

Annovazzi v Meyer

2023 NY Slip Op 34426(U)

December 6, 2023

Supreme Court, New York County

Docket Number: Index No. 655078/2021

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

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INDEX NO. 655078/2021

FURIO ANNOVAZZI and ILUNA USA LLC,
Plaintiffs,

MOTION SEQ. NO. 001; 002; 003

- v -

EDWARD C. MEYER, GAYOU INTERNATIONAL USA LLC,
GAYOU USA INTERNATIONAL LLC, PETER COPPOLA,
ILUNA-GAYOU USA, LLC, JOHN DOE INDIVIDUALS 1-5,
and JOHN DOE ENTITIES 1-5,
Defendants.

DECISION + ORDER ON
MOTION

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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, 29, 30, 31, 32, 33, 34, 35, 36, 37, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 63

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51,
61, 62, 64, 65, 66, 67

were read on this motion to/for DISMISS

In August 2021, plaintiff FURIO ANNOVAZZI, president of plaintiff ILUNA USA LLC
(collectively, "plaintiffs"), commenced this action against defendants EDWARD C. MEYER
("Meyer") and GAYOU INTERNATIONAL USA LLC ("Gayou"), claiming, among other things,
that Meyer breached his duty of loyalty and care with ILUNA USA LLC and breached his
employment agreement (NYSCEF Doc. No. 1, summons and complaint).

Meyer and Gayou (collectively, "defendants") move (Mot. Seq. 001), pre-answer, pursuant
to CPLR 3211(a)(8) and CPLR 2218, for an order dismissing the action against them based on lack
of personal jurisdiction or, alternatively, that a hearing be held as to any issue of fact raised
(NYSCEF Doc. No. 4, notice of motion). In said application, defendants argue that service of
process was not properly effectuated upon them. In support thereof, Meyer submits an affidavit
wherein he affirms he was not home on September 11, 2021, at 6:05 P.M. — the date and time
plaintiffs affirm, via an affidavit of service, that defendants were duly served with process at
Meyer's home in Connecticut (NYSCEF Doc. Nos. 7-8, affidavits of service) — because he was en
route to Philadelphia with his wife and son to visit colleges. This, affirms Meyer, is confirmed by
EZ Pass records reflecting that on September 11, 2021, at 4:09 P.M., his vehicle entered the New
Jersey Turnpike (NYSCEF Doc. No. 9, EZ pass records); a bill from the Radnor Hotel in Saint
Davids, Pennsylvania showing that they checked out on September 12, 2021, at 2:36 P.M.
(NYSCEF Doc. No. 10, Statement from the Radnor hotel); American Express charges for dinner on

September 12, 2021, in Pennsylvania (NYSCEF Doc. No. 11, *credit card statement*); and EZ Pass records showing that on, September 12, 2021, at 7:30 P.M., his car entered back into the New Jersey Turnpike (NYSCEF Doc. No. 9). Plaintiffs also proffers an affidavit of service indicating that Meyer accepted service on behalf of Gayou. Defendants argue that the court lacks personal jurisdiction over them given the falsity of the affidavits submitted. Furthermore, Meyer argues that since his departure from Iluna USA, defendants' activities are not connected to New York.

Before the deadline for their opposition papers for Mot. Seq. 001, plaintiffs filed an amended complaint that added several other defendants, to wit, Gayou USA International LLC, Peter Coppola, Iluna-Gayou USA, LLC, John Doe Individuals 1-5, and John Doe Entities 1-5, as well as, additional causes of action (NYSCEF Doc. No. 20, *amended complaint*). Therewith, plaintiffs filed affidavits of service reflecting that the amended pleadings were served upon defendants on December 4, 2021. Thereafter, plaintiffs opposed the motion and cross-moved, pursuant to CPLR 3025(b), for an order granting them leave to amend the original complaint. In opposition to the motion, plaintiffs argue that defendants' allegations of non-service would not warrant dismissal, but rather, would only entitle them to a traverse hearing. However, they maintain that defendants' arguments of non-service of the original pleadings are rendered moot by the filing of the amended complaint, which was served upon defendants within 120 days from the commencement of the action, and that any deficiencies with service were cured. Plaintiffs also contend that defendants' argument that they lack ties with New York is belied by the employment agreement, which is governed and construed under the laws of the State of New York, as well as the allegations regarding defendants' alleged involvement with Iluna, a New York corporation.

In reply, defendants argue that the court should order a traverse hearing and that the plaintiffs' cross-motion should be held in abeyance pending said hearing (NYSCEF Doc. No. 37).

Defendants also move (Mot. Seq. 002), pursuant to CPLR 305 and 1003, for an order deeming the amended summons and complaint a nullity and, alternatively, extending their time to answer or otherwise respond to the amended summons and complaint until twenty (20) days after the denial of their motion (NYSCEF Doc. No. 38, *notice of motion for Mot. Seq. 002*). Similarly, defendant Peter Coppola also moves, pursuant to CPLR 305 and 1003, to dismiss the amended complaint against him, arguing that the amended pleadings are a nullity since plaintiffs' right to amend same as of right expired before said filing (Mot. Seq. 003). Plaintiffs oppose the motion and cross-move, pursuant to 22 NYCRR §130-1.1, for an order granting sanctions against defendants. In opposition to Mot. Seqs. 002 and 003, plaintiffs maintain that they were not required to seek leave of court to file the amended pleadings and, thus, that the filing of the amended complaint is valid under CPLR 3025 (NYSCEF Doc. No. 64). In reply, defendants argue that a decision on motion sequence 001 would render academic the arguments raised in Mot. Seq. 002 and 003. Further, defendants argue that plaintiffs' claim that they had a right to amend the summons and complaint without leave of court is contradicted by the cross-motion in Mot. Seq. 001 seeking leave to amend same (NYSCEF Doc. No. 67).

The court will address Mot. Seq. 002 first. Defendants move, pursuant to CPLR 305 and 1003, for an order finding that the amended summons is a nullity since plaintiff's right to amend or supplement the summons and complaint, as of right, expired. Alternatively, they move, pursuant to 2004, for an order extending their time to answer or otherwise respond to the amended summons

and complaint within twenty (20) days after denial of their motion (NYSCEF Doc. No. 38, *notice of motion*).

CPLR 3025 provides, in relevant part, that:

“A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.”

Pursuant to CPLR 3211(f), “[s]ervice of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.” Therefore, “[i]f instead of filing an answer, . . . a defendant files a motion to dismiss, such a motion extends the defendant’s time to answer the complaint, and also, thereby, extends the plaintiff’s time to amend the complaint.” (*Hadar v Hadar*, 2011 NY Slip Op 33782(U), **5 [Sup Ct, NY County 2011].)

“A plaintiff may amend the complaint as of right while a pre-answer motion to dismiss the initial complaint is pending.” (*PNR Props., LLC v DVIR MOG 18, Inc.*, 2017 NY Slip Op 30324(U), **5 [Sup Ct, NY County 2017].) In this case, the amended complaint supersedes the initial complaint and becomes the operative complaint in the action. (See *Pomerance v McGrath*, 104 AD3d 440, 442 [1st Dept. 2013]; *Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99, 947 [1st Dept. 2012].)

Here, the original summons and complaint were filed on August 20, 2021 (NYSCEF Doc. No. 1, *original summons and complaint*). Plaintiffs filed with the court affidavits of service reflecting that defendants were served with the pleadings on September 11, 2021 (NYSCEF Doc. No. 2-3, *affidavits of service*). On October 8, 2021, defendants filed a motion to dismiss the complaint (Mot. Seq. 001) based on, *inter alia*, CPLR 3211(a)(8) for lack of personal jurisdiction. On December 16, 2021, plaintiffs filed the amended complaint.¹ Under the CPLR, plaintiffs would have had ten (10) days after service of the order on Mot. Seq. 001 to serve an amended pleading as of right. Therefore, plaintiffs properly filed their amended complaint as of right (see *Matter of Part 60 RMBS Put - Back Litig.*, 195 AD3d 40, 49-50 [1st Dept 2021].) Given the foregoing, that branch of Mot. Seq. 002, seeking to dismiss the amended pleadings on the basis that the amended summons and complaint are a nullity is denied.

As follows, the arguments raised with respect to dismissal of the original complaint are rendered moot (Mot. Seq. 001). Importantly, plaintiffs maintain that defendants were re-served with the amended pleadings within the applicable 120-day period, and they submit affidavits of service in support thereof. Defendants, however, do not deny service of these amended pleadings. (See *Ciminello v Sullivan*, 2009 NY Slip Op 32368[U], **4 [Sup Ct, Suffolk County 2009].)

¹ This court notes that, based on the affidavits of service relating to the amended pleadings, the amended summons and complaint were served before the amended pleadings were filed, in violation of CPLR 304(a). However, the procedural defect is disregarded. (See CPLR 2004; *Yan Ping Xu v New York City Dept. of Health*, 77 AD3d 40, 44 [1st Dept 2010]).

Similarly, Coppola has failed to persuade this court that there is a jurisdictional defect warranting dismissal of the amended complaint against him (Mot. Seq. 003). CPLR 1003 provides that “[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.” As discussed above, at the time of service of the amended pleadings, no answer or responsive pleading had been filed, and the motion to dismiss extended the time for Meyer and Gayou to interpose an answer; thus, this court rejects Coppola’s argument that plaintiffs could not amend their complaint as of right.

Notwithstanding the foregoing, those branches of Mot. Seqs. 002 and 003, which seek, alternatively, an extension of time to interpose an answer, pursuant to CPLR 2004, is granted. All other arguments and reliefs not discussed herein have been considered and are hereby denied. Accordingly, it is hereby

ORDERED that the motion of EDWARD C. MEYER and GAYOU INTERNATIONAL USA LLC (Mot. Seq. 001) seeking dismissal of the original complaint is denied as moot; and it is further

ORDERED that the motion of defendants EDWARD C. MEYER and GAYOU INTERNATIONAL USA LLC (Mot. Seq. 002) is granted solely to the extent they seek an extension of time to interpose an answer in this action with respect to the amended pleadings, and it is otherwise denied; and it is further

ORDERED that the motion of defendant PETER COPPOLA (Mot. Seq. 003) is granted solely to the extent he seeks an extension of time to interpose an answer in this action with respect to the amended pleadings, and it is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that all defendants shall interpose an answer in this action within twenty (20) days after service of this decision and order with notice of entry; and it is further

ORDERED that the parties in this action are hereby directed to appear for a preliminary conference in this action on March 6, 2024, details which shall be provided by this court no later than March 4, 2024.

This constitutes the decision and order of this court.

December 6, 2023

HON. VERA L. SAUNDERS, JSC

CHECK ONE:

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| <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 |