

**Romanow v Sag Harbor Cycle Co., LLC**

2014 NY Slip Op 30099(U)

January 8, 2014

Sup Ct, New York County

Docket Number: 103568/12

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

Myles Romanow,  
Plaintiff,

Index No.: 103568/12

Motion Date: 06/21/13

- v -

Motion Seq. No.: 01

Sag Harbor Cycle Company, LLC,  
Russel Diamond, William Mintz,  
Andy Boyland, Bart Eagle and  
Chet Borgida,

Defendants.

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s)	<u>1</u>
Answering Affidavits - Exhibits	No (s)	<u>2, 3</u>
Replying Affidavits - Exhibits	No (s)	<u>4</u>

**FILED**

JAN 13 2014

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers,

Sag Harbor Cycle Company, LLC (Cycle Company), Russel Diamond (Diamond), William Mintz (Mintz), Andy Boyland (Boyland), Bart Eagle (Eagle) and Chet Borgida (Borgida) move, pursuant to CPLR 3211, to dismiss plaintiff's complaint, based upon inadequate notice in the summons, lack of personal jurisdiction due to inadequate service, and alternatively, to dismiss certain causes of action for failure to state a cause of action.

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

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

Plaintiff cross-moves for partial summary judgment on certain claims for alleged unpaid salary and for leave to amend the complaint. For the reasons set forth below, defendants' motion to dismiss the complaint is granted and plaintiff's cross motion is denied.

Plaintiff was an employee of Cycle Company from April 2012 until his termination on July 27, 2012. Cycle Company was a limited liability company that owned and operated a retail bicycle shop (the Shop) located at 34 Bay Street, Sag Harbor, New York, which sells, repairs and rent bicycles and bicycle related accessories. Boyland, Diamond, Mintz, Eagle and Borgida were the members of Cycle Company's Operating Committee (the Committee), which operates as its board of directors overseeing the Shop's operations on behalf of Cycle Company's 25 members, who have invested \$5000 each in Cycle Company.

Plaintiff contends that, in April 2012, he developed the idea for a bicycle shop in Sag Harbor and presented it to Diamond and that as a result of discussions, plaintiff undertook various activities including securing a location for the Shop, carrying out substantial work to prepare for the Shop's opening on June 9, 2012 and performing more extensive work at the Shop until his termination on July 27, 2012. He asserts he "was subject to the constant supervision and direction" of the Committee, that he had "no real authority" and that, consequently, he was not a real

manager, but merely an ordinary employee who was entitled to extra pay for his overtime work above his ordinary pay rate of \$19.23.

Plaintiff states that he was given a Look brand bicycle (the Bicycle) that defendants sought to recover after his dismissal. When plaintiff did not return the Bicycle, he alleges that defendants caused him to be arrested for its theft. The criminal case is still pending. He further asserts that various cycling memorabilia (the Memorabilia) that he owns has not been returned to him.

Defendants contend that plaintiff was the Shop's store manager, that he had complete authority over the day-to-day running of the Shop, including setting employee schedules, placing orders for product and equipment, hiring and firing of subordinate employees. They assert that plaintiff was not an hourly employee, paid at the rate of \$19.23 per hour, but rather a salaried employee with a wage at the annual rate of \$40,000 per year, plus \$10,000 in compensated expenses.

Each of the individual defendants, except for Eagle, state that they were not served with a summons and that the Shop's location was not their place of business. Plaintiff's affidavits of service of the summonses state that the summons were served in late August 2012, on Diamond, Mintz and Boyland by leaving them with Andrew Wyler (Wyler) at the Shop, who is identified as a co-

worker, and on Cycle Company, by serving Wyler, who is identified as a managing agent. The individual defendants also state that the Shop was not their place of business.

On September 10, 2012, defendants served a demand for a complaint, pursuant to CPLR 3012 (b). Plaintiff served the complaint on October 12, 2012 and defendants filed their answer with affirmative defenses, including jurisdictional defenses, and counterclaims on November 16, 2012. The counterclaims seek the cost of framing the Memorabilia, the value of other property allegedly belonging to Cycle Company, both on behalf of Cycle Company and the individual defendants, and attorneys' fees and costs for a frivolous action. On January 15, 2013, defendants made the instant motion to dismiss.

The court notes that plaintiff has not submitted an affidavit of service on Borgida and, therefore, Borgida's claim that he was not served is unopposed. Accordingly, plaintiff's complaint against him is dismissed.

The nature of plaintiff's work, the scope and terms under which he was employed, the degree of supervision over him by the Committee and the degree of his managerial authority are sharply contested and this factual conflict cannot be resolved on papers and so plaintiff cannot prevail on his cross motion for summary judgment.

CPLR 305 (b) provides that "[i]f the complaint is not served

with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought." "[S]ervice of a summons, unaccompanied by a complaint and without the notice required by CPLR 305 [subd. (b)], [does] not confer jurisdiction over a defendant ...[and] the notice must contain 'at least basic information concerning the nature of the plaintiff's claim and the relief sought'" (Parker v Mack, 61 NY2d 114, 117 [1984] [internal citation omitted]).

In this case, the summonses state that plaintiff seeks a judgment "pursuant to the New York Wage Theft Act ... for unpaid wages ... rightful [ownership] of the bicycle ... [and] emotional damages incurred in connection with ... unwarranted criminal complaints." This lacks the requisite specificity "[s]ince numerous potential causes of action may be brought under these [claims], [and] the summons left defendants to guess the precise claims against them ...the summons was jurisdictionally defective" (Roth v State Univ. of N.Y., 61 AD3d 476, 476 [1st Dept], *lv denied* 13 NY3d 711 [2009]). In Roth, the summons was more specific than in this case, since it identified various sections of the federal and New York State statutes and the New York City Administrative Code section, all dealing with alleged discrimination, but this was insufficient to identify "the precise claims" (*id.*). Plaintiff at bar has not presented sufficient "basic information concerning the nature of [his]

claim" to sustain a finding that the summons was not jurisdictionally defective (Parker, 61 NY2d at 117).

Plaintiff contends that defendants waived jurisdictional objections under CPLR 3211 (e) by not timely moving to dismiss the complaint. However, because defendants served their answer on November 16, 2012 and their motion on January 15, 2013, they were within the sixty days allowed by CPLR 3211 (e) since "[a] motion on notice is made when [it] is served" (CPLR 2211; Rivera v Glen Oaks Vil. Owners, Inc., 29 AD3d 560, 561 [2d Dept 2006], lv denied 9 NY3d 817 [2008]).

Plaintiff also asserts that defendants waived CPLR 305 (b) by including counterclaims, arguing that CPLR 305 (b) was not intended as "a sword to trap a tardy or inattentive plaintiff into dismissal" (Bal v Court Empl. Project, 73 AD2d 69, 71 [1st Dept 1980]; see also Aversano v Town of Brookhaven, 77 AD2d 641, 642 [2d Dept 1980]). "However, the Court of Appeals subsequent decision in Parker ... which stressed the mandatory nature of CPLR 305 [b], casts doubt [on the authority of these cases]" (Sibley v Lake Anne Realty Corp., 136 AD2d 619, 619 [2d Dept 1988]). Regardless, as a decision of the Appellate Division, First Department, Roth is binding authority on this court as to the degree of specificity required in the summons and defendants are not required "to guess the precise claims against them." (Roth, 61 AD3d at 476).

Cycle Company's counterclaims on the Bicycle and the Memorabilia relate to issues and facts plaintiff raised in his complaint and, accordingly, are sufficiently related so as not to constitute a waiver of jurisdictional claims (Textile Tech. Exch. v Davis, 81 NY2d 56, 58-59 [1993]; see also Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner, 57 AD3d 732, 733 [2d Dept 2008]; Bell v Little, 250 AD2d 485, 485 [1st Dept 1998]). While denominated as a counterclaim, defendants' application for sanctions is an attempt to "[recover] legal expenses ... fees and costs for frivolous conduct]" (Engel v CBS, Inc., 93 NY2d 195, 203 [1999]) rather than a claim unrelated to plaintiff's allegations. Accordingly, defendants' motion to dismiss the complaint is granted. Since the court has no jurisdiction over the defendants (M. Katz & Son Billard Prods v Correale & Sons, 26 AD2d 52 [1<sup>st</sup> Dept 1966]), their counterclaims are also dismissed,

It is, therefore,

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that the counterclaims asserted in defendants' answer are dismissed; and it is further;


ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: January 8, 2014

ENTER:

  
J.S.C.  
**DEBRA A. JAMES**

**FILED**  
JAN 13 2014  
NEW YORK  
COUNTY CLERK'S OFFICE