Keyes v Best
2013 NY Slip Op 32534(U)
October 16, 2013
Sup Ct New York County
Docket Number: 102057/2008
Judge: Louis B. York
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SCANNED ON 10/21/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Justice

Index Number : 102057/2008
KEYES, SHERRIE
vs.
BEST, LEROY
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/16/13

_____, J.S.C.

LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------x

SHERRIE KEYES,

Plaintiff,

Index No. 102057/2008

-against-

DECISION AND ORDER

LEROY BEST, MESOPOTAMIA HOLDING CO., LLC and UZI EVRON,

Defendants.

----------x

FILED
OCT 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

In this action, Plaintiff Sherrie Keyes alleges fraud, misrepresentation, and breach of contract on the part of Defendant, Mesopotamia Holding Co., LLC ("MESO") and its principal, Uzi Evron and asks the Court to award her $91,000 in damages. Currently, Defendants move to dismiss this case under CPLR §306 and §308(2) and as under CPLR §3211(a)(1) and (a)(7). Defendant Best is not a party to the Motion to Dismiss. For the reasons below, the Court grants Defendants' motion.

Background

On or around May 27, 2007, Plaintiff entered into an eleven-year lease with Defendant MESO for a commercial property located at 145 West 138th Street, New York, New York. Plaintiff asserts that she intended to operate a bar out of the premises and that she told this to Defendant Uzi Evron. Paragraph 61(A) of the Lease specifically provides that tenant "shall use the demised premises solely for a bar and restaurant" while Paragraph 61(B) states that "tenant shall apply, at its own costs and expenses, for all applicable licenses and permits to operate the business referred to in the use clause herein and shall not serve liquor until a NYS liquor license

has been obtained and a copy delivered to landlord." On June 1, 2007, Plaintiff entered into an agreement with Defendant Leroy Best to purchase Grant Enterprise Incorporated, a liquor business located at the premises. The terms of the agreement provided that the liquor license was to be included in the sale. Neither MESO nor Evron were a party to the agreement between Plaintiff and Best.

On August 6, 2007, the New York State Division of Alcoholic Beverage Control sent a Notice of Pleading to Best ordering him to appear before the Division regarding his alleged violations of subdivision 6 of section 106 of the Alcoholic Beverage Control Law and rule 54.2 of the Rules of the State Liquor Authority [9 NYCRR 48.2]. The Notice of Pleading further informed Best that the violations were "all cause for revocation, cancellation, or suspension of the [liquor] license in accordance with rule 36.1(f) of the Rules of the State Liquor Authority [9 NYCRR 53.1(f)]." Plaintiff alleges that as a result of Best's misconduct, the Division of Alcoholic Beverage Control revoked his license, and that Best no longer possessed the license on June 1, 2007 when he agreed to sell it to Plaintiff. In support of this, Plaintiff cites an unsigned Stipulation of Settlement between the City of New York and Defendants Best and MESO dated April 2007 which, if valid, prohibited the future use or sale of controlled substances at 145 West 38th Street.

Plaintiff initially filed the Summons and Complaint in this action on or about February 8, 2008. In her complaint, she alleges that as part of her June 2007 agreement with Best, Plaintiff purchased Best's liquor license, but that shortly after signing the agreement she learned that the liquor license was not valid. Plaintiff also alleged that Defendants MESO and Evron are guilty of fraud and misrepresentation because they claimed that the license was valid when they knew it was not, and that they intended for Plaintiff to rely on their assertions that the lease was valid.

Plaintiff sought $1,000 in damages for the amount she paid to Best, $45,000 for the amount she paid to MESO for the eleven-year lease, and $45,000 in reimbursement for repairs she made to the premises in anticipation of opening a bar on the premises.

The Court granted Plaintiff's motion for default judgment against Defendants on June 25, 2009. Upon learning of the action against them, Defendant MESO filed an Order to Show Cause in order to have the case dismissed. On or about December 21, 2012, this Court issued a decision and order which granted Defendants' motion. The Clerk of the Court entered the judgment on December 26, 2012. The Court's Order required Plaintiff to re-serve the Complaint on Defendants within 20 days. Defendant MESO's counsel received the Complaint via regular mail on January 8, 2013; but no affidavit of service was attached with the Complaint. Plaintiff also mailed a copy of the Complaint to the home of Defendant Uzi Evron. Evron had not been a party to the Order to Show Cause and thus the Order pertained only to MESO, not Evron.

Defendants now move for dismissal of the case. In their motion, Defendants allege that Plaintiff did not file proof of service with the Court, and that it served Evron years after the deadline. Also, Defendants allege that the fact that the Notice of Petition is dated two months after Plaintiff signed the Lease is documentary evidence that the license was valid when Plaintiff signed the lease. Finally, Defendants argue that Plaintiff has failed to state a cause of action for fraud and misrepresentation. Plaintiff opposes the motion.

Analysis

The Court considers the threshold issue of service. Plaintiff filed the Complaint in February, 2008 and the deadline for service was 120 days of the date of this filing. Plaintiff alleges that she first attempted to serve Evron in 2008 at his home address, 23 Doyty Avenue, Apartment 1B, Staten Island, New York 10305. However, the address listed on the Summons is

524 West End Avenue, which was not Evron's actual residence. In a motion to dismiss brought under CPLR §306, a "plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process." *Munoz v. Reyes*, 40 A.D.3d 1059, 1059, 863 N.Y.S.2d 698, 699 (2nd Dept), *lv denied*, 9 N.Y.3d 806, 842 N.Y.S.2d 782 (2007).

In their motion to dismiss, Defendants correctly note that Evron was not involved in the 2012 Order to Vacate. Thus, the Order granting leave to re-serve applied to MESO but not to Evron. Accordingly, the Court examines the original, defective, service. Dismissal of all claims against Evron is appropriate.

Moreover, even if service had been proper, there is another problem necessitating dismissal. As defendants state, Plaintiff initially served Evron in February, 2008. Accordingly, Plaintiff had until February 2009 to move for default against Evron. CPLR §3215(c), which governs default judgments, states:

> If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court . . . shall dismiss the complaint as abandoned . . . upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Moreover, as the CPLR uses the word "shall," the Court must dismiss the case unless there is good cause for the delay. *See Giglio v NTIMP, Inc.*, 86 A.D.3d 301, 308, 926 N.Y.S.2d 546, 551 (3rd Dept 2011). The determination of whether an excuse is reasonable is left to the discretion of the Court. "The legislative intent underlying CPLR §3215(c) was to prevent the plaintiffs from unreasonably delaying the determination of an action." *Myers v Slutsky*, 139 A.D.2d 709, 710, 527 N.Y.S.2d 464, 465 (2nd Dept 1988). It took three years for Plaintiff to move for a default. Moreover, no excuse or explanation is given. Therefore, the Court grants the Defendants' Motion to Dismiss regarding Defendant Evron.

Defendant also argues that because plaintiff did not file proof of service with the Court, service is not complete against MESO. Defendants concede that it received service by the deadline in the Order but argue that without an affidavit of service as required by CPLR §308(2), service is incomplete and thus defective. CPLR §308(2) provides that "service" constitutes

> delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served... proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing... service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service...

In response, Plaintiff alleges that this Court's Order only required Plaintiff to serve a copy of the Summons and Complaint on Defendant MESO by mail and upon Defendant's counsel within 20 days and that the Order did not require that she file an on Affidavit of Service. However, in no way did the Order waive or override the explicit requirements of CPLR §308(2). The initial judgment against Defendants was vacated due to improper service. It is unclear why Plaintiff's counsel was not more meticulous this time.

In Defendant MESO's Motion to Dismiss, Defendant acknowledges receipt of service via regular mail on January 8, 2013 in accordance with the Order. When notice is defective, the fact that the party received actual notice does not serve to cure the defect *Feinstein v Bergner*, 48 NY2d 234, 243, 422 N.Y.S.2d 356, 361 (1979). "[A]ctual notice alone will not sustain ... service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service." *Kostelanetz & Fink, L.L.P. v Hui Qun Zhao*, 180 Misc. 2d 847, 851, 694 N.Y.S.2d 285, 288 (Civ Ct NY County 1999). In short, the CPLR provides that service shall not be complete until ten days after proof of service is filed with the Court. Failure to file proof leads to incomplete service. Any actual knowledge on the part of Defendant of the suit cannot serve to

remedy Plaintiff's mistake. Accordingly, Defendants' Motion to Dismiss is granted. Because the Court dismisses this action, it need not reach the remaining issues.

Conclusion

For the reasons above, it is

ORDERED that the motion to dismiss is granted and the action is dismissed.

Enter:

Dated: 10/16/13

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
OCT 21 2013
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NEW YORK