

**Napoli Shkolnik, PLLC v Law Office of Andrew Park,
P.C.**

2022 NY Slip Op 30069(U)

January 5, 2022

Supreme Court, New York County

Docket Number: Index No. 652125/2021

Judge: Arlene P. Bluth

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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. ARLENE BLUTH PART 14

Justice

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NAPOLI SHKOLNIK, PLLC,
Plaintiff,

INDEX NO. 652125/2021

MOTION DATE 01/04/2022

MOTION SEQ. NO. 001

- v -

LAW OFFICE OF ANDREW PARK, P.C., ANDREW PARK,
Defendants.

DECISION + ORDER ON MOTION

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LAW OFFICE OF ANDREW PARK, P.C., ANDREW PARK
Plaintiffs,

Third-Party
Index No. 595499/2021

-against-

MARIE NAPOLI, HUNTER J. SHKOLNIK
Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 were read on this motion to/for DISMISSAL.

The motion by third party defendants to dismiss the third-party complaint is granted in part and denied in part, and the cross-motion by defendants for an extension of time to serve the third-party defendants is granted in part and denied in part.

Background

This dispute involves two personal injury law firms and legal fees. The amended complaint details instances in which injured plaintiffs switched law firms from plaintiff to defendants and plaintiff contends that defendants wrongfully retained the entire legal fees for each case. It insists that its attorney liens were never honored by defendants. Defendants and

third-party plaintiffs cite their own cases in which plaintiff took over as counsel for various injured plaintiffs and allegedly kept the entire fee without paying defendants anything.

In this motion, the third-party defendants (individual partners at plaintiff) move to dismiss the third-party complaint on the grounds that they were not served properly and that this pleading fails to state a cause of action against them. The third-party defendants argue that they live in Puerto Rico and that, therefore, this Court has no general jurisdiction over them. They add that this Court lacks specific jurisdiction over them because the claims against them do not arise from any business conducted by either third-party defendant.

The third-party defendants also argue that the attempted service on them was improper and that the only supposed service was via first class mail, which does not satisfy the CPLR. They point out that the 120-day period to serve them expired on September 24, 2021.

Third party defendants contend that the third-party complaint doesn't state a cause of action against them because it relies solely on their status as partners of plaintiff instead of actions they took in their individual capacities. They also seek sanctions against defendants on the ground that the third-party complaint is frivolous.

In opposition and in support of their cross-motion, third-party plaintiffs claim that service was not effectuated because the third-party defendants refused to accept service. They point out that even if the Court were to dismiss, it should be without prejudice contrary to movants' demand that it be with prejudice. The third-party plaintiffs admit, however, that service was not properly effectuated on the third-party defendants.

The third-party plaintiffs (in their capacity as defendants) cross-move to dismiss the first cause of action and the claims against Mr. Park individually. They also make their own request for sanctions.

In reply, third-party defendants contend that there is no dispute that service was not properly effectuated. They claim the Court should deny the branch of the cross-motion that seeks an extension of time to serve the third-party defendants because it was made 73 days after the time to serve expired. They insist this shows a failure to exercise the requisite due diligence.

Third-Party Defendants' Motion

As an initial matter, the Court questions third-party defendants' assertion that this Court is unable to exercise long arm jurisdiction over them. While they submitted evidence showing that they live and work in Puerto Rico (which relates to general jurisdiction), the fact that name partners for a major law firm based in New York City would argue that they cannot be subject to specific/long arm jurisdiction is absurd. Do these partners refuse to accept any profits from New York cases? Do they have absolutely no involvement or supervisory roles in New York cases the firm takes on?

Setting aside those ridiculous arguments relating to specific jurisdiction, the fact is that there is no dispute that the third-party defendants were never properly served. The question for this Court is whether the third-party plaintiffs have stated a sufficient basis to extend their time to serve these parties.

“An extension of time for service is a matter within the court's discretion” (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101, 736 NYS2d 291 [2001]). Here, the Court finds that third-party plaintiffs did not meet their burden for an extension of time under either standard elucidated in *Leader*. The third-party complaint was filed on May 27, 2021 and third-party plaintiffs waited until December 28, 2021 to bring their cross-motion seeking an extension of time to serve. And the third-party plaintiffs admit they knew service was not properly

effectuated; instead, they blame the third-party defendants for evading service attempts in August 2021. That is not a good reason to wait so long to seek an extension of time to serve, especially when third-party plaintiffs uploaded affidavits of service that clearly showed improper service (NYSCEF Doc. Nos. 10, 11 [claiming that service was done by first class mail only]). Obviously, that service was not effective and there is no basis to find that third-party defendants improperly evaded service.

The Court also observes that the process server prepared two affidavits regarding attempted service in early August 2021 detailing the unsuccessful efforts to serve (NYSCEF Doc. No. 32). Those affidavits are dated August 9, 2021 and yet third-party plaintiffs made no effort to extend the time to serve before the deadline expired.

Even if the Court were to overlook third-party plaintiffs' apparent intentional decision not to timely serve third-party defendants, the Court finds that the third-party complaint fails to state a cause of action against them. This pleading lists certain cases in which defendants assert that plaintiff took over as the attorney for the various injured plaintiffs and failed to pay defendants the legal fees they were owed.

The Court fails to see how the third-party defendants, as individuals, could be held personally liable under any of the three causes of action (for breach of contract, breach of Judiciary Law § 475 or unjust enrichment). There are no allegations about what any of the individual third-party defendants did other than that they are partners of plaintiff. And, of course, a dispute between law firms over legal fees should be between the two firms not attorneys in their individual capacities, particularly where there are no allegations of individual actions separate and apart from the firm itself.

Cross-Motion

The Court observes that plaintiff/third-party defendants did not directly oppose the branches of the cross-motion that seek to dismiss the first cause of action in the amended complaint (for breach of contract) and the claims against defendant Park in his individual capacity. Therefore, that relief is granted without opposition.

Prejudice

The Court declines to dismiss the third-party complaint with prejudice as third-party defendants did not state a sufficient reason why the Court should do so. This is a pre-answer motion based, in part, on third-party plaintiffs' failure to serve the pleading; there is no basis to make such a dismissal with prejudice.

Sanctions

The Court denies the parties' requests for sanctions (contained in both the motion and the cross-motion). Clearly, the parties do not like each other. Instead of trying to work out these legal fees disputes and simply moving on, they have decided to sue each other and sue individual attorneys at each firm. That each side dislikes that "scorched earth" legal tactic is not a basis to issue sanctions.

Accordingly, it is hereby

ORDERED that the motion by third-party defendants is granted to the extent that the third-party complaint is dismissed against them without prejudice and denied with respect to the remaining relief requested; and it is further

ORDERED that the cross-motion by third-party plaintiffs/defendants is denied to the extent they sought an extension of time to serve the third-party defendants and for sanctions, and

granted to the extent that the first cause of action in the amended complaint and the claims against defendant Park individually are both dismissed without prejudice; and it is further


ORDERED that counsel for plaintiff/third-party defendants shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed from the caption (the third-party complaint in its entirety and defendant Andrew Park, Esq.) pursuant hereto; 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 (www.nycourts.gov/suptctmanh)); and it is further

ORDERED that upon receipt of the foregoing, the Clerk of the General Clerk's Office shall immediately amend the caption accordingly.

Remote Conference: February 1, 2022 at 11 a.m. (NYSCEF Doc. No. 24).

1/5/2022
DATE


ARLENE BLUTH, 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