

Valcap Advisory Servs. LLC v Fresh Mat, Inc.

2018 NY Slip Op 32139(U)

August 31, 2018

Supreme Court, New York County

Docket Number: 651942/2018

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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VALCAP ADVISORY SERVICES LLC and VALMIKI CAPITAL
MANAGEMENT,

Plaintiffs,

- v -

THE FRESH MAT, INC., JENNIFER OZANNE, and JOHN
BUTLER,

Defendants.

INDEX NO. 651942/2018

MOTION DATE 08/28/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 13, 18, 19, 22

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 20, 21

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss of defendant Jennifer Ozanne (Motion Sequence Number 002) is granted pursuant to CPLR 3211(a)(7) and the complaint in its entirety against defendant Jennifer Ozanne is dismissed, with costs and disbursements to such defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that the motion to dismiss of defendants The Fresh Mat, Inc. and John Butler (Motion Sequence Number 001) is granted

only to the extent that the complaint in its entirety is dismissed against defendant John Butler pursuant to CPLR 3211(a)(8), and the claims against defendant Butler are dismissed with costs and disbursements to such defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that the motion as to defendant The Fresh Mat, Inc. is denied and the action against such defendant is severed and continued against the remaining defendant; and it is further

ORDERED that such defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and*

County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel directed to appear for a preliminary conference in Room 331, 60 Centre Street, New York, New York, on October 16, 2018, at 9:30 AM.

DECISION

Neither sides papers are incomplete and defective, as although referencing, neither attaches a copy of the Affidavit of Service of the Complaint or a copy of the Complaint. In the interest of judicial economy, upon oral argument, the court judicially noticed both documents in the clerk's electronic records, to which neither counsel voiced any objection.

As in Abrahmi v UPC Construction Co., Inc., 170 AD2d 180 (1st Dept. 1991), the complaint at bar contains no "specific or particular" factual allegations against the individual defendant Jennifer Ozanne, let alone any factual allegations against her "from which it could be inferred that [she] had agreed or entered into an understanding with [either or both plaintiffs]" to accept services or that she personally benefitted from such services. The complaint against such defendant is therefore insufficiently plead under CPLR 3103. As the complaint asserts no causes of action against defendant Ozanne personally, there

is no need to conduct a traverse hearing on whether service was properly effectuated upon defendant Ozanne.

On the other hand, as to defendant Butler, the complaint alleges, in pertinent part, "In early 2015, Butler requested that Valmiki assist him in creating Fresh Mat by proving funding and know how". Moreover, the complaint is sufficient to set forth a basis for long-arm jurisdiction, as it asserts that defendants contracted with plaintiffs to perform commercial activities in New York for the defendants' benefit. See Courtroom Television Network v. Focus Media, Inc., 264 AD2d 351 (1st Dept. 1999).

Upon a further review of the record,¹ however, this court finds that while defendant Butler was present in New York to appear for the court sponsored mediation in Butler v. Suria, 17 CV 3077 (U.S. Court, SDNY) on April 25, 2018, he was immune, as an individual, from service of process. See Chase Nat. Bank of the City of New York v Turner, 269 NY 397 (1936). Therefore, jurisdiction over the person of defendant Butler has not been achieved.

As defendant Butler was appearing only on his individual behalf in that lawsuit and defendant corporation was making no

¹The court reconsiders and rescinds its bench ruling that held jurisdiction over defendant Butler was sustained, following further deliberation after oral argument.

such appearance, defendant corporation was not so immune and service upon its officer sufficed.

Defendant corporation has not set forth grounds for dismissal pursuant to CPLR 3211(a)(4), as neither of the plaintiffs at bar nor defendant French Mat, Inc. are named as parties in Butler v Suria.

8/31/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE