

NYC Mgt. Group, Inc. v Gazi

2023 NY Slip Op 32807(U)

August 10, 2023

Supreme Court, New York County

Docket Number: Index No. 654762/2021

Judge: Verna L. Saunders

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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. 654762/2021NYC MANAGEMENT GROUP, INC. d/b/a NEW YORK
MODEL MANAGEMENT,MOTION SEQ. NO. 002

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

DUANE GAZI,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 27, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for

DISMISS

Currently before the court are defendant's motion to dismiss for lack of personal jurisdiction and for failure to state valid causes of action. In addition, defendant asks for an order that disqualifies plaintiff's counsel from this case (NYSCEF Doc. No. 34). Plaintiff opposes the motion and, in addition, cross-moves to disqualify defendant's counsel (NYSCEF Doc. No. 59). For the reasons below, the court denies the motion and cross-motion to disqualify without prejudice, grants the prong of defendant's motion challenging service to the extent of directing a traverse hearing on the issue, and denies the remainder of the motion with leave to seek such relief if the case continues after the traverse hearing.

Plaintiff filed its Summons with Notice on August 4, 2021 (NYSCEF Doc. No. 37). The notice states that the action is for tortious interference with contract and with prospective business advantage, prima facie tort, defamation per se, and injunctive relief. The action, according to the notice, arises out of "Defendant's interference with Plaintiff's existing contracts and business relationships, as well as Defendant's derogatory statements about Plaintiff's business practices" (*id.*, *3). The documents were prepared by plaintiff's counsel, Carlos M. Carvajal ("Carvajal").

Plaintiff's August 20, 2021, affidavit of service indicates that the process server, Roger Padilla of Elite Legal Services of NY, Inc. ("Elite") posted the papers on August 19, 2021, the date that he states he "executed service," and mailed them on August 20, 2021 (NYSCEF Doc. No. 38). The affidavit further indicates that he first attempted personal service on the defendant on August 10, 2021, at 7:10 and on August 11, 2021, at 2:17. The affidavit does not indicate whether Padilla attempted service during the day or in the evening on these prior occasions.¹

¹ Counsel's affirmation in support of plaintiff's default judgment motion states that there was "an additional mailing of the Summons and Complaint {sic}" (NYSCEF Doc. No. 4, ¶ 5). However, plaintiff does not submit further explanation of or evidentiary support for this statement.

On October 25, 2021, plaintiff filed a motion for default judgment (NYSCEF Doc. No. 39). In response, on November 22, 2021, defendant filed a notice of appearance by his attorney, Soo Jee Lee (“Lee”) (NYSCEF Doc. No. 41). The notice included a demand for a complaint. Defendant also challenged the service of the summons with notice for the same reasons set forth in his current motion (*see* NYSCEF Doc. No. 23). Ultimately, the parties resolved the motion by a December 4, 2021 stipulation withdrawing the motion (NYSCEF Doc. No. 43; *see* NYSCEF Doc. No. 44 [*December 6, 2021, decision resolving motion in accordance with stipulation*]).

Plaintiff filed its complaint around thirteen (13) days after the parties filed the above stipulation, on December 19, 2021 (NYSCEF Doc. No. 45). The complaint alleges that defendant was the director of scouting and development for plaintiff, a modeling agency, from March 27, 2017, until around July 19, 2021. The complaint states that, as such, defendant owed plaintiff a fiduciary duty, and that he breached this duty when he encouraged the models that he had signed to leave the company for Linden Staub, defendant’s alleged new place of employment. The complaint set forth causes of action for breach of fiduciary duty, tortious interference with contract, unfair competition, misappropriation of trade secrets, and unjust enrichment.

Shortly after plaintiff filed the complaint, defendant initiated the motion practice at hand.

A motion to disqualify seeks to deprive a party of the “right to representation by the attorney of its choice” (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). “Thus, the movant must meet a heavy burden of showing that disqualification is warranted” (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 470 [1st Dept 2013]). To prevail on a motion to disqualify, the party seeking disqualification must show that there had been an attorney-client relationship between the moving party and the attorney, that the matters at hand are substantially related to the matters the attorney handled during the prior representation, and that the interests of the present and former clients are currently adverse. (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 97-98 [1st Dept 2008] [under prior version of the rule]; *see Tavor v Lane Towers Owners, Inc.*, 197 AD3d 584, 585-586 [2d Dept 2021].)

Ultimately, the court has the discretion to determine whether disqualification is appropriate. (*Flores v Willard J. Price Assoc., LLC*, 20 AD3d 343, 344 [1st Dept 2005]; *Matter of Lopresti v David*, 179 AD3d 1067, 1068 [2d Dept 2020].) In doing so, it balances the right of representation against the “right to have confidential disclosures made to [the] attorney subject to the protections afforded by [the] attorney’s fiduciary obligation to keep confidential information secret” (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]). The court further considers whether the motion to disqualify is a tactical move to delay litigation or deprive the adversary of its right to high quality representation (*id.*).

In support of his position that Carvajal must be disqualified, Lee states that her client “asserts that the plaintiff’s counsel’s prior representation is substantially related to this action” and that counsel obtained “confidential factual information” that “would materially advance plaintiff’s position in this matter” (NYSCEF Doc. No. 36, *27). Further, Lee indicates that Carvajal sent defendant direct e-mails during this lawsuit, although he was represented by an attorney. Lee relies on Rules of Professional Conduct 1.9, which relates to a lawyer’s duty to a

former client – specifically, that a lawyer shall not represent someone with interests adverse to the former client in a related matter and/or if the lawyer acquired confidential information related to the matter in dispute (22 NYCRR 1200.0 Rule 1.9).

The court denies this prong of defendant’s motion. Although Lee states that a prior attorney-client relationship existed between Carvajal and defendant, she has submitted no evidentiary support for this contention. Defendant’s own affidavit relates merely to the alleged failure of proper service, and does not discuss any relationship, or lack thereof, between himself and Carvajal (*see* NYSCEF Doc. No. 42). Defendant also submits an e-mail chain that purports to show direct communication between Carvajal and defendant, but the dates on the e-mails do not correlate to the dates of the purported communications, and there is no indication that Carvajal or Gazi participated in or were copied on the e-mails (*see* NYSCEF Doc. No. 56). Finally, the allegations about the nature of the prior representation are conclusory and generally paraphrase the rule in question. Therefore, the court does not reach plaintiff’s opposition papers as they relate to this issue, or the new points that defendant raises in its reply.

Plaintiff’s cross-motion seeks to disqualify Lee. Plaintiff has established – and defendant does not deny – that there was a prior business relationship between plaintiff and Lee, and that Lee’s current client has an interest that conflicts with that of her former client. However, the parties dispute whether any of the matters on which Lee worked were substantially related to the issues at hand.

In support of its cross-motion, plaintiff submits the affidavit of Chris Marino, its chief operations officer (NYSCEF Doc. No. 60). Marino states that Lee “actually did represent Plaintiff, and moreover represented one of the models at issue here Yilan Hua on behalf of plaintiff” (*id.*, ¶ 17). As evidence of Lee’s work for plaintiff, it submits documentation including 1099-MISC tax forms from 2018 and 2019, showing that plaintiff paid Lee \$82,585.00 and \$76,050.00, respectively, in those years (NYSCEF Doc. No. 61). It also provides copies of the two checks it paid to Lee – for \$2,000.00 and \$460.00, respectively – for her work obtaining a visa for Yilan Hua (*id.*). Plaintiff does not identify the nature of the rest of the work Lee did for it.

Defendant opposes the cross-motion. Lee states that her “prior representation exclusively involved U.S. immigration law and qualifications for immigration visa benefits of foreign fashion models” (NYSCEF Doc. No. 66, ¶ 55). Therefore, she claims that her work for plaintiff was not substantially related to the issues at hand. She states that any confidential information that she obtained “would not be materially adverse to the plaintiff” (*id.*, ¶ 57). Counsel finally argues that plaintiff did not cross-move for this relief until February 18, 2022, nearly three months after her November 22, 2021, notice of appearance, and she states that this delay is “a sufficient basis on which to deny the motion” (*id.*, ¶ 58 [citing *Wiederman v Halpert*, 172 AD3d 1442 [2d Dept 2019].])

Here, too, the court denies the application to disqualify. The amount of compensation Lee received from plaintiff in 2018 and 2019 raises a question as to whether her work was solely related to visa applications, as she states, or whether some of her work was substantially related to the matter currently in dispute. However, it is not enough for plaintiff to raise a question of

fact. Instead, it is plaintiff's burden to show that Lee's prior work bears a sufficient relationship to the issues at hand, and it must do so by identifying the relevant confidential information that was imparted to Lee (*see Pelligrino*, 49 AD3d at 98). Plaintiff has not shown that the work that it identifies, the visa application of Yilan Hua, is related to the issues at hand (*see NYAHS A Servs., Inc. Self-Ins. Trust v People Care Inc.*, 156 AD3d 1205, 1206-1207 [3d Dept 2017] [court affirmed decision that denied disqualification; although prior attorney-client relationship existed and the parties' interests were materially adverse, movant did not meet its burden of showing that the representation was related to the issues at hand]).

Next, the court turns to defendant's challenge to personal jurisdiction. Under CPLR 308 (4), "nail and mail" service, which plaintiff performed here, is appropriate where personal service "cannot be made with due diligence." This provision states that the process server may affix "the summons to the door of either the actual place of business, dwelling place, or usual place of abode" and "by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential'" within 20 days of the date the process server affixed the summons (*id.*). "There are no rigid standards governing the due diligence requirement" (*Brafman & Assoc., P.C. v Balkany*, 190 AD3d 453, 453 [1st Dept 2021] [*Brafman*] [internal quotation marks and citation omitted]; *see Barnes v City of New York*, 51 NY2d 906, 907 [1980]).

Defendant contends that plaintiff did not exercise due diligence before he served him through conspicuous service under CPLR 308(4) and therefore, it never acquired jurisdiction over him.² He contends that the process server's two attempts at personal service are insufficient, especially as they were "made on weekdays during hours when it reasonably could have been expected that [defendant] was either working or in transit to work" (NYSCEF Doc. No. 36 [quoting *County of Nassau v Letosky*, 34 AD3d 414, 415 (2d Dept 2006) (*Letosky*)]). Previously, in opposition to the motion for default judgment, defendant submitted his own affidavit challenging service, alleging that he received the summons with notice by Federal Express rather than by first class mail. He also stated that the label misspelled his last name – using "Gozi" instead of "Gazi" – and the affidavit of service listed the address "270 Madison Street" instead of "207 Madison Street" (NYSCEF Doc. No. 42 [*affidavit and supporting documents*]).³

In opposition to this argument, plaintiff submits the affidavit of Roger Padilla, the process server who served the summons with notice on defendant (NYSCEF Doc. No. 62). Padilla states that he attempted service on three occasions – Tuesday, August 10, 2021, at 7:10 PM, Wednesday, August 11, 2021, at 2:17 PM, and Friday, August 13, 2021, at 7:20 AM (*id.*, ¶ 6). He states that the third attempt is not reflected on the affidavit of service because the form only provides spaces for two attempts. He further states that he made these attempts at 207

² Defendant's argument that the affidavit of service did not comply with General Business Law § 89-cc and Rules of the City of New York §§ 233 and 234, along with other provisions, lacks merit, as the cited provisions do not relate to the affidavit of service. Instead, they describe a process server's obligation to keep detailed records of "service and attempted service by keeping bound paginated volumes or by storing electronic records with a third-party contractor" (RCNY § 233[a] [1]; *see* General Business Law § 89-cc[1]).

³ Exhibit B to the affidavit is completely unreadable. It is unclear what document or documents should have been attached.

Madison Street, not 270 Madison Street (*id.*, ¶ 4; *see* NYSCEF Doc. No. 38). In support, he submits a copy of the worksheet he prepared in connection with the attempted service (NYSCEF Doc. No. 63). The worksheet indicates that Padilla performed the “nail” portion of the service on Thursday, August 19, 2021 (*id.*). The affidavit of service indicates that Padilla then mailed defendant “in an envelope marked personal & confidential” on Friday, August 20, 2021 (NYSCEF Doc. No. 38).⁴

Defendant opposes by reiterating that the affidavit of service shows that service was improper. Defendant challenges the credibility of the Padilla affidavit, pointing to some inconsistencies with the affidavit of service, allegedly poor excuses for the failure to include all attempts at service on the affidavit of service, the suspicion that Padilla asked a person without knowledge whether defendant was at home, and the failure to file the worksheet with the original affidavit of service. However, issues of credibility are not appropriate at this juncture. Instead, a traverse hearing is proper to determine the merit of these challenges, the credibility of Padilla, and the reliability of the additional information contained in the worksheet.

In addition, defendant challenges the times of attempted service. The First Department has found that “successive attempts to serve defendants personally at various times of the day when it could reasonably be expected that they would be at home satisfied the due diligence requirement” (*Farias v Simon*, 73 AD3d 569, 570 [1st Dept 2010]; *see Brafman*, 190 AD3d at 454). This generally includes an effort to serve during non-working hours. According to defendant, Padilla’s attempts at service at 7:10 PM on a weeknight does not satisfy this requirement. A case in the Appellate Term, First Department, *Finkelstein Newman Ferrara LLP v Manning* (35 Misc 3d 130 [A], [App Term, 1st Dept 2012]), stated that at 7:30 PM, “a working person might generally be expected to be home.” In its 2020 decision in *Federal Natl. Mtge. Assn. v Castoldi* (187 AD3d 988, 990-991 [2d Dept 2020]), the Second Department ordered a traverse hearing on the validity of service where one of the process server’s efforts at service was at 7:00 PM on a weeknight and the rest were during working hours during the week.⁵

Defendant also claims that the process server was required to determine whether he was employed and, if possible, to attempt service at his place of employment (NYSCEF Doc. No. 66, ¶ 6 [citing, e.g., *County of Nassau v Yohannan*, 34 AD3d 620, 621 (2d Dept 2006)]).⁶ However, the cases upon which he relies are all Second Department cases, which are only persuasive in the absence of countervailing decisions in the First Department. In this Department, a process server generally is not required to perform, or attempt to perform, service at a defendant’s place of business before resorting to service under CPLR 308(4) (*Eros Intl. PLC v Mangrove Partners*, 191 AD3d 464, 465 [1st Dept 2021] [*Eros*] [citing *Farias v Simon*, 73 AD3d 569, 570 [1st Dept 2010]]). Here, where Padilla allegedly learned through someone at the apartment that defendant

⁴ Padilla additionally notes that the two attempts at service were prior to the third attempt on August 19 at 6:40 PM, when he apparently commenced nail and mail service.

⁵ The court notes that there are Second Department cases, including *Letosky*, that hold a commuter may be in transit during this time.

⁶ Defendant’s reliance on *Estate of Waterman v Jones* (46 AD3d 63, 65 [2d Dept 2007]) is unpersuasive, as in that case the court found that service at the defendant’s place of business was improper because the defendant was not practicing law at the time.

lived in the apartment but was not at home (*see* NYSCEF Doc. Nos. 62, 63),⁷ his alleged efforts were adequate (*see Matter of Shapiro*, 177 AD3d 28, 31 [1st Dept 2019]). Defendant's argument that plaintiff improperly sent the Federal Express mailing to 270 Madison Street is unpersuasive. The affidavit of service, the worksheet, and the Padilla affidavit all show the proper address. Moreover, the Federal Express document itself lists the street address as "207 Madison St," although it uses "270 Madison St" on another document (NYSCEF Doc. No. 42, *9 [Ex C]).

Also, defendant states that the mailing of the summons with notice by Federal Express was defective because the statute requires service by first class mail. "Service by Federal Express overnight mail is not one of the permitted methods of service within the state" (*Ex Machina LLC v Weinberg*, 2009 NY Slip Op 3054 [U], [Sup Ct, NY County 2009]; *see Singer Asset Fin. Co., L.L.C. v Scott*, 10 Misc 3d 1070 [A], [Sup Ct, Rensselaer County 2006], *affd* 38 AD3d 1120 [3d Dept 2007]). Nonetheless, the court finds that a traverse hearing must resolve this issue. The affidavit of service indicates that the process server mailed defendant a copy of the summons with notice by mailing it to defendant in an envelope marked personal and confidential (NYSCEF Doc. No. 38). It is not clear whether that affidavit is referring to the service by Federal Express or by a separate mailing, especially as defendant's Exhibit B to his affidavit, which may have been provided additional information, is unreadable. The court notes that one of the FedEx slips indicates that the package was mailed on December 1, and another – the one that gives the incorrect address – appears to be dated October 29. Neither of these is the alleged date of the mailing (*see* NYSCEF Doc. No. 38). As the affidavit of Padilla is insufficient to resolve the issue, a traverse hearing is appropriate (*see Italian Elegant Jewelry, LLC v Fteha*, 206 AD3d 493, 494-495 [1st Dept 2022]).

The court notes that after this motion was fully submitted, defendant alerted the court and plaintiff to J. Lebovits' decision in *NYC Mgt. Group, Inc. v St. Louis* (75 Misc 3d 1215[A] [Sup Ct, NY County 2022]). In that order, J. Lebovits found that nail-and-mail service was insufficient on one of the defendants because the affidavit of service indicated that the process server made only two attempts at service, both on the same day. There, however, the plaintiff relied entirely on the affidavit of service and the affirmation of counsel, who had no personal knowledge of the facts relating to service. Here, plaintiff has submitted the process server's affidavit and worksheet. In addition, there was no indication that the process server made any attempt to determine whether the defendant was residing at the address in question – and, in fact, "the record suggest[ed] that [she] was *not* living at the address where NYC Management attempted to serve her" (*id.* at *2). More specifically, the court noted that the plaintiff subsequently served the defendant through her mother's home in Connecticut, indicating that the defendant was a co-tenant. Here, on the other hand, the process server found out through defendant's neighbor that defendant resided in the building. Further, the court found that these facts were "alone insufficient to invalidate service," but that they "underscore[d] NYC Management's lack of due diligence . . ." (*id.*).

Finally, the court rejects the argument that the complaint was untimely. As indicated above, plaintiff filed the complaint within thirteen days of the date the parties stipulated to withdraw the motion for default judgment. Further, there is no indication that the allegedly

⁷ According to Padilla, this individual spoke to him via intercom and refused to accept service on defendant's behalf (NYSCEF Doc. No. 62, ¶ 7).

untimely service caused any prejudice to defendant. For all the above reasons, a traverse hearing is warranted. Accordingly, it is

ORDERED that the prong of defendant’s motion seeking disqualification of counsel is denied; and it is further

ORDERED that plaintiff’s cross-motion to disqualify defendant’s counsel is denied; and it is further

ORDERED that the prong of defendant’s motion seeking dismissal for lack of personal jurisdiction is granted to the limited extent of directing that a traverse hearing be held; and it is further

ORDERED that the issues of whether diligent efforts at personal service were made prior to nail and mail service and whether there was a proper mailing that complied with CPLR 308(4) are referred to a Special Referee to hear and report with recommendations, except that in the event of and upon the filing of a stipulation as permitted by CPLR 4317, the Special Referee shall determine these issues; and it is further

ORDERED that counsel for the plaintiff shall, within (45) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that failure to timely comply with the immediately preceding paragraph shall result in the denial and dismissal of the prong of the motion challenging service; and it is further

ORDERED that the remainder of defendant’s motion is denied with leave to renew after the traverse is decided.

This constitutes the decision and order of this court.

August 10, 2023



HON. VERNA L. SAUNDERS, JSC

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