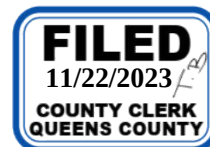


De Rosa v Tebele
2023 NY Slip Op 35292(U)
November 17, 2023
Supreme Court, Queens County
Docket Number: Index No. 710381/2021
Judge: Maurice E. Muir
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



MAURIZIO DE ROSA,

Plaintiff

-against-

HERNAN TEBELE and BALTEBE LLC,

Defendants.

IAS Part – 42

Index No.: 710381/2021

Motion Date: 5/18/23

Motion Cal. No. 14

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by Hernan Tebele (“Mr. Tebele”) and Baltebe, LLC (“Baltebe”) (collectively, the “defendants”) for an order: (1) dismissing Plaintiff’s complaint for lack of personal jurisdiction and incorrect party; (2) granting summary judgment on behalf of Defendants due to the lack of any triable issues of fact; or (3) dismissing this action on the grounds of forum non conveniens; and (4) granting such other relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-memo of Law-Service.....	EF 09 - 23
Affidavit in Opposition.....	EF 24
Memorandum of Law in Support of Motion.....	EF 25

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages based upon an alleged breach of contract by the defendants in connection with conducting a pizza restaurant at Hotel Clasico (“Hotel Clasico”) in Buenos Aires, Argentina. As a result, on May 6, 2021, the plaintiff commenced the instant action; and on July 5, 2021, issue was joined wherein the defendants interposed an answer. Now the defendants seek the above-described relief. In particular, the defendants argue that the restaurant is in Buenos Aires, as well as the witnesses, Mr. Tebele and Mr. De Rosa. Moreover,

the defendants argue that underlying events happened in Buenos Aires. Lastly, the defendants argue that this Court would be unnecessarily burdened considering potential scheduling difficulties or translation issues related to foreign parties, witnesses, and documents.

From the onset the courts finds that the plaintiff failed to establish that he properly served the summons and complaint upon the defendants as required by law. In fact, the plaintiff failed to either provide the court or file a copy of the affidavit of service with the clerk of the court. “CPLR § 308(2) provides, in pertinent part, that personal service may be made upon a defendant by delivery of the summons upon “a person of suitable age and discretion at the actual place of business . . . of the person to be served and by . . . mailing the summons by first class mail to the person to be served at his or her actual place of business . . . , such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing.” A court lacks personal jurisdiction over a defendant, who is not properly served with process (*see National Mtge., LLC v. Esdelle*, 186 AD3d 1384, 1386 [2d Dept 2020]; *Krisilas v. Mount Sinai Hosp.*, 63 AD3d 887, 990 [2d Dept 2009]). When it is determined that process was ineffective, all subsequent proceedings are rendered null and void as to that party (*see National Mtge., LLC v. Esdelle*, 186 AD3d at 1386; *Krisilas v. Mount Sinai Hosp.*, 63 AD3d at 889). Further, service of process upon a natural person must be made in strict compliance with the methods of service set forth in CPLR § 308 (*see Bank of Am. N.A. v. Genzler*, 188 AD3d 634, 646 [2d Dept 2020]; *Indymac Fed. Bank, FSB v. Jones*, 173 AD3d 702, 705 [2d Dept 2019]). Service of process under CPLR § 308, which is at issue here, requires that the summons be delivered within the state to a person of suitable age and discretion at the defendant's “actual place of business, dwelling place or usual place of abode,” along with a mailing of the summons to the defendant's last known residence or actual place of business. Personal jurisdiction is not acquired absent compliance with both the delivery and mailing requirements of the statute (*see Wells Fargo Bank, N.A. v. Heaven*, 176 AD3d 761, 761 [2d Dept 2019]; *Washington Mut. Bank v. Murphy*, 127 AD3d 1167 [2d Dept 2015]). Here, the court finds that the plaintiff failed to serve the summons and complaint upon the defendant as required CPLR § 308(a). As such, dismissal is warranted. (*Wills v. NYPD Holding, Inc.*, 165 AD3d 1311 [2d Dept 2018]; *Purzak v. Long Is. Hous. Servs., Inc.*, 149 AD3d 989 [2d Dept 2017]; *Qing Dong v. Chen Mao Kao*, 115 AD3d 839 [2d Dept 2014]).

More importantly, the plaintiff failed to establish that the instant action should be litigated in the United States. “The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that ‘in the interest of substantial justice the action should be heard in another forum’ ” (*Wild v. University of Pennsylvania*, 115 AD3d 944 [2d Dept 2014] citing *National Bank & Trust Co. of N. Am. v. Banco De Vizcaya*, 72 NY2d 1005 [1988]; CPLR § 327(a); see *Xiu Zhang Yin v. Bennett*, 78 AD3d 936 [2d Dept 2010]). “On a motion to dismiss on the ground of forum non conveniens, the burden is on the movant to demonstrate the relevant private or public interest factors that militate against a New York court's acceptance of the litigation” (*Turay v. Beam Bros. Trucking, Inc.*, 61 AD3d 964 [2d Dept 2008]; see *Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474 [1984] cert. denied 469 US 1108 [1985]; *Matter of Oxycotin II*, 76 AD3d 1019, 1020-1021 [2d Dept 2010]). “Among the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses including, especially, nonparty witnesses, the availability of an alternative forum, the situs of the underlying actionable events, the location of evidence, and the burden that retention of the case will impose upon the New York courts” (*Turay v. Beam Bros. Trucking, Inc.*, 61 AD3d at 966; *Islamic Republic of Iran v. Pahlavi*, 62 NY2d at 479; *Xiu Zhang Yin v. Bennett*, 78 AD3d at 936; *Smolik v. Turner Constr., Co.*, 48 AD3d 452 [2d Dept 2008]).

Here, the court granted the that branch of the defendants’ motion which was to dismiss the complaint on the ground of forum non conveniens is also granted. The fact that the witnesses and evidence are located in Buenos Aires, the fact that Buenos Aires is the situs of the underlying events, the availability of Buenos Aires as an alternative forum, and the burden on the New York courts of retaining a case to which it does not have a substantial nexus militate in favor of dismissal of the action on the ground that Buenos Aires is the more convenient forum. (see (*Turay v. Beam Bros. Trucking, Inc.*, 61 AD3d at 966; *Xiu Zhang Yin v. Bennett*, 78 AD3d at 936; *Smolik v. Turner Constr., Co.*, 48 AD3d 452 [2d Dept 2008]; *Rosenberg v. Stikeman Elliott, LLP*, 44 AD3d 840 [2d Dept 2007])).

The defendants’ remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, it is hereby

ORDERED, that branch of the defendants’ motion to dismiss the complaint based upon doctrine of forum non conveniens, is granted; and it is further,

ORDERED, that branch of the defendants' motion, pursuant to 3211(a)(8), is granted;
and it is further,

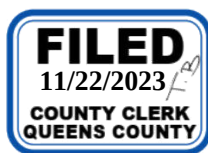
ORDERED, that the complaint is dismissed, without prejudice; and it is further,

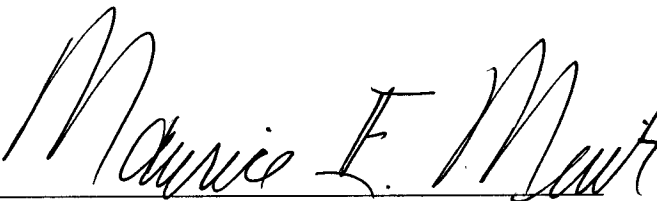
ORDERED, that the defendants shall serve a copy of this Order with Notice of Entry
upon all plaintiff on or before December 15, 2023.

The foregoing constitutes the decision and order of the court.

Dated: November 17, 2023

Long Island City, New York




MAURICE E. MUIR, J.S.C.