

Hecker v Fan
2022 NY Slip Op 34090(U)
December 2, 2022
Supreme Court, Kings County
Docket Number: Index No. 517786/2019
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brookly, New York, on the 2 day of December, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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RICHARD HECKER, TRACTION & SCALE LLC, HECKER CONSULTANCY, LLC, and DOES 1-10,

Plaintiffs,

Index No.: 517786/2019

-against-

DECISION AND ORDER
MS #1 & #2

CALVIN FAN, an individual, MARK MAHONEY, an individual, JORDAN MCKIM, an individual,

Defendants,

and

TATTOO TECHNOLOGIES, INC.

Nominal Defendant,
-----X

Defendants CALVIN FAN, MARK MAHONEY, JORDAN MCKIM, and TATTOO TECHNOLOGIES, INC. move to dismiss Plaintiffs' complaint for lack of personal jurisdiction over the three Individual Defendants. Defendants further move to dismiss the fourth cause of action for declaratory judgement against Nominal Defendant TATTOO TECHNOLOGIES, INC. (Defendant TTI) based on a mandatory forum selection clause.

Plaintiffs' oppose the motion and cross-move to disqualify Defendant CALVIN FAN (Defendant FAN) from representing Defendants pursuant to 22 NYCRR § 1200.0 and Judiciary Law § 478.

DECLARATORY RELIEF AGASINT NOMINAL DEFENDANT TTI

Defendants move to dismiss the fourth cause of action for declaratory judgment against Defendant TTI pursuant to the Indemnification Agreement between Plaintiff RICHARD HECKER (Plaintiff HECKER) and Defendant TTI. The Indemnification Agreement contains a mandatory forum selection clause that grants exclusive jurisdiction to the Delaware Chancery Court.

Plaintiffs do not oppose this part of Defendants motion and thus do not challenge the forum selection clause. Therefore, this part of Defendants motion must be granted and Plaintiffs' fourth cause of action for declaratory judgment against Defendant TTI must be dismissed without prejudice to asserting the claim in Delaware Chancery Court.

PERSONAL JURISIDCTION OVER DEFENDANTS

Defendants move to dismiss Plaintiffs' other causes of action based on lack of personal jurisdiction over any of the Defendants.

Plaintiffs' argue that Defendants waived any personal jurisdiction defense because they did not move to dismiss the complaint on the ground of lack of personal jurisdiction or assert lack of personal jurisdiction in a responsive pleading at the time they filed their notice of appearance citing *Mid-Island Mortgage Corp. v. Johnson*, 175 AD3d 490, 491 [2d Dept 2019].

“[A]n appearance of the defendant is equivalent to personal service of the summons upon [her or] him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of [CPLR] 3211 is asserted by motion or in the answer as provided in [CPLR] 3211” (*id.* at 491, *quoting* CPLR 320[b]).

The Second Department in *American Home Mtge. Servicing, Inc. v. Arklis* (150 AD3d 1180, [2d Dept 2017]), overruled its prior decisions in *Frederic v. Israel*, 104 AD3d 909 [2d Dept 2013], and *Deutsche Bank Nat. Trust Co. v Gordon*, 129 AD3d 769 [2d Dept 2015], which held that a defendant could file a notice of appearance and wait until filing a CPLR § 3211 motion or responsive pleading to raise objection to personal jurisdiction (*American Home Mtge. Servicing, Inc.* at 1182).

However, the present case is distinguishable from that in *Mid-Island Mortgage Corp.*, and *American Home Mtge. Servicing, Inc.* because here the notice of appearance contained an explicit objection to personal jurisdiction and the Defendants raised the objection again in their answer and again in this motion to dismiss pursuant to CPLR § 3211(a)(8).

Further, Plaintiff entered into a stipulation to extend Defendants' time to answer which was so ordered by Justice Peter Sweeney. The stipulation stated that Defendants reserved all defenses except as to improper service. Therefore, Defendants did not waive their personal jurisdiction defenses and Plaintiffs must make a prima facie showing that Defendants were subject to the personal jurisdiction of this Court.

"The ultimate burden of proving a basis for personal jurisdiction rests with the party asserting jurisdiction" (*Aybar v. US Tires and Wheels of Queens, LLC*, — AD3d —, 2022 NY Slip Op 06099 [2d Dept 2022], quoting *Fanelli v. Latman*, 202 AD3d 758, 759 [2d Dept 2022]). "However, in opposing a motion pursuant to CPLR 3211(a)(8) to dismiss based on lack of personal jurisdiction, a party need only make a prima facie showing that personal jurisdiction exists" (*id.*).

Here, Plaintiffs do not make any showing that there is a basis to assert jurisdiction over these non-resident Defendants. Nor do Plaintiffs provide any supporting affidavits

or exhibits that address or oppose any of the substantive personal jurisdictional issues raised in Defendants motion. Plaintiffs have therefore failed to meet their burden and that part of Defendants motion to dismiss for lack of personal jurisdiction must be granted.

DISQUALIFICATION OF DEFENDANTS' ATTORNEY

Since Defendants' motion to dismiss is granted in its entirety, Plaintiffs' cross-motion to disqualify Defendants' attorney, Defendant FAN, from representing Defendants is now moot.

WHEREFORE, it is ORDERED that Defendants motion to dismiss is GRANTED in its entirety and the first, second and third causes of action are dismissed for lack of personal jurisdiction over the Defendants; and it is further

ORDERED that the fourth cause of action is DISMISSED without prejudice to asserting the claim in Delaware Chancery Court; and is it further

ORDERED that Plaintiffs' cross-motion to disqualify Defendants' attorney is DENIED as moot.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.