Williams v Cruz
2020 NY Slip Op 33173(U)
August 12, 2020
Supreme Court, Bronx County
Docket Number: 20085/2020E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

TABATHA WILLIAMS,

Plaintiff,

-*against*-

HECTOR CRUZ,

Defendant.

Index No. 20085/2020E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.:

This is a breach of contract action which arose from a failed sale of a cooperative apartment. Defendant moves for, *inter alia*, the following relief: to cancel the notice of pendency filed by plaintiff on January 14, 2020 (CPLR 6514); to deem his Answer timely filed, or to vacate defendant's purported default and compel plaintiff to accept defendant's Answer; for summary judgment dismissing the claims for unjust enrichment and conversion; for summary judgment on his counterclaims declaring that plaintiff was in breach of contract and that defendant is entitled to the down payment (CPLR 3212); alternatively, to dismiss the Complaint because the court lacks personal jurisdiction over defendant (CPLR 3211 [a] [8]).

In a separate motion, defendant moves to vacate the default judgment entered by the Clerk on July 6, 2020 (CPLR 5015 [a] [1], [3]), and to dismiss the Complaint for failure to obtain personal jurisdiction over defendant or to compel plaintiff to accept defendant's Answer.

On July 12, 2019, the parties executed a contract for plaintiff to purchase the shares of defendant's cooperative apartment in Bronx County. The transaction did not occur, and plaintiff commenced this action seeking damages and the return of the $28,000 down payment which she tendered in connection with the purchase.

The contract provided that the closing would occur "on or about 60 days from the delivery date" (¶ 1.15). The "delivery date" was the date when plaintiff or her attorney was deemed to have received a copy of the fully executed contract. On September 21, 2019, plaintiff's attorney sent an email to defendant's attorney stating that plaintiff had been approved by the Cooperative Board and was cleared to close and inquired about the earliest date that defendant would be able to close. Defendant responded that he was not ready to close because he was in the process of purchasing another unit in the building.

On October 17, 2019, plaintiff's attorney emailed that the closing must occur by October 22, 2019, or plaintiff would lose her financing. Defendant avers that he was ready to close on October 28, 2019, however, in an October 23, 2019 email defendant states that the closing was contingent on him remaining in the apartment until November 1, 2019. Despite several email exchanges, the closing did not take place in October 2019.

On October 31, 2019, plaintiff's attorney advised defendant that plaintiff had to pay additional mortgage fees due to defendant's refusal to timely close and his attorney's failure to respond to multiple inquiries regarding defendant's delay in closing. Defendant agreed to pay plaintiff's mortgage commitment extension fees of $1400 but refused to pay other fees which plaintiff requested.

On November 13, 2019, plaintiff's attorney sent an email advising defendant's attorney that plaintiff's mortgage financing had expired and would not be renewed unless she made payments of almost $6,000, which she was unable to do, and sought to terminate the contract and demanded the return of the down payment. Nevertheless, on November 18, 2019, defendant's attorney sent a letter to plaintiff's attorney scheduling the closing for December 6, 2019, time being of the essence. However, plaintiff's attorney advised defendant's attorney that plaintiff did not

have financing, and on December 6, 2019, plaintiff did not appear at the closing scheduled by defendant, resulting in a December 13, 2019 notice to plaintiff that she had breached the contract and thus, forfeited the down payment.

Plaintiff commenced this action by filing a Summons and Complaint on January 2, 2020, and on January 14, 2020, filed a notice of pendency against the apartment, and an affidavit of service asserting that an individual named "Angel" was served with "the above subpoena/subpoena duces tecum" at the front desk of the apartment building where defendant resides.

Despite alleging that he was not served, defendant asserts that he learned of the Complaint and on March 10, 2020, he served an Answer with counterclaims, which plaintiff rejected as untimely pursuant to CPLR 320.

On March 13, 2020, defendant served the motion for summary judgment and to dismiss the Complaint for lack of personal jurisdiction. On July 6, 2020, despite defendant's Answer and motion, a Judgment was entered by the Clerk awarding plaintiff $30,155.00 on default. On July 8, 2020, defendant filed the instant motion to, *inter alia*, vacate the default judgment.

Lack of Personal Jurisdiction

Pursuant to CPLR 3211 (a) (8), a party may move for dismissal on the ground that the court has no jurisdiction of the person of the defendant. CPLR 308 (2) provides for substituted service and requires that the summons be delivered:

> 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; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service…. (emphasis added).

In *Hulse v Wirth* (175 AD3d 1276, 1277 [2nd Dept 2019]), the court held that, under CPLR 308 (2), jurisdiction is not acquired unless there has been strict compliance with both the delivery and mailing requirements. Service may be proved by an affidavit of service, which ordinarily should be made by the person who effectuated the service (*see Heffernan v Village of Munsey Park*, 133 AD2d 139, 140 [2nd Dept 1987]). The affidavit of a process server constitutes prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, [1st Dept 2006]). "Ordinarily, a proper affidavit of a process server attesting to personal delivery of a summons to a party is sufficient to support a finding of jurisdiction. Where, however, … there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of the evidence at a hearing" (*Matter of Griffin v Griffin*, 215 AD2d 386 [2nd Dept 1995]). Generally, where there is total disagreement as to whether service was accomplished, there should be a traverse hearing (*see Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411 [1st Dept 2010]; *Hinds v 2461 Realty Corp.*, 169 AD2d 629, 632 [1st Dept 1991]).

CPLR 306 sets forth the information that must be specified in a proof of service, including identifying the papers served, the person who was served, the date, time, address, or place, and manner of service, as well as the facts that show that the service was made by an authorized person and in an authorized manner (CPLR 306 [a]). The proof of service must also indicate a description of the person to whom the document was delivered, including but not limited to sex, color of skin, hair color, approximate age, approximate weight and height, and other identifying features (CPLR 306 [b]).

A purported defect in the form of the affidavit of service, such as the sufficiency of a signature, may be a mere irregularity and not a jurisdictional defect that would warrant dismissal of the Complaint (*see Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]).

In *Lang v Wycoff Hgts. Med. Ctr.* (55 AD3d 793, 794 [2nd Dept 2008]), the Court stated that where a defendant moves to dismiss a complaint pursuant to CPLR 3211 (a) (8) on the ground of lack of personal jurisdiction, "a plaintiff 'need only make a prima facie showing' that such jurisdiction exists." The burden of proving proper service is on the plaintiff to show compliance with CPLR 308 (2) (*see James v Brandt*, 144 Misc 2d 190, 192 [Sup Ct, Bronx County 1989]).

Actual receipt of the Summons and Complaint is insufficient. When the "requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" (*Raschel v Rish*, 69 NY2d 694, 697 [1986]).

After dismissal of an action for lack of personal jurisdiction due to improper service of process, there is no longer an action pending on which relief may be granted, including extending the time to make service (*see Henneberry v Borstein*, 91 AD3d 493, 497 [1st Dept 2012]; *Sottile v Islandia Home for Adults*, 278 AD2d 482, 483 [2nd Dept 2000]).

CPLR 5015 (a) empowers the court to vacate a default judgment for several reasons, including a lack of jurisdiction (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

Here, the affidavit of service does not comply with CPLR 308 (2) as to procedure, and with CPLR 306 as to form. The affidavit states that on January 4, 2020, a "subpoena/subpoena duces tecum" was served on "Angel," without reference to a Summons or that the service was intended to be on defendant, who is not identified in the affidavit of service. There is also a failure to identify "Angel's" relationship to defendant or the alleged authority upon which Angel could accept service for defendant. Defendant avers that "Angel" is not authorized to accept service of

legal documents on his behalf. Plaintiff's process server, Sutton, makes no showing of having been denied access to defendant's apartment. Moreover, the affidavit of service does not show that the Summons and Complaint were mailed to defendant. The errors in the affidavit are not mere irregularities, they are jurisdictional. Moreover, the affidavit does not present sufficient indicia of service to warrant a traverse hearing.

Accordingly, the action is dismissed without prejudice to the commencement of a new action upon proper service, and the default judgment is vacated.

Notice of Pendency

In *5303 Realty Corp. v O & Y Equity Corp.* (64 NY2d 313, 317-318, 320 [1984]), the Court stated:

> CPLR 6501 provides: "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property." Once properly indexed, the notice acts as constructive notice to all subsequent purchasers or incumbrancers: "A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he were a party" (CPLR 6501)....
> Critically, the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review. To the extent that a motion to cancel the notice of pendency is available (CPLR 6514), the court's scope of review is circumscribed....
> In entertaining a motion to cancel, the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501....

The Court concluded that a suit to specifically perform a contract for the sale of stock representing a beneficial ownership of real estate will not support the filing of a notice of pendency (id. at 322-323). In *Savasta v Duffy* (257 AD2d 435, 436 [1st Dept 1999]), the Court determined: "The court also properly canceled the notice of pendency since shares in a cooperative apartment are personal and not real property (*Sansol Indus. v 345 E. 56th St. Owners*, 159 Misc 2d 822 [Sup Ct, NY County 1993])." In *Gyurek v 103 E. 10th Owners Corp.* (128 Misc 2d 384, 385 [Sup Ct,

Spec Term NY County 1985]), the court stated that the "plaintiff's selection of the remedy under CPLR 6501 to preserve her rights for conveyance of the shares should a cooperative conversion occur [was] improper," noting that "[s]hares of stock of a cooperative corporation are personalty and not subject to notice of pendency filing."

CPLR 6514 (b) and (c) provide:

> (b) Discretionary cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith.
> (c) Costs and expenses. The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.

In 551 *West Chelsea Partners LLC v. 556 Holding LLC* (40 AD3d 546, 548 [1st Dept 2007), the Court noted that the moving party bears the burden of establishing the lack of good faith. This burden is not easily met since the moving party must raise "at least a substantial question" as to "whether plaintiff has not commenced or prosecuted the action in good faith."

Relying on *Congel v Malfitano* (61 AD3d 807, 809 [2nd Dept 2009], *affd as mod on other grounds* 31 NY3d 272 [2018]), the court in *American Standard Sheet Metal Supply. Corp v 36 Ave. Inc*. (2019 WL 1440470 [Sup Ct, Queens County 2019]) reasoned: "In *Congel v. Maltifano*, the Second Department held an order authorizing an award of costs and disbursements pursuant to CPLR 6514 (c) may only be proper where the cancellation of the Notice of Pendency was made pursuant to that section. (*Congel v. Malfitano*, 61 A.D.3d 807, 809 [2nd Dept 2009]). Therefore, this Court will not grant Defendant's motion for an award under CPLR 6514 (c) where, as here, this Court is cancelling the Notice of Pendency because it does not fall within the scope of CPLR 6501." (*See Delidimitropoulos v Karantinidis*, 142 AD3d 1038, 1039-1040 [2nd Dept 2016].)

Although defendant makes application for the court to direct plaintiff to pay costs and expenses occasioned by the filing and cancellation of the notice of pendency (CPLR § 6514 [c]), and to sanction plaintiff for purportedly acting in bad faith because her claims are for monetary damages and return of the down payment, since the cancellation of the notice of pendency is pursuant to the Supreme Court's inherent power, and not pursuant to CPLR 6514 (a) or (b), the court does not have authority to award costs and disbursements under CPLR 6514 (c) (see *Delidimitropoulos v Karantinidis*, 142 AD3d at 1039-1040). Under the circumstances of this action, the court exercises its discretion and does not impose costs on plaintiff.

Accordingly, defendant's motions to dismiss the Complaint for lack of personal jurisdiction, to cancel the notice of pendency filed by plaintiff on January 14, 2020 (CPLR 6514), and to vacate the default judgment entered by the Clerk of the Court on July 6, 2020, are granted. The motion to dismiss is granted without prejudice to commencement of a new action upon proper service.

Defendant shall serve plaintiff with a copy of this Order with Notice of Entry within 30 days from the date of its entry and shall serve the Clerk of the Court, who is directed to cancel the notice of pendency filed by plaintiff on January 14, 2020 (CPLR 6514), and to vacate the default judgment dated entered by the Clerk on July 6, 2020.

This constitutes the Decision and Order of the court.

Dated: August 12, 2020

Ruben Franco

Ruben Franco, J.S.C.
HON. RUBÉN FRANCO