

Scola v Kromka

2017 NY Slip Op 32880(U)

December 29, 2017

Supreme Court, New York County

Docket Number: 654447/2013

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

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KATARINA SCOLA,
Plaintiff,

INDEX NO. 654447/2013

MOTION DATE 4/11/2017

- v -

MOTION SEQ. NO. 005

RICHARD KROMKA, BLUE STAR ADVISORS, INC.
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 52, 56, 57, 58

were read on this application to/for Vacate - Decision/Order/Judgment/Award

Upon the foregoing documents, it is

Defendant Richard Kromka (“Kromka”) has moved to dismiss this action for lack of personal jurisdiction and for sanctions. The motion to dismiss is granted and the motion for sanctions is denied.

Plaintiff filed the Summons and Complaint in this action against the defendants Kromka and Blue Star Advisors, Inc. (“Blue Star”) on December 24, 2013. Plaintiff had information that defendant Kromka was living in Hong Kong and was employed as a managing director by a company named EuroConsult Asia Limited that used an address in Hong Kong. Plaintiff hired a process server to effectuate service upon the defendant in Hong Kong. According to the Affidavit of Service filed on July 17, 2014, the process server attempted to effectuate service on January 6,

2014, Kromka was not present, and a call to the receptionist indicated that he was away for the office for the moment. Kromka was also not present on a second attempt at service made on January 13, 2014 and a third attempt on January 16, 2014. The next attempt at service was not made until over five-months later, on June 20, 2014 and, at that time, the process server documented that the address was occupied by Regus, a company providing corporate services. The process server was advised by a female employee that the Subject, meaning Kromka, has a company that is using their services, she could collect documents for the Subject and that the Subject “would not come there.” The woman then accepted the documents and “confirmed that she was receiving the Documents on behalf of ‘Richard Kromka.’” The affidavits of service indicate that service was effectuated on June 20, 2014 upon both Kromka and Blue Star by service upon “Christine Cheng – Centre Manger of Regus.”

The last page of the affidavit of service is a computer printout of a FedEx tracking page that indicates that a FedEx package was sent on June 20, 2014 from Moonache, New Jersey and was delivered to Central Hong Kong on June 23, 2014.

Upon being denied a default judgment by the Clerk, on October 26, 2015, plaintiff sought to extend her time to file proof of service and that motion was granted on December 1, 2015. Then on March 17, 2016 plaintiff moved for a default judgment against both defendants. By Decision and Order dated April 8, 2016, the default judgment was granted against both defendants and the Clerk was directed to enter judgment against the defendants jointly and severally for \$32,455.00 plus statutory interest, costs and disbursements.

Acting under the mistaken belief that the April 8, 2016 Decision and Order was in fact a Judgment (a belief to which plaintiff’s counsel still adheres), plaintiff’s counsel failed to file a Proposed Judgment and Bill of Cost with the County Clerk, so no judgment was entered.

Nevertheless, on April 12, 2016, plaintiff served an Information Subpoena with Restraining Notice on defendant Kromka.

Still without taking the necessary steps to obtain the judgment from the County Clerk, on May 9, 2016, plaintiff served a Restraining Notice against a Citibank account held by defendant Kromka. On October 14, 2016, plaintiff commenced a turnover petition for the monies held in the Citibank account, claiming that the court had entered judgment against defendants Kromka and Blue Star. That petition was granted without opposition and plaintiff was awarded an Ordered and Judgment filed November 17, 2016.

On October 17, 2016, plaintiff moved to compel Kromka to comply with the Information Subpoena, again claiming in its affirmation in support that the Clerk of the Court had entered judgment against defendants Kromka and Blue Star. This motion was denied on November 22, 2016 for plaintiff's failure to appear for oral argument.

On December 8, 2016, Citibank issued a check to plaintiff in the amount of \$4,865.22.

Plaintiff again moved to compel Kromka to comply with the Information Subpoena, again claiming in its affirmation in support that the Clerk of the Court had entered judgment against defendants Kromka and Blue Star. This motion was granted by Decision and Order dated February 21, 2017.

On April 11, 2017, defendant Kromka made the instant motion to dismiss and for sanctions against plaintiff counsel for willfully misrepresenting that a judgment had been obtained and levying Kromka's bank account. On May 12, 2017, plaintiff filed her Proposed Bill of Costs and on May 22, 2017, plaintiff finally obtained a judgment from the Clerk.

Irrespective of whether the Regus office in Hong Kong was Kromka's actual place of business, service of process was defective and this action must be dismissed. Service out of state

is permitted so long as service is made “in the same manner as service is made within the state” (CPLR 313). Substituted service upon an individual must be made by delivery “to a person of suitable age and discretion at the actual place of business . . . of the person to be served . . . and by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof . . . that the communication is from an attorney or concerns an action against the person served.” (CPLR 308[2]). Plaintiff has failed to submit any affidavit of service, regarding the required follow up mailing, only a FedEx tracking page. In the absence of such affidavit, plaintiff’s affidavit of service does not contain information as to the address where the mailing was sent, who sent the mailing, what was contained in the mailing, that the envelope was marked “personal and confidential,” and that the envelope did not indicate that the communication was from an attorney or concerned a legal action. Additionally, although the follow up mailing is required to be served by first class mail, plaintiff concedes that the mailing was sent by FedEx. Plaintiff’s counsel’s conclusory statement, made in the passive voice, that a FedEx envelope marked “personal and confidential” was sent to Kromka at his work address on June 20, 2014, does not cure any of these defects in the affidavit of service since counsel’s does not claim that he personally sent the mailing or state the basis for his personal knowledge of the details surrounding the mailing. Nor does counsel address the failure to send the mailing by first class mail as required. Accordingly, this court lacks personal jurisdiction over Kromka and this action is dismissed as against Kromka without prejudice.

Since this court lacks jurisdiction over Kromka and the levy was obtained in the absence of a judgment against Kromka, plaintiff shall return the funds obtained from Citibank to Kromka.

Defendant's motion for sanctions is denied. Although plaintiff's counsel has made several missteps in attempting to collect monies owed to his client, and clearly misunderstands the difference between an order directing entry of judgment and an actual judgment, there is no indication of willful malicious litigation tactics or vexatious litigation that would warrant sanctions against counsel.

Accordingly, it is hereby

ORDERED that this action is dismissed as against defendant Kromka without prejudice; and it is further

ORDERED that plaintiff shall return the sum of \$4,865.22 to Kromka on or before January 15, 2018; and it is further

ORDERED that defendant's motion for sanctions is denied.

12/29/2017

DATE


DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: