

Bakersfield Capital LLC v Hewitt
2020 NY Slip Op 32170(U)
May 14, 2020
Supreme Court, Queens County
Docket Number: 703703/2019
Judge: Joseph Risi
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Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

5/29/2020
4:02 PM

Present: HONORABLE JOSEPH RISI, A.J.S.C.

IA Part 3

COUNTY CLERK
QUEENS COUNTY

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Index

BAKERSFIELD CAPITAL LLC, ELI KREINDLER,
DANIEL LICHTER, and WAYNE LICHTER,

Number 703703/2019

Plaintiffs,

DECISION/ORDER

-against-

Motion Seq. #1 & 2

MICHAEL HEWITT, MICHAEL M. DANIELS,
MASON AMBROSE, PAMELLA POLLITT, SCOTT
MCGAHEY, and VIRTUAL LEGAL PROCEEDINGS,
INC.,

Defendants.

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The following numbered papers read 1 – 18 on this motion (seq. 1) by Defendant Hewitt for an order: (1) pursuant to CPLR §3025, dismissing the amended complaint; (2) pursuant to 28 U.S. Code §1332, granting removal of the action to Federal court; (3) pursuant to CPLR §3212, granting summary judgment; and (3) to extend the time to file an answer; and plaintiffs’ motion (seq. 2) for an order, pursuant to CPLR §3211 to dismiss Defendant Hewitt’s counterclaims.

	<u>Papers Numbered</u>
<u>Seq. 1</u>	
Notice of Motion, Affirmation, Exhibits and Service.....	1-4
Affirmation in Opposition, Exhibit and Service.....	5-7
Reply and Service.....	8-9
<u>Seq. 2</u>	
Notice of Motion, Affirmation, Exhibits and Service.....	10-14
Affirmation in Opposition and Service.....	15-16
Reply and Service.....	17-18

Upon the foregoing papers, it is ordered that the motions are consolidated for determination as follows:

Plaintiffs commenced this action to recover damages by the filing of the summons and

complaint on or about March 3, 2019. Plaintiffs thereafter filed a supplemental summons and amended complaint on April 9, 2019.

Removal

As a preliminary matter, the Court will first address Defendant Hewitt's motion for removal. The doctrine of removal is governed by Federal law and is a unique power that may only be exercised by the Federal courts, applying Federal law. (*George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 51 N.Y.2d 358 [1980]; 28 U.S. Code § 1446 "[D]efendants desiring to remove any civil action from a State court shall file in the district court of the United States"). Thus, the movant must seek this remedy in the appropriate forum of the Federal court. Accordingly, this branch of the motion is denied.

Plaintiff's Amended Complaint and Extending Defendant Hewitt's Time to Answer

Defendant Hewitt, a resident of North Carolina, alleges that plaintiffs' amended complaint should be dismissed because it was untimely.

Pursuant to CPLR §3025, "A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." As to the manner of service upon the aforesaid non-resident defendant, CPLR §313 reads, in pertinent part, as follows:

Service without the state giving personal jurisdiction.

"A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302...may be served with the summons without the state, in the same manner as service is made within the state" by certain categories of persons.

Service within the state by substituted service, pursuant to CPLR §308(2) may be made

as follows:

Personal service upon a natural person shall be made by any of the following methods:

(2) by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served *and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential"* and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; (Emphasis added).

Plaintiffs have failed to demonstrate sufficient service of the original summons and complaint. Thus, their time to file the amended complaint had not begun to run. As such, the amended complaint was timely filed by plaintiffs. However, service of the amended complaint was also insufficient and thus, the time for Defendant Hewitt to answer said complaint has not yet started.

Accordingly, the branch to dismiss the plaintiffs' amended complaint is denied and the branch to extend Defendant Hewitt's time to answer is denied as moot as the time to answer has not yet run.

Summary Judgment

Defendant Hewitt's motion for summary judgment here is premature. On a motion for summary judgment, the movant bears the initial burden of establishing, *prima facie*, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324[1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). A failure to make such a showing requires denial of the motion,

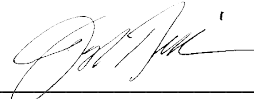
regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Discovery has not commenced nor was there any relevant evidence submitted to support Defendant Hewitt's entitlement to judgment as a matter of law. Thus, this branch of the motion is denied with leave to renew.

Plaintiffs' Motion to Dismiss Counterclaims (seq. 2)

Plaintiffs' motion to dismiss Defendant Hewitt's counterclaims is also denied as premature for the aforementioned reasons. Discovery has not commenced nor have plaintiffs submitted any evidentiary support warrant dismissal of the counterclaims. Thus, plaintiffs' motion is denied with leave to renew.

This is the decision and order of the Court.

Date: May 14, 2020



Hon. Joseph Risi, A.J.S.C.

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