

E.S. v Windsor Owners Corp.
2019 NY Slip Op 32379(U)
August 8, 2019
Supreme Court, New York County
Docket Number: 159133/2017
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 159133/2017

E. S., an infant by his Mother and Natural Guardian,
AMINATA SY and AMINATA SY, Individually,

MOTION DATE 07/09/2019

Plaintiffs,

MOTION SEQ. NO. 003

- v -

WINDSOR OWNERS CORP., TUDOR REALTY SERVICES
CORP., and MARTINA ANDREA SERSCH,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for

DISMISSAL

Motion by defendant Martina Andrea Sersch pursuant to CPLR 327 (a), 3211 (a) (7), and 3211 (a) (8) to dismiss the complaint is denied with prejudice as violative of the single-motion rule of CPLR 3211 (e). (*See Landes v Provident Realty Partners II, L.P.*, 137 AD3d 694 [1st Dept 2016].) Sersch already moved pursuant to CPLR 3211 (a) (8) to dismiss the complaint in motion seq. 001, filed January 19, 2018.

Moreover, the arguments raised in the instant motion are without merit. First, Sersch withdrew her affirmative defense as to personal jurisdiction in a December 6, 2018 stipulation resolving motion seq. 001 and accepted service of process. (NYSCEF Doc No. 57.)

Second, as to any argument regarding an arbitration clause in the lease, such issue was not raised in her pre-answer motion to dismiss or pled as an affirmative defense in her answer. "Although not every foray into the courthouse effects a waiver of the right to arbitrate, nevertheless, where a defendant's participation in litigation 'manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory.'" (*Nishio v E.F. Hutton & Co.*, 168 AD2d 224, 224 [1st Dept 1990], quoting *De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974].) By failing to move to stay the action and compel arbitration or to raise arbitration at all until well over two years after the action was commenced, and instead accepting service of process, interposing an answer with a counterclaim, and otherwise moving forward with the case, including by participating in multiple court discovery conferences and conducting paper discovery and depositions that would not have been available in an arbitration proceeding, "defendant's acceptance of the judicial forum manifested a presence clearly inconsistent with a claim that the parties were obligated to settle their differences by arbitration." (*See Masson v Wiggins & Masson, LLP*, 110 AD3d 1402, 1406 [3d Dept 2013], citing *Sherrill v Grayco*

Builders, Inc., 64 NY2d 261 [1985]; *see also JSBarkats PLLC v Response Scientific Inc.*, 149 AD3d 652 [1st Dept 2017] [holding that “[d]efendants’ participation in [a] lawsuit, in both state and federal court, for approximately 11 months before moving to compel arbitration manifested an affirmative acceptance of the judicial forum and caused plaintiff unnecessary delay and expense.”] Moreover, the issue of whether there is a binding arbitration agreement between the parties is not properly the subject of a 3211 (a) (7) or (8) motion, as movant has styled the instant motion. As such, the Court finds that any interest or right of arbitration Sersch may have had pursuant to any sublet agreement by and between Sersch and Plaintiff has been waived for the purposes of the instant action.

Third, as the entirety of Sersch’s arguments in support of the branches of her motion as to CPLR 327 (a) and, as styled in her memorandum of law in support, CPLR 503 (a), are predicated on the parties’ agreement to arbitrate, as any such right has been waived, the branches of the motion pursuant to CPLR 327 (a) and 503 (a) are both duplicative and moot, and the arguments in support are entirely unavailing.

Last, on March 25, 2019, counsel for Sersch, Matt Simon, Esq., e-filed a consent to change attorney, dated March 22, 2019, substituting Matt Simon Law in as attorney of record for Sersch. (NYSCEF Doc No. 63.) “Judiciary Law § 470, which recognizes a nonresident attorney’s right to practice law in New York, requires such attorney to maintain a physical office in this state for such purpose.” (*Law Office of Angela Barker, LLC v Broxton*, 60 Misc3d 6, 7 [App Term, 1st Dept 2018], citing *Schoenefeld v State of New York*, 25 NY3d 22 [2015].) The address listed on the consent to change attorney is 19 Carteret Street, Montclair, NJ 07043 (the “Montclair Address”). The attorney registration details kept for Mr. Simon by the New York State Unified Court System show that he is currently registered and in good standing with the New York Bar and list that same Montclair address as his registration address. The Court takes judicial notice of the Matt Simon Law website, mattsimonlaw.com, which provides the Montclair Address as the address of the law office with “[a]dditional locations at 67 Summit Avenue, Hackensack, NJ and 520 Fellowship Road, Mount Laurel, NJ.” (Last accessed August 8, 2019, 11:08 a.m.) As such, the Court finds cause for concern that counsel for Sersch is not authorized to defend Sersch in this action in New York State.

The Court would be remiss if it did not address the arguments raised in opposition by Plaintiffs and co-defendants that the instant motion is frivolous. Pursuant to 22 NYCRR 130-1.1:

“(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this part

“(c) For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or

prolong the resolution of the litigation, or to harass and maliciously injure another. . . . In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

“(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court’s own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.”

In accordance with 22 NYCRR 130-1.1, the Court, based upon the arguments made in opposition to the instant motion and on its own initiative, shall provide Sersch and her counsel a reasonable opportunity to be heard, at which time Sersch shall show cause as to why Plaintiff and/or co-defendants should not be awarded costs from Sersch and/or counsel for Sersch, or why this Court should not impose sanctions upon Sersch and/or counsel for Sersch, under 22 NYCRR 130-1.1, based upon their frivolous conduct in this action, including, but not limited to, the filing of the instant motion.¹

The hearing will further provide an opportunity for counsel for Sersch, Matt Simon, Esq. of Matt Simon Law, to be heard and to show cause as to why this Court should not find that Matt Simon, Esq., is not authorized to defend Sersch in this action in the State of New York based upon a failure to maintain a physical law office in the State. (*See Marina District Dev. Co. v Toledano*, —NYS3d—, 2019 NY Slip Op. 05480 [1st Dept., July 9, 2019].)

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¹ Based upon co-defendants’ letter to the Court dated July 29, 2019 (NYSCEF Doc No. 83), the Court grants leave to co-defendants (and Plaintiffs) to move based upon discovery issues in this case, including, but not limited to, the alleged failure of Sersch to appear for court-ordered depositions and any attempted unilateral adjournment of a deposition by Search without Court approval. Any and all such motions must be made returnable no later than October 2, 2019, with no adjournment of the return date of any such motion permitted past October 2, 2019—the motion must be fully submitted on or before October 2, 2019. The Court will, upon receipt of any and all such motions, calendar them for oral argument to be held at the same time as the hearing, October 16, 2019, at 2:15 p.m.

CONCLUSION

Accordingly, it is

ORDERED that the motion is denied with prejudice; and it is further

ORDERED that the next status conference in this matter is adjourned from October 15, 2019, at 9:30 a.m., to October 16, 2019, at 2:15 p.m., at which time the 22 NYCRR 130-1.1 hearing and the hearing as to whether Matt Simon Law may defend Sersch in this action shall be had; and it is further

ORDERED that Plaintiffs and co-defendants shall, within 10 days of the NYSCEF filing date of the decision and order on this motion, each serve a copy of this order with notice of entry upon Sersch.

The foregoing constitutes the decision and order of the Court.

8/8/2019							
DATE				ROBERT DAVID KALISH, J.S.C.			
CHECK ONE:	☐	CASE DISPOSED	☒	DENIED	☒	NON-FINAL DISPOSITION	
APPLICATION:	☐	GRANTED				GRANTED IN PART	☐ OTHER
CHECK IF APPROPRIATE:	☐	SETTLE ORDER				SUBMIT ORDER	
	☐	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	☐ REFERENCE