

<b>Judson Realty, LLC v Judson CRE LLC</b>
2022 NY Slip Op 32367(U)
July 20, 2022
Supreme Court, New York County
Docket Number: Index No. 159388/2020
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

JUDSON REALTY, LLC, PRIVET ASSOCIATES, L.P., IVY  
REALTY ASSOCIATES, L.P., JUDSON HOLDING 1, L.P.,  
PHOENIX 962 MADISON, INC., PHOENIX MADISON  
AVENUE, L.P., 963 LEXINGTON REALTY, LLC, DRAFT  
ASSOCIATES, L.P., PARTITA PARTNERS LLC

Plaintiff,

- v -

JUDSON CRE LLC, NICHOLAS JUDSON,

Defendant.

INDEX NO. 159388/2020

MOTION DATE 08/05/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 46, 47, 48, 49, 50, 51, 52, 53, 59

were read on this motion to/for

DISMISSAL

**I. Factual and Procedural Background**

**A. The Pleadings**

Plaintiffs brought this action against Nicholas Judson (“Nicholas”) and Judson CRE LLC (“CRE”) (collectively “Defendants”) alleging that CRE, which was incorporated by Nicholas in April of 2019, is a direct competitor of Judson Realty and contains materially false and misleading misrepresentations on the CRE website. Specifically, Plaintiffs allege there exist false representations that CRE was involved in a variety of real estate transactions that were allegedly consummated by Judson Realty in violation of New York General Business Law (“GBL”) §§ 349 and 350 and §43(a) of the Lanham Act (NYSCEF Doc. No. 5). It is also alleged Nicholas defaulted on a loan (the “Loan”) issued by Plaintiff Judson Realty (“Judson Realty”).

Defendants served their Answer with Counterclaims on January 12, 2021 (NYSCEF Doc. No. 7). In pertinent part, Defendants' Answer contains a section with the header "Counterclaims and Third-Party Complaint". In its "Counterclaims and Third-Party Complaint" Defendants allege that Nicholas was responsible for all aspects of Judson Realty's commercial real estate business and that "Judson Realty, including the member(s) constituting its majority, represented to Nicholas that he was earning "sweat equity" and would be made president of Judson Realty and receive a majority interest therein." Defendants allege that Stephen Judson<sup>1</sup> ("Stephen") breached various promises and representations made to Nicholas and unilaterally terminated Nicholas from Judson Realty in April of 2020. It is alleged that at the time of Nicholas's termination, Judson Realty owed Nicholas sums for his services as a broker, including commissions that exceed \$500,000 in value. Defendants further allege that Plaintiffs converted business opportunities directed to Nicholas.

On January 26, 2021, counsel for Plaintiffs filed a reply to Defendants' Counterclaims, as well as an "Answer to Third Party Complaint" with affirmative defenses on behalf of those entities named in Defendants' Answer with Counterclaims (NYSCEF Doc. No. 10). Plaintiffs state in their second and twenty second affirmative defenses that the third-party claims are barred because they are procedurally deficient and improper because they do "not allege that the Third-Party Defendants are liable in whole or in part for the claims against defendants." (*Id.*) Moreover, Defendants failed to file a Third-Party Summons, pay a separate index fee, and failed to serve the Third-Party Complaint after service of Defendants' Answer. Pursuant to a written stipulation executed by counsel dated February 5, 2021, counsel for Plaintiffs accepted service of the Third-Party Complaint, but did so without approval or consent to the propriety of the Third-Party Complaint and reserved all objections with respect to it (NYSCEF Doc. No. 45).

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<sup>1</sup> Defendants style Stephen Judson as a "third-party defendant"; however, for the reasons stated in this decision, this Court does not retain subject matter jurisdiction over Stephen Judson or any of the "third-party defendants."

### **B. Discovery and Motion to Dismiss**

A Preliminary Conference Order was signed by Hon. Alexander M. Tisch, J.S.C. on July 28, 2021 directing depositions and other disclosures to take place (NYSCEF Doc. No. 18). Shortly after, on August 5, 2021, the “Third-Party Defendants” Stephen Judson, Judson Family, LLC, 1063 Madison Associates, L.P., 924 Realty Associates, L.P., Invention Partners, LLC and Cirrus Cloud, LLC (Collectively “Third-Party Defendants”) moved to dismiss the Third-Party Complaint pursuant to CPLR § 3211(a)(7) (NYSCEF Doc. No. 19).

Third-Party Defendants argue that the Third-Party Complaint must be dismissed because of a series of fatal procedural deficiencies pursuant to CPLR § 1007 and the asserted causes of action do not meet the substantive requirements of CPLR § 1007 which requires Third-Party Defendants to be responsible for all or part of the Plaintiffs’ claims against Defendants.

Defendants argue in opposition that the Court of Appeals has rejected a strict interpretation of third-party practice, and that the Third-Party claims should be heard since they arise from the same operative facts and circumstances as those alleged in the Amended Complaint. Defendants further argue that pursuant to CPLR §3211(e), Third-Party Defendants have waived any defenses relating to procedural defects since Third-Party Defendants allowed over 60 days to lapse prior to filing their motion to dismiss. Finally, Defendants argue that pursuant to CPLR §§ 306-b, 2001, and 2004, should the Court find any procedural deficiencies, the Court should, in the interest of justice, deem the Third-Party Summons and Complaint to have been properly served and timely filed. Defendants also cross-move to compel discovery and award Defendants attorneys’ fees in connection with the instant motion practice.

In reply, Third-Party Defendants concede that the Court of Appeals has endorsed a more liberal reading of CPLR § 1007; however, § 1007 still requires a third-party defendant to be

responsible to a defendant/third-party plaintiff for at least part of the liability a plaintiff asserts against a defendant/third-party plaintiff. Moreover, Third-Party Defendants claim that Defendants' waiver argument pursuant to CPLR §3211(e) is inapplicable since the time limitation in that rule applies only for motions to dismiss based on lack of personal jurisdiction or improper service, while the instant motion to dismiss is for failure to state a claim pursuant to CPLR §§ 1007 and 3211(a)(7).

## II. Analysis

### A. Procedure for Commencing a Third-Party Action

CPLR § 1007 provides the proper procedure for commencing a third-party action. In pertinent part, the rule states: "**After service of the answer**, a defendant may proceed against a person not a party **who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant**, by filing.... **a third-party summons and complaint with the clerk of the court**...for which...**a separate index number fee shall be collected**." (Emphasis added).

As a general matter, jurisdiction cannot be obtained over a defendant except through strict compliance with the statutorily mandated procedures (Macchia v Russo, 67 NY2d 592 [1986]; Worldview Entertainment Holdings, Inc. v Woodrow, 204 AD3d, 629 [1st Dept 2022] (finding no jurisdiction over parties where defendant never filed a third-party summons and complaint with the clerk of the court, never paid a separate index number fee, and never served party with a third-party summons); Rosenblum v 170 West Village Associates, 175 AD2d 702, 703 [1st Dept 1991]).

Here, it is undisputed that Defendants did not follow the procedures mandated by CPLR § 1007. Defendants never filed a third-party summons or complaint with the Clerk of the Court, and never paid a separate index number fee. Therefore, this Court does not have jurisdiction over the

Third-Party Defendants and the Third-Party Complaint should be dismissed. (Worldview at 629; Rosenblum at 703).

### **B. CPLR §3211(e) and Waiver**

Defendants argue that Third-Party Defendants waived any defenses related to procedural infirmities regarding the Third-Party Complaint by failing to file this motion to dismiss pursuant to CPLR §3211(e).

According to Rule §3211(e), “an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading.” Defendants argue that because the sixty-day deadline pursuant to CPLR §3211(e) has lapsed, Third-Party Defendants cannot argue procedural infirmities require dismissing the Third-Party Complaint. However, the procedural infirmities related to the Third-Party Complaint have only ancillary relation to personal service; rather, the gravamen of the procedural infirmities relate to whether this Court ever obtained subject matter jurisdiction due to Defendants’ failure to file a Third-Party Summons and Complaint with the Court Clerk pursuant to CPLR §1007. Moreover, according to Third-Party Defendants’ notice of motion to dismiss, the grounds they are seeking dismissal upon is CPLR §3211(a)(7). According to CPLR §3211(e), “a motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) of this rule may be made at any subsequent time or in a later pleading”. Therefore, Defendants’ CPLR §3211(e) argument as it pertains to waiver and a sixty-day deadline is inapplicable.

Further, the failure to file the initial papers necessary to institute an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity (Financial Industry Regulatory

Authority, Inc. v Fiero, 10 NY3d 12, 17 [2008] (a court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may on its own motion, at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action); O'Brien v Contreras, 126 AD3d 958 [2d Dept 2015]; Bayridge Prince, LLC v City of New York, 56 Misc.3d 684, 685 [Sup Ct Kings County 2017] ("failure to file initial papers necessary to institute an action constitutes a nonwaivable, jurisdictional defect, and is not the type of error that falls within the court's discretion to correct."); Worldview Entertainment Holdings Inc. v Woodrow, 2022 NY Slip Op 32080(U) at \*8 [Sup Ct New York County 2022]). Defendants' failure to file the initial papers necessary to institute the third-party action is a nonwaivable jurisdictional defect that the Court cannot correct. Because of these filing defects, the Court lacks subject matter jurisdiction and the waiver defense pursuant to CPLR §3211(e) does not apply.

### **C. Requisite Liability Pursuant to CPLR § 1007**

Defendants also fail to meet the requisite liability requirements to institute a third-party action pursuant to CPLR § 1007. According to CPLR § 1007, a third-party action is appropriate when there exists a non-party who may be liable to the Defendant for all or part of the Plaintiff's claim against the Defendant. Although third-party practice has its origins in strict indemnity, the Court of Appeals has read CPLR § 1007 more liberally and should not be read as allowing recovery solely for claims sounding in strict indemnity. (George Cohen Agency, Inc. v Donald S Perlman Agency, Inc., 51 NY2d 358, 365 [1980]). However, while impleader is allowed via a variety of causes of action, the liability sought to be imposed upon a third-party defendant must still arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action (Qosina Corp. v C&N Packaging, Inc., 96 AD3d 1032, 1034-1035 [2d Dept 2012]; Warner v Levinson, 188 AD2d 268 [1st Dept 1992]; Lucci v Lucci, 150 AD2d 649 [2d Dept 1989]; BBIG

Realty Corp. v Ginsberg, 111 AD2d 91, 93 [1st Dept 1985]; Rausch v Garland, 88 AD2d 1021, 1022 [3d Dept 1982]).

Here, Defendants have failed to show that the liability they seek to impose on Third-Party Defendants arises from or is conditioned upon the liability asserted against Defendants by Plaintiff in the main action. Specifically, Plaintiffs seek damages from Defendants based on allegedly false and deceptive practices and false advertising in violation of GBL §§ 349 and 350, violating §43(a) of the Lanham Act, and damages from Nicholas's alleged default on a loan. Therefore, any named Third-Party Defendant must somehow be responsible to Defendants for part or all of Defendants' potential liability for violations of GBL, the Lanham Act, or the default on the Loan.

The causes of action alleged by Defendants in their "Third-Party Complaint" fail to show how the Third-Party Defendants are in some way responsible to Defendants for any liability which might be imposed by Plaintiff's lawsuit. Defendants have failed to assert in their pleadings or argue in their motion papers that the named Third-Party Defendants are liable to Defendants for any of Defendants' alleged violation of the GBL, the Lanham Act, or the default on the Loan. Moreover, Defendants make no differentiation between their counterclaims and Third-Party Complaint, as they are both pleaded identically and simultaneously (*see* NYSCEF Doc. No. 7 at 13).

While Plaintiff's claims against Defendants may be related to Defendants' counterclaims/Third-Party Complaint since they both touch on Nicholas's former employment with Judson Realty, Defendants have failed to make a threshold showing of how any of their causes of action against "Third-Party Defendants" are conditioned upon or arise from Defendants' potential liability to Plaintiffs. Simply because a cause of action arises from the same transaction or occurrence does not equate to the requisite liability necessary to plead a Third-Party Complaint. Indeed, as the Third-Party Complaint was conjoined with Defendant's counterclaims against

Plaintiff, the proper procedural vehicle is not a Third-Party Complaint, but rather counterclaims pursuant to CPLR §3019. Therefore, Defendants' Third-Party Complaint must be dismissed.

**D. Defendants' Cross Motion to Compel**

For the reasons listed in Section II(A) and II(B), Defendants' cross motion to compel discovery are denied to the extent they seek information or documents in the possession or control of Third-Party Defendants. The Court has no jurisdiction over Third-Party Defendants and cannot compel them to respond to requests for documents or interrogatories, as CPLR §§3120 and 3130 only permit the service of notices for document production and interrogatories on the parties to an action. To the extent Defendants seek to compel discovery from Plaintiffs, this matter is set for a status conference scheduled for August 4, 2022 at 11:00 a.m.

**E. CPLR §§ 306-b, 2001, and 2004**

Pursuant to CPLR § 2001, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just. The Court makes no finding on the merits of the allegations stated in Defendants purported Third-Party Complaint; rather, the Court finds that the necessary procedure to plead these allegations was deficient and the use of impleader, given the substance of Defendants' allegations, is improper. Therefore, the dismissal of Defendants' "Third-Party Complaint" is without prejudice.

Accordingly, it is hereby

ORDERED that the Defendants' "Third Party Complaint" is dismissed without prejudice; and it is further

ORDERED that Defendants' cross motion to compel discovery to the extent it is directed at Plaintiffs is to be resolved at a status conference with the Court scheduled for August 4, 2022 at 11:00 a.m.

This constitutes the decision and order of the Court.

7/20/2022  
DATE

Mary V Rosado  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: