

Harris v Lichtenstein
2020 NY Slip Op 30998(U)
April 21, 2020
Supreme Court, New York County
Docket Number: 154155/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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TAMARA HARRIS, BETSY HARRIS,
Plaintiff,

- v -

ANDREW LICHTENSTEIN, ALLISON HARRIS SCHIFINI,
TJ MONTANA ENTERPRISES, LLC.,

Defendant.

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INDEX NO. 154155/2017
MOTION DATE 02/17/2019
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 19, 20, 21, 22, 23, 24, 25, 29, 30, 31, 32, 114, 119, 120

were read on this motion to/for DISMISS

In this action arising from a disputed 19.35% interest in TJ Montana Enterprises LLC (TME) following the death of one of its owners, Steven Harris, defendant Allison Harris Schifini (Schifini) moves pursuant to CPLR 3012(b) to dismiss this action due to the plaintiffs' failure to serve a complaint. The plaintiffs oppose, arguing that the instant motion is an attempt to avoid the terms of the parties' preliminary settlement agreement, and that they were not required to serve a complaint as the defendants never filed a notice of appearance or served a demand for the complaint. The motion is denied.

TME owns the building located at 82 East 3rd Street in Manhattan. Following the death of Steven Harris on April 28, 2017, the plaintiffs claimed that they were entitled to his 19.35% share of TME pursuant to his will and assignment signed March 7, 2017. Schifini disputes the validity of the will and assignment and claims that her mother is entitled to the 19.35% share under TME's operating agreement. These competing claims are the subject of a related case before this court, Harris v Harris, Index No. 656962/2017.

This action was commenced via summons with notice on May 4, 2017. Upon commencing this action, the plaintiffs filed an emergency motion for a temporary restraining order and preliminary injunction seeking to enjoin the defendants from dissipating TME's assets

prior to their ownership of the 19.35% share being established. On May 12, 2017, the parties appeared for oral argument, at which time the parties entered into a preliminary settlement agreement whereby the defendants agreed to escrow 19.35% of any company profits, and the parties would exchange relevant financial documents and cooperate on any potential sale of the building. A similar agreement was not entered into in the related case.

On October 16, 2017, Schifini moved to dismiss this action as against her pursuant to CPLR 306-b based upon the plaintiffs' failure to serve her with the summons and notice. On February 7, 2018, this court denied Schifini's motion without prejudice to any party moving to enforce the terms of the preliminary settlement agreement. On February 22, 2018, Schifini made the instant motion seeking to dismiss the action for failure to serve a complaint pursuant to CPLR 3012(b). At the time of the motion, no formal notice of appearance had been filed by Schifini's counsel, nor had any demand for the complaint been made. Approximately five months later, on July 20, 2018, Schifini filed a demand for the complaint which the plaintiff rejected as untimely on July 25, 2018. On August 8, 2018, co-counsel for Schifini served a notice of appearance demanding notification and service of documents, but did not demand a complaint. No complaint was served following co-counsel's notice of appearance.

CPLR 3012(b) provides that: "If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance... If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision." CPLR 302(a) provides in relevant part that: "The defendant appears by serving an answer or notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after the service of the summons."

Here, Schifini failed to make a timely demand for the complaint within the time prescribed under CPLR 3012(b) and 302(a), and failed to serve a proper notice of appearance prior to the instant motion to dismiss. Schifini's notice of appearance was only first served on August 8, 2018, following the appearance of co-counsel. Schifini argues that her appearance by counsel at oral argument for the plaintiffs' motion seeking a temporary restraining order and preliminary injunction constitutes notice of her appearance such that a complaint was required to be served within 20 days, even if no formal notice of appearance was served. However,

Schifini's argument fails to comport with the plain language of CPLR 3012(b) which states that, if no demand is made, the complaint shall be served within twenty days after the service of the notice of appearance. See Howard B. Spivak Architect, P.C. v Zilberman, 59 AD3d 343, 344, (1st Dept. 2009) ("Because defendants did not answer or serve a notice of appearance after they were served with the summons with notice, plaintiff's time to serve them with the complaint did not begin to run.").

Nonetheless, the plaintiffs did not serve a complaint in the approximately three-year period following the commencement of this action by summons with notice, even after receiving notice of appearance by Schifini's co-counsel on August 8, 2018. Schifini argues, for this reason, that the plaintiffs have abandoned this action. The plaintiffs contend that they have not abandoned the action, but rather were not obligated to serve a complaint under CPLR 3012(b), and further argue that Schifini's attempts to dismiss this action are an attempt to circumvent the terms of the preliminary settlement agreement in the related case where no such settlement agreement was entered.

Dismissal under CPLR 3012(b) is permissive, and left to judicial discretion. See McKenzie v Jack D. Weiler Hosp., 171 AD3d 615 (1st Dept. 2019); Hernandez v Chaparro, 95 AD3d 745 (1st Dept. 2012); CPLR 3012(b). Under circumstances such as these, where Schifini failed to timely make a demand for the complaint or file a proper notice of appearance prior to moving to dismiss, dismissal of the action is not warranted. See Howard B. Spivak Architect, P.C. v Zilberman, supra; see also Parsons v Parsons, 6 Misc.3d 1032(A) (Sup Ct, Dutchess County 2005) (declining to dismiss action for failure to serve complaint when defendant fails to demand complaint or file formal notice of appearance despite parties appearing for conferences and executing stipulations). Although the plaintiffs delayed in serving a complaint, and failed to serve a complaint within 20 days of service of the notice of appearance filed following the instant motion, which is grounds for dismissal under CPLR 3012(b), there is a strong policy in New York State that lawsuits should be resolved on the merits. See Acosta v State, 270 AD2d 164 (1st Dept. 2000). Moreover, the court is persuaded that dismissal of this action would serve only to allow Schifini and the other defendants to circumvent the preliminary settlement agreement, and avoid the escrow of the company's profits, prior to a determination of the ownership of the 19.35% membership interest in the related action, thereby prejudicing the plaintiff. Hendrick Hudson Cent. Sch. Dist. v Falinski, 71 AD3d 769 (1st Dept. 2010) (finding prejudice if settlement agreement relied upon and performed under were voided).

Accordingly, it is,

ORDERED that the motion by Allision Harris Schifini to dismiss the action pursuant to CPLR 3012(b) is denied and leave is granted to the plaintiffs to serve a complaint within 20 days of the filing of this order, and it is further

ORDERED that failure to serve a complaint within that time may result in dismissal of this action pursuant to CPLR 3012(b); and it is further,

ORDERED that the parties are to appear for a status/settlement conference on August 20, 2020, at 9:30 a.m., all counsel appearing shall have full settlement authority.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/21/2020
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: