Parker v Genesis Corp.
2022 NY Slip Op 30023(U)
January 6, 2022
Supreme Court, New York County
Docket Number: Index No. 101837/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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MARIAN E. PARKER,

Plaintiff,

- v -

GENESIS CORPORATION D/B/A GENESIS 10, MORGAN STANLEY, N.A., and JOHN DOES 1 – 10,

Defendants.

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INDEX NO. 101837/2019

MOTION SEQ. NO. 001

INTERIM DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for JUDGMENT – DEFAULT.

In this employment discrimination action, plaintiff Marian Parker moves, pursuant to CPLR 3215, for a default judgment against defendants Genesis Corporation d/b/a Genesis 10 ("Genesis") and Morgan Stanley, N.A. ("Morgan N.A.") (collectively "defendants"). Genesis and Morgan N.A. oppose plaintiff's motion and cross-move, pursuant to CPLR 3211(a)(8), to dismiss the complaint. Plaintiff opposes the cross motions by Genesis and Morgan N.A. and cross-moves against Morgan N.A. to name as a defendant Morgan Stanley & Co., LLC ("Morgan LLC") which, she claims, should have been named as defendant instead of Morgan Stanley, N.A. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the captioned action by filing a summons with notice alleging, inter alia, discrimination and retaliation, on November 22, 2019. Docs. 15, 19. On March 18, 2020,

plaintiff's process server, Anthony Schultz, purported to serve Genesis with a summons with notice as well as a complaint dated March 16, 2020 and filed March 18, 2020. Docs. 18-20. In his affidavit of service, Schultz wrote that he served Genesis, a domestic corporation, by delivering the papers to "Tyrone 'Doe'", whom he knew to be an individual authorized to accept service of process on behalf of the company, at the said entity's "Messenger Center" at 950 Third Avenue, 26th Floor. Doc. 20.

On March 19, 2020, Schultz purported to serve the summons with notice and complaint on "Morgan Stanley, N.A. b/s/u Ct. Cop" [sic] ("CT Corp.") by delivering the papers to John Carlos, whom he knew to be authorized to accept service on behalf of the company. Docs. 19, 21. The same day, CT Corp. notified the "Morgan Stanley Law Division" that plaintiff had served CT Corp. as agent for the company and noted the name discrepancy given that Morgan LLC had been sued as Morgan N.A. Doc. 28.

PLAINTIFF'S MOTION FOR DEFAULT

On February 25, 2021, plaintiff filed the instant motion for a default judgment against Genesis and Morgan N.A. pursuant to CPLR 3215. Doc. 16. In support of the motion, plaintiff's counsel submits an affirmation in which he asserts that the application must be granted since defendants failed to answer and their time to do so expired in October 2020. Doc. 18. He annexes to the motion Schultz's affidavits of service. Docs. 20-21. Plaintiff also submits an affidavit of merits in which she states that Genesis, a staffing firm, placed her in a position at Morgan N.A. beginning in 2013 and that, on or about November 29, 2016, after she told Morgan N.A. that she needed certain accommodations based on her physical condition, her employment there was "abruptly ended." Doc. 17. Based on these submissions, plaintiff maintains that she is entitled to a default judgment against defendants.

GENESIS' OPPOSITION TO PLAINTIFF'S MOTION AND ITS CROSS MOTION AGAINST PLAINTIFF

Genesis opposes plaintiff's motion, arguing that a default judgment cannot be entered against it since it was never properly served with process. Doc. 23. Genesis also asserts that plaintiff's claims against it must be dismissed given her failure to serve it with process (CPLR 3211[a][8]). Doc. 23. Specifically, claims Genesis, defendants did not fail to provide plaintiff with an accommodation and her employment ended at or about the time she was told it would. Doc. 23.

Glenn Klein, President and Chief Financial Officer of Genesis, submits an affidavit in opposition to plaintiff's motion and in support of Genesis' cross motion in which he states that, on March 13, 2020, he notified Genesis' employees that they would be permitted to work from home due to the Covid-19 pandemic; that all water and food deliveries to Genesis' New York office were stopped on March 16, 2020; nobody authorized to accept service on the company was present at 950 Third Avenue on March 18, 2020; Genesis did not employ anyone by the name of Tyrone at 950 Third Avenue as of March 18, 2020; he was not aware of anyone named Tyrone employed by the building's management company; Genesis did not have a "message center";[1] and Genesis did not receive the summons and complaint by mail or personal service. Doc. 35. Klein further asserts that "Genesis Corporation d/b/a Genesis 10" is not an existing entity since it is actually known as Genesis Corp., and he submits documentation confirming this representation. Docs. 31, 32, 35.

Gina Ahern, Director of Client Services for Genesis, also submits an affidavit in opposition to plaintiff's motion and in support of the cross motion by Genesis. Doc. 33. Ahern states that, on October 16, 2013, Salescare, Inc., of which company plaintiff was president, contracted with

[1] As noted above, Schultz's affidavit of service reflects that service was effectuated on the "Messenger Center", not the "message center", although it is unclear whether this is merely a typographical error by Klein.

Genesis ("the consulting contract") to provide consulting services to Morgan LLC on a temporary basis. Doc. 33. Pursuant to the consulting contract, represents Ahern, plaintiff was assigned to work for Morgan LLC subject to a three-year tenure limitation. Doc. 33.[2] According to Ahern, plaintiff's assignment to Morgan LLC ended at the end of the three-year tenure. Doc. 33. In October 2016, plaintiff asked Genesis and Morgan LLC if they would accommodate her by allowing her to work at home or from her former work location. Doc. 33. Although Genesis asked plaintiff to provide medical documentation in support of her request, plaintiff did not provide the same by the time her temporary assignment ended. Doc. 33.

MORGAN N.A.'s OPPOSITION TO PLAINTIFF'S MOTION AND ITS CROSS MOTION AGAINST PLAINTIFF

Morgan N.A. opposes plaintiff's motion for default arguing, inter alia, that "Morgan Stanley, N.A." could not have been served with process since it is not a legal entity and, thus, any purported service on it was a nullity. Doc. 24. Morgan N.A. further asserts that, although plaintiff served CT Corp., a registered agent for service on Morgan LLC, CT Corp. was not authorized to accept service on behalf of Morgan Stanley, N.A., a non-existent entity which could not be sued. Doc. 24. Further, Morgan N.A. asserts that a default judgment cannot be granted against it because any failure on its part to answer in a timely fashion was attributable to law office failure caused by the Covid-19 pandemic. Doc. 24. Additionally, it asserts, as does Genesis, that it has a meritorious defense insofar as plaintiff's employment ended at the end of the three-year tenure restriction on her assignment. Doc. 24.

[2] This appears to contradict the "Independent Contractor Agreement" ("the agreement") submitted in support of Genesis' cross motion. Paragraph 3 of the agreement provides as follows: "3. Term and Termination. (a) This Agreement will be effective for a period of one (1) year starting on the date hereof. The original term shall be extended automatically for additional one-year periods (each a "renewal term") unless notice that this Agreement will not be extended is given by either party in writing to the other at least fourteen (14) days prior to the expiration of the original term or any renewal term." Doc. 34.

In support of its cross motion to dismiss, Morgan N.A. again argues that service on "Morgan Stanley, N.A." or on CT Corp. was a nullity and that this Court thus lacks jurisdiction over it. Doc. 24.

In an affidavit in opposition to plaintiff's motion and in support of Morgan N.A.'s cross motion, Nancy Kathleen Manley, Executive Director in Legal and Compliance at Morgan LLC, states that Morgan Stanley, N.A. is not an existing legal entity and was not an existing legal entity at the time this action was commenced. Doc. 25. Manley asserts that, although CT Corp. was authorized to accept service on behalf of Morgan LLC, it was not authorized to accept service on behalf of Morgan N.A. Doc. 25.[3] Due to the pandemic, claims Manley, the papers served on Morgan N.A. were "overlooked" and Morgan LLC did not know about the summons and complaint against Morgan N.A. until it (Morgan LLC) received plaintiff's motion for a default judgment on or about February 25, 2021. Doc. 25.

Anthony Piggott, Executive Director at Morgan Stanley Services Group, Inc. ("MSSG"), also submits an affidavit in opposition to plaintiff's motion and in support of Morgan N.A.'s cross motion. Doc. 29.[4] Piggott represents that he was an Executive Director in Morgan Stanley's Enterprise Infrastructure Group when plaintiff began working for the company in 2013. Doc. 29. He claimed that plaintiff had a three-year tenure restriction, commencing in November 2013 and expiring on November 23, 2016, pursuant to which MSSG had the option, as of the tenure date, of converting plaintiff to full-time status at a higher rate of pay or "disengag[ing]" her. Doc. 29. Piggott represents that it is standard practice to disengage contractors such as plaintiff at the end of their tenure since keeping such individuals past the tenure date involves an "exception process"

[3] Manley submits documentation reflecting that Morgan LLC is formally known as Morgan Stanley & Co. LLC and that CT Corporation was its agent for service of process. Docs. 26-27.
[4] Piggott does not elaborate on the relationship between Morgan LLC and MSSG.

and approval from MSSG's legal department. Doc. 29. He further maintains that MSSG disengaged plaintiff from her position due solely to her tenure restrictions and the company's standard practice, and that he had no knowledge that she suffered from any disability or requested any accommodations. Doc. 29.

PLAINTIFF'S OPPOSITION TO THE CROSS MOTIONS BY GENESIS AND MORGAN N.A. AND PLAINTIFF'S "CROSS MOTION" AGAINST MORGAN N.A.

Plaintiff opposes the cross motion by Genesis on the ground that it (Genesis) was properly served with process. Docs. 41-42. In support of this argument, plaintiff submits an affidavit by Schultz, its process server, who maintains that, on March 18, 2020, he served an individual named Tyrone at Genesis' "Message Center" at 950 Third Avenue in Manhattan since the building would not allow him to go to its office. Doc. 41.

In reply to plaintiff's opposition, Genesis concedes that it is not challenging the adequacy of plaintiff's pleadings, but merely its failure to serve process before the expiration of the statute of limitations. Doc. 44. Genesis further asserts that since it was sued as Genesis Corporation and not as Genesis Corp., its legal name, there is no personal jurisdiction over it. Doc. 44.

Plaintiff opposes the cross motion to dismiss by Morgan N.A. and cross-moves, pursuant to CPLR 305(c), to amend the complaint to name Morgan LLC as a defendant instead of Morgan N.A. Docs. 5, 39.[5] Plaintiff also submits a proposed amended summons and complaint naming Morgan LLC as a defendant. Doc. 40. In support of the cross motion to amend the complaint, plaintiff argues that the amendment must be permitted pursuant to CPLR 305(c) since the naming of Morgan N.A. was merely a misnomer and Morgan LLC would not be prejudiced by such an amendment. Doc. 43.

[5] Plaintiff's cross motion was improperly filed under motion sequence 002. However, in that motion sequence, this Court has already issued an order, filed September 24, 2021, granting defendants' motion to have Laurie A. Peterson, Esq. appear *pro hac vice* on their behalf in this action. Doc. 50.

In reply, Morgan N.A. argues that all claims against it must be dismissed and that plaintiff is not entitled to amend the complaint to name Morgan LLC. Doc. 45. This, asserts Morgan N.A., is because although plaintiff served CT Corp., a designated agent for Morgan LLC, CT Corp. could not accept service for another, non-existent entity. Doc. 45.

LEGAL CONCLUSIONS

Plaintiff's Motion For A Default Judgment Against Genesis

It is well settled that a default judgment may be entered where plaintiff can demonstrate the facts constituting the claim, as well as proof that defendant was properly served with process but failed to answer or otherwise appear in the action (*Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 [1st Dept 2016]). Here, although plaintiff's affidavit sets forth the facts constituting the claim, she is not entitled to a default judgment against Genesis since it is unclear whether that entity was properly served with process.

As noted previously, Schultz purported to serve Genesis with a summons with notice as well as a complaint dated March 16, 2020 and filed March 18, 2020. Docs. 18-20. In his affidavit of service, Schultz noted that he served Genesis, a domestic corporation, by delivering the papers to "Tyrone 'Doe'", whom he knew to be an individual authorized to accept service of process on behalf of the company, at Genesis' "Messenger Center" at 950 Third Avenue, 26th Floor. Doc. 20. In opposition to the motion, however, Klein represents that, on March 13, 2020, he notified Genesis' employees that they would be permitted to work from home due to the Covid-19 pandemic; that all water and food deliveries to Genesis' New York office were stopped on March 16, 2020; nobody authorized to accept service on the company was present at 950 Third Avenue on March 18, 2020; Genesis did not employ anyone by the name of Tyrone at 950 Third Avenue as of March 18, 2020; he was not aware of anyone named Tyrone employed by the building's

management company; Genesis did not have a "message center"; and Genesis did not receive the summons and complaint by mail or personal service. Doc. 35.

"An affidavit of service constitutes prima facie evidence of proper service and the 'mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service' (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008] [internal quotation marks omitted])" *(Ocwen Loan Servicing, LLC v Ali*, 180 AD3d 591, 591 [1st Dept 2020]). Here, Schultz's allegations regarding service of process are disputed by Klein on multiple points, thereby creating a clear dispute regarding how service was effectuated, as opposed to a "mere denial" of service, and these issues must thus be resolved at a traverse hearing *(See Ananda Capital Partners, Inc. v Stav Elec. Sys., Ltd.,* 301 AD2d 430 [1st Dept 2003] [citations omitted]; *see also Poree v Bynum*, 56 AD3d 261 [1st Dep't 2008]).

Plaintiff's "Cross Motion" To Amend The Complaint And Motion For A Default Judgment Against Morgan N.A.

As discussed above, plaintiff moved for a default judgment against Genesis and Morgan N.A. and those defendants then cross-moved against plaintiff to dismiss the complaint. "A cross motion is 'merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion' (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1; *see* CPLR 2215)" (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013]). Since plaintiff's motion to amend the complaint does not seek relief from the party who made the initial motion (plaintiff herself), her application to amend the complaint is not technically a cross motion. However, since this technical defect resulted in no prejudice to Genesis or Morgan N.A., both of which have had an ample opportunity to be heard on the merits regarding the relief sought in plaintiff's purported cross motion, this technical defect will be disregarded *(See Dugas v Bernstein*, 5 Misc 3d 818, 824, n 2

[Sup Ct, NY County 2004] [citations omitted]). Moreover, neither Genesis nor Morgan N.A. raised an objection to this procedural error (*Id.*).

Turning to the merits of plaintiff's proposed amendment, it is well settled that:

> CPLR 305 (c) authorizes the court, in its discretion, to "allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced" (CPLR 305 [c]). Where the motion is to cure "a misnomer in the description of a party," it should be granted even if the statute of limitations has run where "(1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought" (*Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [1990]; *see Tokhmakhova v H.S. Bros. II Corp.*, 132 AD3d 662, 662 [2015]; *Honeyman v Curiosity Works, Inc.*, 120 AD3d 1302 [2014]).

(*New Found., LLC v Ademi*, 140 AD3d 1038, 1039 [2d Dept 2016]).

Here, plaintiff attempted to serve Morgan N.A. with process by delivering the summons with notice and complaint to CT Corp. Manley concedes that CT Corp. was Morgan LLC's designated agent for service of process and it is undisputed that Morgan N.A. was a nonexistent entity. Since Morgan LLC was properly served via its designated agent, this Court obtained jurisdiction over it, and because Morgan N.A. does not exist, plaintiff's attempt to serve it was clearly a mistake of the type CPLR 305(c) was designed to correct. (*See Ralph Ferrara, Inc. v Bermuda Limousine Co.*, 184 AD2d 301 [1st Dept 1992] [plaintiff allowed to amend its complaint to replace non-existent entity named as defendant with actual name of defendant given proper service on, and absence of surprise and/or prejudice to, the intended defendant]).

Neither Manley nor Morgan N.A.'s attorney even attempts to explain how Morgan LLC would be prejudiced if plaintiff were permitted to amend the complaint. Additionally, the complaint was pleaded with such specificity, including names of individuals who were involved in the discrimination alleged by plaintiff, that the misnomer "could not possibly have misled [Morgan LLC] concerning who it was that the plaintiff was in fact seeking to sue" (*Holster v Ross*,

45 AD3d 640, 642-643 [2d Dept 2007] [citations omitted]). Therefore this Court grants plaintiff's cross motion to amend the complaint to name Morgan Stanley & Co., LLC as defendant in place of the incorrectly named Morgan Stanley, N.A. (*See Charlton v General Foods, Inc.*, 52 AD2d 829 [1st Dept 1976]).

In opposing plaintiff's application to amend the complaint, Morgan N.A. relies, inter alia, on *Smith v Giuffre Hyundai, Ltd.*, 60 AD3d 1040 (2d Dept 2009). In that case, plaintiff served a summons and complaint on the Secretary of State naming Giuffre Brooklyn as defendant although the intended defendant was Giuffre White Plains. The Appellate Division, Second Department held that plaintiff could not amend the complaint pursuant to CPLR 305(c) because personal jurisdiction was not obtained over Giuffre White Plains. In so holding, the Second Department noted, inter alia, that there was no evidence in the record that the process served at Giuffre's Brooklyn address was delivered to a person authorized to accept service of process for Giuffre White Plains. Here, however, Manley concedes that CT Corp., which was served with the complaint naming Morgan N.A. as a defendant, was the designated agent for service on Morgan LLC. Thus, *Smith* is clearly distinguishable.

Since it "would [ ] be highly prejudicial to permit this amendment without allowing the proper defendant to present a defense" (*Shampan Lamport, LLC v Tao Group, LLC*, 2017 NY Slip Op 31689[U], *4-5 [Sup Ct, NY County 2017] [Bluth, J.]), this Court denies plaintiff's motion for a default judgment against Morgan N.A. The motion must also be denied given that plaintiff sought the default against a nonexistent and thus improper defendant.

Genesis' Cross Motion To Dismiss

Since a traverse hearing is required to determine whether Genesis was properly served, the branch of its motion to dismiss based on lack of personal jurisdiction must be held in abeyance at this juncture.[6] Similarly, the branch of Genesis' cross motion seeking to dismiss the complaint for failure to state a cause of action is held in abeyance pending the traverse hearing, since a finding that Genesis was not properly served would result in the dismissal of all claims against it.

Morgan N.A.'s Cross Motion To Dismiss

Given that Morgan LLC is to be substituted as a defendant in place of Morgan N.A., Morgan N.A.'s motion to dismiss based on lack of personal jurisdiction is denied as moot.[7]

Accordingly, it is hereby:

ORDERED that the motion by plaintiff Marian E. Parker seeking a default judgment against defendant Genesis Corporation d/b/a Genesis 10, as well as that defendant's cross motion to dismiss the claims against it pursuant to CPLR 3211(a)(7) and (a)(8), is held in abeyance pending the outcome of a traverse hearing regarding the propriety of service on said defendant; and it is further

ORDERED that the cross motion by Genesis Corporation is decided to the extent that this matter is referred to a Judicial Hearing Officer or Special Referee for a traverse hearing to hear and determine the issue of service of process with respect to said defendant; and it is further

ORDERED that such granting of a traverse hearing and/or referral is conditioned on defendant Genesis Corporation serving a copy of this order, within 30 days of entry of this order, with notice of entry, upon opposing counsel and upon the Special Referee Clerk (60

[6] This Court rejects Genesis' claim that the complaint must be dismissed against it on jurisdictional grounds because it was sued as Genesis Corporation instead of Genesis Corp. CPLR 2001 allows this Court to excuse a mistake, omission, defect, or irregularity such as this where "a substantial right of a party is not prejudiced."
[7] Morgan N.A. does not seek dismissal based on CPLR 3211(a)(7) (failure to state a cause of action). Doc. 45.

Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar, and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that failure to serve the order on the Special Referee Clerk within the time period set forth above shall be deemed an abandonment of Genesis Corporation's jurisdictional claim, and a denial of said defendant's cross motion to dismiss; and it is further

ORDERED that the motion by plaintiff seeking a default judgment against defendant Morgan Stanley, N.A. is denied as moot; and it is further

ORDERED that the cross motion by defendant Morgan Stanley, N.A. seeking dismissal of the complaint is denied as moot; and it is further

ORDERED that the "cross motion" by plaintiff seeking to amend the complaint, pursuant to CPLR 305(c), to name Morgan Stanley & Co., LLC as a defendant in place of Morgan Stanley, N.A. is granted; and it is further

ORDERED that the amended complaint in the proposed form annexed to the moving papers (NYSCEF Doc. 40) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

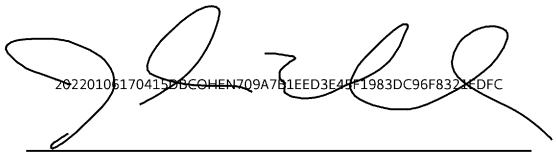
ORDERED that counsel for defendant Genesis Corporation shall serve a copy of this order with notice of entry upon all parties as well as the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are

directed to mark the court's records to reflect the change in the caption substituting defendant Morgan Stanley & Co., LLC for defendant Morgan Stanley, N.A.; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh); and it is further

ORDERED that defendant Morgan Stanley & Co., LLC shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on July 12, 2022 at 10 a.m. unless the traverse hearing ordered above has not yet been conducted, in which case the parties are to contact the court to obtain a new date for the conference.



1/6/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE