

Kenan v Hamozeg

2018 NY Slip Op 31535(U)

February 6, 2018

Supreme Court, New York County

Docket Number: 653271/2017

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

SHAHAR KENAN,

INDEX NO. 653271/2017

Plaintiff,

MOTION DATE

- v -

ZACK HAMOZEG, ZACK'S DANCE LOFT, LLC,

MOTION SEQ. NO. 001, 002

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 57, 58, 59, 60, 62, 63, 64, 65, 70, 71, 72, 73

were read on this motion to/for JUDGMENT - DEFAULT

This is a dispute based on an alleged agreement between the parties for the use of a dance studio at 247 West 30th Street, 2nd Floor, New York, NY. Plaintiff moves for a preliminary injunction (seq. No. 001) and for a default judgment against defendants (seq. No. 002).

Defendants cross-move, under seq. No. 002, to dismiss the complaint for lack of personal jurisdiction.

The cross motion to dismiss the complaint based on personal jurisdiction rests on, among other things, the notion that there is no such person as Zack Hamozeg. Rather, the proper person who is the owner and principal of Zack's Dance Loft, LLC, as reflected in the lease for the space at issue in this action, is named "Zackery Engl." (Doc. No. 44.) In Engl's affidavit, he does not deny that he had dealings with plaintiff or that he was served with process, only that the papers do not reflect his real name. It should be noted that the lease to the premises was signed by a

person with the name “Zackary Engel.” (Doc. No. 45.) Plaintiff’s mere mistake in nomenclature does not render service of process deficient. The error is curable by amendment of the caption. (See CPLR 1024.) Defendants’ contention that service was flawed since it was carried out by a party is without merit, since the only named plaintiff is Shahar Kenan, and the process server’s name is Magdalena Kulisa. (Doc. No. 22.) Defendants have not alerted this Court of any authority standing for the proposition that the process server must be a stranger to the parties, however preferable that may be in practice. Defendants’ other arguments have been considered and found to be lacking in merit. The branch of the cross motion seeking dismissal is denied.

As for plaintiff’s motion for a default, it is similarly denied. “Under CPLR 3012 (d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading ‘upon such terms as may be just,’ provided that there is a showing of a reasonable excuse for the delay.” (*Emigrant Bank v Rosabianca*, 156 AD3d 468 [1st Dept 2017].) Among the factors that a court may consider are “the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense.” (*Id.*; see *Antcorp. Inc. v Citirich Realty Corp.*, 140 AD3d 417, 417-418 [1st Dept 2016].) The court must also bear in mind the “strong public policy in favor of resolving cases on the merits.” (*Antcorp. Inc. v Citirich Realty Corp.*, 140 AD3d at 418.) Considering the confusion with the naming of the defendants, defendants’ multiple appearances and participation in this action on plaintiff’s motion for a preliminary injunction, and the strong public policy preferring resolution of cases on their merits, the default should be denied.

Turning to plaintiff’s motion for a preliminary injunction, plaintiff was required to demonstrate “a likelihood of success on the merits, irreparable injury in the absence of the sought

relief, and a balance of the equities in [his] favor.” (*Rakosi v Sidney Rubell Co., LLC*, 155 AD3d 564 [1st Dept 2017].) Plaintiff requests that this Court enjoin defendants from taking actions with respect to the dance space that he contends he is entitled to, as well as to prevent any disposition of an interest in the LLC defendant, which plaintiff also contends he is entitled to. However, plaintiff is not a signatory to defendants’ lease, and he fails to submit anything in writing that demonstrates that he had an agreement with defendants. Plaintiff alleges that he loaned defendants a sum of money not totaling more than several thousand dollars (which would not have covered even a single month’s rent) at the rate of 40% interest over six months and, if defendants could not repay the loan, he would receive a 51% interest in the LLC. The alleged contract is very likely either usurious (*see* General Obligations Law § 5-501; Banking Law § 14-a [1]), violative of the statute of frauds (*see* General Obligations Law § 5-701 [10]), or incredible on its face. In short, plaintiff has failed to establish a likelihood of success on the merits.

Accordingly, it is hereby:

ORDERED that plaintiff’s motion for a default is denied (seq. No. 002); and it is further

ORDERED that defendants’ cross motion is granted to the limited extent that defendants’ answer is deemed timely filed, *nunc pro tunc*, and the caption is amended to reflect that defendant ZACK HAMOZEG is removed, and ZACKERY ENGL, also known as ZACKARY ENGEL is added to the caption as a defendant; and it is further


ORDERED that plaintiff's motion for a preliminary injunction is denied, and all stays are vacated (seq. No. 001); and it is further

ORDERED that counsel for the newly-added defendant shall have 20 days after this order is entered in which to file an answer, as well as to serve a copy of this order with notice of entry on plaintiff; and it is further

ORDERED that counsel for defendant shall e-file a completed Notice to County Clerk (Form EF-22), with a copy of this order attached thereto, and the Clerk is directed to mark this Court's records to reflect that ZACK HAMOZEG is removed from the caption as a defendant, and "ZACKERY ENGL, also known as ZACKARY ENGEL" is added to the caption as a defendant; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on May 1, 2018 at 2:15 p.m., at 80 Centre Street, Room 280.

2/6/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
APPLICATION:	<input checked="" type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	