

Isaac v 125 Fulton Bagel Cafe LLC
2019 NY Slip Op 31949(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 150967/16
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 18

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FELECITA ISAAC,

Plaintiff,

-against-

Index No.: 150967/16

125 FULTON BAGEL CAFÉ LLC, LONG ISLAND
BAGEL CAFÉ LLC and CMG GROUP, LLC,

Defendants.

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CMG GROUP, LLC,

Third-Party Plaintiff,

-against-

CONSOLIDATED EDISON, INC., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC. AND
NEW YORK CITY DEPARTMENT OF DESIGN AND
CONSTRUCTION,

Third-Party Defendants.

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ALEXANDER M. TISCH, J.:

In this trip and fall action, defendants 125 Fulton Bagel Café LLC and Long Island Bagel Café LLC (together, the LLCs) move to dismiss the complaint and any cross claims against them. Although the LLCs motion is not denominated as one made pursuant to specific a subsection of CPLR 3211, the substance of the motion is clearly a challenge to personal jurisdiction, and specifically for improper service upon the LLCs (CPLR 3211 [a] [8]), and for failure to state a cause of action (CPLR 3211 [a] [7]). The LLCs also move for a stay of discovery pending the outcome of this motion (CPLR 3214 [b]) and, alternatively, to extend the deadline to file the Note of Issue and Certificate of Readiness (NOI).

In support of dismissal for improper service, the LLCs provide the affidavit of Randy

Narod who avers that he is the sole owner of the LLCs. Narod further avers that he has reviewed the affidavits of service which indicate that service was made on Anthony Doe, but that Anthony Doe is not a member or manager of either of the LLCs, and was not authorized to accept service on behalf of those companies. Narod states that Long Island Bagel Café LLC does not lease or operate a business at the location where plaintiff alleges she tripped. Narod admits that 125 Fulton Bagel Café LLC leases the premises, and submits a copy of the lease, which provides that, absent the tenant's negligence or misconduct, the tenant is not responsible to repair or replace any part of the sidewalk.

The complaint states, and plaintiff testified, that she tripped due to a hole in the sidewalk (Issac tr at 52) in front of the premises at 125 Fulton Street (Complaint, ¶ 24). Defendant CMG Group, LLC (CMG) produced its managing member, who testified that CMG owns the building at 125 Fulton Street, and that the owner, or landlord, was responsible for repairs to the sidewalk under the lease with 125 Fulton Bagel Café LLC (Dimou tr at 26).

In opposition to the motion, plaintiff argues that defendants waived their right to assert the defense of improper service by failing to move for dismissal on this ground prior to answering. However, CPLR 3211 (e) provides, in relevant part, that:

“an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.”

The LLCs' answer was served on August 15, 2018; it contains a seventh affirmative defense of lack of improper service. This motion was filed on August 15, 2018 (NYSCEF Doc No. 55). Consequently, the LLCs' jurisdiction motion is timely.

CPLR 311-a requires that service on a domestic limited liability company be made by personal service upon certain individuals, which includes members and managers of the LLC

vested with the management of the company, an agent authorized by appointment to receive process, or a person designated by the LLC to receive process. Section 303 of the New York Limited Liability Company Law permits service on a limited liability company through service upon the New York Secretary of State. Plaintiff does not state that any attempt was made to serve through the Secretary of State. Plaintiff also does not oppose this motion on the ground that service on the LLCs was properly made, or dispute the LLCs' showing or contention that service was not properly made. Consequently, the complaint against the LLC's is dismissed. In addition, the motion to stay discovery or, alternatively, to extend the NOI is denied as moot.

Defendant CMG Group, LLC (CMG), the owner, opposes the motion to dismiss its cross claims arguing that it served them upon the LLCs after the LLCs filed its answer, but the affidavit of service submitted is dated August 9, 2016, almost two years prior to the LLCs' filing of its answer.¹ CMG makes only a conclusory argument that it has remedied the alleged defect in service, or of its proper service on the LLCs, and its cross claims against the LLCs are dismissed. As the basis for dismissal of the claims against the LLCs is this Court's lack of jurisdiction, due to improper service, a threshold issue, dismissal is without prejudice. In any event, CMG did not move for relief of leave to amend, but "impleader requires no court leave under the CPLR" (Siegel, NY Prac § 156 [6th ed. 2019]).

In light of the foregoing, it is

ORDERED that the motion of defendants 125 Fulton Bagel Café LLC and Long Island Bagel Café LLC to dismiss the complaint as against them and the cross claims asserted against them by defendant CMG Group, LLC is granted and the complaint and all cross claims asserted

¹ In addition, the court's records reveal that, on May 28, 2019, the plaintiff and CMG filed a stipulation of discontinuance, discontinuing all cross claims as to all defendants. No party has augmented their submissions on this motion to address this stipulation.

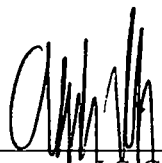
against defendants 125 Fulton Bagel Café LLC and Long Island Bagel Café LLC are dismissed in their entirety as against these defendants; and it is further

ORDERED that branch of the motion to stay discovery in this action or, alternatively, to extend the deadline to file the Note of Issue and Certificate of Readiness is denied as moot.

This constitutes the decision and order of the Court.

Dated: July 8, 2019

ENTER:



J.S.C.
HON. ALEXANDER M. TISCH