

**Callagy Law, P.C. v Law Off. of Gabriel & Shapiro,
LLC**

2020 NY Slip Op 31100(U)

March 30, 2020

Supreme Court, New York County

Docket Number: 161471/2019

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

CALLAGY LAW, P.C.

Plaintiff,

- v -

LAW OFFICE OF GABRIEL & SHAPIRO, LLC

Defendant.

-----X

INDEX NO. 161471/2019

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 9 through 24, 26 through 31

were read on this motion to/for OSC – DECLARATORY/SUBSTITUTION.

In this dispute between two law firms to substitute as counsel en masse in over 100 separate personal injury lawsuits, the incoming counsel, plaintiff Callagy Law, P.C. pursues the following causes of action and equitable relief: (1) a declaration requiring outgoing counsel, defendant Law Office of Gabriel & Shapiro, LLC to sign attorney substitution forms or an order from the court forcing substitution and transfer of files; (2) negligent misrepresentation; (3) tortious interference with a contractual relationship; and (4) promissory estoppel. By the instant motion, plaintiff seeks a declaration to force the law firm substitution, defer fee splitting until after the disposition of each underlying case, and to require the transfer of files from defendant to plaintiff.

Defendant opposes the motion and cross-moves, pre-answer, to dismiss this matter for lack of jurisdiction pursuant to CPLR 3211(a)(8), claiming there was improper service. Defendant’s cross-motion also seeks a denial of plaintiff’s motion for substitution of attorney of record until the client pays defendant all outstanding cost, fees, and expenses; and setting a calculation or percentage of attorney fees payable to defendant upon receipt thereof and that said calculation and percentage [not] be determined at the disposition of [each] case; and costs” (NYSCEF #16). Plaintiff opposes the cross-motion.

The Decision and Order is as follows:

BACKGROUND

Plaintiff law firm claims that its putative client, Saddle River Valley Surgical Center (“SRVSC”), hired defendant law firm to handle over 100 personal injury

protection claims in either litigation or arbitration. Plaintiff claims that in July 2019, SRVSC terminated its relationship with defendant and instead retained plaintiff. On September 4, 2019, plaintiff delivered to defendant a substitution of attorney form signed by SRVSC and plaintiff (NYSCEF #10 – Consent to Substitute Attorney Form). Plaintiff claims that the parties attempted to facilitate the substitution and transfer of files, however, the efforts broke down. Plaintiff claims that defendant misrepresented the nature of its retainer agreement with SRVSC and demands money to which it is not entitled. Plaintiff further claims that defendant refused to accept its proffer of a check to pay for defendant’s retaining lien in an effort to obtain SRVSC’s client file from defendant. Due to defendant’s refusal to transfer the client file, defendant has remained SRVSC’s counsel as it still maintains SRVSC’s client file.

Plaintiff filed its summons and complaint in this matter on November 25, 2019 (NYSCEF ## 1-2). On the same day, plaintiff sent defendant an email with the subject line -- “We filed a summons and complaint against you” (NYSCEF #24 – Exh B – Email Correspondence between Pl and Def). The email stated: “Courtesy copies attached. Please advise if you will accept service via this email. If not, we will formally serve you tomorrow” (*id.*). Plaintiff attached its complaint to the email. The attached complaint bears a mark from the New York County Clerk indicating that the Clerk had not accepted and indexed the complaint at the time it was sent to defendant (*id.*). Also on November 25, plaintiff filed an initial Order to Show Cause for the same declaratory relief sought in the instant motion (NYSCEF #3), but the court deemed it abandoned on January 14, 2020 (NYSCEF #8).

Defendant responded on November 26, 2019: “I apologize for not getting back to you yesterday... When there is a signed order with Index you can send to me via email cod to Arthur Gabriel and I will send you an email saying it was received accepting service” (*id.*). No further email correspondence is provided. Defendant never served an answer in this matter.

Plaintiff therefore filed the instant OSC on January 28, 2020, which was signed by the court on February 7, 2020 (NYSCEF #13). The OSC was personally served on defendant on February 11, 2020 (NYSCEF #15). Defendant filed its cross-motion to dismiss on February 21, 2020, its first appearance in this matter (NYSCEF #16). The motion was argued on February 26, 2020, and the parties were instructed to not file any additional papers or sur-replies. However, defendant ignored this instruction and filed a sur-reply on March 20, 2020 (NYSCEF #26). Defendant’s sur-reply will not be considered.

DISCUSSION

Defendant’s cross-motion to dismiss pursuant to CPLR 3211(a)(8) for lack of jurisdiction is granted. Plaintiff failed to effectuate proper service. Plaintiff does not

claim to have served defendant pursuant to CPLR 311 and did not submit an affidavit of service in this matter. The only service plaintiff claims to have effectuated is by email after defendant allegedly waived service.

However, from the record submitted, defendant did not agree to the terms of plaintiff's November 25, 2019 email asking it to waive its right to service and accept service electronically. "Waiver is an intentional relinquishment of a known right and should not be lightly presumed". The intent to waive "must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act" (*Ess & Vee Acoustical & Lathing Contractors, Inc. v Prato Verde, Inc.*, 268 AD2d 332, 332 [1st Dept 2000] [internal citations omitted]). Here, defendant stated that it would waive service only after a "signed order with Index [number]" was issued, and plaintiff was to email defendant such notice (NYSCEF #24). Only after this condition was satisfied would defendant then send an email to plaintiff "saying [service] was received" and accepted (*id.*). There is no evidence of any further communication between the parties regarding waiver of service or the terms of the waiver. Thus, defendant did not waive service.

Plaintiff asks that the court look to *Knopf v Sanford* (150 AD3d 608, 610 [1st Dept 2017]) and find service by email proper on the basis that defendant "expressly requested such service... and the record establishes a pattern of email service between opposing counsel." Here, in contrast, defendant clearly did not expressly ask for electronic service. Instead, plaintiff asked if defendant would accept electronic service, and defendant countered with its terms for waiver. Indeed, plaintiff and defendant did not expressly agree to terms regarding waiver of service. As such, *Knopf* and the lead case on electronic service in the First Department, *Alfred E. Mann Living Tr. v ETIRC Aviation S.a.r.l.* (78 AD3d 137, 142 [1st Dept 2010] [finding alternative email service proper when parties have waived service of process by contract]), are inapplicable to the facts here.

Thus, based on the record, plaintiff fails to carry its burden of establishing proper service (*see Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 350-351 [1st Dept 2002] [plaintiff failed to sustain burden of establishing proper service as he failed to provide testimony or sworn affidavit of process server]). As such, plaintiff failed to properly serve defendant thereby depriving this court of personal jurisdiction in this matter. Plaintiff's complaint is dismissed at this time.

As such, plaintiff's motion is denied as moot. In any event, even if this court did have personal jurisdiction, plaintiff's motion would be denied as premature. Plaintiff effectively seeks partial summary judgment on its claim for declaratory relief. While plaintiff's moving papers do not mention CPLR 3212 or any other procedural basis for its motion, it is clear that plaintiff seeks a declaration from this court regarding the substitution of counsel and transfer of files. This is the ultimate

relief that plaintiff seeks in its complaint. As such, plaintiff's motion would be deemed one for partial summary judgment.

However, plaintiff is not entitled to summary judgment for declaratory relief before issue is joined by service of answer (*see Leff v Leff*, 182 AD2d 401, 402 [1st Dept 1992] ["the rule prohibiting grant of summary judgment prior to joinder of issue is strictly adhered to"]). Defendant did not answer in this matter. Thus, if the court were to reach plaintiff's motion, it would be denied.

Accordingly, it is ORDERED that defendant's motion to dismiss for lack of jurisdiction is granted; plaintiff's complaint is dismissed without prejudice to renew with proof of proper service; it is further

ORDERED that plaintiff's motion for summary judgment is denied as moot; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.



MARGARET A. CHAN, J.S.C.

3/30/2020

DATE

MARGARET A. CHAN, 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