

Jae Duk Ahn v Kyong Koo Kang
2015 NY Slip Op 31739(U)
August 5, 2015
Supreme Court, Queens County
Docket Number: 700943/15
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JAE DUK AHN and J&J CLEANERS NY, INC.,

Plaintiffs,

-against-

KYONG KOO KANG, et al.,

Defendant.

Index No: 700943/15

Motion Date: 5/12/15
6/3/15

Motion Seq. No.: 2 & 3

X

The following numbered papers read on this motion by defendant Amy Yang Kyung Kang (Amy Kang) pursuant to 3211(a)(1), (7) and (8) dismissing the complaint due to lack of personal jurisdiction, failure to state a claim and on documentary evidence; on the motion by plaintiff Kyong Koo Kang (Kyong Kang) pursuant to CPLR 3211(a)(8) dismissing the complaint for lack of personal jurisdiction; on the cross motion by plaintiffs for an order disqualifying the Law Firm of DK & Associates from its representation of defendant Amy Kang; and on the cross motion by plaintiffs for an order disqualifying the Law Firm of DK & Associates from its representation of defendant Kyong Kang and deeming plaintiff's filing of proof of service timely filed nunc pro tunc and directing defendants Kyong Kang and New Star Realty and Management Corp to appear and answer within 30 days.

FILED

AUG 05 2015

**COUNTY CLERK
QUEENS COUNTY**

Papers
Numbered

Notices of Motion - Affidavits - Exhibits.....	EF 35-42
	EF 55-60
Notices of Cross Motion - Affidavits - Exhibits..	EF 47-50
	EF 61-64
Answering Affidavits - Exhibits.....	EF 51-53
	EF 65-68
Reply Affidavits.....	EF 69

Upon the foregoing papers it is ordered that these motions and cross motions are determined as follows:

Plaintiff brought this suit against defendants asserting claims for common law fraud, negligent misrepresentation, breach of fiduciary duty, and fraudulent inducement in the sale of a dry cleaning business. The plaintiff allege that the defendants working together designed a fraudulent scheme to inflate sales revenue of a dry cleaning business in order to sell the business to the plaintiff at an inflated price.

Turning first to the two cross motions which seek to disqualify the Law Firm of DK & Associates from representing the defendants Amy Kang and Kyong Kang. These cross motion are denied. The decision to disqualify an attorney rests within the sound discretion of the court (*Midwood Chayim v Aruchim Dialysis Assoc., Inc. v Brooklyn Dialysis, LLC*, 83 AD3d 1177, 1178 [2d Dept 2011]; *Mondello v Mondello*, 118 AD2d 549 [2d Dept 1986]). A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right that should not be abridged absent a clear showing that disqualification is warranted (*Aryeh v Aryeh*, 14 AD3d 634 [2d Dept 2005]).

22 NYCRR 1200.29, also known as Rule 3.7, entitled "Lawyer as witness," provides in pertinent part that:

"a lawyer shall not act as a advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact, unless: 1) the testimony relates solely to an uncontested issue; 2) the testimony relates solely to the nature and value of legal services rendered in the matter; 3) disqualification of the lawyer would be a substantial hardship on the client; 4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or 5) the testimony is authorized by the tribunal."

In order to obtain disqualification under Rule 3.7, the moving party must demonstrate that (1) the testimony of the opposing counsel is necessary to his or her case and (2) such testimony is or may be prejudicial to the client (see *Goldberger v Eisner*, 21 AD3d 401 [2d Dept 2005]). The plaintiffs have failed to demonstrate that defense counsel possesses relevant information adverse to the defendants Amy Kang and Kyong Kang based on his involvement in the transaction at issue and that the alleged information is unavailable from any other source (see *Zutler v Drivershield Corp.*, 15 AD3d 397 [2d Dept 2005]).

22 NYCRR 1200.7, also known as Rule 1.7, entitled "Conflicts of Interest: current clients," provides in pertinent part that:

"a lawyer shall not represent a client if a reasonable lawyer would conclude that either: 1) the representation will involve the lawyer in representing differing interests; or 2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests."

The plaintiffs failed to establish that the defendants have a divided interest or that the defendants' attorney possesses a personal, business or financial interest at odds with that of his clients, the defendants (*see Greene v Greene*, 47 NY2d 447 [1979]; *Olmoz v Town of Fishkill*, 258 AD2d 447 [2d Dept 1999]).

Turning next to the motions to dismiss the complaint. The defendant Amy Kang has moved to dismiss the complaint for lack of service. The plaintiffs, however, has established that Amy Kang was properly served under CPLR 308(2). Here, in the affidavit of service, the process server states that the summons and complaint were delivered to June Kim, son, at 153-25 41st Avenue, Flushing, New York on March 2, 2015 at 9:15 p.m. The defendant Amy Kang admits that the summons and complaint were delivered to her step-son, but states that he is only fourteen years old and has not reached the age of majority. The test of whether a person is of suitable age and discretion is not just whether they are over eighteen. A person of suitable age and discretion must be objectively of sufficient maturity, understanding, and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant (*Martinez v McSweeney*, 41 Misc 3d 1232(A) (Supt Ct, Queens County 2013); *Citibank, N.A. v Kollen*, 162 Misc 2d 883, 887 [Sup Ct, Kings County 1994]; *City of New York v Chemical Bank*, 122 Misc 2d 104, 108-109 [Sup Ct, NY County 1983]). Here, the defendant's step-son was of suitable age and discretion. Additionally, the defendant Amy Kang did not submit any evidence, that the place where service was effectuated was not her dwelling place or usual place of abode.

The defendant Amy Kang has also moved to dismiss the complaint under CPLR 3211(a)(1) and (7). In order to be successful on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of the claim (*see Held v Kaufman*, 91 NY2d 425 [1998]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]). Here, the documentary evidence submitted by the defendant Amy Kang did not resolve all factual issues and does not completely dispose any claim. The defendant Amy Kang submitted documents in an effort to establish that she was not an owner or investor in the subject business. The defendant's alleged

liability, however, are not based on her having an ownership interest in the business, but rather with her actions as an employee of the business.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]).

To plead a cause of action for fraud, a plaintiff must plead a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, as well as justifiable reliance of the other party on the misrepresentation or material omission and injury caused as a result of that reliance (*Northeast Steel Prods., Inc. v John Little Designs, Inc.*, 80 AD3d 585 [2d Dept 2011]; *Hense v Baxter*, 79 AD3d 814 [2d Dept 2010]). Here, the complaint has sufficiently pled a cause of action for fraud against the defendant Amy Kang. The plaintiff's argument that the fraud and fraudulent inducement claims are duplicative is without merit. These claims can co-exist and therefore, the fraudulent inducement cause of action is not dismissed (see e.g., *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]).

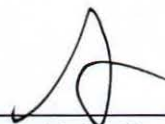
The complaint does not state as to whom each cause of action is pled against. Thus, to the extent that the complaint has tried to plead cause of action against Amy Kang for Breach of Fiduciary Duty and Negligent Misrepresentation, those causes of action are dismissed against her without opposition.

The defendant Kyong Kang has moved to dismiss the complaint for lack of service. The process server satisfied the delivery requirement of CPLR 308(2) in attempting to deliver the summons and complaint to the defendant Kyong Kang by leaving the summons and complaint with a security guard who refused to permit access to the defendant's premises. Service at this location was proper because the outer bounds of defendant's actual dwelling place are deemed to extend to the security booth, the point at which the process server's progress was arrested (*Duffy v St. Vicent's Hosp.*, 198 AD2d 31 [1st Dept 1993]; *Costine v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 173 AD2d 422 [1st Dept 1991]). Additionally the security guard was a person of suitable age and discretion (*U.S. 1 Brookville Real Estate Corp. v Spallone*, 21 AD3d 480 [2d Dept 2005]). The fact that Kyong Kang, as he alleges, may have been out of the country at the time of service does not raise any issue as

to service, as he does not deny that the place of service was his dwelling place or usual place of abode nor does he argue that the security guard is not a person of suitable age and discretion (see *Tribeca Lending Corp. v Crawford*, 79 AD3d 1018 [2d Dept 2010]). Additionally, the fact that the plaintiff filed proof of service late is procedural defect rather a jurisdictional defect (*Khan v Hernandez*, 122 AD3d 802 [2d Dept 2014]). The plaintiffs have cross moved to extend the time to file proof and accept the filed proof of service nunc pro tunc. Here, inasmuch as the proof of service was only a few days late, the plaintiffs have promptly moved for the court to correct this defect and the defendants are not prejudiced by this delay, the branch of cross motion should be granted. Therefore, the motion to dismiss for lack of personal jurisdiction is denied and the cross motion to extend the time to file proof of service is granted and filed proofs of service are deemed timely filed.

Accordingly, the motion by the defendant Amy Kang to dismiss the complaint is denied except that the causes of action for negligent misrepresentation and breach of fiduciary duty are dismissed against Amy Kang. The motion by defendant Kyong Kang to dismiss the complaint is denied. The cross motion to disqualify the Law Firm of DK & Associates from its representation of defendant Amy Kang is denied. The branch of the cross motion to disqualify the Law Firm of DK & Associates from its representation of defendant Kyong Kang is denied. The branch of the cross motion to deem plaintiffs' filing proofs of service timely nunc pro tunc is granted.

Dated: August 5, 2015



J.S.C.

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