

Schweitzer v Rueda

2020 NY Slip Op 32690(U)

August 18, 2020

Supreme Court, New York County

Docket Number: 157534/2019

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 157534/2019

DINA SCHWEITZER,

Plaintiff,

MOTION SEQ. NO. 001

- v -

JORGE RUEDA SR., JORGE RUEDA, and TELMA
VASQUEZ A/K/A YOLANDA VASQUEZ A/K/A TELMA
RUEDA,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

In this action by plaintiff Dina Schweitzer sounding, inter alia, in malicious prosecution, defendants Jorge Rueda Sr. ("Rueda Sr."), Jorge Rueda ("Rueda"), and Telma Vasquez a/k/a Yolanda Vasquez a/k/a Telma Rueda ("Telma") (collectively "defendants") move, by order to show cause, to dismiss the complaint pursuant to CPLR 3211(a)(7) (failure to state a claim) and (a)(8) (lack of jurisdiction). Plaintiff opposes the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff and Rueda became involved in a romantic relationship in 2015. After the termination of the relationship, Rueda, Rueda Sr., and Telma allegedly made false statements about plaintiff, resulting in her arrest on August 3, 2018. Doc. 4 at par 15. According to plaintiff, the charges against her were later dismissed. Doc. 1.

On July 30, 2019, a warrant was issued for plaintiff's arrest based on Rueda's allegedly false representation to the police that she had violated an order of protection. Doc. 3 at par. 23. As a result of the information provided by Rueda, plaintiff was then arrested on August 16, 2019. Doc. 3 at par. 23.

On August 1, 2019, plaintiff, who claims that she was subject to emotional, sexual, and physical abuse by Rueda, commenced the captioned action by filing a summons with notice alleging wrongful arrest, malicious prosecution, defamation, intentional infliction of emotional distress, and assault and battery. Doc. 1.

On August 17, 2019, the Criminal Court, New York County granted a temporary order of protection ("the 8/17/19 OOP") against plaintiff in an underlying criminal proceeding against her. Doc. 6. The 8/17/19 OOP forbade plaintiff from contacting, or communicating in any way, directly or indirectly, with Rueda until February 17, 2020. Doc. 6.

On November 26, 2019, plaintiff moved for an extension of time to serve defendants with process in the captioned action. Docs. 3, 8. The same day, this Court (Cohen, J.) issued an order extending plaintiff's time to serve defendants with process until March 25, 2020. Doc. 8.

On December 5, 2019, the Family Court, New York County issued an order of protection ("the 12/5/19 OOP") directing Rueda to stay away from plaintiff and her home until April 28, 2020. Doc. 19.

On January 6, 2020, the Family Court, New York County issued an order of protection directing plaintiff to avoid Rueda through April 3, 2020 ("the 1/6/20 OOP"). Doc. 20. The 1/6/20 OOP provided, however, that service of process on Rueda by a process server did not violate its terms. Doc. 20.

Plaintiff served defendants with process in this action via a process server on February 11, 2020. Docs. 9-11.

On March 2, 2020, defendants filed the instant order to show cause seeking to dismiss the complaint on the grounds that there was no jurisdiction since service of process was untimely (CPLR 3211[a][8]) and the complaint failed to state a claim. CPLR 3211(a)(7). Doc. 12. The order to show cause was signed on June 6, 2020. Doc. 14. On July 30, 2020, counsel for defendants filed a limited notice of appearance which did not contain a demand for a complaint. Doc. 23.

Plaintiff opposes the motion on the ground that she properly served defendants with process in accordance with Justice Cohen's order. Doc. 15. She further asserts that defendants' motion is actually one for reargument and must be denied. Doc. 15. Additionally, plaintiff maintains that defendants failed to establish that the complaint fails to state a claim. Doc. 15.

LEGAL CONCLUSIONS:

Plaintiff correctly asserts that the focus of defendants' motion is that Justice Cohen erred by granting her additional time to serve defendants with process. However, instead of moving to reargue Justice Cohen's decision pursuant to CPLR 2221, as they are required to do, they denominate their motion as one to dismiss for lack of jurisdiction pursuant to CPLR 3211(a)(8). In support of the motion, they claim that, since Justice Cohen erred by allowing plaintiff an extension of time to serve process, any service effectuated pursuant to his order was a nullity.^[1]

CPLR 2221 (d) (1) expressly requires that any motion to reargue filed with a court be specifically labeled as such. This requirement was designed to relieve the court from speculating

^[1] There is no question that defendants were served on February 11, 2020, prior to the March 25, 2020 deadline imposed by Justice Cohen.

whether a party was seeking leave to reargue or to renew the motion (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2221:7). Since a party's failure to label the motion as one for reargument violates the statute (*id.*), and defendants did not label the motion as such, it must be denied. In any event, as noted above, plaintiff served process in a timely fashion in accordance with Justice Cohen's order and, to the extent defendants argue that Justice Cohen erred by directing that defendants be served despite the existence of a protective order, the protective order did not prohibit service of process on them.

Additionally, defendants' argument that the complaint must be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7) is rejected as conclusory. Defendants merely assert that the complaint has no merit and that the claim was brought solely to harass them (Doc. 14 at pars. 22, 26), but fail to persuade this Court that plaintiff's claims warrant dismissal. *See Subway Real Estate Corp v Jahedi*, 2019 NY Slip Op 31298(U), *4 (Sup Ct, NY County 2019).

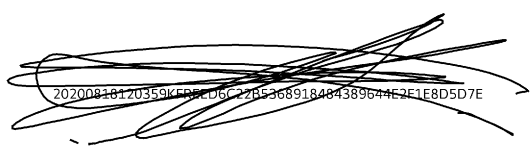
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied in all respects; and it is further

ORDERED that the parties are directed to participate in a telephonic status conference with the court on September 10, 2020 at 4:30 p.m. (the parties are to provide the court with a dial-in number and access code or are to be on the line and then patch the court in at (646) 386-5655); and it is further

ORDERED that this constitutes the decision and order of the court.

8/18/2020
DATE



KATHRYN E. FREED, 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