Pan Am Global Equities, Inc. v Consulting Assoc. of NY, Inc.
2015 NY Slip Op 30330(U)
March 10, 2015
Supreme Court, New York County
Docket Number: 156085/2012
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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PAN AM GLOBAL EQUITIES, INC., NEWMARK KNIGHT FRANK GLOBAL MANAGEMENT SERVICE LLC, MOORE STREET DEVELOPERS LLC, and WHITEHALL PROPERTIES LLC,

Plaintiffs,

Index No. 156085/2012

Decision and Order

- against -

Mot. Seq. 003

CONSULTING ASSOCIATES OF NY, INC., ALUMILEX, INC., CLEARVIEW ARCHITECTURAL, INC. d/b/a CLEARVIEW GLASS ENTERPRISES, FAI ENGINEERING GROUP, P.C., and ROMEO FRACCAROLI, P.E.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, negligence, and nuisance arising from the renovation and residential conversion of the building located at 3 New York Plaza, New York, New York (the "Project").

Plaintiffs, Pan Am Global Equities, Inc., Newmark Knight Frank Global Management Service LLC, Moore Street Developers LLC, and Whitehall Properties LLC (collectively, "Plaintiffs"), commenced this action on September 5, 2012, by Summons with Notice. Plaintiffs previously moved for, and obtained, a default judgment (the "Default Judgment") as against defendant Clearview Architectural Inc. d/b/a Clearview Glass Enterprises ("Clearview"), by Order dated September 3, 2013.

Plaintiffs filed a notice of entry for the Default Judgment on September 16, 2013. Thereafter, on December 27, 2013, Clearview interposed an answer (the

"Clearview Answer"), via e-filing, asserting various affirmative defenses, including improper service and lack of jurisdiction, and raising cross-claims as against co-defendants Consulting Associates of NY, Inc. ("Consulting Associates"), Alumilex, Inc. ("Alumilex"), FAI Engineering Group, P.C. ("FAI"), and Romeo Fraccaroli, P.E. ("RFPE").

Clearview now moves, by notice of motion dated August 15, 2014, for an Order, pursuant to CPLR §§ 3211(a)(8) and 306-b, dismissing Plaintiff's complaint for lack of personal jurisdiction; and, pursuant to CPLR § 5015(a)(4), for lack of personal jurisdiction over Clearview. Alternatively, Clearview moves for an Order, pursuant to CPLR § 3211(a)(5), dismissing Plaintiffs' complaint as against Clearview for failure to comply with the applicable statute of limitations.

Plaintiffs oppose.

As an initial matter, CPLR § 5015 provides for relief from a judgment or order, on stipulation, "upon the filing with [the clerk of the court] of a stipulation of consent to such vacatur by the parties personally or by their attorneys." (CPLR § 5015[b]). Although Plaintiffs argue that Clearview is not entitled to an Order vacating the Default Judgment because Plaintiffs and Clearview have already stipulated to waive the Default Judgment, Plaintiffs fail to demonstrate that any such stipulation was filed with the clerk of the court pursuant to CPLR § 5015(b). Accordingly, in light of the previously entered Default Judgment against Clearview, the Clearview Answer is a nullity and the instant motion to dismiss will be treated as a motion to vacate the Default Judgment.

As for Clearview's motion to vacate the Default Judgment, for lack of personal jurisdiction, CPLR § 5015(a) provides, "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of . . . lack of jurisdiction to render the judgment or order". (CPLR § 5015[a][4]). A motion predicated upon lack of jurisdiction need not assert a meritorious defense; a default judgment entered in the absence of personal jurisdiction over the defendant is a nullity. (*Boorman v. Deutsch*, 152 A.D.2d 48, 51 [1st Dep't 1989]). Where the plaintiff fails to properly serve the summons and complaint, the court fails to acquire personal jurisdiction over the defendant, and any subsequent proceedings are null and void. (*Prudence v. Wright*, 94 A.D.3d 1073, 1074 [2d Dep't 2012]; *Adames v. New York City Transit Authority*, 510 N.Y.S.2d 610, 611 [1st Dep't 1987]).

Clearview argues that Plaintiffs failed to obtain personal jurisdiction over Clearview because Plaintiffs failed to comply with the statutory requirements to complete service upon an unauthorized foreign corporation pursuant to BCL § 307.

BCL § 307 provides:

> In any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil practice law and rules, a foreign corporation not authorized to do business in this state is subject to a like jurisdiction. In any such case, process against such foreign corporation *may be served upon the secretary of state as its agent.*

(BCL § 307[a] [emphasis added]).

Pursuant to BCL § 307(b), service upon an unauthorized foreign corporation via the secretary of state as agent "shall be sufficient if notice thereof and a copy of the process are . . . Delivered personally without this state to such foreign corporation by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made." (BCL § 307[b][1]). Alternatively, BCL 307 permits a plaintiff to complete service upon an unauthorized foreign corporation if notice and a copy of process are "Sent by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file . . . in the jurisdiction of its incorporation . . .". (BCL § 307[b][2]). Additionally, BCL § 307(c) requires proof of service by affidavit of compliance, and, where service of a copy of process was effected by mailing in accordance with this section, "there shall be filed with the affidavit of compliance either the return receipt signed by such foreign corporation or other official proof of delivery or, if acceptance was refused by it, the original envelope with a notation by the postal authorities that acceptance was refused." (BCL § 307[c][1]-[2]).

Business Corporation Law § 307 is a "distinctive jurisdictional provision" because the appointment of the Secretary of State as agent is a constructive, rather than an actual, designation. (*Stewart v. Volkswagen of Am., Inc.*, 81 N.Y.2d 203, 209 [1993]; BCL § 307[a]). For this reason, the statute contains procedures "calculated to assure that the foreign corporation, in fact, receives a copy of the process" and, "strict compliance with [those procedures] is required". (*Stewart v. Volkswagen of*

Am., Inc., 81 N.Y.2d 203, 209 [1993] quoting *Flick v Stewart-Warner Corp.*, 76 N.Y.2d 50, 56-57 [1990]).

In Plaintiffs' affidavit of service upon Clearview, dated September 10, 2012, Plaintiffs' process server attests to service of Plaintiffs' initiatory papers upon Clearview by personally delivering copies of Plaintiffs' initiatory papers to the NYS Secretary of State. However, Plaintiffs' affidavit of service does not contain any reference to the additional requirements to complete service upon an unauthorized foreign corporation pursuant to BCL § 307(b).

In a Notice to Corporation, dated October 23, 2012, Plaintiffs' counsel states that Plaintiffs' summons with notice were served upon Clearview "on September 10, 2012 via service upon the New York Secretary of State under and pursuant to Business Corporation Law Section 307." However, Plaintiffs do not state whether service was completed by personal delivery without the state to the foreign corporation or mailing to the foreign corporation in its jurisdiction of incorporation. Nor do Plaintiffs' present any proof of delivery pursuant to BCL § 307(c).

Here, it is undisputed that Clearview is an unauthorized foreign corporation doing business in New Jersey. Although Plaintiffs' affidavit of service upon Clearview demonstrates preliminary steps to complete service pursuant to BCL § 307, Plaintiffs' fail to demonstrate that such service was sufficiently completed. Plaintiffs' affidavit of service upon Clearview does not state that a copy of Plaintiffs' summons with notice was delivered to Clearview pursuant to BCL §§ 307(b)(1) or (b)(2), which set forth procedures to ensure that the unauthorized foreign corporation actually receives process served upon the Secretary of State as agent. Plaintiffs' Notice to Corporation likewise fails to demonstrate strict compliance with the procedures set forth in BCL § 307. Plaintiffs do not provide an affidavit of compliance stating the steps taken to complete service, or submit any proof of delivery pursuant to BCL § 307(c).

As Plaintiffs fail to demonstrate strict compliance with the statutory requirements set forth in § 307, Plaintiffs fail to satisfy their burden of establishing jurisdiction over Clearview. Accordingly, vacatur of the Default Judgment is warranted and Clearview's motion to dismiss Plaintiffs' complaint as against Clearview for lack of jurisdiction is granted.

Wherefore it is hereby,

ORDERED that defendant Clearview's motion to vacate the Default Judgment; and it is further

ORDERED that the Default Judgment entered in favor of Plaintiffs and against Clearview Architectural Inc. d/b/a Clearview Glass Enterprises is vacated; and it is further

ORDERED that defendant Clearview's motion to dismiss Plaintiffs' complaint as against Clearview for lack of jurisdiction is granted; and it is further

ORDERED that Plaintiffs' complaint is dismissed without prejudice as against Clearview Architectural Inc. d/b/a Clearview Glass Enterprises and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: March 10, 2015

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Eileen A. Rakower, J.S.C.