

BetzJitomir v Neurauter
2021 NY Slip Op 33246(U)
March 15, 2021
Supreme Court, Steuben County
Docket Number: Index No. E2018-1285cv
Judge: Kevin M. Nasca
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**STATE OF NEW YORK
SUPREME COURT: COUNTY OF STEUBEN**

SUSAN BETZJITOMIR,

Plaintiff,

v.

**LLOYD NEURAUTER,
KARRIE NEURAUTER,
JANE DOE, AND
JOHN DOE,**

Defendants.

DECISION & ORDER

Index No. E2018-1285cv

Upon reading and considering plaintiff's notice of motion filed on February 6, 2020, with the affidavit of plaintiff by Susan BetzJitomir, Esq., pro se, dated January 27, 2020, and exhibits A-E; notice of cross-motion filed August 20, 2020, with the affirmation in opposition to plaintiff's motion for summary judgment and in support of cross-motion to dismiss by Nicholas J. Narchus, Esq., counsel for defendant Karrie Neurauter, dated August 13, 2020, and exhibits A-E; affirmation of Susan BetzJitomir, Esq. dated August 22, 2020; and this matter having come before this court.

DISCUSSION

Plaintiff commenced this tort action seeking civil damages for alleged injuries caused by defendants Karrie Neurauter ("defendant Karrie") and Lloyd Neurauter ("defendant Lloyd") by the death of Michele Neurauter ("Michele"). Plaintiff asserts that the defendants caused Michele's death, which interfered with Michele's contractual obligation to plaintiff for legal services rendered. Plaintiff alleges that Michele was making regular payments on the outstanding debt at the time of her death, when defendants conspired and murdered Michele.

Plaintiff now seeks summary judgment against defendants on the grounds that there are no genuine issues of any material fact. In response, defendant Karrie filed a cross-motion seeking to dismiss plaintiff's complaint for failure to state a cause of action.

Service of Plaintiff's Summary Judgment Motion

Defendant Karrie argues that plaintiff failed to serve her with the notice of motion for summary judgment and did not seek leave from court for alternate service until the present motion.

Where an attorney has appeared on behalf of a party, papers to be served in a pending action, shall be served upon the party's attorney. CPLR 2103(b). "A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard." CPLR 2214[b]. However, a court may overlook late service of papers where no prejudice results to the opposing party. CPLR 2214(c); *Palette Stone Corp. v. Guyer Bldrs.*, 194 AD2d 1019, 1020 [3d Dept 1993].

Plaintiff seeks summary judgment against defendants. The same motion requests alternate service of the motion upon defendant Karrie. The record is devoid any indication that defendant Karrie was personally served with plaintiff's summary judgment motion. However, at the time the motion was filed, defendant Karrie had not appeared in the action. Subsequent to the filing of plaintiff's motion, defendant Karrie retained counsel, who admittedly received a copy of the motion; consented into NYSCEF on defendant Karrie's behalf; was provided an extension of time to respond to plaintiff's motion; and filed opposition and a cross-motion to plaintiff's summary judgment motion. Therefore, this court does not find that defendant Karrie was prejudiced by plaintiff's failure to personally serve her with a copy of the motion, as her counsel received a copy of plaintiff's motion at least eight (8) days prior to the time at which the motion was noticed to be heard.

Service of Defendant Karrie's Cross-Motion

Plaintiff argues that she was not properly served with defendant Karrie's cross-motion.

Following the commencement of an action, parties may consent to participation in electronic filing and service. 22 NYCRR 202.5-b(2)(i). In an e-filed matter, service of interlocutory documents is made upon another participating party who has consented to electronic filing, by filing the document electronically with the New York State Court Electronic Filing system ("NYSCEF"). 22 NYCRR 202.5-b(f)(2)(ii). Electronic transmission of the NYSCEF notification constitutes service of a filed document upon the parties consented into the matter and the e-mail addresses authorized for service. *Id.* However, "such service will not be effective if the filing party learns that the notification did not reach the address of the person to be served." *Id.* NYSCEF records proof of service. *Id.* Alternate service methods authorized by the CPLR, utilized by a party to serve such documents, however, require that proof of that service be electronically filed. *Id.* Failure to properly serve a party with the requisite notice of motion deprives the court of

jurisdiction to entertain the motion. *Lee v. I-Sheng Li*, 129 AD3d 923, 923 [2d Dept 2015]; *Wells Fargo Bank, N.A. v. Reid*, 122 AD3d 832, 832-833 [2d Dept 2014]; *Burstin v. Pub. Serv. Mut. Ins. Co.*, 98 AD2d 928, 929 [3d Dept 1983].

Here, plaintiff asserts that she was not properly served with defendant Karrie's cross-motion. Upon review of the NYSCEF docket, defendant Karrie filed her cross-motion on August 20, 2020¹. The confirmation notices for defendant Karrie's cross-motion filings fail to show that plaintiff received an e-mail notification of the filings. Although the NYSCEF record demonstrates that plaintiff stipulated and consented to converting this matter to e-filing on July 7, 2020, she did not consent into NYSCEF for this matter until August 23, 2020. No affidavit of service was filed by defendant Karrie showing that plaintiff was served with her cross-motion by electronic or alternate means pursuant to the CPLR. Absent proof of service of defendant Karrie's cross-motion, this court is deprived of jurisdiction to entertain defendant Karrie's cross-motion. Consequently, defendant Karrie's cross-motion is denied, without prejudice, with leave to re-file upon proper service to plaintiff and defendant Lloyd.

Summary Judgment

Summary judgment may only be granted where the moving party submits sufficient evidence to establish that they are entitled to judgment as a matter of law. CPLR 3212[b]. "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." *Id.* The moving party on a motion for summary judgment bears the burden of setting forth sufficient evidence to warrant judgment as a matter of law. *Paternostro v. Advance Sanitation, Inc.*, 126 AD3d 1376, 1377 [4th Dept 2015]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Lamberta v. Long Is. R.R.*, 51 AD2d 730, 730-731 [2d Dept 1976]. "Anything less requires a denial of the motion, even where the opposing papers are insufficient." *Lamberta*, 51 AD2d at 730-731; *Winegrad*, 64 NY2d at 853.

¹ This court notes that defendant Karrie's notice of cross-motion was initially filed August 14, 2020, and removed by the Steuben County Clerk's office for failure to attach counsel's affirmation to the notice, as indicated, instead of filing it as a separate document. As such, portions of defendant's cross-motion were refiled on August 20, 2020.

I. Tortious Interference with a Contract

Plaintiff moved for summary judgment on the basis that there was a valid agreement between Michele and plaintiff set forth in a retainer agreement. Plaintiff alleged that defendants knew about the contract and intentionally interfered with the contract by causing her death.

“Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” *Transpo Bus Servs., LLC v. New York Bus Sales, LLC*, 175 AD3d 975, 976 [4th Dept 2019], quoting *Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 424 [1996]; *Amalif, Inc. v. 428 Co., Inc.*, 185 AD3d 1553, 1556 [4th Dept 2020]. “To impose liability, a defendant must induce or intentionally procure a third-party’s breach of its contract with the plaintiff and not merely have knowledge of its existence.” *Beecher v. Feldstein*, 8 AD3d 597, 597 [2d Dept 2004]; *Rosario-Suarz v. Wormuth Bros. Foundry*, 233AD2d 575, 576 [3d Dept 1996].

Here, plaintiff failed to submit sufficient evidence in support of her cause of action for tortious interference with a contract to warrant judgment as a matter of law. Plaintiff failed to submit evidentiary proof of a valid contract with Michele or of defendants’ knowledge or intentional interference with that contract. The bare conclusory assertions made by plaintiff, without more, are insufficient to make out a prima facie showing of entitlement to summary judgment. Consequently, plaintiff’s motion for summary judgment on her cause of action for tortious interference with a contract is denied.

II. Intentional Infliction of Emotional Distress

Plaintiff also moves for summary judgment arguing that defendants were aware that Michele and plaintiff had become friends, and that she was caused emotional distress by the loss of her friend and the money that Michele owed and was diligently paying.

“In order to state a cause of action for intentional infliction of emotional distress, plaintiff must allege: [i] extreme and outrageous conduct; [ii] intent to cause, or disregard of a substantial probability of causing, severe emotional distress; [iii] a causal connection between the conduct and injury; and [iv] severe emotional distress.” *Gilewicz*, 118 AD3d at 1299, quoting *Howell v. New York Post Co.*, 81 NY2d 115, 121 [1993]. Relief for such claim is limited to those directly or

intentionally harmed. *Lauyer v. Cornelius*, 85 AD2d 866, 867 [3d Dept 1981]; *Casale v. Unipunch, Inc.*, 177 AD2d 1029, 1029 [4th Dept 1991]. Moreover, “bystanders, in the absence of physical injury to themselves, generally cannot recover for the emotional distress caused by witnessing the injury or death of a third party.” *Trombetta v. Conkling*, 187 AD2d 213, 215 [4th Dept 1993], citing *Tobin v. Grossman*, 24 NY2d 609 [1969]. However, an exception applies where a plaintiff establishes “that he suffered serious emotional distress that was proximately caused by the observation of a family member’s death or serious injury while in the zone of danger.” *Coleson v. City of New York*, 24 NY3d 476, 483 [2014], quoting *Stamm v. PHH Veh. Mgt. Servs., LLC*, 32 AD3d 784, 786 [1st Dept 2006]; *Stamm*, 32 AD3d at 786, quoting *Bovsun v. Sanperi*, 61 NY2d 219, 231-232 [1984].

Here, plaintiff failed to submit sufficient evidentiary proof in support of her cause of action for intentional infliction of emotional distress to warrant judgment as a matter of law. Plaintiff’s submissions were insufficient to establish as a matter of law a causal connection between defendants’ conduct and injury suffered by plaintiff; severe emotional distress; or that she was within the zone of danger. Plaintiff’s bare conclusory allegations of emotional distress, without more, are insufficient to make out a prima facie showing of entitlement to summary judgment on that claim. Consequently, plaintiff’s motion for summary judgment on her cause of action for intentional infliction of emotional distress is denied.

DECISION

Accordingly, it is the decision and order of the court that plaintiff’s motion for summary judgment **DENIED** and defendant Karrie’s motion to dismiss is **DENIED**.

Dated: March 15, 2021


Honorable Kevin M. Nasca
Supreme Court Justice