

Klein Slowik PLLC v 105 4th Ave. Condominium
2020 NY Slip Op 31289(U)
May 4, 2020
Supreme Court, New York County
Docket Number: 650940/2019
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

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KLEIN SLOWIK PLLC, : Index No. 650940/2019

Plaintiff, : DECISION AND ORDER

-against- :

105 4th AVENUE CONDOMINIUM, a/k/a 105 :
FOURTH AVE. CORP., a/k/a 105 ASSOCIATES,
and BEN HIRSCH, :

Defendants. :

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LOUIS L. NOCK, J.

Individual defendant Ben Hirsch moves (seq. no. 001)¹ to dismiss the claims asserted against him in this action, pursuant to CPLR 3211 (a) subsections 1 (documentary evidence), 7 (failure to state a claim), and 8 (lack of jurisdiction). The motion is opposed. The motion is granted as set forth hereinbelow.

BACKGROUND

The complaint alleges that the entity defendant – 105 4th Avenue Condominium, a/k/a 105 Fourth Ave. Corp., a/k/a 105 Associates (the “Condo”) – retained the plaintiff law firm (the “Firm”) to represent it in connection with a request for access into the Condo’s property by a third-party “owner of neighboring premises . . . during the course of construction at the Neighboring Premises” (Complaint ¶ 8). The complaint further alleges that the Condo made partial payments to the Firm on account of said representation (*id.*, ¶ 9). Significantly, the complaint is permeated with the acknowledgment that the retainer was between the Firm and

¹ The moving affirmation makes it clear that the motion is being made by the individual defendant only (*see*, NYSCEF Doc. No. 5), identifying moving counsel as “counsel for Defendant Ben Hirsch” (*id.*, ¶ 1).

“the Condo” (*see*, Complaint, *passim*). In a nutshell, this is an action by the Firm for outstanding fees accrued on account of the aforesaid representation, amounting to \$34,687.02, as alleged. There are four causes of action asserted. One for breach of contract, again acknowledging that the retainer agreement was between the Firm and “the Condo” (Complaint ¶ 29); a second for an account stated; and a third and fourth for unjust enrichment and *quantum meruit*.

DISCUSSION

CPLR 3211 (a) (8) (Lack of Jurisdiction)

This prong of the motion asserts, without any detail whatsoever, that Hirsch was never served with process (*see*, NYSCEF Doc. No. 7). Specifically, it consists of one nondescript statement by Hirsch, at the close of his affidavit, that: “Finally, the Complaint must be dismissed for failure to properly serve me.” (*Id.*, ¶ 4.) But the Firm has filed an affidavit of service of process, signed by a process server, attesting to service of process (NYSCEF Doc. No. 2). It is elementary that “a process server’s affidavit of service establishes a *prima facie* case as to the method of service and, therefore, gives rise to a presumption of proper service” (*LaSalle Bank Natl. Assn. v Calle*, 153 AD3d 801, 802 [2d Dept 2017]). A defendant’s bare assertion of improper service in the face of such *prima facie* evidence of service, containing no detail at all, such as the case here, is insufficient to raise an issue of fact as to service of process (*see, id.*). Therefore, this prong of the motion to dismiss is denied.

CPLR 3211 (a) (1) and (7) (Documentary Evidence and Failure to State a Claim)

The complaint expressly acknowledges that the Firm’s retainer agreement was exclusively between it and the Condo. Indeed, Hirsch has submitted compelling evidence to

that effect through his submission of the retainer agreement, which, while signed by him, was only signed by him as an officer of, and solely on behalf of, the Condo (*see*, NYSCEF Doc. No. 15).² Even if the complaint alleged that Hirsch signed it in his individual capacity – which it does not – that allegation, even on a motion to dismiss, could not overcome the import of the actual documentary evidence plainly contradicting such allegation, such as the retainer agreement between the Firm and the Condo, exclusive of any other person or entity (*e.g.*, *Ullman v Norma Kamali, Inc.*, 207 AD2d 691 [1st Dept 1994]).

Moreover, causes of action asserted under alternative theories cannot stand where there is a contract governing the subject of the action, as in the present case (*e.g.*, *First Class Concrete Corp. v Rosenblum*, 167 AD3d 989 [2d Dept 2018]).

Consequently, no cause of action asserted can succeed against individual defendant Ben Hirsch given the openly conceded and indisputable fact that he is not a party to the Firm's contract with entity defendant 105 4th Avenue Condominium, a/k/a 105 Fourth Ave. Corp., a/k/a 105 Associates. Therefore, the motion is granted and the claims asserted against individual defendant Ben Hirsch are dismissed.

Accordingly, it is

ORDERED that the motion by individual defendant Ben Hirsch to dismiss the claims against him in this action is granted, and, accordingly, they are severed and dismissed; and it is further

² There is no evidence of any personal guaranty whereby Hirsch guaranteed the Condo's performance under the retainer agreement between it and the Firm.

ORDERED that the action will continue solely against entity defendant 105 4th Avenue Condominium, a/k/a 105 Fourth Ave. Corp., a/k/a 105 Associates; and it is, accordingly, further

ORDERED that the caption of this action, henceforth, shall read:

“-----X
 KLEIN SLOWIK PLLC, :

 Plaintiff, :

 -against- :

 105 4th AVENUE CONDOMINIUM, a/k/a 105 :
 FOURTH AVE. CORP., a/k/a 105 ASSOCIATES, :

 Defendant. :
 -----X”.

This shall constitute the decision and order of the court.

Dated: New York, New York
May 4, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.