

<b>Design Dev. NYC, Inc. v Goldstein</b>
2019 NY Slip Op 30854(U)
April 4, 2019
Supreme Court, New York County
Docket Number: 156431/2018
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM
Justice
INDEX NO. 156431/2018
DESIGN DEVELOPMENT NYC, INC. D/B/A BEST & COMPANY NYC, MOTION DATE
Plaintiff, MOTION SEQ. NO. 001

- v -

PATRICIA GOLDSTEIN, PAJ HOLDINGS V 39N LLC, ALICIA GOLDSTEIN, JAMES PRUSKY,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7-29, 31 were read on this motion to/for dismiss.

By notice of motion, defendants move pursuant to CPLR 3211(a)(4), (7), and (8) for an order dismissing the complaint, and pursuant to CPLR 602 for an order consolidating this action with Prusky v Design Development NYC, Inc. d/b/a Best & Company, pending in this court under index number 652880/18. Plaintiff opposes the motion seeking dismissal but does not oppose consolidation.

I. MOTION TO DISMIS

A. Lack of personal jurisdiction

1. Patricia Goldstein

Absent any dispute that defendant Patricia Goldstein was deceased at the time the action was commenced, the complaint is dismissed against her. (Marte v Graber, 58 AD3d 1 [1st Dept 2008] [action cannot be commenced against dead person; instead, plaintiff must name personal representative of decedent's estate]).

As Patricia died before the action was commenced, CPLR 1015 does not apply as it pertains to the death of a “party,” and thus the action is not stayed due to her death. (*Id.* at 3 [action commenced after defendant’s death was nullity from inception and case should have been dismissed]).

## 2. Alicia Goldstein and James Prusky

Pursuant to CPLR 308(2), service may be made upon a person by delivering the pleadings 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.

Here, service was made on defendants Alicia Goldstein and James Prusky by delivery to a doorman at 200 East 65<sup>th</sup> Street, Service Center, New York, New York 10065. By affidavit, Alicia asserts that she and her husband, Prusky, have resided at a different address in Manhattan since 2008, and that the service address is not and never was their place of business, dwelling place, or usual place of abode; rather, her mother, Patricia, resided there until her death. (NYSCEF 12).

Plaintiff contends that the service address is the only address it knew as Goldstein’s and Prusky’s residence, relying on the parties’ contract for renovation of the dwelling at the service address, which lists that address as Goldstein’s. (NYSCEF 28, 22). Plaintiff also submits the deed to the property, which reflects that Patricia and defendant PAJ Holdings V 39N LLC own the property, and a Secretary of State filing that lists the service address as PAJ’s address. (NYSCEF 27, 26).

However, that the contract to renovate the property at issue reflects Goldstein as its owner does not establish that Goldstein and Prusky lived there or that it was their usual place of

abode, and none of plaintiff's other proof demonstrates that the service address was Alicia and Prusky's actual place of business, dwelling place, or usual place of abode.

As Alicia and Prusky sufficiently rebut the facts set forth in the affidavit of service on them of the pleadings, and as plaintiff offers no evidence to undermine their rebuttal, they have demonstrated that they were not properly served. (*See Schurr v Fillebrown*, 146 AD2d 623 [2d Dept 1989] [as it was not refuted that process server served defendant at address that was not his residence, court properly dismissed action without first conducting traverse hearing]; *New York State Higher Educ. Svces. Corp. v Perchik*, 207 AD2d 1040 [4<sup>th</sup> Dept 1994] [court lacked jurisdiction over defendant as his sworn statement that he did not reside at service address was unrefuted]; *see also Silvering v Sunrise Family Med., P.C.*, 161 AD3d 1021 [2d Dept 2018] [as plaintiff failed to show that defendant served at her actual place of business, attempted service was thus defective as matter of law and action dismissed against her]).

Accordingly, all claims asserted against Patricia Goldstein, Alicia Goldstein, and James Prusky are dismissed.

#### B. Quasi-contract claims

As a party may plead alternative theories to a breach of contract claim despite the existence of a contract, there is no basis upon which, at this juncture, to dismiss plaintiff's quasi-contract claims asserted against PAJ. (*Beach v Touradji Cap. Mgt. L.P.*, 85 AD3d 674 [1<sup>st</sup> Dept 2011] [plaintiff permitted to plead both contract and quasi-contract claims in alternative]).

#### C. Defamation and Lien Law claims

As these claims are interposed against Patricia, Alicia, and Prusky, they are dismissed based on the lack of jurisdiction over them. (*Supra*, I.A.).

## II. MOTION TO CONSOLIDATE

Absent any opposition to the motion to consolidate, and after dismissing plaintiff's claims against Patrica, Alicia, and Prusky, the motion is granted to the extent of consolidating plaintiff's remaining quasi-contract claim against PAJ with the other pending action.

## III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing all claims against defendants Patricia Goldstein, Alicia Goldstein, and James Prusky, and the complaint is severed and dismissed as against them, and the motion is otherwise denied; it is further

ORDERED, that defendants' motion to consolidate is granted and the above-captioned action is consolidated for joint trial and discovery in this Court with *Prusky v Design Development NYC, Inc. d/b/a Best & Company*, Index No. 652880/18, pending in this Court; it is further

ORDERED that the consolidation shall take place under Index No. 652880/18; it is further

ORDERED, that within 30 days from entry of this order, counsel for the movants shall file with the General Clerk's Office (60 Centre Street, Room 119) a copy of this order with notice of entry, together with, if a Request for Judicial Intervention ("RJI") has not yet been filed in either action, an RJI and shall pay the fee therefor, and the Clerk of the General Clerk's Office shall reassign this action to the justice presiding over the other action under Index No. 652880/18; it is further

ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness with the General Clerk’s Office in each of the above actions, the Clerk of the General Clerk’s Office shall place the aforesaid actions upon the trial calendar for a joint trial; it is further

ORDERED, that in both actions, such filing with 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](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED, that the parties in this action are directed to appear for the previously-scheduled compliance conference in the other action in Part 14 on May 7, 2019 at 9:30 am.

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4/4/2019  
DATE

  
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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

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

APPLICATION:

CHECK IF APPROPRIATE: