

Responsify LLC v Algomedica, Inc.
2022 NY Slip Op 32421(U)
July 1, 2022
Supreme Court, New York County
Docket Number: Index No. 652956/2021
Judge: Verna L. Saunders
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

-----X INDEX NO. 652956/2021

RESPONSIFY LLC, Plaintiff, MOTION SEQ. NO. 001

- v -

ALGOMEDICA, INC. and
JAGDISH VIJ DBA ALGOMEDICA,
Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20

were read on this motion to/for DISMISS.

On May 5, 2021, plaintiff commenced this action by summons with notice against defendants (NYSCEF Doc. No. 1, *summons with notice*). On June 10, 2021, defendants filed a notice of appearance and a demand for a complaint (NYSCEF Doc. Nos. 2-3, *notice of appearance and demand for complaint*). Following said demand, on June 24, 2021, plaintiff filed a complaint alleging causes of action sounding in breach of contract (NYSCEF Doc. No. 4, *complaint*). On June 25, 2021, plaintiff filed an affidavit of service indicating that defendants were served with the “summons and complaint.” (NYSCEF Doc. No. 5, *affidavit of service*).

Defendants now move, pre-answer, for dismissal of the complaint against them, pursuant to CPLR 3211(a)(8) or, in the alternative, pursuant to CPLR 3211(a)(1) and (7) (NYSCEF Doc. No. 6, *notice of motion*). In support of their motion, defendants argue that dismissal of the complaint is warranted because they were never served with process. By affirmation dated July 13, 2021, defendants argue that they were never properly served with the summons with notice. Instead, the summons with notice was sent by United States mail on May 5, 2021, to defendant JAGDISH VIJ’s (“VIJ”) residence in California, which is not any of the methods of service authorized by CPLR 313, and required by CPLR 308 and CPLR 311. Moreover, challenging affidavits of service sworn to in California, dated June 11, 2021, indicating that defendants were served with the “summons and complaint” on June 11, 2021, defendants argue that these affidavits are defective since they do not include a certificate of conformity, as required by CPLR 2309(a). Defendants further argue that, although these affidavits of service indicate that a Jim Stanfield, a person purportedly authorized to accept service on their behalf, received the pleadings, VIJ submits an affidavit wherein he avows: “I do not know “Jim Stanfield. He is not - as claimed in the affidavit - an employee of[f] mine or of ALGOMEDICA INC. He is not authorized to accept service of process on either me or ALGOMEDICA, INC.” The affidavits of service, claim defendants, are also inaccurate. They reflect that service of the complaint, which is dated June 24, 2021, was made on defendants almost two weeks earlier, on June 11, 2021. Furthermore, according to defendants, dismissal is warranted as against VIJ because he was not a party to the contract that is subject to this litigation (NYSCEF Doc. No. 7, *Turchi’s affirmation*).

In opposition, plaintiff argues that VIJ is personally liable for the debt of the corporate entity because his corporation is merely his alter ego. Plaintiff argues that its failure to file a certificate of conformity does not warrant dismissal and that the alleged inconsistencies within the affidavits of service were mere typos. It attached an amended affidavit of service reflecting that on June 11, 2021, it served only the summons with notice. Plaintiff further states, “[w]hile the [a]ffidavit of [VIJ] carefully distanced defendants from Jim Stanfield, the individual upon whom the Summons with Notice was served, it conveniently fails to disclose his relationship to defendants or why he was at the business premise and held himself out to be the manager authorized to accept service.” (NYSCEF Doc. No. 18, *Sugarman’s affirmation*).

In reply, defendants maintain that the motion should be granted, and the action dismissed since “[p]laintiff’s opposition papers, citing no authority, are conclusory and based on self-serving amended affidavits of service unaccompanied by a certificate of conformity, and fail to set forth any grounds for denying the instant motion.” (*Turchi’s reply affirmation*).

In determining a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) A pleading may be dismissed, pursuant to CPLR 3211(a)(7) if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (See CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) Furthermore, “[a] cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014], quoting *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002].)

CPLR 3211(a)(8) provides a basis for dismissal of a complaint on the ground that “the court has not jurisdiction of the person of the defendant,” such as where a defendant is never served with process. An affidavit of service constitutes *prima facie* evidence of proper service (See *Wells Fargo Bank, N.A. v Javier*, 179 AD3d 482, 482 [1st Dept 2020]; *Wells Fargo Bank, N.A. v Njoku*, 148 AD3d 438, 439 [1st Dept 2017]) and mere denials of receipt are insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service. (See *Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008].)

Here, this court finds that plaintiff fails to state a cause of action against VIJ because said defendant was not a party to the subject agreement, which was entered into exclusively between plaintiff and the corporate defendant (NYSCEF Doc. No. 12, *agreement*). Case law is clear that, “[a]n agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his or her personal liability for, or to, that of the principal.” (*Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673 [1st Dept 2010]; see also *News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 147 [1st Dept 2005].)

Although plaintiff contends, albeit only through an affirmation in opposition to the motion, that the corporate entity is merely VIJ's alter ego, this argument is insufficient to warrant denial of the motion against VIJ. "In order to state a claim for alter-ego liability plaintiff is generally required to allege complete domination of the corporation . . . in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014] [internal quotation marks and citation omitted].) The complaint states, in rather conclusory fashion: "[u]pon information and belief, any corporation that might have been in existence was merely the alter ego of individual defendant and did not conduct itself as a corporation, in that it failed to have meeting[s], keep minutes, etc." (NYSCEF Doc. No. 4 ¶ 9). There are no specific allegations in the complaint to show that said defendant used his corporate position to perpetuate a fraud and, furthermore, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil." (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner LLC*, 146 AD3d 1, 12 [1st Dept 2016]; see *Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 946 [2d Dept 2013].)

Turning next to the corporation, defendants have failed to establish that plaintiff's failure to include a certificate of conformity, in accordance with CPLR 2309(c), is a fatal defect warranting dismissal of the complaint against ALGOMEDICA (see *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009] ["The absence of such a certificate [of conformity] is a mere irregularity, and not a fatal defect].) Moreover, the amended affidavits of service reflecting service of the summons with notice upon defendants on June 11, 2021, and correcting its prior reference to service of the "summons and complaint" in the original affidavit, renders moot defendants' argument that the initial pleadings in this action were never served. (*Matter of Savitt*, 161 AD3d 109, 115 [1st Dept 2018] ["any defects in the affidavit of service or the failure to timely file said affidavits with this Court are irregularities that can be properly cured by deeming it filed *nunc pro tunc*"]; *Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442 [1st Dept 1998].) That said, while the affidavit of service of the corporate defendant state that the pleadings were delivered to "Jim Stanfield", the affidavit of VIJ raises serious concerns regarding Stanfield's authority to accept service on behalf of the corporation. VIJ affirms, "I do not know 'Jim Stanfield.' He is not - as claimed in the affidavit - an employee o[f] mine or of ALGOMEDICA INC. He is not authorized to accept service of process on either me or ALGOMEDICA, INC." (NYSCEF Doc. No. 8 ¶ 6). As such, a traverse hearing is required on the issue of service with respect to the corporate entity. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that all claims against defendant JAGDISH VIJ DBA ALGOMEDICA are dismissed; and it is further

ORDERED that that portion of the application seeking dismissal of the action against defendant ALGOMEDICA, INC. shall be held in abeyance until after a traverse hearing on the issue of service; and it is further

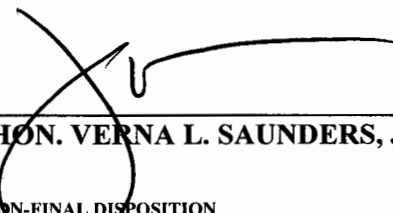
ORDERED that the parties are directed to appear for a traverse hearing on September 27, 2022, at 11:00 am, details which shall be provided by the court no later than September 23, 2022; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order upon defendants, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court 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/supctmanh).

This constitutes the decision and order of this court.

July 1, 2022



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE