

SIRI Med. Assoc., PLLC v Paradise Ct. Mgt. Corp.

2016 NY Slip Op 33113(U)

July 29, 2016

Supreme Court, Bronx County

Docket Number: 22805/2015E

Judge: Mary Ann Brigantti

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti

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SIRI MEDICAL ASSOCIATES, PLLC., a/k/a CATSKILL
PHYSICAL MEDICINE AND PAIN MANAGEMENT, PLLC.,

Plaintiff,

-against-

DECISION / ORDER
Index No. 22805/2015E

PARADISE COURT MANAGEMENT CORPORATION,
SENTINEL INSURANCE COMPANY,
LIMITED/THE HARTFORD,

Defendants

-----X
The following papers numbered 1 to 14 read on the below motion noticed on March 16, 2016 and duly submitted on the Part IA15 Motion calendar of **April 26, 2016**:

<u>Papers Submitted</u>	<u>Numbered</u>
Sentinel Motion, Memo. of Law., Exhibits	1,2,3
Pl.'s Aff. in Opp., Exhibits	4,5
Paradise's Cross-Motion, Exhibits	6,7
Pl.'s Aff. in Opp., Exhibits	8,9
Pl.'s Cross-Motion, Exhibits	10,11
Sentinel's Reply., Opp. to Cross-Motion	12
Paradise's Reply, Exhibits	13,14

Upon the foregoing papers, defendant Sentinel Insurance Company, Limited/The Hartford ("Sentinel") moves for an order (1) dismissing the plaintiff's fourth cause of action, and (2) severing plaintiff's third cause of action, pursuant to CPLR 3211(a)(7) and 603, respectively. Plaintiff Siri Medical Associates, PLLC. a/k/a Catskill Physical Medicine and Pain Management, PLLC. ("Plaintiff") opposes the motion. Defendant Paradise Court Management Corporation ("Paradise") cross-moves for an order dismissing Plaintiff's complaint for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), or for lack of legal capacity to sue, pursuant to CPLR 3211(a)(3). Plaintiff opposes the motion. Plaintiff cross-moves for an order granting leave to serve an amended summons and complaint pursuant to CPLR 3025. Sentinel opposes Plaintiff's cross-motion.

I. Background

This matter arises out of an alleged gas odor condition that was present inside of offices

located at 2940 Grand Concourse in the Bronx, New York. According to the complaint, at relevant times, Plaintiff was a medical provider who leased the subject offices from defendant Paradise. Plaintiff alleges that in 2014, a gas odor condition at the premises caused it to temporarily close its medical practice and thus sustain significant financial losses. Plaintiff thereafter brought this action against Paradise, alleging that Paradise was negligent in failing to take the appropriate action to correct the hazardous condition, and failed to fulfill its obligations under the controlling lease agreement (Plaintiff's first and second causes of action). Plaintiff's third and fourth causes of action are asserted against defendant Sentinel. Plaintiff alleges Sentinel, its insurer, breached its obligations to pay for Plaintiff's losses and expenses due to the odor of gas at the premises. Plaintiff also alleges that Sentinel acted in bad faith in failing to perform its obligations pursuant to the insurance policy without good cause.

Sentinel now moves to dismiss Plaintiff's fourth cause of action, on the grounds that New York Law does not recognize a separate cause of action for "bad faith" breach of an insurance contract. Sentinel also moves to sever Plaintiff's third cause of action, because Sentinel's obligations under the insurance policy are totally unrelated to the issues of Paradise's potential liability under the lease agreement, or in negligence. While both claims may arise out of the alleged gas odor condition on the premises, the issues of law are plainly disparate and the proof with respect to each cause of action does not overlap. Allowing the claims to be resolved in a single trial may result in juror confusion or undue prejudice to Sentinel.

In opposition to this motion, Plaintiff submits an affidavit of its principal who asserts that Sentinel "in gross disregard ignored her quests and failed to investigate her report of loss relating to business." Plaintiff contends that its "bad faith" cause of action is viable in New York. Plaintiff also alleges that severance is not appropriate because the "cause of the damage" and the "damages incurred" are the same. Plaintiff alleges that Sentinel's failure to investigate the loss of business due to the gaseous odor is directly connected to co-defendant Paradise's failure to remedy the problem.

Paradise seeks dismissal of the action on the grounds that Plaintiff lacks capacity to sue. Paradise argues that "Siri Medical Associates, PLLC." ("Siri") was not a contracting party nor an intended third-party beneficiary of the lease executed solely between Paradise and "Catskill Physical Medicine and Pain Management, PLLC." ("Catskill") Paradise also argues that Catskill lacks legal capacity to sue because it is no longer a tenant of the present lease.

Paradise also contends it is entitled to dismissal for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Plaintiff endeavored to effectuate service pursuant to CPLR 311, which allows for personal service to be made on a corporation where the papers are delivered 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." Paradise notes that Plaintiff's affidavit of service states that the summons and complaint were left with "Gjek Lumaj," the "superintendent" of the building. However, in an affidavit, Mr. Lumaj explains that he has not been the superintendent of Paradise's building since 2003 and at the time of alleged service, he was the superintendent at a completely different building. Mr. Lumaj also denies ever receiving the summons and complaint, and provides a photograph of himself, demonstrating that he does not fit the affidavit's description of the person allegedly served. Paradise also provides an affidavit of its former president, Prela Rukaj, who confirms the statements made by Mr. Lumaj, and states among other things that Paradise only received notice of this lawsuit when co-defendant mailed its Answer to Paradise's former New Jersey location. Mr. Rukaj reviewed Plaintiff's affidavit of service and asserts that the process server is either "seriously mistaken or not telling the truth" because Mr. Lumaj had not been employed by Paradise since 2003, and the description of him is erroneous. Since Plaintiff failed to serve an authorized person in accordance with CPLR 311, Paradise alleges that it is entitled to dismissal of the complaint.

In addition, Paradise argues that it is entitled to dismissal because Plaintiff failed to file its affidavit of service until some five (5) months after the time to complete service had expired, or just recently on March 3, 2016. Moreover, the affidavit itself is deficient on its face, because it does not contain all of the information required by CPLR 306(a).

In opposition to the cross-motion, Plaintiff asserts that Paradise has waived its proffered defenses by failing to raise them in a timely answer or pre-answer motion to dismiss within sixty days of service. In any event, Plaintiff asserts that Siri has standing to maintain this lawsuit, as Catskill changed its name to Siri in 2013, during its tenancy at the subject premises. Plaintiff also argues that it effected personal service on Paradise. Plaintiff submits an affidavit from its process server, Kenneth Borden, Esq., who asserts that he arrived at the property on May 28, 2015 and rang the doorbell for "superintendent" and "Gjek Lumaj." Mr. Lumaj allegedly answered via cell phone and confirmed that he was the building's superintendent. When he arrived at the property, Mr. Borden allegedly served him with the papers, and Mr. Lumaj never

stated that he was not authorized to accept them. Plaintiff also argues that "[a]ll indications point to the fact that the Summons and Complain were transmitted to the Defendant."

In reply, Paradise notes, *inter alia*, that although Plaintiff contends that it changed its name to Siri from Catskill in 2013, records from the New York State reveal that Siri and Catskill are indeed separate, active entities, and both entities existed before the lease was signed in 2011. Paradise asserts that Plaintiff provided no records to support its assertion that it filed a name-change during the tenancy, and the evidence reveals that only Catskill executed the lease. Paradise further asserts that it has not waived its proffered defenses.

Finally, Plaintiff has filed a cross-motion seeking leave to supplement the summons, and to amend the Plaintiff's complaint, to add "Airlu Realty LLC.," allegedly the owner of the premises, as a party defendant. Plaintiff also requests permission to "add allegations in support of its claim as to Defendant Sentinel." In opposition to this cross-motion, Sentinel notes that Plaintiff's proposed amended pleading contains no additional allegations against Sentinel.

II. Applicable Law and Analysis

Sentinel Motion to Dismiss / Severance

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997])[on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR 3026). 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 into any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept.

1992]).

Plaintiff's fourth cause of action alleging that Sentinel acted in "bad faith in failing to perform its obligations" under the subject insurance policy must be dismissed because the claim fails as a matter of law. "Allegations that an insurer acted in bad faith, or that an insurer had no good faith basis for denying coverage are redundant to a cause of action for breach of contract based on the denial of coverage, and do not give rise to an independent tort cause of action, regardless of the insertion of tort language into the pleading" (*Royal Indemn Co. v. Solomon Smith Barney, Inc.*, 308 A.D.2d 349, 350 [1st Dept. 2003][internal citations omitted]). In other words, Plaintiff's "bad faith" claims must be dismissed because they are "intrinsically tied to the damages allegedly resulting from a breach of contract" (see *The Hawthorne Group, LLC. v. RRE Ventures*, 7 A.D.3d 320, 323 [1st Dept. 2004][internal citations omitted]).

In opposition to the motion, Plaintiff submits an affidavit from its principal alleging that Sentinel "in gross disregard" ignored requests and failed to investigate the reported loss associated with the business, however these allegations do not set forth a "tort existing independently from the parties' contract" (see *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308 [1995]). Plaintiff's counsel also makes general averments to causes of action under General Business Law §349 and New York Insurance Law §2601, however such claims are not found in Plaintiff's pleading or proposed amended pleading.

Sentinel's motion to sever Plaintiff's third cause of action from the main action is also granted. Severance is within the discretion of the trial court, and the exercise of that discretion should not prejudice a substantial right of the party seeking such relief (see *Shanley v. Callanan Industries, Inc.*, 54 N.Y.2d 52 [1981]; CPLR 603). Severance may be properly granted where, for example, the claims raise unique issues of law or fact, or consideration of the claims would create a substantial risk of confusing the trier of fact (see, e.g., *Radiology Resource Network, P.C. v. Fireman's Fund Ins. Co.*, 12 A.D.3d 185 [1st Dept. 2004]).

In this case, Plaintiff's first two causes of action allege that defendant Paradise violated certain terms and conditions of the lease agreement that existed between those parties. The issue to be determined is whether Paradise breached its obligation to, among other things, provide Plaintiff with quiet enjoyment of the premises when it allegedly failed to "investigate, cooperate, repair, maintain, and/or remedy the hazardous conditions at the premises." Plaintiff's third cause of action is against Sentinel, its insurer, based on Sentinel's alleged failure to properly investigate

Plaintiff's insurance claim, in breach of the insurance agreement it had with Plaintiff. While these causes of action arise out of common facts - the existence of a gas odor at the property - they involve completely different questions of liability as each defendant owed a unique obligation to Plaintiff. Further, there is no showing that the proof with respect to each action will overlap. Under these circumstances, the "identity of the facts is insufficient" to deny severance (*see, Beerman v. Morhaim*, 17 A.D.3d 302 [2nd Dept. 2005]; *Dreizen v. Morris I. Stoler, Inc.*, 98 A.D.2d 759 [2nd Dept. 1983]). While Plaintiff claims that this motion is premature, it does assert what discovery would be necessary before the motion is considered, and does not allege that the movant is in exclusive possession of any pertinent facts that would warrant denial of the motion.

Paradise Cross-Motion to Dismiss

Paradise initially contends that the complaint must be dismissed because Plaintiff lacks the capacity to bring this action. The Court first notes that Paradise did not waive this defense, as even if it is determined that service was proper, Paradise's time to answer or otherwise move did not begin to run until March 3, 2016, the date the proof of service on Paradise was filed (*see Pipinas v. J. Sackaris & Sons, Inc.*, 116 A.D.3d 749, 750 [2nd Dept. 2014]). Nevertheless, Paradise has failed to conclusively demonstrate that the plaintiff Siri, initially named "Siri Medical Associates, PLLC., a/k/a Catskill Physical Medicine and Pain Management, PLLC.," lacks the legal capacity to bring this action. While Siri is not a signatory to the subject lease agreement, Plaintiff has provided evidence that during the term of the leasehold, Catskill changed its name to Siri, that Siri assumed any and all liabilities of Catskill, and that Siri remitted rent payments to Paradise. Paradise has submitted evidence that "Siri" and "Catskill" both continue to exist as separate entities, however this does not negate the possibility that Siri was assigned Catskill's rights under the lease and is therefore entitled to enforce its terms (*see, e.g., Sea Cliff Delicatessen, Inc. v. Skrepek*, 199 A.D.2d 510 [2nd Dept. 1993]). On a motion to dismiss, the pleadings are to be liberally construed, affording plaintiffs the benefit of every possible favorable inference (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). Dismissal of "Catskill's" claims is not required, as "Catskill" is not named as a separate plaintiff in this action.

Paradise also argues that it is entitled to dismissal of this action pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Paradise contends that Plaintiff failed to effectuate service in compliance with CPLR 311(a)(1), because it did not serve the papers on a person

authorized by Paradise to receive such service. Contrary to Plaintiff's contention, Paradise did not waive this defense, since Paradise never formally or informally appeared in the action before bringing this motion (*see Cadlerock Joint Venture, L.P. v. Kierstedt*, 119 A.D.3d 627 [2nd Dept. 2014]; *see also HSBC Bank USA v. A&R Trucking Co., Inc.*, 66 A.D.3d 606 [1st Dept. 2009]).

In support of its motion, Paradise presents evidence that the person allegedly served, Mr. Lumaj, was not employed by Paradise at the time of service. Mr. Lumaj denies ever receiving process in this matter, and attests that he was the superintendent at a completely different property. Mr. Lumaj also notes that he does not fit the description contained in the affidavit of service. Paradise also argues that even if Mr. Lumaj was served the papers, this service would nevertheless be a nullity as Mr. Lumaj was not authorized to accept service on behalf of Paradise under CPLR 311(a)(1). In opposition, Plaintiff has provided an affidavit from its process server Kenneth Borden, who asserts that he traveled to 2940 Grand Concourse in the Bronx, and rang a doorbell labeled "superintendent" and "Gjek Lumaj." In response, Mr. Lumaj answered by cell phone. Mr. Borden states that Mr. Lumaj arrived at the property and acknowledged he was the superintendent of the building. Mr. Borden states that he advised Mr. Lumaj that he was there to "serve papers," and Mr. Lumaj accepted the summons and complaint without stating that he was not authorized to do so.

Personal service upon a corporation can be effectuated through "delivering the summons and complaint 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" CPLR 311(a)(1). The Court of Appeals has held that CPLR 311(a)(1) is to be construed liberally, and in evaluating whether service should be sustained, "the circumstances of the particular case must be weighed" (*see Fashion Page, Ltd. v. Zurich Ins. Co.*, 50 N.Y.2d 265, 273 [1980]). The Court further noted that a process server attempting service under CPLR 311 may be entitled to rely on the representations of corporate employees to identify the proper person to accept service (*id.* at 272). Service will be sustained if, after review of the facts and circumstances, it is determined that the process server acted reasonably and with due diligence in serving the summons and complaint (*id.* at 273).

In this case, the submissions raise an issue of fact as to whether Mr. Lumaj received the papers, whether he responded to 2940 Grand Concourse representing himself as the building superintendent, and whether, after Mr. Borden identified himself as a process server serving

“papers,” Mr. Lumaj accepted service without indicating that he was not authorized to do so (*see Arvanitis v. Bankers Trust Co.*, 286 A.D.2d 273 [1st Dept. 2001]). While Mr. Lumaj has expressly denied that he (1) was superintendent at the building, or (2) ever received the summons and complaint, the Borden affidavit contradicting these claims raises an issue of fact that must be addressed in a hearing. Paradise also argues that Plaintiff failed to complete service by filing the affidavit of service with the Court within 120 days. However, the late filing of proof of service is considered only a procedural irregularity and not a jurisdictional defect, or grounds for dismissal (*see, e.g., Khan v. Hernandez*, 122 A.D.3d 802, 803 [2nd Dept. 2014]).

Paradise also argues that the purported affidavit of service is defective in various ways. The affidavit fails to conform with CPLR 306(a) as it does not contain (1) the address of the premises within which service was attempted; (2) the time that such purported service was attempted; (3) that service of process was served upon either one of the persons designated in the statute to accept service. Further, the person purportedly served, Mr. Lumaj, has filed an affidavit denying receipt of the papers. He also affirms that he has never accepted service of process and had been directed by his employer to not accept mail or legal documents on behalf of anyone in the building. Mr. Rukaj, former president of Paradise, states that he first became aware of this action upon receipt of the answer of co-defendant Sentinel Insurance Company, Limited/The Hartford, at Paradise’s former New Jersey address, on June 25, 2015.

CPLR 306(a) provides that “[p]roof of service shall specify the papers served, the person who was served and the date, time, address, or, in the event there is no address, place and manner of service, and set forth facts showing that service was made by an authorized person and in an authorized manner.” Here, the affidavit of service from Kenneth P. Borden does not contain the time of service, or the address where the papers were allegedly served. However, defects in the actual affidavit will not deny jurisdiction where service was actually effectuated (*see Morrissey v. Sostar, S.A.*, 63 A.D.2d 944 [1st Dept. 1978]; *Navarro v. Singh*, 110 A.D.3d 497 [1st Dept. 2013]). As noted *supra*, a hearing is required to determine whether service was properly effectuated under CPLR 311. If it was, any defects in the affidavit of service would not deny jurisdiction over Paradise.

Plaintiff’s cross-motion for leave to amend the complaint

Plaintiff’s cross-motion seeking leave to amend the complaint will be held in abeyance

pending the outcome of the hearing, except that any leave to amend claims brought against defendant Sentinel is denied. While Plaintiff asserts that he is bringing additional allegations against Sentinel, no additional claims against that party are found in the proposed amended pleading annexed to Plaintiff's cross-motion.

III. Conclusion

Accordingly, it is hereby

ORDERED that Sentinel's motion to dismiss Plaintiff's fourth cause of action is granted, and that cause of action is dismissed pursuant to CPLR 3211(a)(7), and it is further,

ORDERED, that Sentinel's motion to sever Plaintiff's third cause of action pursuant to CPLR 603 is granted, and it is further,

ORDERED, that Plaintiff's third cause of action against Sentinel is hereby severed from Plaintiff's first and second causes of action, and Plaintiff's third cause of action against Sentinel is to proceed under a different index numbers and separate and subsequent Notice of Trial; and it is hereby further,

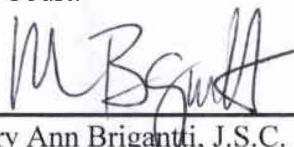
ORDERED, that Paradise's motion to dismiss Plaintiff's complaint pursuant to CPLR 3211(a)(3) is denied, and it is further,

ORDERED, that Paradise's motion to dismiss Plaintiff's complaint for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) is decided to the extent that a traverse hearing is to take place on 11/14, 2016, at 9:30AM in IAS Part 15, Room702, to determine whether service was properly effectuated in this matter, and it is further,

ORDERED, that Plaintiff's cross-motion for leave to amend his complaint is held in abeyance pending the outcome of the traverse hearing, except that any leave to amend the claims brought against defendant Sentinel is denied.

This constitutes the Decision and Order of this Court.

Dated: 7/29, 2016



Hon. Mary Ann Briganti, J.S.C.