

MSD USA LLC v Tiffany Elle, LLC

2021 NY Slip Op 32828(U)

December 29, 2021

Supreme Court, New York County

Docket Number: Index No. 652957/2021

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

MSD USA, LLC,

Plaintiff,

- v -

TIFFANY ELLE, LLC, BIANCA MANIPOL, JOHN DOES 1-10,
JANE DOES 11-20, ABC CORPORATIONS 1-10,

Defendants.

-----X

INDEX NO. 652957/2021

MOTION DATE 09/24/2021,
10/04/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 14, 15, and 17

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 16, and 17

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion by individual defendant Bianca Manipol to dismiss the complaint as against her (seq. no. 001) and the motion by company defendant Tiffany Elle, LLC, to dismiss the complaint as against it (seq. no. 002) are consolidated herein for disposition and are granted, without opposition, and for reasons stated in the motions.

By way of very brief discussion:

One can plainly see that the Asset Purchase Agreement upon which this action is predicated was not executed by individual defendant Bianca Manipol in her individual capacity; but rather, in her representative capacity as a member of company defendant Tiffany Elle, LLC

(see, Asset Purchase Agreement [NYSCEF Doc. No. 2]). That is reason enough for the claims against Ms. Manipol to be dismissed.

Both defendants challenge personal jurisdiction in this case through the submission of Ms. Manipol's affirmation (filed as NYSCEF Doc. Nos. 8, 12) which, in a vacuum, does a fairly decent job of arguing that they have no nexus to New York and, thus, no basis to be sued here. The glaring problem with that argument is its ignorance of the express venue clause in the Asset Purchase Agreement (section 11.16) which provides:

Governing Law and Jurisdiction. This Agreement shall be governed by and construed in accordance with the substantive laws of the State of New York. *This agreement shall be subject to the exclusive jurisdiction of the state courts of the State of New York and all parties hereby irrevocably submit to the jurisdiction of such courts with respect to any claim arising out of or in connection with this Agreement.*

(Emphasis added.)

Therefore, what remains of the personal jurisdiction argument is the portion of it challenging service of process. Service of process was attempted at a Texas apartment at which Ms. Manipol – a member of the LLC – had not lived in or worked at for three years prior to the filing of this lawsuit. “It is well settled that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made” (*Persaud v Teaneck Nursing Ctr., Inc.*, 290 AD2d 350, 351 [1st Dept 2002]). Plaintiff must prove “[s]trict compliance with all the service dictates of CPLR 308 . . . in order to obtain jurisdiction” (*id.*, at 350-51 [dismissing complaint where plaintiff failed to show that service had been attempted at defendant's actual dwelling place]; *see also; Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979 [2d Dept 2011] [dismissing complaint where plaintiff failed to prove that it had served defendant at actual place of business], *lv denied* 19 NY3d 810 [2012]).

CPLR § 311-a provides for service of process on a limited liability company and states, in part, as follows:

(a) Service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.

Limited Liability Company Law § 303 provides:

- (a) Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose.
- (b) Nothing in this section shall limit or affect the right to serve any process required or permitted by law to be served upon a limited liability company in any other manner now or hereafter permitted by law or applicable rules of procedure.

The affidavit of service filed by plaintiff does not state which provision, if any, of the CPLR or the Limited Liability Company Law was intended to be satisfied; but the attempt, in any event, does not appear to have satisfied any. The affidavit of service indicates that the process server went to the address 6236 Lindsay Gardens, The Colony, TX 75066, two times, and on the second occasion affixed the summons and complaint to the door there, and at some time mailed a copy to the same address, in what seems to be an attempt to accomplish service through CPLR 308 (4) (affix-and-mail service) (*see*, NYSCEF Doc. No. 5). The process server openly acknowledges that at some point he spoke with a person at the premises, a “Russell

Gibson,” who said that “he’s rented from Ms. Manipol for the last 6 months, but she lives out of the country with her husband” (*id.*). Plaintiff’s attempted affix-and-mail service does not comport with any method permitted by the CPLR or the Limited Liability Company law for service of process on an LLC. Even assuming that plaintiff was attempting to serve Ms. Manipol as a member of the LLC via CPLR § 308 (4) service, such attempt would be unavailing because Ms. Manipol does not live at that address and has not lived there since 2017, as she attests and as is consistent with the Russell Gibson account in the affidavit of service.

With regards to that service being effective as to Ms. Manipol personally (although dismissal as to her can be independently grounded on the fact that she is not a party to the Asset Purchase Agreement [*see, supra*]) – it cannot be effective because the process server explicitly acknowledges that “Russell Gibson, renter, advised he’s rented from Ms. Manipol for the last 6 months, but she lives out of the country with her husband” (NYSCEF No. 4), which is consistent with Ms. Manipol’s attestation submitted in support of the motions (*see, NYSCEF Doc. Nos. 8, 12*).

As a final note, the mere fact that notices, pursuant to the Asset Purchase Agreement, were authorized for delivery to the Texas address (*see, NYSCEF Doc. No. 2 § 10.10*) does not render that address valid for statutory service of process purposes (*see, e.g., Cere v Subway Intl. BV, 96 AD3d 438 [1st Dept 2012]*).

Accordingly, it is

ORDERED that the motion by defendant Bianca Manipol (seq. no. 001) to dismiss the complaint as against her is granted, and the claims asserted against her in the complaint are dismissed; and it is further

ORDERED that the motion by defendant Tiffany Elle, LLC, (seq. no. 002) to dismiss the complaint as against it is granted, and the claims asserted against it in the complaint are dismissed; and it is further

ORDERED that the claims, if any, against unknown defendants expressed in the caption as John Does, Jane Does, and ABC Corporations, are severed and dismissed for the lack of any substantive allegations relating to same.

This will constitute the decision and order of the court.

ENTER:



<u>12/29/2021</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE