SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT HON. ALEXANDER M. TISCH PART CVA P2
Justice

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"JOHN DOE",

Plaintiff,

- v -

CAMP GAN ISRAEL,

Defendant.

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INDEX NO. 527819/2019

MOTION DATE 12/13/2021

MOTION SEQ. NO. 001, 003, 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14 – 20, 23 - 27 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56 – 66, 75 - 77, 81 were read on this motion to/for AMEND

The following e-filed documents, listed by NYSCEF document number (Motion 004) 67-71, 78, 79 were read on this motion to/for DISMISS

ALEXANDER M. TISCH, J.:

Upon the foregoing documents, defendant Camp Gan Israel (CGI) moves to dismiss plaintiff's complaint for lack of personal jurisdiction based on improper service (Motion Seq. 001). Plaintiff opposes the motion and separately moves to amend the complaint to include Camp Can Israel, Inc. (CGI Inc.) (Motion Seq. 003). CGI opposes this motion.

CGI additionally moves for dismissal of the first, third, fourth, fifth, and sixth causes of action in plaintiff's complaint pursuant to CPLR 3211 (a) (7) (Motion Seq. 004). Plaintiff opposes.

BACKGROUND

Plaintiff brings this action pursuant to CPLR 214-g of the Child Victims Act ("CVA"). According to the complaint, plaintiff was sexually assaulted in 1992 and 1994 by camp counselors Shmuel Posner (Posner) and Motti Sandman (Sandman) while attending summer camp at CGI. The CGI camp is located at 487 Parksville Road, in the Town of Liberty, in Sullivan County, New York (the Parksville Rd address) with a principal place of business located at 770 Eastern Parkway, Kings County, New York (the Eastern Pkwy address). At the time of the alleged abuse, plaintiff was approximately nine and eleven years old. As a result of this sexual abuse, plaintiff asserts in the complaint (1) negligent hiring, retention, supervision, and direction; (2) negligence and gross negligence; (3) breach of non-delegable duty; (4) breach of fiduciary duty; (5) negligent infliction of emotional distress (NIED); (6) breach of duty *in loco parentis*.

Plaintiff filed the complaint on December 23, 2019. Plaintiff then attempted to serve CGI at the Eastern Pkwy address on February 11, 2020, at 8:14pm, February 12, 2020, at 6:45am, and February 17, 2020, at 5:06pm. After those unsuccessful attempts of personal delivery, plaintiff served CGI by "nail and mail" at the above address. Plaintiff's process server affixed the summons and complaint to CGI's door on February 17, 2020 and mailed a copy to CGI on February 18, 2020.

CGI filed an answer containing the affirmative defense of improper service and moved to dismiss for as much on May 22, 2020. CGI argues that plaintiff was required to serve them pursuant to CPLR 311 (a) since they have been incorporated in Pennsylvania since 1976. According to defendant, pursuant to CPLR 311, plaintiff was required to serve an officer, director, managing or general agent, cashier, assistant cashier, or a person authorized to accept service on behalf of CGI. CGI contends that because plaintiff served them through the "nail and mail"

procedure rather than pursuant to CPLR 311, this court does not have personal jurisdiction over CGI.

In opposition, plaintiff argues that because CGI is not a corporation, he did not need to comply with the method of service enumerated in CPLR 311. According to plaintiff, "Camp Gan Israel" is the name typically given to any camp organized under the auspices of Chabad-Lubavitch and there are multiple "Camp Gan Israels" across the country and in the same state. Thus, plaintiff argued that the Camp Gan Israel incorporated in Pennsylvania has no connection to CGI. In addition, plaintiff underscored that the address for the Pennsylvania camp listed by the Pennsylvania Secretary of State is different from the CGI's New York address. Plaintiff also contends that even if plaintiff was required to serve defendant pursuant to CPLR 311, service was proper under CPLR 311 (b) as alternative service. In any event, plaintiff served CGI again on July 20, 2020, pursuant to CPLR 311 (a). Plaintiff does not attach an affidavit of service evidencing as much to this motion but attaches it to plaintiff's subsequent motion to amend the complaint.

CGI did not reply in substance to plaintiff's opposition. Instead, CGI asks the Court to disregard plaintiff's opposition since they did not serve opposition at least seven days prior to the return date.[1]

On September 11, 2020, CGI filed a third-party summons and complaint against Posner and Sandman.

Plaintiff then separately moved on November 12, 2021, to amend the complaint pursuant to CPLR 3025 (b) to include CGI Inc. as a defendant. Plaintiff argues that CGI Inc. has been doing business in New York as an unauthorized corporation since it is not registered with the New York

[1] CGI's request is denied. The parties signed a stipulation dated July 10, 2020, adjourning the motion to dismiss from July 20, 2020 until July 27, 2020. That same stipulation also extended plaintiff's time to submit opposition to CGI's motion to July 27, 2020. The opposition was filed on July 27, 2020.

Secretary of State as a foreign corporation in accordance with Business Corporation Law (BCL) §§ 1301 (a), 1304, and 304. Plaintiff's position in this motion is that CGI and CGI Inc. are the same entity. Plaintiff submits CGI Inc.'s IRS Form 990 for 2016 and 2020 to demonstrate that CGI is doing business as a foreign corporation in New York under the name CGI Inc. CGI Inc.'s address listed on the IRS Form 990 is 580 Crown Street, Suite 509, Brooklyn, New York 11213 (the Crown St address).

To add to the confusion of CGI and CGI Inc.'s identity as presented, plaintiff asserts that they received a copy of CGI's insurance policy from Markell Insurance Company. The policy identified the insured as CGI and listed CGI's address as the Eastern Pkwy address. This insurance policy was not attached to either motion.

As a result, plaintiff argues that since CGI concealed its status by failing to register to do business in New York as a foreign corporation, plaintiff should now be granted leave to add CGI Inc. under the relation back doctrine now that the CVA's revival window has closed.

In CGI's opposition, CGI admits to operating as a corporation under CGI Inc. CGI also submitted an affidavit by Rabbi Joseph Futerfas (Rabbi Futerfas), the Assistant Director for CGI at the Parksville Rd address. Rabbi Futerfas stated that the Crown St address belonged to Marc L. Minkoff, the organization's accountant. CGI also contends that the subsequent personal service plaintiff effectuated on July 20, 2020, by delivery to Rabbi Halberstam was also improper because Rabbi Halberstam, according to Rabbi Futerfas' affidavit, has no connection to CGI Inc. and was not authorized to accept service. Rabbit Futerfas highlights that Rabbi Halberstam's office is merely in the same building as CGI's office. According to defendant, even if CGI was an unauthorized foreign corporation, CPLR 311 would still apply and service of process would have

to be completed pursuant BCL § 307, which codifies service of process on unauthorized foreign corporations. Defendant argued that plaintiff failed to serve CGI in accordance with this section.

DISCUSSION

The first issue the Court must resolve is whether there is personal jurisdiction over defendant CGI. If CGI was properly served, then the Court will entertain plaintiff's subsequent motion. If CGI was served improperly, then the action must be dismissed as the Court would lack personal jurisdiction over CGI.

A foreign corporation is prohibited from doing business in New York State until it has been authorized to do so (BCL § 1301 [a]; *Aybar v Aybar*, 37 NY3d 274, 283 [2021]).[2] A foreign corporation may apply to do business in New York State by submitting an application of authority to the Department of State (BCL § 1304). The application must designate the Secretary of State as an agent upon whom process against it may be served and the address for process to be mailed (BCL § 1304 [6]). This requirement is codified in BCL § 304 (a). The failure to designate the Secretary of State as an agent proscribes those corporations from conducting business in New York State (BCL § 304 [b]).

Here, plaintiff claims that CGI is not authorized to do business in New York. CGI concedes that it has a camp located at the Parksville Rd address and an office located at the Eastern Pkwy address. In rebuttal, CGI merely disagrees and offers no evidence to dispute this claim, such as an

[2] "The predicate for this State's jurisdiction over an *unauthorized* foreign corporation is the fact that it is doing business in the State and has thus created a constructive presence over which New York courts can exert general jurisdiction," and BCL section 307 prescribes the method of service (*Flick v Stewart-Warner Corp.*, 76 NY2d 50, 55 [1990]). CGI does not contest that they are doing business in New York. In fact, defendant concedes that they have been operating a summer camp located at the Parkville Rd address since 1969 and maintains a business office located at the Eastern Pkwy address. Even had this not been the case, the Court would have found, under these facts, CGI to have been doing business in New York (*Alicanto, S.A. v Woolverton*, 129 AD2d 601, 602 [2d Dept 1987] ["There is no precise measure of the nature or extent of activities necessary for finding that a foreign corporation is "doing business" in the State. Determination of this question must be approached on a case by case basis with inquiry made into the type of business being conducted."]).

application of authority. This leaves the Court with only one conclusion—that CGI is in fact an unauthorized foreign corporation doing business in New York.[3] The Court must consider CGI's corporate status to conduct business here in New York to determine what type of service would be proper (CPLR 311; BCL §§ 306; 307). However, the Court is without power to penalize CGI in this matter for doing business in violation of the enumerated statutes as such authority is reserved for actions brought by the New York State Attorney General (BCL § 1303). Nevertheless, depending on the analysis involving service below, the Court may very well draw a negative inference from CGI's failure to apply for authority to conduct business in New York and register with the Secretary of State as an agent.

CPLR 311 (a) (1) permits personal service upon any domestic or foreign corporation by delivering the summons to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. Upon motion, without notice, CPLR 311 (b) allows for alternative service on any domestic or foreign corporation if service is impracticable under CPLR 311 (a) within 120 days. CPLR 311 also permits an unauthorized foreign corporation to be served pursuant to BCL § 307 (*Hessel v Goldman, Sachs & Co.*, 281 AD2d 247, 247-248 [1st Dept 2001]). To serve an unauthorized foreign corporation under BCL § 307, process must be served upon the Secretary of State and upon the corporation either personally outside New York State or by mail with return receipt requested at an address specified in the statute (*Flick v Stewart-Warner Corp.*, 76 NY2d 50, 55 [1990] ["In sum, we hold that strict compliance with the procedures of Business Corporation Law § 307 is required to effect service on an unauthorized foreign corporation.").

[3] The Court recognizes that CGI, an unauthorized foreign corporation, may still defend this action (BCL § 1312).

Here, BCL § 307 is inapplicable because plaintiff does not claim to have served or has actually served the Secretary of State. Nor is there any evidence evincing as much. Plaintiff, instead, claims that they properly served CGI pursuant to CPLR 311 (b) by way of alternate service. Plaintiff served CGI by "nail and mail" at the Eastern Pkwy address. This argument, however, also fails. Plaintiff is not entitled to serve CGI in an alternative manner of their own accord. Alternative service must be requested by motion, and it is for the Court to determine the method (CPLR 311 [b]). A plaintiff must demonstrate the impracticability to serve a defendant pursuant to CPLR 311 (a) to warrant the use of CPLR 311 (b). The Court, under these facts, may very well have granted the method of alternative service plaintiff effectuated (*Snyder v Alternate Energy Inc.*, 19 Misc3d 954, 959 [Civ Ct, New York County 2008, Cooper, J.] ["[I]n devising appropriate forms of alternative service, [courts] have a wide latitude to 'fashion . . . means adapted to the particular facts of the case before it.'"], citing *Dobkin v Chapman*, 21 NY2d 490, 499 [1968]). But the Court declines to entertain whether service of CGI was impractical under CPLR 311 (a). Plaintiff neither in this motion, nor in their subsequent motion, ask this Court to grant such relief and to deem the alternative service proper and complete, *nunc pro tunc* (*Matter of Pollina*, 192 AD3d 118, 123 [2d Dept 2020] ["[A]t issue is whether the court is empowered to authorize substituted service, nunc pro tunc, when a party undertakes such service before seeking an order allowing it to do so. . . . . [W]e find that the court is empowered to authorize substituted service nunc pro tunc."]). With great prudence, plaintiff also served CGI by personal delivery at the Eastern Pkwy address on July 20, 2020. The question now becomes whether such service is sufficient pursuant to CPLR 311 to grant this Court jurisdiction over the defendant.

Putting the issue of timing aside for a moment, plaintiff served Rabbi Halberstam located at the Eastern Pkwy Address on behalf of CGI. The affidavit submitted, indicates that Rabbi

Halberstam stated that he was authorized to accept service on behalf of CGI. Rabbi Futerfas attests, on the other hand, that Rabbi Halberstam has no connection to CGI, does not work for CGI, and merely has an office in the same building as CGI at the Eastern Pkwy address. Rabbi Futerfas explicitly states that Rabbi Halberstam was not authorized to accept service on behalf of CGI. According to plaintiff, CGI lists the Eastern Pkwy address on its website as its office address. Plaintiff also made diligent attempts to serve CGI at this Eastern Pkwy address in February of 2020 and July of 2020. Moreover, CGI is an unauthorized foreign corporation doing business in New York, and as such, has not designated the Secretary of State as an agent authorized to accept service.

"In evaluating whether service is to be sustained, the circumstances of the particular case must be weighed" (*Fashion Page, Ltd. V Zurich Ins. Co.*, 50 NY2d 265, 273 [1980]). Under these circumstances, plaintiff's process server acted reasonably and with due diligence, and when viewed through an objective lens, the manner of service was calculated to give and did give CGI fair notice of the commencement of this action (*Belluardo v Nationwide Ins. Co.*, 231 AD2d 661, 661 [2d Dept 1996]; *Martin v Archway Inn,* 164 AD2d 843, 845 [1st Dept 1990]). If the plaintiff served the wrong person, then the fault lies on CGI as he took reasonable steps to effectuate service (*Belluardo*, 231 AD2d at 661). CGI has operated a camp in New York since 1969 and has failed to register with the New York Secretary of State. In addition, CGI's website indicates the Eastern Pkwy address as its office location, and the process server received confirmation from Rabbi Halberstam that he was authorized to receive service on behalf of CGI. Under the concept of apparent authority, when a recipient of process represents, without authority, they are authorized to accept service on behalf of an entity, service at a proper location, where the process server relies upon such authority, has been upheld (*Everbank v Kelly*, 203 AD3d 138, 145 [2d Dept 2022],

citing *Fashion Page*, 50 NY2d at 273). As such, there is ample evidence in this matter to support a determination that process server acted reasonably (*see Eastman Kodak Co. v Miller & Miller Actuaries, Inc.*, 195 AD2d 591, 591 [2d Dept 1993] [finding service on a receptionist had apparent authority to accept service of process]).

The situation present here bears similarity to *Hessel v Goldman Sachs & Co.* (281 AD2d 247, 248 [1st Dept 2001]). In *Hessel*, the court found that service was proper on a legal assistant who represented she was authorized to accept service and then later submitted an affidavit stating she was in fact not authorized to accept service since the process server acted reasonably and with due diligence under the circumstances and the manner was calculated to give and did give the corporate defendant notice of the action (*id.*, citing *Belluardo*, 231 AD2d at 661-662). Likewise, plaintiff's process server here relied on the representation of Rabbi Halberstam, and even though defendant submits an affidavit from Rabbi Futerfas rebutting Rabbi Halberstam's apparent authority, the process server acted reasonably under the circumstances, which did give CGI notice of this action.

Returning to the issue of timing, plaintiff initiated this action on December 23, 2019, with the filing of the summons and complaint. Pursuant to CPLR 306-b, plaintiff had 120 days to serve the summons and complaint. Thus, plaintiff had until April 21, 2020, to serve CGI. Plaintiff did not serve process on Rabbi Halberstam until July 20, 2020. However, on March 20, 2020, due to the COVID-19 pandemic, Governor Cuomo issued Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8), which tolled the service of any legal action and notice (*Brash v Richards*, 195 AD3d 582, 585 [2d Dept 2021]). This toll would be extended a number of times, and ceased as of November 4, 2020 pursuant to Executive Order (A. Cuomo) No. 202.72 (9 NYCRR 8.202.72 ; see Executive Order [A. Cuomo] Nos. 202.14 [9 NYCRR 8.202.14], 202.28 [9 NYCRR 8.202.28],

202.38 [9 NYCRR 8.202.38], 202.48 [9 NYCRR 8.202.48], 202.55 [9 NYCRR 8.202.55], 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67]). As such, plaintiff's service of CGI was timely, and CGI's motion to dismiss is denied.

Plaintiff's Motion for Leave to Amend

The Court now turns to plaintiff's motion to amend the complaint to add CGI, Inc. as a defendant pursuant to CPLR 3025 (b).

As discussed *supra*, plaintiff has submitted a record of CGI's publicly filed IRS Form 1990 for 2016 and 2020, which reflect that CGI was doing business a foreign corporation in New York under CGI, Inc., and lists CGI Inc.'s address as 580 Crown Street. Additionally, Camp Gan Israel of Parksville identifies itself as CGI Inc. on its online donation page.

"In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is 'palpably insufficient' to state a cause of action or is patently devoid of merit" (*Scofield v DeGroodt*, 54 AD3d 1017, 1018 [2d Dept 2008]). "Whether to grant such leave is within the motion court's discretion, the exercise of which will not be lightly disturbed" (*Pergament v Roach*, 41 AD3d 569, 572 [2d Dept 2007]).

Plaintiff argues that there can be no prejudice or surprise as the documentary evidence reflects that CGI regularly presents itself as CGI, Inc. and thus conducts business as the same entity. Plaintiff also argues that all claims to be asserted against CGI, Inc. in the amended complaint are based on the same conduct alleged in the initial complaint, and notes that formal discovery has not yet commenced as this matter is still in the pleading stage.

Plaintiff maintains that while the relevant statute of limitations under the CVA has expired, the application to add CGI, Inc. as a defendant can nevertheless be deemed timely under the

relation-back doctrine. As set forth in CPLR 203(f), the doctrine provides that that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading." (CPLR 203[f]; *see also Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546 [1st Dept 2013]). The Court of Appeals established a three-prong test for when the relation-back doctrine can be used to add a new defendant: "(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Buran v Coupal,* 87 NY2d 173 [1995]).

In opposition, CGI does not address the merits of plaintiff's argument that he should be permitted to add CGI, Inc. as a defendant using the relation-back doctrine. Rather, CGI relitigates its arguments that this Court lacks jurisdiction over CGI as CGI was not properly served, and hence plaintiff's motion to amend is moot. However, this Court has now determined that it has jurisdiction over CGI as plaintiff's service on CGI was timely and proper.

As discussed *supra*, the first two prongs of the *Buran* test are clearly met as both claims arose out of plaintiff's alleged abuse, and CGI and CGI, Inc. are united in interest. The third prong also is met, as plaintiff has extensively detailed why CGI, Inc. was not originally named as a defendant given plaintiff's prior lack of knowledge of CGI's concealed incorporated name. Additionally, given that CGI's arguments under both motions that it was not properly served as a

corporation make continual references to CGI, Inc., defendants cannot claim a lack of notice of this litigation or claim any prejudice.

The Court thus grants plaintiff's application, and directs that plaintiff serve his amended complaint upon CGI and CGI, Inc. to supersede the original complaint filed only against CGI. An amended complaint will supersede the original complaint (*Stella v Stella*, 92 AD2d 589 [2d Dept. 1983]), and it must be served in order to have that effect (*see Brooks Bros. v Tiffany*, 117 AD 470, 471 [1st Dept 1907] ["[w]here an amended pleading is served, it takes the place of the original pleading"]; *Schoenborn v Kinderhill Corp.*, 98 AD2d 831, 832 [3d Dept 1983] ["An amended complaint having been served, it superseded the original complaint and became the only complaint in the case"]).

Accordingly, plaintiff's motion for leave to amend is granted, and plaintiff shall serve a copy of his amended complaint on defendants within 20 days.

CGI's Subsequent Motion to Dismiss

On November 17, 2021, while both CGI's motion to dismiss and plaintiff's motion to amend were *sub judice,* CGI filed a subsequent motion to dismiss individual causes of action in the original complaint pursuant to CPLR 3211 (a)(7). CGI argues that said claims are duplicative and do not allege distinct damages.

Plaintiff argues that the Court should disregard CGI's subsequent motion under the "single motion rule" pursuant to CPLR 3211 (e). Plaintiff also argues that CGI had the opportunity to raise these grounds when it filed its original motion, and its second motion should thus be rejected. CGI argues that its subsequent motion should be deemed a "supplemental" motion to dismiss as it is based on caselaw not in existence at the time it filed its first motion. CGI further notes that pursuant

to CPLR 3211 (c), the Court has discretion to treat its subsequent motion as a motion for summary judgment on notice to the parties.

Given that plaintiff's motion for leave to amend has now been granted, the Court finds that the most prudent path at this juncture of the litigation is for CGI to refile its motion for dismissal after service of plaintiff's amended complaint on behalf of both CGI and CGI Inc., so that defendants may raise arguments for dismissal of each claim asserted against both in plaintiff's amended complaint if they choose.

Accordingly, CGI's subsequent motion for dismissal is denied without prejudice, with leave to renew.

CONCLUSION

As such, it is hereby

ORDERED that defendant Camp Gan Israel (CGI)'s motion to dismiss plaintiff's complaint for lack of personal jurisdiction based on improper service (Motion Seq. 001) is denied; and it is further

ORDERED that plaintiff's motion to amend the complaint to add Camp Can Israel, Inc. (CGI Inc.) as a defendant (Motion Seq. 003) is granted; and it is further

ORDERED that the supplemental summons and amended complaint, in the form annexed to the moving papers (NYSCEF Doc No. 58), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint shall be served, in accordance with the Civil Practice Law and Rules, upon the additional party in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

"JOHN DOE,"

Plaintiff, INDEX NO.: 527819/2019

-against-

CAMP GAN ISRAEL and CAMP GAN ISRAEL, INC.,

Defendants.

CAMP GAN ISRAEL,

Third-Party Plaintiff, THIRD-PARTY INDEX NO.:

-against-

SHMUEL POSNER and MORDECHAI SANDMAN,

Third-Party Defendants.

And it is further

ORDERED that plaintiff serve a copy of this order upon the Clerk of the Court and Trial Support Office, if applicable, who are directed to mark the court's records to reflect the party being added pursuant hereto; and it is further

ORDERED that defendant CGI's motion pursuant to CPLR 3211(a)(7) to dismiss plaintiff's individual causes of action (Motion Seq. 004) is denied without prejudice, with leave to renew after service of the amended complaint.

This constitutes the decision and order of the court.

KINGS COUNTY CLERK FILED 2022 NOV -1 AM 9:56

10/25/2022
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[x]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE