

Dweck v MEC Enters. LLC

2016 NY Slip Op 31659(U)

August 31, 2016

Supreme Court, New York County

Docket Number: 152011/2014

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

ISAAC RALPH DWECK,

Plaintiff,

Index No. 152011/2014

-against-

Motion Seq. Nos. 001 & 002

MEC ENTERPRISES LLC,
TINSEL TRADING COMPANY,
MARCIA CEPPOS

Defendants.

X

MEC ENTERPRISES LLC, AND
MARCIA CEPPOS

Third-Party Plaintiffs,

-against-

DWECK 37TH STREET ASSOCIATES,
ISAAC ROBERT DWECK, HANK HENRY DWECK,
RICHARD DWECK, JACK RALPH DWECK
and BERKSHIRE FASHIONS, INC.

Third-Party Defendants.

X

OSTRAGER, J:

Before the Court is a motion to dismiss the Third-Party Complaint by the Third-Party Defendant, Berkshire Fashions, Inc. ("Berkshire"), pursuant to CPLR §3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action (mot. seq. 001). Also submitted is a motion to dismiss the Third-Party Complaint by Third-Party Defendants Dweck 37th Street Associates ("Dweck 37") and Jack Ralph Dweck ("JRD"), pursuant to CPLR §3211(a)(8) for lack of personal jurisdiction (mot. Seq. 002), and a cross-motion by Third-Party Plaintiffs MEC Enterprises LLC ("MEC") and Marcia Ceppos ("Ceppos") for a finding that service of the Third-

Party Complaint was properly completed on the movants or, in the alternative, granting the Third- Party Plaintiffs additional time to serve the Third-Party Complaint.

The Complaint alleges the following facts. Dweck 37 is a New York partnership that formerly owned property located at 1 West 37 Street in Manhattan (the “Property”), and the plaintiff, Isaac Ralph Dweck, is a former partner in Dweck 37 (Complaint ¶2). The defendant MEC is a former tenant at the Property, defendant Ceppos is a personal guarantor for MEC, and defendant Tinsel Trading Company (“Tinsel”) is a sub-lessee of MEC (¶ 3-7).

MEC leased first floor commercial space with mezzanine and basement from Dweck 37 in June 2008. MEC vacated the leased space on or about December 31, 2012 before the lease expired (¶ 8-9). On December 21, 2012, the Property was sold, but Dweck 37 retained the right to collect delinquent, or back rent, from tenants of the Property through the closing date of December 28, 2012 (the “Closing”) (¶ 10-11). By a written agreement dated December 20, 2012, all partners except for Third-Party Defendant Jack Ralph Dweck assigned to the plaintiff, Isaac Ralph Dweck, the right to collect back rent under a 2012 Mutual Release and Agreement (the “2012 Agreement”) (¶12). JRD later assigned the right to collect back rent to the plaintiff Isaac Ralph Dweck by a written agreement dated February 18, 2014, effective December 20, 2012 (the “2014 Assignment”) (¶13). In March 2014, the plaintiff commenced this action to recover \$676,077.03 allegedly owed by MEC, Tinsel, and Ceppos for back rent (NYSCEF Doc. No. 1). All the defendants answered, and MEC counterclaimed, in May 2014, and discovery proceeded (NYSCEF Doc. No. 5).

Two years later, on January 21, 2016, defendants MEC and Ceppos filed a Third-Party Complaint against Dweck 37, as well as four individuals Isaac Robert Dweck, Hank Henry Dweck, Richard Dweck, and Jack Ralph Dweck, who allegedly were or are partners of Dweck

37. Also named was Berkshire Fashions, Inc., which is alleged to be a former or current partner of Dweck 37 (Third-Party Complaint, NYSCEF Doc. No.16, ¶14). In their Third-Party Complaint, the defendants/Third-Party Plaintiffs MEC and Ceppos seek \$900,000 in damages from the Third-Party Defendants for alleged misrepresentations and breach of contract. Third-Party Defendants Isaac, Hank and Richard have all answered without raising any jurisdictional defense (NYSCEF Doc. No. 41). The remaining three Third-Party Defendants have made the instant pre-answer motions to dismiss in lieu of answering.

Motion Sequence 001

In support of its motion to dismiss the Third Party Complaint against it, Berkshire submits an affidavit from Hank Henry Dweck, who asserts (at ¶1) that he is “the executive vice president of Berkshire Fashions, Inc.” Hank asserts that Berkshire was merely a tenant at the Property 1 West 37th Street. He asserts that the Property was previously owned fifty percent by his cousins, the plaintiff Isaac Ralph Dweck and third-party defendant Jack Ralph Dweck, and fifty percent by himself and third-party defendants Richard Dweck and Isaac Robert Dweck. He further asserts (at ¶4) that Berkshire “did not own the building at 1 West 37th Street and was not a partner in the building.” In support of that assertion, he provided a copy of a January 16, 1979 partnership agreement for Dweck 37 as owner of the Property, which names various individuals as partners but not Berkshire (Exh. C). Based on these assertions and documents, Berkshire argues there is no basis for naming Berkshire as a Third-Party Defendant, and it seeks dismissal of the action against it as well as costs and attorneys’ fees for defending this action.

In opposition, the defendants/Third-Party Plaintiffs MEC and Ceppos argue via an affirmation from counsel that documents disclosed during discovery establish that Berkshire was “at all relevant times herein a partner of DWECK 37TH STREET ASSOCIATES, a New York

General Partnership, the owner and Landlord of the subject building” (¶3). Attached to the affidavit as Exhibits A and B are two documents to support this position. The first is the aforementioned 2014 Assignment whereby Jack Ralph Dweck agrees, effective December 20, 2012, to the assignment of the delinquent rent claims made by the other partners in the partnership known as Dweck 37th Street Associates. The second document is the 2012 Agreement referenced above and in the 2014 Assignment regarding the original assignment of delinquent rent claims. Significantly, Berkshire is a party and a signatory to that 2012 Agreement naming “Berkshire Fashions, Inc.” with Isaac Robert Dweck signing for Berkshire as “President”. Although the 2012 Agreement does refer to Berkshire in the “Whereas” clause as only “a tenant,” the introductory paragraph is somewhat ambiguous as it refers to Isaac Robert, Hank and Richard Dweck and Berkshire “collectively” as one party to the Agreement. Counsel argues that the 2012 Agreement evidences Berkshire’s interest in the partnership and that Berkshire’s reliance on the 1979 partnership agreement to suggest otherwise is misplaced, as that agreement was necessarily amended over the years, as proven, for example, by the fact two original (1979) partners Shirley Dweck and David Chabbott neither signed the 2012 and 2014 agreements nor were mentioned as partners or parties. The moving defendants offer no reply.

On a pre-answer motion to dismiss such as this pursuant to CPLR 3211(a)(1) and (7), the Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory ... Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law ...” *Leon v Martinez*, 84 NY2d 83, 87 (1994)(citations omitted). Applying that standard here, the motion to dismiss by Third-Party Defendant Berkshire must be denied based

on the lack of conclusive evidence, and the parties should proceed to develop the record more fully through discovery.

Motion Sequence 002

In their motion to dismiss the Third-Party Complaint, Third-Party Defendants Jack Ralph Dweck and Dweck 37 assert that the Court lacks personal jurisdiction over them. The motion is supported by an affirmation from counsel, as well as affidavits from Hank Henry Dweck and Jack Ralph Dweck and various exhibits. Third-Party Plaintiffs have cross-moved for an order finding service proper and deeming the affidavits of service timely filed, *nunc pro tunc*, or in the alternative extending the time to complete service.

Turning first to Dweck 37, Hank Henry Dweck attests (§1) that he was a partner in Dweck 37, “a defunct general partnership that existed to hold title to the commercial building at 1 West 37th Street, New York, New York [the Property] that it sold in December, 2012.” He documents the sale with a copy of the deed naming Dweck 37 as Seller, which appears to be signed by Hank on behalf of the partnership, though the notarization refers to him as Harry (Exh A). He also provides what he describes as the “final” partnership tax return in 2012 for Dweck 37 (§2, Exh. B). Both documents have an address for Dweck 37 c/o Berkshire. While offering no details as to how service was purportedly completed, Hank Henry Dweck seeks dismissal as against Dweck 37 asserting lack of jurisdiction on the grounds that the partnership allegedly “was never served, an affidavit of service was never filed, it is defunct and carries on no current business operations” (§2).

Counsel correctly notes that proof of service must be filed pursuant to CPLR 306-b within 120 days of the commencement of the third-party action. The commencement by filing

was completed on January 21, 2016, making the filing due by late May 2016. No affidavit of service was filed as of May 26, 2016, when the motion was made.

By contrast, an affidavit of service was timely filed for the Third-Party Defendant Jack Ralph Dweck (“Jack” or “JRD”) in early May 2016 (NYSCEF Doc. No. 30). The affidavit alleges that Jack Ralph Dweck was served by delivery of the papers to Simmie Wong, an assistant and person of suitable age and discretion at Berkshire Fashions Inc., located at 420 Fifth Avenue and described in the affidavit as JRD’s “actual place of business.” In a one-paragraph affidavit, JRD asserts that he was “never served with a copy of the third party summons and complaint in this matter.” He adds that he has “no current connection with Berkshire Fashions” and that he was “bought out of [his] stake in Berkshire” about 9 years ago.

Hank Henry Dweck in his affidavit (¶3) corroborates JRD’s claim, asserting that JRD “has not been connected in any way with Berkshire Fashions Inc. for approximately nine years and since then he has not maintained an office in the Berkshire space at 420 Fifth Ave, New York, New York.” Counsel reiterates the claim and argues that service was deficient under CPLR 308(2), which requires service on a natural person by delivery to “a person of suitable age and discretion at the actual place of business.”

In response to the jurisdictional challenge by Dweck 37, the Third-Party Plaintiffs filed an affidavit of service on July 6, 2016 (NYSCEF Doc. No. 54) and a cross-motion requesting that the Court deem the affidavit of service of the Third Party Summons and Complaint upon Dweck 37 timely filed *nunc pro tunc*, or (b) in the alternative, if the Court holds service upon Dweck 37 and/or JRD was not already completed, an Order extending the Third-Party Plaintiffs’ time to serve Dweck 37 and/or JRD *nunc pro tunc*. They argue that service upon the partnership was properly made pursuant to CPLR 310 by personally serving various individual partners by

delivering the papers to a person of suitable age and discretion at the actual place of business.

Dweck 37 opposes, arguing that the movants failed to establish the statutorily required “good cause” or “interest of justice” so as to permit an extension of time pursuant to CPLR 306-b and that the movants also failed to comply with this Court’s rules regarding procedures to request extensions of time.

As previously noted, CPLR §306-b requires the affidavit of service to be filed within 120 days after commencement of the action, or in this case by late May 2016. The filing was completed about 45 days late, in early July 2016. However, the failure to timely file an affidavit of service is not a jurisdictional defect, but merely a procedural irregularity which can be cured by an order *nunc pro tunc*. *Djokic v. Perez*, 22 Misc.3d 930 (NY City Civil Ct. 2008); *see also Weininger v. Sassower*, 204 A.D.2d 715 (2d Dep’t 1994). As public policy favors a disposition on the merits, the Court finds good cause to extend the time to file and to excuse any technical noncompliance with the rules.

Further, while Dweck 37 does not specifically object to the manner of service, the Court finds that service was properly completed on Dweck 37 pursuant to CPLR 310 by serving the various individual partners by means of delivery to a person of suitable age and discretion at the partnership’s business address and the actual place of business of at least some of the partners. Indeed, no partner other than JRD has denied that Berkshire was that particular partner’s business address, and all the partners were served there. The reference in section 310 to “personal service” upon partners in the partnership incorporates the methods of personal service set forth in CPLR §308, and CPLR §308(2) expressly permits the delivery of summons within the state to a person of suitable age and discretion at the actual place of business followed by a mailing, as was done here. Thus, the Court finds that the service here on the partnership Dweck

37 is valid. *Foy v 1120 Avenue of the Americas Associates*, 223 AD2d 232 (1st Dep't 1996); see also *Atkinson v D.M.A. Enters.*, 159 Misc.2d 476 (Sup Ct, New York Co. 1993).

With respect to service upon Jack Ralph Dweck, the Third-Party Plaintiffs criticize JRD's affidavit as insufficient to prove that service on a person of suitable age and discretion at the Berkshire offices constitutes proper service on JRD. Specifically, moving counsel argues that while JRD indicated that he is no longer connected to Berkshire, the "dispositive question is whether or not Jack has conducted business at 420 Fifth Avenue as part of the partnership Dweck 37th Street Associates" (¶30). Jack does not specifically address that point in response; counsel in opposition to the cross-motion focuses his comments instead on plaintiffs' request for an extension of time to file proof of service on Dweck 37, which would purportedly prejudice JRD as a Florida resident.

This Court finds that the competing allegations and documentary evidence create an issue of fact requiring a traverse hearing. The issue is, as Third-Party Plaintiffs allege, whether 420 Fifth Avenue constitutes JRD's actual place of business as a partner in Dweck 37, when that address has been used repeatedly by Dweck 37 as its business address c/o Berkshire. Although claims have been made that Dweck 37 is defunct, JRD does not specifically state in his affidavit that neither he nor Dweck 37 does any business at the address where service was made; JRD simply states that he disassociated himself from Berkshire. Nevertheless, JRD's explicit denial of receipt of the summons and complaint and his purported buyout from Berkshire, along with the various documents and allegations by Hank Henry Dweck that Jack does not maintain space at the Berkshire office, are sufficient to create an issue of fact requiring a traverse hearing. *650 Fifth Ave. Co. v Travers Jewelers Corp.*, 2010 NY Slip Op 51829[U] (Sup Ct, 2010).

Accordingly, it is hereby

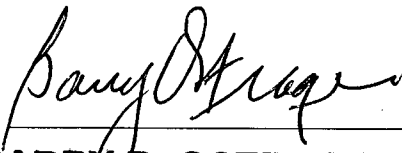
ORDERED that the motion by the Third-Party Defendant, Berkshire Fashions, Inc., to dismiss the Third-Party Complaint pursuant to CPLR 3211(a)(1) and (7) is denied, and Berkshire shall file an answer to the Third-Party Complaint within 20 days ; and it is further

ORDERED that the motion by Dweck 37th Street Associates to dismiss the Third-Party Complaint for lack of jurisdiction is denied, and the cross-motion by the Third Party Plaintiffs to have the affidavit of service deemed timely filed *nunc pro tunc* is granted; and it is further

ORDERED that a traverse hearing on the issue of effective service on Jack Ralph Dweck will take place on September 26, 2016 at 10:00 a.m.; and it is further

ORDERED that the parties other than Jack Ralph Dweck should appear on September 26, 2016 at 9:30 a.m. for a discovery scheduling conference, and defendant Jack Ralph Dweck shall appear on that date for a traverse hearing.

Dated: August 31, 2016



BARRY R. OSTRAGER J.S.C.
JSC