

Hulse v Wirth

2018 NY Slip Op 33640(U)

March 8, 2018

Supreme Court, Suffolk County

Docket Number: 602916/2017

Judge: Martha L. Luft

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This opinion is uncorrected and not selected for official publication.

Short Form Order

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

LINDA HULSE and PAUL LESZCZYNSKI,

Plaintiffs,

-against-

CHERI WIRTH INDIVIDUALLY and DOING
BUSINESS AS DIGGER'S ALES N' EATS,
DIGGER O' DELLS, the purported
corporation S C NET WIRTH INC., DIGGER'S
FINE FOODS & SPIRITS TAVERN, INC., MAX
KATZ, INC. And
STEVEN WIRTH INDIVIDUALLY and DOING
BUSINESS AS DIGGER'S ALES N' EATS AND
AS OWNER OF DIGGER'S ALES N' EATS,

Defendants.

_____x

Mot. Seq. No. 001 - MG
Orig. Return Date: 06/21/2017
Mot. Submit Date: 10/03/2017

Mot. Seq. No. 002 - MG
Orig. Return Date: 10/03/2017
Mot. Submit Date: 10/17/2017

PLAINTIFFS' ATTORNEY

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Islandia, NY 11749

DEFENDANTS' ATTORNEY

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330 Old Country Road
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DEFENDANTS PRO SE

Diggers Ales N' Eats
58 West Main Street
Riverhead, NY 11901

Riverhead Tavern, Inc.
34 Maidstone Lane
Wading River, NY 11792

Upon the e-filed documents numbered 1 through 74, it is

ORDERED, that defendants' Cheri Wirth's and Steven Wirth's ("Wirth Defendants"),
motion to dismiss the verified complaint (motion sequence #001) pursuant to CPLR 3211 (a) (8)
is granted; and it is further

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ORDERED, that defendants' Cheri Wirth's, Steven Wirth's, S.C. Net Wirth, Inc. and Digger's Ales N' Eats motion to dismiss the amended verified complaint (motion sequence #002) pursuant to CPLR 3211 (a) (8) is granted.

This is an action for personal injuries allegedly sustained by plaintiff Linda Hulse as a result of a slip and fall accident on an exterior stairway in a bar and restaurant at 58 West Main Street Riverhead, known as Digger's Ales N' Eats or Digger O'Dell's ("Diggers"). Plaintiff Paul Leszczynski is Linda Hulse's husband who claims damages for loss of companionship. The Wirth Defendants are alleged to be the owners of Diggers. The accident allegedly occurred on March 2, 2014.

Motion to Dismiss the First Verified Complaint (Motion Sequence #001)

The summons and verified complaint were e-filed on February 15, 2017, within three years of the alleged accident. The affidavits of service indicate that on February 28, 2017 at 12:05 PM copies of the summons and verified complaint were delivered to Michael Paservi, who identified himself as the manager of Diggers, at 58 West Main Street. The affidavit of service also indicates that the Wirth Defendants were served at their alleged last known residence at 58 West Street, Riverhead. The Wirth Defendants answered on March 28, 2017 and raised lack of personal jurisdiction as an affirmative defense.

The Wirth Defendants then moved to dismiss. They each submitted affidavits indicating that they never received a copy of the summons and verified complaint by mail pursuant to CPLR 308(2). The Wirth Defendants also asserted that they reside at 72 West Main Street, not at 58 West Main Street, which is the location of Diggers bar and restaurant.

CPLR 308(2) provides for delivery and mail service as follows:

"by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or 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, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other...."

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Plaintiffs' opposition papers do not dispute the Wirth Defendants' sworn statements that they reside at 72 West Main Street. Even assuming that plaintiffs had intended to mail to 58 West Main Street as the Wirth Defendants' actual place of business, this mailing would not effectuate service upon them because the affidavit of service does not state that the summons and verified complaint were in an envelope marked "personal and confidential" or whether or not the envelope indicated that it was sent from an attorney.

When a CPLR 308(2) mailing is made to a defendant's actual place of business, the envelope must be labeled "personal and confidential" and must not indicate on the outside that the contents concern litigation or that the communication is from an attorney. Noncompliance with this requirement is a jurisdictional defect. *Pesner v. Fried*, 166 A.D.2d 512, 560 N.Y.S.2d 795 (2d Dep't., 1990); Mc Kinney's Commentaries, 3:308 (c), CPLR 308. Thus, plaintiffs failed to obtain personal jurisdiction over the Wirth Defendants by way of the first verified complaint.

The Motion to Dismiss the Amended Verified Complaint (Motion Sequence #002)

On June 13, 2017, almost four months after the statute of limitations had expired and more than twenty days after the Wirth Defendants answered the first verified complaint, the plaintiffs filed and served an amended verified complaint, purporting to add S.C. Net Wirth, Inc. as a defendant. Plaintiffs served and filed this amended summons and verified complaint without first having sought leave of court. Service upon S.C. Net Wirth, Inc. was made by filing with the Secretary of State. The affidavit of service indicates that the Wirth Defendants were served again by delivery and mailing purportedly under CPLR 308(2). Delivery was made to a manager of Diggers on June 13, 2017 and the papers allegedly were mailed to the Wirth Defendants at their "last known residence", which again was specified as 58 West Main Street. The affidavit did not indicate that the envelope was marked "personal and confidential" or that it was in a plain wrapper not bearing a lawyer's address. The Wirth Defendants also deny receipt of this second mailing. The Wirth Defendants and S.C. Net Wirth, Inc. moved to dismiss the amended verified complaint.

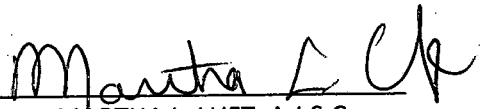
Plaintiffs' failure to obtain leave pursuant to CPLR 3025(b) and 1003 to serve an amended summons and complaint constitutes a jurisdictional defect and renders the amended verified complaint a nullity. The amended verified complaint must be dismissed. *Crook v. E.I. du Pont de Nemours Co.*, 181 A.D.2d 1039, 582 N.Y.S.2d 581 (4th Dep't., 1992), *aff'd*, 81 N.Y.2d 807, 611 N.E.2d 289 (1993); *Yonker v. Amol Motorcycles*, 161 A.D.2d 638, 555 N.Y.S.2d 416 (2d Dep't., 1990).

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Since effective service of neither the summons and verified complaint nor the summons and verified amended complaint was made upon the Wirth Defendants or S.C. Net Wirth, Inc. within the three year statute of limitations period, this action must be dismissed as against all three of these defendants. In light of the foregoing, it is unnecessary to reach the parties' remaining contentions.

Date: March 8, 2018
Riverhead, New York


MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION