Kosachuk v Quality Choice Healthcare, Inc.
2015 NY Slip Op 31249(U)
July 17, 2015
Supreme Court, New York County
Docket Number: 153303/15
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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CHRIS KOSACHUK,

Plaintiff,

-against- Index No. 153303/15

QUALITY CHOICE HEATHCARE, INC. D/B/A QUALITY CHOICE CORRECTIONAL HEALTH CARE AND KATHY RUDOLF PETRINO,

Defendants.

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CAROL R. EDMEAD, J.

Plaintiff Chris Kosachuk pro se moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint. Defendants Quality Choice Healthcare, Inc. d/b/a Quality Choice Correctional Healthcare (Quality) and Kathy Rudolph Petrino s/h/a Kathy Rudolf Petrino cross-move, pursuant to CPLR 2215, 3211, and 3212, for an order dismissing the complaint.

Plaintiff seeks to recover on a "Secured Promissory Note" (Note), allegedly drawn by Quality to the order of nonparty International Trading & Investment Ltd. (Investment), which subsequently assigned the Note to one Matias Bullrich, who in turn, subsequently assigned it to plaintiff.

The court will first discuss defendants' arguments in support of their cross motion. Petrino contends that she was not properly served, and that, therefore, she is not subject to the personal jurisdiction of this court.

CPLR 308 (2) provides that service upon a natural person within the state may be made:

"by delivering the summons . . . 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 *and* by either mailing the summons to the person to be served 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 . . . ."

(Emphasis added.) It is undisputed that, while plaintiff delivered a copy of his summons and motion papers to a person other than plaintiff at the address of her "actual place of business," he failed subsequently to mail the papers, as required by the statute. His argument, that Petrino's papers in opposition to his motion show that Petrino was served, is unavailing. "'Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.'" *Williams v DRBX Holdings, LLC*, 80 AD3d 534, 534 (1st Dept 2011), quoting *Macchia v Russo*, 67 NY2d 592, 595 (1986). "When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents." *Raschel v Rish*, 69 NY2d 694, 697 (1986). Accordingly, this court lacks personal jurisdiction over Petrino, and the complaint is dismissed, as against her.

Quality's argument is three-pronged. First, citing Business Corporation Law (BCL) § 1312, Quality argues that, as the alleged successor-in-interest of Investment, plaintiff may not maintain this action, because Investment is an unlicensed foreign corporation. BCL § 1312 provides that:

> "(a) A foreign corporation *doing business in this state* without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes . . . . This prohibition shall apply to any successor in interest of such foreign corporation."

(Emphasis added.) By its terms, BCL § 1312 is solely applicable to corporations "doing business in this state." Quality has not shown, or even contended, that Investment has done business in

the State, and plaintiff avers that Investment is not doing, and never has done, business in New York. Kosachuk affidavit, ¶ 5.

Secondly, citing New York Uniform Commercial Code (UCC) § 3-407, Quality argues that the Note is unenforceable, because handwritten changes were made on it. UCC § 3-407 lists such alterations of an instrument as are "material," and then provides, in relevant part, that:

> "(2) As against any person other than a subsequent holder in due course
>
> (a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents ...;
>
> (b) no other alteration discharges any party and the instrument may be enforced according to its original tenor ... .
>
> "(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor ... ."

Quality does not contend that the alterations on the Note are fraudulent. Accordingly, without needing to decide whether plaintiff is a holder in due course, the Note may be enforced "according to its original tenor."

Quality's final argument is that plaintiff lacks standing to enforce the Note, because the Note was not assigned to plaintiff, or to plaintiff's predecessor-in-interest, in conformance with UCC § 3-202 (2). That subsection provides that:

> "An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof."

Plainly, no indorsement is written on the Note. Quality argues that the fact that the indorsements from Investment to Bullrich, and from Bullrich to plaintiff, as plaintiff has presented them to the court, appear on separate pieces of paper, also shows that the indorsements

were not "so firmly afixed [to the Note] as to become a part thereof." That argument raises an issue of fact that may not be decided at the present posture of this action, to wit, whether, at the time that they were made, the indorsements were sufficiently firmly affixed to the Note to satisfy the requirement of section 3-202 (2). *See Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637-638 (2d Dept 2011).

To be sure, where, as here, a defendant has put the question of standing in issue, plaintiff will need to prove his standing in order to obtain relief. *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 (1991).

Accordingly, it is hereby

ORDERED that the cross motion of defendant Kathy Rudolf Petrino is granted and the complaint is severed and dismissed as against said defendant; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion of defendant Quality Choice Healthcare to dismiss the complaint is denied; and it is further

ORDERED that the motion of plaintiff Chris Kosachuk for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendants' attorney within 20 days of service on plaintiff of a copy of this order with notice of entry and defendant shall move against or serve an answer to the complaint within 20 days after service thereof

Dated: July 17, 2015.

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD