

ZeetoGroup, LLC v Baker Hostetler, LLP
2022 NY Slip Op 33475(U)
October 13, 2022
Supreme Court, New York County
Docket Number: Index No. 158723/2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

DECISION/ORDER
PART 8

ZeetoGroup, LLC et al

INDEX NO. 158723/2021

- v -

MOT. DATE

Baker Hostetler, LLP et al

MOT. SEQ. NO. 1-2

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
ECFS DOC No(s).
ECFS DOC No(s).
ECFS DOC No(s).

Plaintiffs ZeetoGroup (Zeeto), Tibrio, LLC (Tibrio) and Stephen Goss (Goss) bring this action against defendants Baker & Hostetler, LLP (Baker) and Marc Powers (Powers) for malicious prosecution. In motion sequence 1, defendant Baker moves to dismiss pursuant to CPLR 3211(a)(1)(5) and (7) and in motion sequence 2 defendant Powers moves to dismiss pursuant to CPLR 3211(a)(8) on the basis that the court lacks personal jurisdiction over him. Plaintiff opposes both motions. The motions are consolidated for the court's consideration and disposition in this single decision/order.

The relevant facts are as follows. In the complaint, plaintiffs allege that Baker represented the digital marketing agency Original Agency (OA) in an arbitration proceeding before the American Arbitration Association in San Diego California against the data technology company Zeeto for wrongful termination of the parties' LLC agreement. On April 22, 2020, the arbitrator issued the Initial Award in favor of Respondent Zeeto. Zeeto then requested the arbitrator award it attorney's fees and costs pursuant to Section 15.10 of the LLC Agreement, which provides in relevant part: "In the arbitrator's award, the arbitrator shall allocate, in his or her discretion, among the parties to the arbitration all costs of arbitration, including the fees of the arbitrator and reasonable attorney's fees, costs and expert witness expenses of the parties." On June 17, 2020, the Arbitrator, in a Final Award, denied Zeeto's application for attorney's fees because the parties could have inserted the common contractual language allowing the recovery of fees to the "prevailing party" and "[t]he fact that they chose not to do so, is indication of a desire to follow the American Rule", which provides that fees are normally borne equally by the parties. On April 19, 2021, the parties entered into a Tolling Agreement "to allow Parties an opportunity to further discuss the Claim, there has been a mutual desire expressed to defer formal legal action by Claimant in return for a tolling of the statute of limitations." On May 24, 2021, plaintiff Zeeto then commenced an action

Dated: 10/13/22

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

against Baker in California Superior Court, County of San Diego asserting a single cause of action for malicious prosecution. Zeeto then voluntarily discontinued that action on August 10, 2021. On September 21, 2021, plaintiff filed the instant action alleging malicious prosecution by Baker.

Applicable standard

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). Under CPLR § 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v. Martinez*, *supra* at 88).

Motion Sequence 1

Defendant Baker moves to dismiss pursuant to CPLR 3211[a][1], [5] and [7] contending that plaintiffs’ complaint is barred by New York’s one year statute of limitations for a malicious prosecution claim under CPLR 215(3). Baker contends that the instant case was filed on September 21, 2021 and the final arbitration terminated on June 17, 2020 the day the Arbitrator issued a final award and that if the court tolled the limitations period for an additional 35 days, and no further, as per the Tolling Agreement, plaintiff would have until July 22, 2021 to commence the instant action, which it did not do. Therefore, plaintiff is time barred from bringing the instant action. Defendant Baker further argues that the filing of the California action did not toll the statute of limitations in New York under CPLR 205 as the “prior action” was not filed in New York, but was filed in California.

Plaintiffs oppose the motion and assert that this court should reject Baker’s argument because its claim was timely as the parties Tolling Agreement was still in effect when plaintiffs filed the complaint and/or the one-year statute of limitations was suspended while plaintiff (OA) appealed the arbitrator’s final award.

In its Reply, Baker argues that plaintiffs’ opposition fails to acknowledge that it previously brought the California Action against Baker and Powers asserting the same malicious prosecution claim against them and the tolling agreement remained in effect through the filing of the instant New York lawsuit because neither party has provided notice of its intent to terminate the agreement. Baker contends that plaintiffs’ commencing the legal action against Baker in California was a material breach of the Tolling Agreement which “excuses further performance” by the counterparty and “justifies him in abandoning the contract.”

The court agrees with plaintiffs. The Tolling Agreement provides in pertinent part “This Agreement shall terminate upon the earlier of 1) thirty (30) days after a Party provides notice of intent to terminate this Agreement in writing addressed to the other Party at the address indicated below or (2) September 29, 2021. Notice shall be provided by Certified, Registered Mail, or E-Mail. The date on which this Agreement terminates shall be the “termination Agreement”. The Tolling Agreement provided two options to terminate, neither of which Baker utilized. The court rejects Baker’s argument that plaintiffs’ commencement of the California action terminated the agreement. A review of the Tolling Agreement provides in Section 5 two methods to terminate the agreement, neither of which Baker availed itself of. In fact, Baker filed a petition to vacate the arbitrator’s award in Supreme Court, New York County, which was dismissed on September 30, 2020, within the one year that plaintiff filed this action. Finally, the court rejects plaintiffs’ argument that Baker’s filing of its appeal tolled the statute of limitations.

Next, Baker argues that plaintiffs' complaint should be dismissed because a malicious prosecution action cannot be based on a contractual arbitration and that the court should apply California substantive law. Baker contends that the LLC Agreement required the parties to arbitrate in California, the hearing took place in California and plaintiffs' malicious prosecution claim is premised on an alleged abuse committed by Baker in a proceeding conducted in California and therefore California has an interest in regulating conduct that purportedly occurred within its borders.

Plaintiffs disagree and argue that New York law should apply here because the only connection between this action and California is that the physical hearing took place in California and that Baker's argument contradicts its execution of a Petition to Vacate Arbitration Award (the "Petition") filed on or around July 23, 2020 in Supreme Court, New York (index no. 653347/20).

Under New York's choice of law rules, malicious prosecution claims are governed by the law of the state where the underlying proceeding took place--here, the state of California *See Seghers v. Morgan Stanley DW, Inc.*, No. 06 Civ. 4639(GEL), 2007 U.S. Dist. LEXIS 34483, 2007 WL 1404434, at n.11 (S.D.N.Y. May 10, 2007) (applying Texas law to malicious prosecution claim); see also Restatement (Second) Conflicts of Laws § 155 (stating that malicious prosecution and abuse of process claims are generally determined "by the local law of the state where the proceeding complained of occurred").

There is no dispute that the 16-day arbitration from which this action arises occurred in California. The court rejects plaintiffs' argument that because Baker filed a petition to vacate the arbitration award in Supreme Court, New York County, that it availed itself of the jurisdiction of New York. The court notes that plaintiffs too filed an action in California that was ultimately dismissed, which it did not address in its opposition. Here, the LLC Agreement required the parties (OA and Zeeto) to arbitrate in San Diego, California. Plaintiff's claim for malicious prosecution is premised on the alleged abuse by Baker and Powers in an arbitration proceeding that occurred in California, thus California has a paramount interest in regulating conduct that occurred within its borders. Therefore, California substantive law applies to law in the instant action.

Next, Defendant argues that Zeeto's claim should be dismissed under CPLR 3211(a)(7), failure to state a claim because plaintiff's claim is based on a contractual arbitration and that under California law it prohibits malicious prosecution claims against the party who brought the arbitration and that party's attorney and therefore the action should be dismissed. On this point, the court agrees.

California courts have consistently held that private arbitration awards cannot form the basis for a subsequent malicious prosecution claim. *See, Brennan v. Tremco, Inc.* 25 Cal. 4th 310 (2001); *Dorit v. Noe*, 49 Cal.App.5t h 458 (Cal.Ct.App. 2020); *Sacco v. Benzinger*, 2003 U.S. Dist. LEXIS 28426 N.D. Cal. Dec. 18 2003

The parties agreed to private arbitration pursuant to their LLC Agreement. Zeeto, in turn, elected to file a malicious prosecution claim against OA's attorneys, defendant Baker. The California courts have held that a contractual arbitration is not the sort of action that will support a malicious prosecution claim. *See, Brennan* Moreover, in *Sacco*, "The California Court has been explicit: arbitration type forums do not fall within the range of legal proceedings sufficient to provide a basis for malicious prosecution claims".

Based on the foregoing, plaintiffs' complaint is dismissed because the malicious prosecution claim arises from the arbitration in California.

Finally, defendants' argument that plaintiffs are collaterally estopped by the ruling made by the arbitrator in the underlying action is outright rejected. Defendants failed to satisfy its burden to show that the

issues in the arbitration and the instant matter are identical, that the issue was litigated and decided and that there was a full and fair opportunity to litigate. It is clear from the arbitration decision that the arbitrator did not address the issues of malicious prosecution in his decision.

Irrespective of the parties' arguments above, the complaint is dismissed considering the reasoning set forth above.

Motion Seq. 2

In motion sequence 2, defendant Powers moves to dismiss pursuant to CPLR 306-b and 3211[a][8] or alternatively pursuant to CPLR 3211[a][1], [5] and [7] claiming that plaintiffs failed to serve him within 120 days of commencing this action as required by CPLR 306-b, and therefore the court lacks personal jurisdiction over Powers.

Applicable standard

CPLR 3211(a)(8) permits a motion to dismiss for lack of personal jurisdiction over a defendant due to improper service. *See West v. Doctor's Hosp.*, 198 AD2d 92 [1st Dept 1993] (affirming lower court's dismissal pursuant to CPLR 3211(a)(8) for plaintiff's failure to comply with the requirements for service under CPLR 308(2)); *Kosachuk v. Quality Choice Healthcare, Inc.*, 2019 NY Slip Op 32871(U), ¶4 (Sup Ct, NY County 2019) (dismissing defendant for lack of personal jurisdiction due to plaintiff's failure to comply with the CPLR).

CPLR 306-b requires that service of the summons and complaint "shall be made within one hundred twenty days after the commencement of the action." Where the plaintiff fails to effect service within 120 days, "the court, upon motion, shall dismiss the action without prejudice as to that defendant."

CPLR 308 (2) provides, in pertinent part, that personal service may be made upon a defendant by delivery of the summons upon "a person of suitable age and discretion at the actual place of business . . . of the person to be served and by . . . mailing the summons by first class mail to the person to be served at his or her actual place of business . . . , such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing."

"Jurisdiction is not acquired pursuant to CPLR 308 (2) unless both the delivery and mailing requirements have been strictly complied with" (*Josephs v AACT Fast Collections Servs., Inc.*, 155 AD3d 1010, 66 NYS3d 17 [2017], quoting *Gray-Joseph v Shuhai Liu*, 90 AD3d 988, 934 NYS2d 868 [2011]; accord *Munoz v Reyes*, 40 AD3d 1059, 1059, 836 NYS2d 698 [2007]; *Ludmer v Hasan*, 33 AD3d 594, 821 NYS2d 661 [2006]). "CPLR 308 (2) requires strict compliance, and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made" (*Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 931 NYS2d 675 [2011]).

Defendant Powers argues that plaintiffs failed to complete service on him within 120 days as prescribed by CPLR 306-b and that although CPLR 308(2) permits substitute service by delivering the summons to "a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served," the text of the statute makes clear that the plaintiff must also "mail[] the summons to the person to be served" by specified means in order to complete service, which was not done. Powers further claims, in a footnote, that he does not concede the address listed in the proof of service is his actual place of business, dwelling place, or actual place of abode for purposes of CPLR 308(2). Finally, Powers argues that plaintiff's deadline to timely file proof of service of the required

mailing, February 9, 2022, has long passed and the proof of service on February 4, 2022, makes no mention of any efforts to complete service with a mailing.

Plaintiffs argue in opposition that Powers had knowledge of and a copy of the lawsuit within 120 days and that while service was defective due to the mailing, it has been cured by a second service on Powers. Based on Powers' failure to demonstrate prejudice suffered or a failure to diligently serve him, Zeeto requests it be granted an extension for service so this case may finally move forward and that it went above and beyond to try and have Powers served within the 120-day time limit.

Here, plaintiffs filed the summons and complaint on September 22, 2021. They had 120 days to effectuate service on defendant Powers. As per plaintiffs' affidavit of service, the process server served Powers by substitute service on the doorman, as the affidavit of service indicates "substituted service", at 1 Gracie Terrace #2B, New York County, NY 10028 on January 20, 2022. A review of the affidavit of service shows that the mailing of the summons and complaint to defendant Powers not only never occurred, but also the affidavit of service does not purport to show that the mailing had been effectuated on Powers. Plaintiffs again served Powers by substituted service on April 13, 2022, which was beyond the 120-time period. Similar to plaintiffs' first service attempt on Powers, plaintiff again did not effectuate the required mailing. Plaintiff's argument that Powers had knowledge of the lawsuit is rejected. Even if true, is insufficient to correct the service defect. Moreover, plaintiffs' request in an affirmation in opposition to extend time to serve Powers is procedurally improper. Rather, plaintiffs should have filed its motion immediately when it realized that it could not effectuate service over Powers within the 120 time frame or immediately thereafter. Plaintiffs' counsel submits in his affirmation the attempts and efforts by the process server and the Nationwide investigator to locate and serve Powers, "that Zeeto hired process servers to track cars, pull title reports....". However, a review of the Nationwide report provides a timeframe of June 3, 2021 through July 20, 2021, which dates were prior to the filing of the instant action and contains no affidavit from someone with personal knowledge outlining the efforts to locate Powers, only an attorney affirmation. Regardless, it would not warrant a different result.

Based on the foregoing, defendants' motion to dismiss as to defendant Powers is also granted and plaintiff's complaint is dismissed in its entirety.

ORDERED that defendants' motions to dismiss are granted, plaintiffs' complaint is dismissed in its entirety and the Clerk of the Court is directed to enter judgement; accordingly, and it is further

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10.13.22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.