Khanna v Hartford
2015 NY Slip Op 32015(U)
October 28, 2015
Supreme Court, New York County
Docket Number: 653317/2014
Judge: Eileen A. Rakower

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

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AJAY KHANNA,

Plaintiff,

Index No.
653317/2014

DECISION and ORDER

- against -

Mot. Seq. #001

THE HARTFORD, PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD, EIFERT FRENCH & KETCHUM, AMERICAN ARBITRATION ASSOCIATION, VERIZON COMMUNICATIONS, and CON EDISON OF NEW YORK,

Defendants.

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

Plaintiff, Ajay Khanna ("Plaintiff" or "Khanna"), brings this action against defendants, The Hartford ("Hartford"), Property & Casualty Insurance Company of Hartford ("PCICH") (and together with Hartford, collectively, the "Hartford Defendants"), Eifert French & Ketchum ("EFK"), American Arbitration Association ("AAA"), Verizon Communications ("Verizon"), and Con Edison of New York ("Con Ed") (collectively, "Defendants") for lost income allegedly incurred as a result of a power outage and a loss of communication services following Superstorm Sandy.

Plaintiff commenced this action on October 29, 2014, by summons and complaint. On November 18, 2014, the Hartford Defendants filed a notice of removal to remove this action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1441 and 1446. On December 16, 2015, Plaintiff filed a motion to remand, arguing, inter alia, that complete diversity does not exist between Plaintiff, a New York resident, and defendants, EFK, AAA, Verizon, and Con Ed, all of whom are New York citizens. Hartford opposed. On February 13, 2015, Plaintiff filed an amended complaint. On March 11, 2015,

Hartford filed a letter with the District Court, "stating that Plaintiff's Amended Complaint would likely support claims against Verizon Communications that would 'serve to destroy diversity jurisdiction' and therefore 'this matter should be remanded back to state court.'" (*Khanna v. Hartford et. al.*, No. 14-CV-09172-VEC [S.D.N.Y. Apr. 2, 2015] [Order remanding action to state court]). By Order dated April 2, 2015, Plaintiff's motion to remand was granted and this case was remanded to the New York Supreme Court, County of New York. (*Id.*).

EFK now moves for an Order, pursuant to CPLR § 3211(a)(8), dismissing Plaintiff's complaint for lack of personal jurisdiction on the basis of improper service; or, alternatively, pursuant to CPLR § 3211(a)(7), dismissing Plaintiff's complaint for failure to state a cause of action. In support, EFK submits: the attorney affirmation of Lori A. Eaton, dated April 22, 2015; Plaintiff's summons and complaint; a notice of removal removing this action to the Southern District of New York; the envelope post-marked November 24, 2014 in which Plaintiff mailed a copy of Plaintiff's summons and complaint; an Order, dated January 20, 2015, directing Plaintiff to file an Amended Complaint in the Southern District of New York on or before February 16, 2015; the Order for Service of Plaintiff's Amended Complaint; the envelope and enclosures post marked March 30, 2015 relating to Plaintiff's Amended Complaint; the Order of Remand, dated April 2, 2015, remanding the instant action back to the State Court.

Plaintiff opposes. Plaintiff submits, via e-filing, a document entitled "Reply to Hartford and Motion for Summary Judgment", in which Plaintiff purports to move for summary judgment as against EFK, the Hartford Defendants, and Verizon. However, no notice of motion is filed with respect to Plaintiff's purported motion for summary judgment.

EFK opposes Plaintiff's purported motion for summary judgment.

Verizon and the Hartford Defendants, respectively, also submit papers in opposition to Plaintiff's purported motion for summary judgment.

Turning first to the issue of jurisdiction over EFK, CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

> (8) the court has not jurisdiction over the person of the defendant;

(CPLR § 3211[a][8]).

CPLR § 311 permits personal service upon a corporation by delivery of Plaintiff's initiatory papers, "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law." (CPLR § 311[a][1]).

Pursuant to CPLR § 312-a:

> As an alternative to the methods of personal service authorized by section 307, 308, 310, 311 or 312 of this article, a summons and complaint, or summons and notice, or notice of petition and petition may be served by the plaintiff or any other person by mailing to the person or entity to be served, by first class mail, postage prepaid, a copy of the summons and complaint, or summons and notice or notice of petition and petition, together with two copies of a statement of service by mail and acknowledgement of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender.

(CPLR § 312-a[a]).

CPLR § 312-a further provides that, "[s]ervice is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender. The signed acknowledgement of receipt shall constitute proof of service." (CPLR § 312-a[b][1]). Thus, "[t]he mailing of process pursuant to CPLR § 312-a does not effect personal service." (*Shenko Electric, Inc. v. Harnett*, 1990 N.Y. App. Div. LEXIS 9337, 1 [4th Dep't 1990]). Rather, "[s]ervice is complete only when the acknowledgment of receipt in the form prescribed by CPLR § 312-a(d) is mailed or returned to the sender (CPLR § 312-a[b]). If the acknowledgment of receipt is not mailed or returned to the sender, the sender is required to effect personal service in another manner (CPLR § 312-a[e][f])." (*Id.*).

Pursuant to CPLR § 306-b, "[i]f service is not made upon a defendant within one hundred twenty days after the commencement of the action, provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." (CPLR § 306-b). However, "it has always been and still remains the rule that service of process can be waived by respondent simply by appearing in the proceeding and submitting to the court's jurisdiction." (*Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 720 FN2 [1997]). Thus, under CPLR § 320(b), "an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection" based on lack of personal jurisdiction is raised. (CPLR § 320[b]). Although "[a] formal appearance is effected 'by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer, . . . a party can also appear informally by substantially participating in the litigation." (*Matter of Sessa v. Board of Assessors of Town of N. Elba*, 46 A.D.3d 1163, 1164 [3d Dep't 2007] *quoting* CPLR § 320[a]; *McClure Newspaper Syndicate v. Times Printing Co.*, 164 A.D. 108, 109 [1st Dep't 1914] ["A voluntary general appearance by a defendant in an action, for any purpose, is equivalent to personal service of the summons upon him."]). It is the general rule that a defendant does not waive any defenses based on lack of personal jurisdiction by removing the action to federal court. (*Magwitch, L.L.C. v Pusser's Inc.*, 84 A.D.3d 529, 530 [1st Dep't 2011]).

Pursuant to 28 U.S.C. § 1446(d), "[p]romptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded." (28 U.S.C. § 1446[d]). Additionally, "[a] case removed to federal court is thenceforth governed by federal procedural rules." (*Herzog & Straus v. GRT Corp.*, 553 F.2d 789, 791 FN2 [2d Cir. 1977] *citing Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70*, 415 U.S. 423, 437 [1974]).

Rule 4(m) of the Federal Rules of Civil Procedure ("FRCP") provides:

> If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

(FRCP R. 4[m]). For purposes of an extension of time for service under Rule 4(m)m "Good cause is generally found only in exceptional circumstances where the plaintiff's failure to serve process in a timely manner was the result of circumstances beyond its control." (*Vaher v. Town of Orangetown*, 916 F. Supp. 2d 404, 419 [S.D.N.Y. 2013] [citations omitted]). Therefore, an "attorney's inadvertence, neglect, mistake or misplaced reliance does not constitute good cause." (*Id.*). Under Rule 4(d) of the FRCP, a plaintiff may request that a defendant waive the formal requirements of service of process. (FRCP R. 4[d]). This Rule "further allows the plaintiff to recover the costs of complying with those requirements if the defendant refuses to waive formal service." (*Stapo Indus. v. M/V Henry Hudson Bridge*, 190 F.R.D. 124, 125 [S.D.N.Y. 1999]).

EFK argues that Plaintiff's complaint must be dismissed because EFK was not properly served with process in this action. With respect to Plaintiff's original complaint, in the affirmation of Eaton, Eaton affirms that, "the only action taken by the plaintiff to serve [EFK] was mailing a single copy of the Summons and Complaint received through the postal service on November 24, 2014." (Eaton Affirm. ¶ 13). EFK argues that Plaintiff's mailing is insufficient to constitute proper service under CPLR § 311 or 312-a.

Additionally, EFK argues that Plaintiff filed an Amended Complaint, without having completed service of Plaintiff's original complaint upon EFK, and that Plaintiff failed to properly serve Plaintiff's Amended Complaint upon EFK. In the affirmation of Eaton, Eaton affirms that, "[o]nce removed to the Southern District of New York, the plaintiff filed an Amended Complaint by order of the Court on February 16, 2015." (Eaton Affirm. ¶ 8; *Khanna v. Hartford et. al.*, No. 14-CV-09172-VEC [S.D.N.Y. Jan. 20, 2015] [Order directing Plaintiff to file Amended Complaint on or before February 16, 2015]). Eaton affirms that, thereafter, Plaintiff "was ordered to properly serve EFK within 120 days of filing the Amended Complaint"[1] and that, "[b]y postal service marked March 30, 2015, the Plaintiff mailed duplicate copies of the Amended Complaint with a request for waiver of service in accordance with Fed. R. Procedure 4." (*Id.* ¶¶ 9-10).

[1] By Order dated February 17, 2015, the district court directed the Clerk of Court to issue a summons for each of the Defendants named in Plaintiff's Amended Complaint, and further ordered that "Plaintiff must effect service within 120 days of the date the summons is issued. If within 120 days of issuance of the summons, Plaintiff has not made service or requested an extension of time in which to do so, under Rules 4(m) and 41(b) of the Federal Rules of Civil Procedure, the Court may dismiss this action for failure to prosecute." (*See Khanna v. Hartford et. al.*, No. 14-CV-09172-VEC [S.D.N.Y. Feb. 17, 2015] [Order directing service of Plaintiff's Amended Complaint]).

Eaton affirms that, "On April 3, 2015 and prior to the return of a waiver of service, an order was entered into in the District Court for the Southern District of New York remanding the current action back to the state court." (*Id.* ¶ 11). EFK argues that Plaintiff failed to complete service on EFK in the state or federal action, and that, as a result, the Court lacks personal jurisdiction over EFK and Plaintiff's action as against EFK must be dismissed.

Plaintiff's affidavit in opposition to EFK's motion to dismiss for lack of personal jurisdiction states:

> EFK should not be allowed dismissal for lack of service because, in fact, Plaintiff filed the Amended Complaint in federal court, and proceeded with service to EFK according to instructions as requested by EFK and the federal court. EFK has refused to return the service of process, and this court should therefore allow Plaintiff to serve EFK and any other Defendants directly at the hearing to complete the process of service.

(Khanna Aff. ¶ 4). However, Plaintiff does not provide proof of service of Plaintiff's Complaint or of Plaintiff's Amended Complaint pursuant to CPLR § 312-a(b).

Here, insofar as Plaintiff fails to provide proof of service of Plaintiff's original complaint upon EFK pursuant to CPLR §§ 311 or 312, and further fails to provide proof of service of Plaintiff's Amended Complaint upon EFK pursuant to the CPLR or FRCP, Plaintiff's action as against EFK must be dismissed.

In light of the foregoing, to the extent that Plaintiff moves for summary judgment against EFK, such motion is moot as against EFK and need not be addressed.

As for Plaintiff's purported motion for summary judgment against Verizon and the Hartford Defendants, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory

allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). Pursuant to CPLR § 3212(f), the court may deny a motion for summary judgment, "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated". (CPLR § 3212[f]).

With respect to Verizon, Plaintiff's papers seek "summary judgment . . . in the sum of $43,530 for loss of business income, plus interest from October 29, 2012, plus treble damages, because it failed to Answer [sic] the Amended Complaint in a timely manner." (Pl's "Reply to Hartford and Motion for Summary Judgment" p. 2). However, Plaintiff fails to present proof in admissible form sufficient to make a prima facie showing of entitlement to judgment as a matter of law on Plaintiff's claims for loss of business income against Verizon, and Plaintiff's submissions are insufficient to eliminate any material issue of fact in Plaintiff's case. To the extent that Plaintiff's motion essentially seeks a judgment by default against Verizon, pursuant to CPLR § 3215, Plaintiff fails to file proof of the facts constituting the claim, the default, and the amount due as required under CPLR § 3215(f). (CPLR § 3215[f]; *Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dep't 1994]). Accordingly, Plaintiff fails to demonstrate that a default judgment against Verizon is warranted at this time[2].

With respect to the Hartford Defendants, Plaintiff's papers seek "damages of $43,530, claim expenses of $10,000, plus interest at 9% from October 29, 2012, plus costs, and triple damages of $160,590 against . . . [the Hartford Defendants], because Defendant's [sic] actions caused damage to the Plaintiff, and were willful." (Pl's "Reply to Hartford and Motion for Summary Judgment" p. 1). In addition, Plaintiff seeks punitive damages of 2% of revenue from both The Hartford Financial Services Group Inc.'s (2014 revenue of $18,614,000,000 from its public 10(k) filing) and Property and Casualty Insurance Co of Hartford (2012 revenue of $49,450,253 from Indiana's Department of Insurance)." (*Id.*). Here, Plaintiff fails to present proof in admissible form sufficient to make a prima facie showing of entitlement to judgment as a matter of law on Plaintiff's claims against the Hartford Defendants. In addition, although the Hartford Defendants acknowledge an insurance policy (the "Policy") issued to non-party Corporate Power Inc. ("Corporate Power"), the Hartford Defendants' opposition suggests that issues of fact may exist as to whether Corporate

[2] Verizon argues, in opposition, that Verizon cannot be in default because Verizon was not properly served with an Amended Complaint pursuant to CPLR § 312-a. However, Plaintiff's papers note that Verizon appeared at a pre-trial conference on January 16, 2015, during which Verizon informed the Court that Verizon waived service. (Pl's "Reply to Hartford and Motion for Summary Judgment" p. 2). Plaintiff does not provide minutes from the January 16, 2015 conference or submit any other documentation regarding said waiver.

Power assigned rights under the Policy to Plaintiff. The Hartford Defendants represent that they have not yet had the opportunity to conduct discovery into the issue of Plaintiff's standing in this action. (DeAngelis Affirm. ¶ 7). In addition, the Hartford Defendants' opposition suggests that factual questions may exist as to whether the Policy, which contains a "water exclusion" and an "acts and decisions exclusion", provides coverage for Plaintiff's claims. (*See e.g, id.* ¶¶ 8-13, 22-24). Accordingly, Plaintiff fails to demonstrate that summary judgment against the Hartford Defendants is warranted at this time.

Finally, Plaintiff's papers also seek to amend the caption, "to correct 'The Hartford' to 'The Hartford Financial Services Group Inc.' because The Hartford is the trade name for The Hartford Financial Services Group Inc., which is the parent company of Property and Casualty Insurance Co of Hartford" and "to change 'Verizon Communications' to 'Verizon New York Inc.' as per the Federal Court Order on January 16, 2015." (Pl's "Reply to Hartford and Motion for Summary Judgment" p. 1; *Khanna v. Hartford et. al.*, No. 14-CV-09172-VEC [S.D.N.Y. Jan. 20, 2015] [Order directing Plaintiff to file Amended Complaint on or before February 16, 2015 and further directing that, "[i]n the Amended Complaint, Plaintiff should also correct the case caption to reflect that Verizon New York Inc., rather than Verizon Communications, is the properly named Defendant"]). As neither Verizon nor the Hartford Defendants appear to oppose Plaintiff's requests to amend the caption, Plaintiff is permitted to amend the caption as requested.

Wherefore, it is hereby,

ORDERED that EFK's motion to dismiss is granted; and it is further

ORDERED that Plaintiff's complaint as against defendant Eifert, French & Ketchum is dismissed; and it is further

ORDERED that Plaintiff's remaining claims against Verizon and the Hartford Defendants are severed and shall proceed; and it is further

ORDERED that Plaintiff is permitted to amend the caption and the amended caption shall appear as follows:

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AJAY KHANNA,

Index No.
653317/2014

Plaintiff,

- against -

THE HARTFORD FINANCIAL SERVICES GROUP INC., PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD, EIFERT FRENCH & KETCHUM, AMERICAN ARBITRATION ASSOCIATION, VERIZON NEW YORK INC., and CON EDISON OF NEW YORK,

Defendants.

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and it is further

ORDERED that Plaintiff shall serve a copy of this decision upon the Clerk, who is directed to amend the caption accordingly; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 205, 71 Thomas Street, on January 26, 2016, at 9:30 AM.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: October 28, 2015

OCT 28 2015

EILEEN A. RAKOWER, J.S.C