

Conway v De Poland
2022 NY Slip Op 30210(U)
January 21, 2022
Supreme Court, New York County
Docket Number: Index No. 651615/2021
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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PAUL DANIEL CONWAY a/k/a
DANIEL CONWAY,

Plaintiff,

Index No. 651615/2021

-against-

DECISION AND ORDER

BETH CHASIDAM DE POLAND a/k/a
BETH CHASADIM DE POLAND a/k/a
CONGREGATION BETH HACHSIDIM DE POLEN
and AVROHOM STERN a/k/a ABRAHAM STERN
a/k/a ARNOLD STERN,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

Plaintiff brought this action based on the failure by defendants Beth Chasidam de Poland, a religious corporation, and Stern to close a transaction to sell plaintiff the air rights to the real property at 233 East Broadway, New York County. Plaintiff alleges breach of contract and a related equitable claim. Plaintiff discontinues his claim for attorneys' fees, to which Beth Chasidam expressly and Stern by his nonappearance consent. C.P.L.R. § 3217(a) and (b).

Plaintiff now moves for a default judgment against Beth Chasidam and Stern. C.P.L.R. § 3215. Beth Chasidam cross-moves to dismiss the complaint based on lack of jurisdiction, C.P.L.R. § 3211(a)(8), due to plaintiff's failure to serve the corporation in compliance with C.P.L.R. § 311(a)(1). Stern has not appeared

to oppose the motion.

I. MOTION FOR A DEFAULT JUDGMENT

To obtain a default judgment against defendants who have failed to appear or answer, plaintiff must prove adequate service of the summons and complaint, defendants' default, and the facts supporting plaintiff's claim. C.P.L.R. § 3215(a) and (f); PV Holding Corp. v. AB Quality Health Supply Corp., 189 A.D.3d 645, 646 (1st Dep't 2020). Plaintiff's supporting affidavit presents only his unverified complaint, affidavits of service, and other documents related to service and the parties' identity. Aff. of Daniel Conway, NYSCEF Doc. No. 7. His motion includes no proof of the elements of his breach of contract or equitable claims. PV Holding Corp. v. AB Quality Health Supply Corp., 189 A.D.3d at 646. He does not even attest that his complaint is true. As discussed below, he also does not show adequate service on Beth Chasidam. C.P.L.R. § 311(a)(1). Due to the absence of evidence supporting plaintiff's claims against either defendant, as well as evidence showing adequate service on Beth Chasidam, the court denies plaintiff's motion for default judgment.

II. CROSS-MOTION TO DISMISS THE COMPLAINT

Beth Chasidam cross-moves to dismiss the claims against it because the affidavit of service on the congregation shows conspicuous place service, pursuant to C.P.L.R. § 308(4). Conway Aff., Ex. B, at 1, NYSCEF Doc. No. 9. That provision applies to

personal service on a natural person. Beth Chasidam is a not-for-profit corporation that must be served pursuant to C.P.L.R. § 311(a)(1), by delivering the pleadings to an officer, director, agent, cashier, or other authorized agent. Because plaintiff did not personally serve Beth Chasidam according to this statute, the congregation seeks to dismiss the claims against it due to lack of personal jurisdiction. C.P.L.R. § 3211(a)(8).

Plaintiff replies that the cross-motion is too late, as a motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(8) must be served before the time to answer expires. Plaintiff also contends that conspicuous place service is sufficient since Beth Chasidam, as a religious corporation, is not required to and did not allow for service on the New York State Secretary of State and has avoided service by vacating the congregation's premises at 233 Broadway, New York County. Conway Aff. Ex. B, at 3. Plaintiff relies on C.P.L.R. § 311(b), which allows alternate service on a corporation as directed by the court.

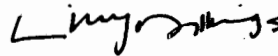
Plaintiff did not seek permission from the court pursuant to C.P.L.R. § 311(b) to serve by an alternate method. Therefore, for service to be valid, it must be effected pursuant to C.P.L.R. § 311(a)(1), with which plaintiff undisputedly did not comply. As for plaintiff's contention that the cross-motion is late, and any objection to service waived, C.P.L.R. §§ 320 and 3012(a) and (c) set the time for responding to a complaint as either 20 or 30

days after service is complete, depending on the method used. Since service on Beth Chasidam has not been completed, the time for Beth Chasidam to respond to the complaint has not yet begun to run, and the cross-motion is both timely and meritorious.

III. CONCLUSION

For the reasons explained above, the court denies plaintiff's motion for default judgment, grants defendant Beth Chasidam de Poland's cross-motion, and dismisses the complaint against Beth Chasidam without prejudice. C.P.L.R. §§ 3211(a)(8), 3215. Plaintiff and the remaining defendant shall appear for a Preliminary Conference March 2, 2022, at 11:00 a.m. by video conference. The court will provide a Microsoft Teams link. Plaintiff shall serve defendant Stern with this Decision and Order by delivery or first class mail to his last known address within three days after the date this Decision and Order is filed.

DATED: January 21, 2022



LUCY BILLINGS, J.S.C.

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