

**Klitnick v Wanouno**

2023 NY Slip Op 34447(U)

December 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 509570/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14<sup>th</sup> day of December 2023

HONORABLE FRANCOIS A. RIVERA  
-----X

ASHER KLITNICK,  
Plaintiff,

- against -

**DECISION & ORDER**  
Index No.: 509570/2021

CHAVA WANOUNO AND SOLOMON WANOUNO,  
Defendants.

-----X  
CHAVA WANOUNO AND SOLOMON WANOUNO,  
Third-Party Plaintiff

-against -

SNOW SERVICES PLUS CORPORATION d/b/a  
SNOW SERVICES PLUS INC.,

Third-Party Defendant

-----X  
CHAVA WANOUNO AND SOLOMON WANOUNO,

Fourth Third-Party Plaintiff

- against -

SHOLOM WASSERMAN, KYUNGHYE AHN  
and ARTEMIO GARISTA.,

Fourth Third-Party Defendants  
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by fourth-party defendant Kyunghye Ahn on June 24, 2022, under motion sequence two, for an order: (1) pursuant to CPLR 3211(a)(8) dismissing the fourth-party complaint on the grounds that the Court does not have personal jurisdiction over Kyunghye Ahn.

- Notice of Motion
- Affirmation in Support

- Exhibits A-O
- Supplemental affirmation in Support
  - Exhibit J
- Memorandum of Law in Opposition
  - Exhibit A-D
- Affirmation in Reply

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by fourth-party defendant Shalom Wasserman on August 10, 2022, under motion sequence three, for an order: (1) pursuant to CPLR 3211(a)(8) dismissing the fourth-party complaint on the grounds that the Court does not have personal jurisdiction over Shalom Wasserman.

- Notice of Motion
- Affirmation in Support
- Affidavit in Support
  - Exhibits A-B
- Memorandum of Law in Support
- Memorandum of Law in Opposition
- Affirmation in Reply
- Supplemental Memorandum of Law in Support
- Affidavit in Opposition

## **BACKGROUND**

On April 23, 2021, plaintiff Asher Klitnick (hereinafter plaintiff) commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's Office. On July 23, 2021, defendant Solomon Wanouno (hereinafter S. Wanouno) interposed and filed a verified answer with the KCCO. S. Wanouno's answer pled six denominated cross claims asserted against co-defendant Chava Wanouno (hereinafter C. Wanouno).

The plaintiff's verified complaint alleges thirty-two allegations of fact in support of a single cause of action for damages for personal injuries. The verified complaint alleges, among other things, the following salient facts. On February 7, 2021, the plaintiff was lawfully on certain property located in Lakewood, New Jersey (hereinafter the subject premises) owned by S. Wanouno and C. Wanouno. The plaintiff was caused to slip and fall at the subject premises and sustained serious and permanent injuries due to a dangerous condition. The dangerous condition

was caused by the negligence of the defendants and/or their agents in the ownership, operation, management, maintenance, and control of the subject premises.

On January 26, 2022, defendant/third party plaintiff C. Wanouno and S. Wanouno jointly commenced a third-party action against third party defendant Snow Services Plus Corporation d/b/a Snow Services Plus Inc. by filing a summons and third-party complaint with the KCCO.

On March 29, 2022, defendant/third party plaintiff C. Wanouno and S. Wanouno jointly commenced a fourth-party action against fourth-party defendants Shalom Wasserman (hereinafter Wasserman), Kyunghye Ahn (hereinafter Ahn) and Artesimo Garista by filing a summons and fourth-party complaint with the KCCO. The fourth-party complaint alleges the following salient fact. Fourth-party defendants Wasserman, Ahn, and Artemio Garista failed to maintain the subject premises pursuant to the lease. Furthermore, the fourth-party defendants are necessary and appropriate parties to this litigation, by virtue of their ownership, control, repair, maintenance of same, and/or by their breach of duty and/or by their negligence.

Fourth-party defendants Ahn, under motion sequence two, and Wasserman, under motion sequence three, have made the instant motions to dismiss in lieu of answering the fourth-party complaint.

## LAW AND APPLICATION

### *CPLR 3211(a)(8) Motion by Ahn*

Ahn claims that the Court lacks personal jurisdiction over him. The ultimate burden of proving a basis for personal jurisdiction rests with the party asserting jurisdiction (*Fanelli v Latman*, 202 AD3d 758, 759 [2d Dept 2022]). However, to defeat a motion pursuant to CPLR 3211(a)(8) to dismiss for lack of personal jurisdiction, a plaintiff need only make a prima facie

showing that personal jurisdiction exists (*Aybar v US Tires & Wheels of Queens, LLC*, 211 AD3d 40, 49 [2d Dept 2022]). When considering the motion, the facts alleged in the complaint and affidavits in opposition to such a motion to dismiss are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in favor of the plaintiff (*Fanelli*, 202 AD3d at 759).

Under New York's long-arm statute, a court may exercise personal jurisdiction over any non-domiciliary, who in person or through an agent transacts any business within the state (CPLR 302[a][1]), regardless of whether that non-domiciliary has entered New York State (*see Fischbarg v Doucet*, 9 NY3d 375 at 380 [2007]). To determine whether personal jurisdiction exists under CPLR 302(a)(1), a court must determine first whether the defendant transacted business in New York and, if so, and secondly whether the cause of action asserted arose from that transaction (*Leuthner v Homewood Suites by Hilton*, 151 AD3d 1042, 1043 [2d Dept 2017]).

Whether a defendant has transacted business within New York is determined under the totality of the circumstances, and rests on whether the defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws (*see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 338 [2012]). Further, to satisfy the second prong of the jurisdictional inquiry, there must be an articulable nexus, or a substantial relationship, between a defendant's in-state activity and the cause of action asserted (*Leuthner*, 151 AD3d at 1043–1044).

Here, accepting the factual allegations in the complaint as true and construing them in the light most favorable to the fourth-party plaintiffs, they failed to make a prima facie showing that Ahn was subject to personal jurisdiction in New York (*see Paterno v Laser Spine Inst.*, 24 NY3d 370, 378 [2014]). The fourth-party complaint alleges that the plaintiff was caused to trip and fall

due to an alleged dangerous condition at the subject premises in Lakewood, New Jersey, leased by fourth-party defendants Wasserman, Ahn, and Artemio Garcia. It further alleges that the fourth-party defendants had a duty to maintain the subject premises according to the lease and were negligent and failed to maintain the subject premises according to the lease.

Thus, the fourth-party plaintiffs have failed to sufficiently allege that Ahn projected himself into New York and purposefully availed himself of the benefits and protections of New York's laws governing tenants. Furthermore, personal jurisdiction over Ahn was not conferred pursuant to CPLR 302 (a)(3) based upon alleged tortious activity occurring outside New York (*see Penguin Group [USA] Inc. v American Buddha*, 16 NY3d 295, 302 [2011]). There is no dispute that the situs of the accident and the injury is in New Jersey (*see Bloomgarden v Lanza*, 143 AD3d 850, 852 [2d Dept 2016]). Furthermore, the record does not demonstrate that Ahn regularly did or solicited business or engaged in any other persistent course of conduct in New York as required by CPLR 302(a)(3)(i). Accordingly, the motion by Ahn to dismiss the Fourth-party complaint asserted against him pursuant to CPLR 3211(a)(8) is granted.

***CPLR 3211(a)(8) Motion by Wasserman***

Robert Sernerad, fourth-party plaintiff's process server (hereinafter Sernerad), averred in his affidavit of service that he served the summons and fourth-party complaint, and certain discovery demands on Wasserman as follows. Sernerad made three unsuccessful attempts to personally serve Wasserman at his home located at a specific two-story residence in Lakewood, New Jersey. The first attempt at service was made on April 4, 2022, at 9:27 a.m.; the second was made on April 8, 2022, at 7:34 a.m.; and the third was made on April 13, 2022, at 6:05 p.m. Thereafter on April 19, 2022, at 10:58 a.m., Sernerad affixed a copy of the papers to a glass panel on a brown wooden door at the residence; he then mailed a copy of the same papers

addressed to Wasserman at the same address on April 19, 2022, and then filed the affidavit of service with the KCCO on May 13, 2022.

There is no dispute that service was attempted pursuant to CPLR 308 (4). However, a plaintiff may only resort to service pursuant to CPLR 308 (4) where service pursuant to CPLR §§ 308(1) and (2) cannot be made with due diligence (*Faruk v Dawn*, 162 AD3d 744, 745 [2d Dept 2018], citing *County of Nassau v Lotosky*, 34 AD3d 414 [2d Dept 2006]). This requirement must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received (*id.*). All three of the plaintiff's attempts at service on the defendant were made on a weekday, during normal business hours when it could reasonably have been expected that the defendant would either be working or be in transit to or from work (*County of Nassau v Yohannan*, 34 AD3d 620, [2d Dept 2006], citing *Earle v Valente*, 302 AD2d 353, [2d Dept, 2003]).

To satisfy the due diligence requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment (*Serraro v Staropoli*, 94 AD3d 1083, 1085 [2d Dept 2012]). Moreover, there is nothing in the record to indicate that the process server made any attempt to inquire of neighbors as to the Wasserman's working habits (*County of Nassau v Yohannan*, 34 AD3d at 620, citing *Walker v Manning*, 209 AD2d 691 [2d Dept 1994]). Under these circumstances, the attempted service of the summons and complaint herein pursuant to CPLR 308 (4) was defective as a matter of law, and jurisdiction was not acquired over defendant Wasserman (*Faruk*, 162 AD3d at 745). Having failed to demonstrate the exercise of due diligence before attempting service of the summons and fourth-party complaint pursuant to CPLR 308 (4), the complaint as asserted

against fourth-party defendant Shalom Wasserman must be dismissed for lack of personal jurisdiction.

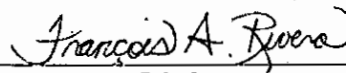
### CONCLUSION

The motion by fourth-party defendant Kyunghye Ahn for an order pursuant to CPLR 3211(a)(8) dismissing the complaint on the grounds that the Court does not have personal jurisdiction over him is granted.

The motion by fourth-party defendant Shalom Wasserman for an order pursuant to CPLR 3211(a)(8) dismissing the complaint on the grounds that the Court does not have personal jurisdiction over him is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

  
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J.S.C.