

Gillespie v New Project, LLC
2019 NY Slip Op 32763(U)
September 19, 2019
Supreme Court, New York County
Docket Number: 153259/2019
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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WILLIAM LEE GILLESPIE,

Plaintiff,

- v -

NEW PROJECT, LLC and HEARTLAND SCENIC STUDIO,
INC.,

Defendants.

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INDEX NO. 153259/2019

MOTION DATE 06/28/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

NYSCEF Doc Nos. 13-27, 31-36, and 40-52 were read on this motion to dismiss.

Motion by defendant Heartland Scenic Studio, Inc. ("Heartland") pursuant to CPLR 3211 (a) (1), (7), and (8), (c), and 3212 to dismiss the complaint of Plaintiff William Lee Gillespie, and for the dismissal of all the cross claims of defendant New Project, LLC ("New Project") is granted pursuant to CPLR 3211 (a) (8), as the Court does not have personal jurisdiction of Heartland.

BACKGROUND

Plaintiff commenced the instant action on March 28, 2019. The complaint alleges that plaintiff was injured on January 23, 2019, when he was struck by part of a wall during the demolition of an exhibit at the Museum of Natural History (the "Museum") due to the negligence of Defendants New Project and Heartland. The complaint alleges that Heartland is a foreign corporation organized in Nebraska and doing business in New York. (Complaint ¶ 4.) The complaint further alleges that Heartland was a contractor, including for fabrication, installation, and demolition of exhibits at the Museum. (*Id.* ¶ 5.) The complaint further alleges, upon information and belief, that Heartland originally installed the subject exhibit. As styled in the complaint, the first cause of action applies to New Project, only, the second cause of action applies to Heartland, only, and the third cause of action applies to both Defendants. In sum and substance, all three causes of action sound in common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), and, specifically, as to Labor Law § 241 (6), violations of 12 NYCRR (Rule) §§ 23-1.5 (a), 23-1.7 (a) (1) and (2), 23-1.8 (c) (1), 23-3.2 (c), 23-3.3 (b) (1) and (3), 23-3.3 (c) and (g), and 23-1.33.

On April 19, 2019, Plaintiff e-filed affidavits of service indicating that, on March 29, 2019, Defendants New Project and Heartland were served with the summons and complaint by means of a clerk in the Office of the Secretary of State of the State of New York pursuant to Limited Liability Company Law § 303 and Business Corporation Law § 307, respectively.

On April 24, 2019, New Project interposed its answer and asserted cross claims for common-law indemnification, contribution, and contractual defense and indemnification.

On May 29, 2019, Heartland filed the instant motion pursuant to CPLR 3211 (a) (1), (7), and (8) and (c) and 3212 to dismiss the complaint and all cross claims. As is relevant here, movant argues that Heartland was not properly served and that this Court has not obtained jurisdiction over Heartland. Movant argues that Plaintiff failed to comply strictly with the requirements of Business Corporation Law § 307 by mailing a copy of the summons and complaint to Heartland, by regular mail, without a return receipt requested, and by failing to file an affidavit of compliance. Movant cites to *Flick v Stewart-Warner Corp.* (76 NY2d 50, 56 [1990]) in support of its argument.

On June 19, 2019, Plaintiff e-filed an affidavit of service, dated April 30, 2019, indicating that a copy of a default letter and the summons and complaint were mailed to Heartland at 5329 Lindbergh Drive, Omaha, NE 68110, by regular mail and certified mail, return receipt requested, and that a “Kristie Strong” signed for the delivery on May 6, 2019. (NYSCEF Doc No. 39.) Plaintiff argues in his opposition papers that Heartland’s argument that Plaintiff failed to properly serve Plaintiff because Plaintiff mailed the summons and complaint to Heartland by regular mail, not certified mail with return receipt requested, is incorrect and frivolous. (Affirmation of Miller ¶ 8.)

New Project in its opposition papers takes no position as to whether the complaint was properly served but argues that plaintiff should be given an opportunity to correctly serve the complaint in the interest of justice because the statute of limitations has not yet run. (Affirmation of Rosenzweig ¶ 19.)

In reply, Heartland argues and reiterates that Plaintiff failed to serve it in strict compliance with the provisions of Business Corporation Law § 307, in that Plaintiff has failed to file an affidavit of compliance.

DISCUSSION

“While the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiffs, in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the Supreme Court.” (*Aybar v Goodyear Tire & Rubber Co.*, —NYS3d—, 2019 NY Slip Op 06584 [2d Dept 2019].) It is well-settled law in New York that “strict compliance with the procedures of Business Corporation Law § 307 is required to effect service on an unauthorized¹ foreign corporation.” (*Flannery v General Motors Corp.*, 86 NY2d 771, 773 [1995], citing *Flick* at 57.)

The Court of Appeals in *Flick* (at 55) described these procedures as follows:

“Service may be commenced on an unauthorized foreign corporation by serving the process ‘upon the secretary of state as its agent’ (§ 307 [a]). Such process

¹ Plaintiff has not alleged that Heartland is an authorized foreign corporation. Further, the Court takes judicial notice of the New York Department of State Division of Corporations Corporation and Business Entity Database, within which Heartland does not appear. (See https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY [last accessed September 19, 2019, at 2:57 p.m.]

must be served personally at the office of the Secretary of State in Albany or on the deputy or an authorized agent for service (§ 307 [b]). Thereafter, notice of the service and a copy of the process must either be delivered ‘personally without this state to such foreign corporation’ in accordance with section 307 (b) (1) or sent ‘by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested’ in accordance with section 307 (b) (2). Regardless of whether such service is effected personally (§ 307 [b] [1]) or by registered mail (§ 307 [b] [2]) an affidavit of compliance must be filed in accordance with section 307 (c) (1) or section 307 (c) (2) with the clerk of the court in which the action is pending within 30 days after such service. In either case service of process is not complete until “ten days after [the affidavit of compliance containing proof of service is] filed with the clerk of the court” (§ 307 [c] [1], [2] [emphasis added]).”

In *Flannery* (at 773), the Court of Appeals, citing to *Flick*, held that the failure to file an affidavit of compliance as required by Business Corporation Law § 307 is a jurisdictional defect, not a mere irregularity subject to cure.

Further, the Court of Appeals noted in *Stewart v Volkswagen of America, Inc.* (81 NY2d 203, 205–206 [1993]) that:

“The statute is precise as to the sequence of service and notice actions necessary to initiate and complete acquisition of jurisdiction. A party must first serve the Secretary of State, and then either deliver personally a copy of the process to the foreign corporation or send a copy of the process to:

- ‘such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its incorporation,’
- ‘or if no such address is there specified, to its registered or other office there specified,’
- ‘or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff.’ (Business Corporation Law § 307 [b] [2] [emphasis added].)”

In *Stewart* (at 207–208), the Court of Appeals held that it was the plaintiff’s burden to show that he “satisfy[ied] the first two statutory specifications [the above bullets]” and that a plaintiff cannot “choose randomly from the menu of the statute” but must show that “the specified steps for gaining jurisdiction by service and notice were precisely followed in the delineated sequence set forth in the statute.”

Here, Plaintiff alleges that, on April 30, 2019, a copy of a “default letter” and of the summons and complaint were mailed to Heartland. The Court has no copy of the “default letter” and so cannot determine whether Plaintiff noticed Heartland in its mailing pursuant to Business Corporation Law § 307 (b) that it had served process upon the Secretary of State. For this reason alone, Plaintiff has failed to make his prima facie showing, and the motion must be granted.

Further, and similarly to the plaintiff in *Stewart*, Plaintiff has failed to show prima facie that the April 30, 2019 mailing to Heartland at 5329 Lindbergh Drive, Omaha, NE 68110 was made to the address specified for the purpose of mailing process on file with the Nebraska department of state or the equivalent, or was the registered or other office there specified, or if no such office was there specified, that the address was the last address known to Plaintiff. For the purposes of the instant motion, the Court takes judicial notice of the Corporate & Business Search section of the website of the Nebraska Secretary of State. (*See* www.nebraska.gov/sos/corp/corptest.cgi?acct-number=0811688 [reCAPTCHA and click-through to complete entity search required], last accessed September 19, 2019, at 2:57 p.m.) The records show that, since February 21, 2003, Heartland’s “Registered Agent and Office Address” has been “William T. Foley, Suite 100, 10330 Regency Parkway Drive, Omaha, NE 68114.” The Lindbergh Drive address used by Plaintiff is listed as the Principal Office Address of Heartland. Under Business Corporation Law § 307 and the holding in *Stewart*, Plaintiff was required to mail the requisite notice of service along with process to the Regency Parkway Drive address, not the Lindbergh Drive address. This was not done. As such, this is a second basis for granting the motion.

Finally, as argued by movant and as undisputed in the opposition papers, Plaintiff has failed to file an affidavit of compliance pursuant to the requirements of Business Corporation Law § 307 (c) (2). Not only has there been no showing by Plaintiff in its April 30, 2019 affidavit that Heartland was put on notice that the Secretary of State was served with process, and not only was that affidavit improperly mailed to Heartland’s Principal Office Address instead of the Registered Agent and Office Address as required, but also the affidavit of compliance was not e-filed until June 19, 2019, the same day that Plaintiff filed his opposition to the instant motion, which was not “within thirty days after receipt of the return receipt signed by the foreign corporation,” which was signed on May 6, 2019. As such, “[P]laintiff’s failure to serve defendant [Heartland] in accordance with the strict requirements of Business Corporation Law § 307 (c) (2) divest[s] Supreme Court of jurisdiction over [Heartland].” (*Flannery* at 773.)

While New Project argued in opposition that this Court should permit Plaintiff to serve Heartland properly with process in the interest of justice because the statute of limitations has not yet run, New Project cites no case law for the proposition that a defendant that has demonstrated entitlement to dismissal on CPLR 3211 (a) (8) grounds may nevertheless be required to remain in the action and be properly served within a period of time. Plaintiff has made no application for an extension of time to serve Heartland, nor has Plaintiff made any showing that good cause exists for such an extension or that it would be in the interest of justice to do so. The mere fact that the statute of limitations has not yet run is not determinative of whether an extension of time to serve a party is in the interest of justice. (*See generally Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001].) As no such application has not been made by Plaintiff, and consistent with the holdings of the Court of Appeals in *Flick*, *Stewart*, and *Flannery*, the Court finds that

Heartland has demonstrated its entitlement to dismissal of the complaint, and, consequently, all cross claims, under CPLR 3211 (a) (8).

CONCLUSION

Accordingly, it is

ORDERED that the motion is granted on CPLR 3211 (a) (8) grounds, and the balance of the motion is moot, as the Court is divested of jurisdiction over Heartland; and it is further

ORDERED that the complaint and all cross claims against Heartland are dismissed; and it is further

ORDERED that, within 10 days of the NYSCEF filing date of the decision and order on this motion, Heartland shall serve a copy of this order with notice of entry on Plaintiff, New Project, and the clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff and New Project shall comply with the Court's June 18, 2019 preliminary conference order (*see* NYSCEF Doc No. 30) as to all discovery and the schedule for depositions, the September 17, 2019 request by movant on consent of Plaintiff and New Project to adjourn the depositions is denied (*see* NYSCEF Doc No. 54), and Plaintiff and New Project are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, October 15, 2019, at 9:30 a.m., for a compliance conference.

The foregoing constitutes the decision and order of the Court.

9/19/2019
DATE


HONORABLE ROBERT D. KALISH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE