

Posner v Circle Jay Glass LLC
2022 NY Slip Op 34416(U)
December 28, 2022
Supreme Court, New York County
Docket Number: Index No. 652742/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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MICHAEL POSNER

Plaintiff,

- v -

CIRCLE JAY GLASS LLC,

Defendant.

-----X

INDEX NO. 652742/2022

MOTION DATE 12/22/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISS.

Defendant's motion to dismiss is denied. Plaintiff's cross-motion for sanctions and to compel defendant to comply with a subpoena is denied.

Background

Plaintiff alleges that he started working for defendant as an independent contractor in 2019 in sales and was supposed to receive a commission for each sale. He contends that defendant refused to pay him for the commissions he earned.

Defendant moves to dismiss on the ground that plaintiff never worked for it and that, instead, plaintiff worked for non-party Circle Glass LLC. It claims that defendant acquired the assets to Circle Glass LLC on July 5, 2019. It also argues that plaintiff failed to state a cause of action against defendant because plaintiff did not identify with whom he had a contract, when it was made, or any details about the alleged agreement. Defendant insists that the allegations in the complaint are too vague to satisfy plaintiff's burden to state a cognizable cause of action. Defendant also demands that plaintiff be sanctioned because the instant lawsuit is frivolous.

In opposition and in support of his cross-motion, plaintiff insists he has stated a valid cause of action. He points out that defendant's assertion that plaintiff never worked for it is only supported by an affirmation from counsel for defendant and so it cannot form the basis of a motion to dismiss. Plaintiff submits an affidavit in which he asserts that he was paid by defendant and points to a 1099 form he received from defendant documenting what defendant paid him. Plaintiff also demands that this Court compel defendant to comply with a subpoena served in another matter (where plaintiff is suing Circle Glass LLC).

In reply, defendant claims that no affidavit from someone with personal knowledge is required for a motion to dismiss. It also claims that plaintiff never filed an affidavit of service and so the complaint should be dismissed as the Court does not have jurisdiction over defendant. Defendant argues that plaintiff also failed to identify the other pending case brought by plaintiff as a related matter. It further contends that the affidavit submitted by plaintiff does not contain a certificate of conformity and should therefore be disregarded.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] 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, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).” “Any deficiency on the face of the complaint as to lack of details in pleading the facts and circumstances relied upon may be cured by affidavit submitted by the

plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion to dismiss under CPLR 3211(a)(7)” (*Components Direct, Inc. v Eur. Am. Bank and Tr. Co.*, 175 AD2d 227, 232, 572 NYS2d 359 [2d Dept 1991]).

The Court denies defendant’s motion. As an initial matter, the Court finds that the complaint states a cognizable cause of action. It claims that plaintiff is owed commissions from defendant in connection with his work as a salesperson from 2019. Certainly, more detail might be helpful and will undoubtedly be necessary for plaintiff to meet his burden to recover against defendant. But plaintiff need not plead every conceivable detail in a complaint. He need only give the defendant notice about the issues in the case. The complaint here, although brief, meets that burden.

Moreover, plaintiff cured any deficiencies through his affidavit (NYSCEF Doc. No. 13) in which he includes more details about his allegations. The fact is that plaintiff included a 1099 form in opposition (NYSCEF Doc. No. 17) that raises a legitimate issue about whether defendant (and not just the prior non-party entity) employed plaintiff. That plaintiff did not initially include a certificate of conformity is of no moment as it is not a fatal defect (*see e.g., Midfirst Bank v Agho*, 121 AD3d 343, 351, 991 NYS2d 623 [2d Dept 2014]). In any event, the defect can be cured after the fact (*Bank of New York v Singh*, 139 AD3d 486, 487, 33 NYS3d 1 [1st Dept 2016]). And that is what plaintiff did here (*see* NYSCEF Doc. No 25).

While defendant is correct that ordinarily it need not include an affidavit from someone with personal knowledge on a motion to dismiss, defendant was required to do so here to the extent it moves to dismiss pursuant to CPLR 3211(a)(1). Defendant cannot establish documentary evidence sufficient to dismiss this case based upon an attorney’s affirmation alone particularly where, as here, defendant claims that plaintiff never worked for it. That, of course,

is a factual assertion that has to be supported by someone with personal knowledge of those alleged facts.

Similarly, to the extent that defendant moves to dismiss pursuant to CPLR 3211(a)(5), that branch of the motion is denied as defendant did not sufficiently explain in the moving papers upon what specific basis of this provision it seeks dismissal. And the Court observes that although defendant cited the CPLR section for improper service in the notice of motion, it did not expound upon this basis until the reply papers. It is axiomatic that a movant cannot raise an argument for the first time in reply and so the Court denies the branch of the motion that seeks dismissal on the ground that defendant was not served. In any event, plaintiff belatedly uploaded copies of the affidavits of service (NYSCEF Doc. Nos. 22, 26).

Plaintiff's Cross-Motion

The Court declines to compel defendant comply with a subpoena served in a related matter. Although plaintiff could have certainly moved in the related case to compel, the fact is that plaintiff has now sued both entities in separate litigations. Therefore, the proper course is to conduct routine discovery in this case where defendant is a party to the litigation. Plaintiff is free to include similar demands as part of the discovery process in this case. And this part's rules require that a preliminary conference be held before a discovery motion can be made. That way, there is a Court-ordered schedule for discovery laying out the parties' obligations that can be referenced when discovery motions are made.

Summary

The Court observes that defendant's concern, raised in reply, that plaintiff failed to identify this case as related to another pending litigation is wholly incorrect as it was defendant who filed the RJI (which assigns a case to a judge). And the Court observes that defendant did, in


fact, identify the related case on the RJI (although counsel for defendant failed to include the judge assigned). For some reason, the matter was not sent to the judge assigned to the other matter. Given that this matter should be assigned to that judge, (Justice Nock), the Court will reassign this matter to that part as this case was filed after the one before Justice Nock.

The Court declines to issue any sanctions, which both parties seek. This is a routine motion to dismiss and a cross-motion for discovery. That the parties seem to dislike each other is not a basis to issue sanctions.

Accordingly, it is hereby

ORDERED that defendant’s motion and plaintiff’s cross-motion are both denied in their entirety; and it is further

ORDERED that this matter is remitted to the General Clerk’s Office for reassignment to Hon. Louis L. Nock, who presides over the related matter, Index No. 653918/2020.

<p><u>12/28/2022</u> DATE</p>	 <hr style="border: 0; border-top: 1px solid black;"/> <p>ARLENE P. BLUTH, J.S.C.</p>	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input type="checkbox"/> GRANTED</p> <p><input type="checkbox"/> SETTLE ORDER</p> <p>CHECK IF APPROPRIATE: <input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input checked="" type="checkbox"/> DENIED</p> <p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART</p> <p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT</p> <p><input type="checkbox"/> OTHER</p> <p><input type="checkbox"/> REFERENCE</p>