [Sup Ct, Queens County 1995] [where summons named one defendant personally and also named corporation and partnership as defendants, of which defendant was officer, service of one copy of pleadings on defendant did not confer jurisdiction over corporation or partnership]).

5. Tolling agreements

Given my finding, *supra*, III.A., I need not address the tolling agreements.

B. Plaintiffs' motion for a default judgment

Aside from the two defendants identified above, plaintiffs have established that they properly served defendants and that they have a meritorious claim against them. And, as I have rejected defendants' arguments related to their motion to dismiss, which arguments also underlie their opposition to plaintiffs' motion for a default judgment against them, defendants have not established any ground upon which to deny plaintiffs' motion. However, as the damages sought by plaintiffs are approximate and/or speculative, an inquest must be conducted.

As for the John Doe defendants and defendants Land Base LLC, as they were served in December 2010, plaintiffs' time to move for a default judgment against them expired in January 2012. (CPLR 3215[c]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied; it is further

ORDERED, that plaintiffs' cross motion for a default judgment is granted as to defendants Christensen, Christensen Capital Law Corporation, Christensen and Barrus, Inc., Jeffrey M. Moritz, Nature Issues, Inc., Sterling Peak, Inc., Zamworks, LLC, and Proprietary Media, Inc.; it is further

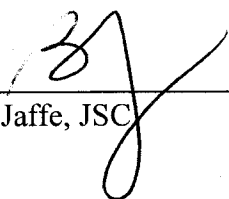
ORDERED, that that an assessment of damages against said defendants is directed; it is further

ORDERED, that a copy of this order with notice of entry be served upon the Clerk of the

Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the appropriate fees, if any, to place this action on the appropriate trial calendar for the assessment herein directed; and it is further

ORDERED, that plaintiffs' motion for a default judgment against defendants Land Base LLC, John Does 1-50, and John Doe Corporations 1-50 is denied and the complaint is dismissed against them pursuant to CPLR 3215(c).

ENTER:



Barbara Jaffe, JSC

DATED: June 25, 2013
New York, New York