

Izuogu v Aramark Servs. Inc.

2023 NY Slip Op 33017(U)

August 31, 2023

Supreme Court, New York County

Docket Number: Index No. 100135/2023

Judge: Lori S. Sattler

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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. LORI S. SATTLER PART 02TR

Justice

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ANTHONY IZUOGU,

Plaintiff,

- v -

ARAMARK SERVICES INC., MORGAN, LEWIS &
BOCKIUS LLP,

Defendant.

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INDEX NO. 100135/2023

MOTION DATE 05/02/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISSAL.

In this action alleging abuse of process, Defendants Aramark Services Inc. (“Aramark”) and Morgan, Lewis & Bockius LLP (“Morgan Lewis”) (collectively, “Defendants”) move to dismiss. Plaintiff Anthony Izuogu (“Plaintiff”) opposes the motion.

The action relates to another action pending in this Court between Plaintiff and Aramark, *Anthony Izuogu v Aramark Food Services*, Index No. 100625/2022 (“underlying action”), in which Aramark is represented by Morgan Lewis. The underlying action was commenced in New York Supreme Court by Plaintiff, who is self-represented in both actions, on June 22, 2022. On August 9, 2022, Morgan Lewis, as Aramark’s counsel, removed the matter to federal court. Plaintiff moved to remand the matter back to state court, which the federal court granted in a Memorandum Opinion and Order dated November 17, 2022 (NYSCEF Doc. No. 11) on the grounds that removal was untimely. As set forth in that Order, Aramark was served with the Complaint in the underlying action on June 24, 2022 via its registered agent CT Corporation. Aramark’s Notice of Removal was filed on August 9, 2022, after the thirty-day period it had to

do so pursuant to 28 USC § 1446(b)(1). In opposition, Aramark had argued that its removal was timely because when service is made on a statutory agent the time to remove runs not from the date of service but from the date the defendant receives notice of the service. The Court rejected that argument, finding that Aramark's registered agent was not a statutory agent and therefore the time to remove had expired. The matter was remanded back to state court.

Plaintiff then commenced the instant action against Aramark and Morgan Lewis. The Complaint filed April 10, 2023 alleges that Defendants conspired together against Plaintiff by removing the underlying action when they knew doing so was frivolous, and in doing so caused injury to Plaintiff. The Complaint does not specify any causes of action but the Summons states that the action is one for malicious prosecution, abuse of process, and harassment (NYSCEF Doc. Nos. 5, 6). Plaintiff seeks \$15,000,000 and a restraining order (*id.*).

Defendants filed this motion on May 2, 2023 seeking dismissal of the Complaint in its entirety pursuant to CPLR 3211(a)(1) and (7). On June 12, 2023, Plaintiff filed an Amended Complaint (NYSCEF Doc. No. 24), which is limited to claims based on purported abuse of process and harassment without any reference to malicious prosecution. On the same day, Defendants filed a letter indicating that they wanted the Court to consider their motion to dismiss as applicable to the Amended Complaint. Eight days later Plaintiff filed opposition to the motion to dismiss which refers to his Amended Complaint.

The filing of an amended pleading does not automatically abate a motion to dismiss that was addressed to an original pleading (*Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 38 [1st Dept 1998]). Here, Defendants have indicated that they want their motion to apply to the new pleading. Additionally, the Amended Complaint was filed before Plaintiff filed opposition papers, and his opposition explicitly refers to the Amended Complaint rather than the original

pleading, thereby satisfying any due process concerns (*id.*; *see also Donoso v New York Univ.*, 160 AD3d 522 [1st Dept 2018]). Accordingly, the Court will apply the motion to Plaintiff's Amended Complaint.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), “the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory” (*M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). “[F]actual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

“Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). The process used must involve “an unlawful interference with one’s person or property” (*id.*, citing *Williams v Williams*, 23 NY2d 592, 596 [1969]).

The Amended Complaint alleges that after Plaintiff commenced the underlying action, Defendants “conspired to and actually carried out improper removal of the matter before this Court to the United States District Court of the Southern District of New York with the motive of abusing judicial process in order to cause harm to plaintiff” (Amended Complaint ¶ 5). It asserts that Defendants knew the matter was no longer removable and nevertheless “went ahead with the unlawful removal in a deliberate attempt to misuse, for their malicious intent, the judicial tool/process of removal to a federal forum” (*id.* ¶ 6). He contends that the “unlawful removal” to

federal court caused him financial expense and “considerable delay” in the underlying action (Amended Complaint ¶ 9).

The Amended Complaint also alleges a second instance of abuse of process which purportedly occurred after the matter was remanded to this Court. Specifically, Plaintiff filed a motion for default judgment, which Aramark opposed. Plaintiff alleges that Morgan Lewis, acting on behalf of Aramark, made an “unlawful ex parte submission to the Court” when it submitted its opposition and “submitted to the Court a false certificate of service” (*id.* ¶ 11). In their motion to dismiss, Defendants concede that when they filed opposition papers to Plaintiff’s motion, the affidavit of service said February 21, 2023 when service was in fact made on February 22, 2023. They contend this was an inadvertent ministerial error. Ultimately, Plaintiff filed a reply. The motion was denied in light of Aramark’s appearance in the action.

Even when read in the light most favorably to Plaintiff, the Amended Complaint fails to state a cause of action for abuse of process. Plaintiff fails to plead any facts that show that Defendants removed the underlying action with an intent to cause Plaintiff harm without any excuse or justification or for some other collateral objective. To the contrary, the federal court’s decision sets forth the reasons Defendants believed removal was timely. The fact that they were incorrect is insufficient to find any intent to cause harm. Likewise, Plaintiff cannot sustain a cause of action for abuse of process based on Defendants having filed a misdated affidavit of service. The Amended Complaint fails to demonstrate that this was done intentionally, or that the error caused Plaintiff any harm. It cannot be disputed that Plaintiff was served with and timely responded to the papers he alleges were submitted ex parte.

To the extent the Amended Complaint also contains a cause of action for harassment, that must be dismissed. New York does not recognize a civil cause of action for harassment (*Hartman v 536/540 E. 5th St. Equities, Inc.*, 19 AD3d 240 [1st Dept 2005]).

Accordingly for the reasons set forth herein it is hereby:

ORDERED that the Defendants' motion to dismiss the Amended Complaint herein is granted and the Amended Complaint is dismissed in its entirety.

This constitutes the Decision and Order of the Court.

8/31/2023

DATE



LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE