

<b>Zach v East Coast Restoration &amp; Constr. Consulting Corp.</b>
2018 NY Slip Op 31218(U)
June 14, 2018
Supreme Court, New York County
Docket Number: 657346/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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KATARZYNA ZACH,

Plaintiff,

DECISION AND ORDER

-against-

Index Number

EAST COAST RESTORATION AND CONSTRUCTION  
CONSULTING CORP., and GREG SOBOLEWSKI  
JONCZK,

657346/2017

Defendants.

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FRANK P. NERVO, J:

Plaintiff moves for summary judgment in lieu of complaint based on a stipulation of settlement of an action against defendant. (CPLR 3212) Plaintiff alleges that the stipulation is an instrument for the payment of money only as it required defendants to make certain monthly installment payments. Plaintiff's attorney, in her affirmation, alleges that defendants defaulted in making those payments. Plaintiff has not submitted an affidavit in support of the motion.

Defendant Jonczk did not serve an answer to the complaint; rather, he made a motion to dismiss the complaint on the ground that he was not properly served with the summons and complaint and motion papers. Defendant East Coast Restoration and Construction Consulting Corp. has not submitted any opposition to this motion. The record indicates that East Coast was properly served through the Secretary of State.

Plaintiff's attorney alleges that the parties entered into a stipulation in which defendants agreed to pay plaintiff an amount to satisfy the amount demanded in a lawsuit. The payments were to have been made monthly. In the event defendants were delinquent in making payments, plaintiff could enter judgment. According to plaintiff's attorney's affirmation, defendants defaulted in the payment obligation and that the principal sum of \$69, 472 is owed to plaintiff.

The attorney's affirmation is legally insufficient as the required proof on a motion for summary judgment. In order to succeed on a motion, the movant must offer proof in admissible form that eliminates all triable issues of fact. The affirmation is not based on personal knowledge of the facts; therefore, the court cannot consider it, as it is nothing more than inadmissible hearsay. As such, plaintiff is not entitled to judgment, regardless of the adequacy of the opposition papers. (*Winegrad v. New York University Medical Center*, 64 NY2d 857) In this case, the opposition was legally and factually inadequate; however, the burden of opposing the motion never shifted from plaintiff.

While the court is denying the motion for summary judgment, it will convert this matter into a plenary action and give the parties an opportunity to serve a complaint and an answer. The court, despite Jonczk's argument that the court lacks *in personam* jurisdiction over him, finds that the summons was properly served. While the court is denying the summary judgment motion, it will convert this action and allow plaintiff to serve a complaint. The court is doing so as a matter of the discretion CPLR 3213 gives it. (see *Schultz v. Barrows*, 94 NY2d 624, affg 263 AD2 565)

Jonczek submits an unsworn document in opposition to the motion. He asserts that the document, a purported affirmation, is sufficient because he is in the Dominican Republic and is unable to obtain a notarization or embassy certification. The purported affirmation recites only that it is made under penalties of perjury. It does not contain the language required by CPLR 2106 (b).

The unsworn document admits that he was in the United States in late December, 2017 when the papers were served. He asserts, however, that the papers were served on Bogdan Sieldecki at 80 Stephensburg Road, Port Murray, New Jersey. Jonczk does not deny that that this is his address. He asserts that the affidavit of service is a fabrication, as it describes him incorrectly. He claims that although he is bald, the process server's affidavit states that he has gray hair.

In another unsworn document, Bogdan Siedlecki states that he was at a post-Christmas party at 80 Stephensburg Road, when he answered the door at 7:30 PM. The person at the door gave him legal papers naming both defendants. Siedlecki alleges that he told the process server that he "is not Sobolewski". The word Poland is written on the date line.

The affidavit from the process server contains two color photographs, one an enlargement of the smaller one, of defendant that show that although he is partially bald, his remaining hair is gray. The process server states that he rang the doorbell at the Stephensburg Road address on December 26, 2017, at 7:45 PM. Two children appeared at the door and stated that their father was Greg, but that he did not want to come to the door; however, he eventually came to the door. The person at the door matched the person in the photograph. The process server asked the person if his name is Greg and the person answered yes. At that time, the process server handed him the papers.

The court finds that Jonczk's purported affirmation is neither credible nor legally sufficient. It fails to state when he left the United States and when he arrived in the Dominican Republic or where he resides in that country. It fails to state how he became aware of this motion. It fails to deny that the address where the process server served the papers was his. However, even if the court were to overlook these deficiencies, the purported affirmation could still not form the basis for denying the motion or even setting this matter down for a traverse.

A party may not submit his or her own affirmation on a motion; rather, an affidavit is required. (see *Piscareta v. Minnitti*, 265 AD 2d 450) Moreover, the purported affirmation is defective., as it does not conform to the requirements of CPLR 2106 (b). That rule allows a person residing in a foreign nation to submit an affirmation provided that the affirmation concerns language in addition to the usual statement that the affirmation is submitted under penalties of perjury. The additional required language is the recitation that the affirmation must state that it is made under penalties of perjury which may include a fine or imprisonment and that the document may be filed in an action or proceeding in a court of law. The writing in this case does not contain this language.

The court cannot consider Sidlecki's purported affirmation in that he is not a person qualified to submit an affirmation under CPLR 2106 (a). He is not a physician, attorney, dentist or osteopath. His purported affirmation is of no value on this motion.

While the court will permit an answer, that answer may not contain a defense of lack of personal jurisdiction. And while the court is denying this motion for summary judgment under CPLR 3213, that denial is without prejudice to a new motion for summary judgment under CPLR 3212. (see *Schultz v. Barrows*, 263 AD2d 565 *id.* at 571)

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the summons in this action is deemed to have been properly served and that this court has jurisdiction over defendants, and it is further

ORDERED that on its own motion the court converts the this matter into a plenary action; and it is further

ORDERED that plaintiff shall serve her verified complaint on defendants within twenty days of the date of entry of this order by the Clerk; and it is further

ORDERED that defendants shall serve their verified answers within thirty days of service of the complaint; and it is further

ORDERED that defendants' answers may not contain the affirmative defense of lack of personal jurisdiction; and it is further

ORDERED that the denial of this motion for summary judgment in lieu of complaint is without prejudice to a motion for summary judgment by any of the parties pursuant to CPLR 3212; and it is further

ORDERED that counsel for the parties, or a party appearing pro se, are directed to appear for a preliminary conference at Part 4 of this court, 80 Centre Street, room 327, New York, New York 10013 on November 9, 2018 at 10:00 AM.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: June 14, 2018

ENTER:



**HON. FRANK P. NERVO**  
JSC