

A1 Buying & Selling House LLC v 1362 Pac. LLC

2024 NY Slip Op 32553(U)

July 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 537335/2022

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 15th day of July, 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
AI BUYING AND SELLING HOUSE LLC,

Index No.: 537335/2022

Plaintiffs,

-against-

DECISION AND ORDER

1362 PACIFIC LLC and
SERPICO, SERPICO & SIDDIQUI, P.C.,
AS ESCROWEE,

Defendants.
-----X

The following e-filed papers considered herein:

NYSCEF Doc. Nos.

Motion Seq. No. 2

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Motion Seq. No. 3

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Upon the foregoing papers, Defendant 1362 Pacific LLC (“1362 Pacific”) moves for an order, pursuant to CPLR 3211 (a) (8) and 306-b, dismissing Plaintiff AI Buying and Selling House LLC’s (“Plaintiff”) action due to lack of service of the summons and complaint and lack of personal jurisdiction over 1362 Pacific (Mot. Seq. No. 2).

Plaintiff moves, pursuant to CPLR 2221, for leave for reargument, renewal and clarification of an order dated April 13, 2023, which granted 1362 Pacific and Serpico, Serpico & Siddiqui, P.C., as Escrowee’s (the “Serpico Firm”) (collectively, “Defendants”) motion to dismiss (Mot. Seq. No. 1) the

third cause of action against the Serpico Firm (Mot. Seq. No. 3). Defendant 1362 Pacific opposes the motion as untimely and without merit. Plaintiff further cross-moves to extend time to file the summons and complaint on 1362 Pacific (Mot. Seq. No. 4). In opposition, 1362 Pacific contends that Plaintiff failed to demonstrate either good cause or that the interests of justice require an extension.

This matter arises out of a failed real estate transaction. In its complaint, Plaintiff alleged that 1362 Pacific owned certain property located at 1362 Pacific Street in Brooklyn, New York (the "Property"). In May 2022, Plaintiff alleged that it entered into a contract with 1362 Pacific for the purchase of the Property. Pursuant to the contract of sale, Plaintiff claims that its \$125,000 deposit was placed in escrow with 1362 Pacific's attorney Serpico, Serpico & Siddiqui, P.C. Plaintiff alleges that when its multiple attempts to schedule the closing were ignored by 1362 Pacific, it sent a "time is of the essence" letter, scheduling the closing for September 19, 2022. Plaintiff claims that 1362 Pacific's attorney rejected the letter and failed to provide an alternative date. According to Plaintiff, 1362 Pacific scheduled the closing on November 29, 2022, without Plaintiff's consent or approval of further adjournment. Plaintiff rejected the November 29th closing, citing to certain outstanding items as evidence that 1362 Pacific was not ready to close. Plaintiff further asserts that 1362 Pacific has refused to return its deposit despite 1362 Pacific's willful default in the performance of the contract and that it should have a vendee's lien against the Property for the amount of the downpayment and interest. In its complaint Plaintiff sues Defendants for breach of contract; declaratory judgment; and (3) attorney's fees. In addition, Plaintiff asserts a breach of contract and/or breach of fiduciary duty cause of action as against the Serpico Firm.¹

In Motion Sequence No. 2, 1362 Pacific moves to dismiss, on the grounds that Plaintiff did not (i) serve the summons and complaint; (ii) attempt to serve the summons and complaint; (iii) file proof of service upon 1362 Pacific; or (iv) seek leave to extend time to serve prior to the expiration of the initial 120 days from the date of filing. Defendant 1362 Pacific asserts that the affidavits of service filed as NYSCEF Document Nos. 9 and 10 indicate that the summons and complaint were served on the Serpico Firm. Though one of the affidavits includes the handwritten notation "c/o 1362 Pacific

¹ Defendants moved by order to show cause for an order cancelling the Notice of Pendency and dismissing this cause of action against the Serpico Firm (Mot. Seq. No. 1). By order dated April 13, 2023, the Court found that the cancellation of the Notice of Pendency had been rendered moot due to Plaintiff's voluntary cancellation of same and dismissed the third cause of action, as violative of the Safe Harbor Provisions of Judiciary Law § 497 (5) (NYSCEF Doc No. 31). Judiciary Law § 497 (5) provides as follows: "No attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys to an IOLA account pursuant to a judgment in good faith that such moneys were qualified funds" (Judiciary Law § 497 [5]). The order also held that the Serpico Firm was to continue to hold the down payment in escrow until there was a stipulation by the parties or an order or judgment of the Court (NYSCEF Doc No. 31).

LLC,” 1362 Pacific contends that on its face this affidavit does not purport to attest to service upon a limited liability company. Even if it did, 1362 Pacific maintains that the method of service described in the affidavit does not make out a prima facie showing of service upon a limited liability company pursuant to CPLR 311-a.

In its opposition, Plaintiff avers that this is Defendants’ second, belated motion seeking dismissal of the action based on lack of personal jurisdiction and it is asserted after 1362 Pacific already appeared in this action by filing the order to show cause to remove the notice of pendency. Moreover, Plaintiff argues that 1362 Pacific was served by delivering the summons and complaint to John Serpico at the address listed for notices in the contract of sale. Plaintiff further argues that the summons and complaint were mailed and delivered to Isaac Azaria, the sole member of 1362 Pacific. In support of its opposition, Plaintiff includes a “corrected” affidavit of service.

In reply, the Serpico Firm first points out that Plaintiff’s affirmation in support of its first motion (Mot. Seq. No. 3) and its second motion (Mot. Seq. No. 4) improperly included opposition to the instant motion (Mot. Seq. No. 2). With respect to Plaintiff’s argument that 1362 Pacific waived its jurisdictional defense, the Serpico Firm notes that 1362 Pacific never previously filed a motion to dismiss or interposed an answer and therefore, there was no waiver. In addition, the Serpico Firm argues that 1362 Pacific has not actively participated in this litigation. The Serpico Firm contends that Plaintiff had not yet attempted service on 1362 Pacific when it filed the order to show cause. The Serpico Firm avers that service on 1362 Pacific was not proper by leaving a copy of the summons and complaint at the office of the Serpico Firm, attorneys for 1362 Pacific. The Serpico Firm further claims that although the contract of sale provided that service of notices under the contract must be made to Isaac Azaria with a copy to the Serpico Firm, Plaintiff’s assertion that service upon 1362 Pacific was authorized, under the contract, by serving its attorney, the Serpico Firm, is incorrect since service of pleadings are not governed by contract notice provisions. The Serpico Firm also asserts that Plaintiff’s submission of a “corrected” affidavit of service is impermissible and is still defective. According to the Serpico Firm, the first affidavit of service was defective because it failed to include the proper name of the party Plaintiff claims it attempted to serve. The second affidavit, the Serpico firm argues, failed to include the address where service was purportedly attempted. The entirety of Plaintiff’s opposition rests on the proposition that service was properly effectuated upon 1362 Pacific through the Serpico Firm. Since service on the Serpico Firm was not authorized under the CPLR or the New York Limited Liability Law, the Serpico Firm claims that Plaintiff has not rebutted its prima facie showing of entitlement to dismissal for lack of jurisdiction.

In Motion Sequence No. 3, Plaintiff seeks clarification of the Court's April 13, 2023 order (the "April Order") dismissing the third cause of action against the Serpico Firm. The branch of Plaintiff's motion seeking leave to renew stems from Plaintiff's subsequent filing of an amended complaint² and Defendants' rejection of the amended complaint. Plaintiff argues that Defendants' contention that the entire action was dismissed against the Serpico Firm is at odds with the April Order. Instead, Plaintiff avers that the April Order did not dismiss the other three causes of action against Defendants. Accordingly, Plaintiff further seeks to compel Defendants to accept the amended complaint. Plaintiff maintains that in Motion Sequence No. 1, Defendants did not include arguments to support dismissal of the breach of contract action against the Serpico Firm. Plaintiff asserts that it filed the amended complaint prior to Defendants' time to answer the complaint had expired. However, Plaintiff seeks leave to amend the complaint under CPLR 3025 (b) and argues that Defendants would not be prejudiced.

In opposition, the Serpico Firm argues that Plaintiff's motion seeking reargument and/or clarification is untimely because it was made more than sixty days after service of the April Order with Notice of Entry. The Serpico Firm further argues that the motion is without merit because in its order to show cause, it sought to dismiss the entire third cause of action and all claims interposed against it. Thus, the Serpico Firm asserts that Plaintiff's notion that the order to show cause was only directed to the breach of fiduciary claim is incorrect. The Serpico Firm further alleges that Plaintiff has improperly attempted to interpose direct causes of action against it. With respect to the portion of Plaintiff's motion seeking leave to renew, the Serpico Firm argues that not only did Plaintiff present no argument in support of renewal but also that the basis for renewal—the amended complaint—is untenable since the prior motion and April Order were directed at the complaint. In addition, the Serpico Firm contends that Plaintiff's filing of the amended complaint disregards the April Order since it attempts to interpose the same causes of action this Court ruled were improper. Thus, the Serpico Firm argues that the proposed amendment is devoid of merit and is barred by *res judicata*.

In its reply, Plaintiff asserts that its motion is timely since it was filed ten days after the last conference before the Court on June 15, 2023, when the Court allegedly requested that the Plaintiff file a motion to clarify. Plaintiff further contends that the April Order contained no language reflecting the dismissal of the entire complaint against the Serpico Firm. Plaintiff avers that 1362 Pacific sold the Property and Plaintiff is unaware of any other assets held by it. According to Plaintiff, dismissal of the complaint would thus cause Plaintiff undue hardship and would be prejudicial.

² In the amended complaint, Plaintiff asserts two new causes of action against the Serpico Firm: as nominal holder and for breach of implied covenant of good faith and fair dealing (NYSCEF Doc No. 49). Plaintiff further asserts a new cause of action against Defendants for violation of General Business Law § 349 (*id.*).

In Motion Sequence No. 4, Plaintiff cross-moves, as a “precaution,” for leave to extend the time to serve the summons and complaint on 1362 Pacific. Plaintiff argues that 1362 Pacific was properly served and that it waived any jurisdictional defense; however, if the Court finds that 1362 Pacific was not served Plaintiff seeks thirty days to serve the entity through the New York Secretary of State. Pursuant to CPLR 306-b, Plaintiff argues that it has “good cause” since John Serpico was served and the “interest of justice standard apply [*sic*].”

In opposition to the cross-motion, the Serpico Firm argues that while Plaintiff asserts that it met both standards for extension of time pursuant to CPLR 306-b, Plaintiff did not provide any actual argument in support of its claim. The Serpico Firm contends that the only attempt at service upon 1362 Pacific occurred when Plaintiff’s counsel personally delivered a copy of the summons and complaint to the receptionist at the office of the Serpico Firm. The Serpico Firm further contends that it is not a registered agent or designated recipient for service of process on 1362 Pacific. Moreover, the Serpico Firm argues that proof of mailing was not only “improperly submitted in [its] second set of opposition papers,”³ but it was also unavailing because the CPLR does not provide for service on a limited liability company by mail. The Serpico Firm also asserts that Plaintiff did not timely move for the extension and instead waited more than four months after being advised of non-service and seven months after the statutory 120-day period for service had expired.

Plaintiff argues in reply that 1362 Pacific has already appeared in this action and did not raise the issue of jurisdiction in its order to show cause or conference before the Court. Plaintiff cites to the affirmation of counsel stating that he is counsel of 1362 Pacific *and* the Serpico Firm. Moreover, Plaintiff points to counsel’s proposed order in which he lists one of the reliefs sought as dismissal of the third cause of action against the Serpico Firm. Plaintiff further argues that the manner of service was sufficient pursuant to the terms of the contract. Plaintiff contends that dismissal of the complaint would result in 1362 Pacific reaping a windfall.

A day after filing its reply to Motion Sequence Nos. 3 and 4, Plaintiff submitted a self-described “supplemental affirmation in further support of the motion.”⁴ In this supplemental affirmation, Plaintiff contends that the Department of State website lists the address for service of process on 1362 Pacific as “C/O John Serpico, at SERPICO, SERPICO & SIDDIQUI, P.C.” at the same address; thus, Plaintiff claims that service was effectuated. Plaintiff also filed as an exhibit a purported printout from this

³ The Serpico Firm asserts that in Plaintiff’s affirmation in support of its cross-motion, Plaintiff (1) devoted only two paragraphs in support of the request for CPLR 306-b relief; (2) included further unauthorized opposition to the Serpico Firm’s motion (Mot. Seq. No. 2); and (3) incorporated additional arguments in reply to 1362 Pacific’s opposition to and in further support of Motion Sequence No. 3.

⁴ On its face, the supplemental affirmation relates to Motion Sequence Nos. 2 and 4 (NYSCEF Doc No. 70).

website. At the outset, the Court notes that it will not consider Plaintiff's "alleged documentary proof as it was submitted in counsel's self-entitled [supplemental affirmation], which was, in effect, an improper sur-reply" (*Flores v Stankiewicz*, 35 AD3d 804, 805 [2d Dept 2006] [internal citations omitted]; see also *McMullin v Walker*, 68 AD3d 943, 944 [2d Dept 2009], citing *Flores*; *Ostrov v Rozbruch*, 91 AD3d 147, 155 [1st Dept 2012] ["Supplemental affirmations however, should be sparingly used to clarify limited issues, and should not be utilized as a matter of course to correct deficiencies in a party's moving or answering papers."]).

Following oral argument on November 29, 2023, the Court reserved decision on Motion Sequence Nos. 2 and 4. With respect to Motion Sequence No. 3, the Court found that the April Order was self-explanatory in that it directed that (i) the third cause of action was dismissed pursuant to Judiciary Law § 497 (5) and (ii) the monies in the escrow account will be paid out upon order of the Court or stipulation of the parties. While the April Order states that only the third cause of action was dismissed, Plaintiff has no viable cause of action against the Serpico Firm, the escrow agent. Plaintiff's alleged damages flow from the alleged breach of contract by 1362 Pacific. Thus, the portion of Plaintiff's motion seeking clarification is deemed moot and the portion seeking an order compelling the amended complaint is granted only to the extent that the new causes of action are asserted as against 1362 Pacific only.

The Court now turns to Motion Sequences Nos. 2 and 4, which relate to service of the summons and complaint. On the one hand, 1362 Pacific argues that the summons and complaint should be dismissed because it was not served. On the other hand, Plaintiff seeks an extension of time to perfect service.

Pursuant to CPLR 311-a, personal service on a domestic or foreign limited liability company:

"shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant."

This provision also provides that service may be made pursuant to article three of the limited liability company law (*id.*). "Limited Liability Company Law § 303 provides that the Secretary of State is the statutory agent for service of process for domestic limited liability companies" (*Evans v City of Mt. Vernon*, 163 AD3d 770, 772 [2d Dept 2018]).

“The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process” (*Bankers Tr. Co. of California, N.A. v Tsoukas*, 303 AD2d 343, 343 [2d Dept 2003]). Here, Plaintiff concedes that it did not serve 1362 Pacific through the Secretary of State. Even if Plaintiff mailed a copy of the summons and complaint to Mr. Azaria, this method of service does not comply with CPLR 311-a. Further, assuming arguendo that Plaintiff’s printout of the Secretary of State’s website was properly submitted and admissible, the printout clearly lists in bold print the Serpico Firm address as the “Post Office address to which the *Secretary of State* shall mail a copy of any process against the corporation served upon the Secretary of State by personal delivery” (emphasis added). Accordingly, the Court finds that Plaintiff did not properly serve 1362 Pacific and the question now turns to whether waiver of jurisdictional and service defenses occurred by the filing of the order to show cause.

“[A] party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction” (*Skyline Agency v Ambrose Coppotelli*, 117 AD2d 135, 140 [2d Dept 1986]). This is true whether the attorney filed a formal notice of appearance or not (*see Am. Home Mtge. Servicing, Inc. v Arklis*, 150 AD3d 1180, 1181-1182 [2d Dept 2017]; *Sabr Mtge. Loan 2008-1 REO Subsidiary-1 LLC v Murillo*, 2020 NY Slip Op 33924[U], *4 [Sup Ct, Suffolk County 2020]). “An appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon that defendant, and, in the absence of an objection to jurisdiction by way of a motion or answer, the appearance confers personal jurisdiction over that defendant” (*U.S. Bank N.A. v Jong Shin*, 224 AD3d 933, 935 [2d Dept 2024]; *see* CPLR 320 [b], 321 [e]). This appearance may be formal or informal (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1010 [2d Dept 2020]). An informal appearance “comes about when the defendant, although not having taken any of the steps that would officially constitute an appearance under CPLR 320 (a), nevertheless participates in the case in some way relating to the merits” (*id.* at 1009, quoting David D. Siegel & Patrick M. Connors, *New York Practice* § 112 [6th ed, 2018]).

The Serpico Firm argues that 1362 Pacific did not previously move to dismiss the action against it and thus, no waiver occurred. Moreover, since Plaintiff had not attempted service on 1362 Pacific at the time the order to show cause was filed, the Serpico Firm argues that the issue of personal jurisdiction did not need to be addressed since it had not been obtained in the first place. The Court disagrees. The Second Department has held that “an informal appearance may occur even where the defendant is not served with process” (*Travelon, Inc. v Maekitan*, 215 AD3d 710, 712 [2d Dept 2023] [internal citations omitted]). An informal appearance may occur where a party opposes a motion for a preliminary injunction (*id.*). It logically follows that where a defendant moves for affirmative relief

by order to show cause it also makes an informal appearance. Here, Defendants were represented by the same counsel who moved to dismiss a cause of action against the Serpico Firm and also sought affirmative relief (i.e., the cancellation of the Notice of Pendency) on behalf of 1362 Pacific. Thus, the jurisdictional defense should have been raised and preserved in 1362 Pacific's papers. Since it was not, 1362 Pacific LLC's jurisdictional defense was waived.

Accordingly, it is hereby

ORDERED, that Defendant 1362 Pacific LLC's motion to dismiss (Mot. Seq. No. 2) is denied; and it is further

ORDERED, that the portion of Plaintiff's motion (Mot. Seq. No. 3) seeking clarification is denied as moot and the portion seeking to compel Defendants to accept the amended complaint is granted only to the extent that the amendments include causes of action against Defendant 1362 Pacific only; and it is further

ORDERED, that Plaintiff's cross-motion for an extension of time to serve Defendant 1362 Pacific LLC (Mot. Seq. No. 4) is denied as moot; and it is further

ORDERED, that Defendants are directed to file an answer within 30 days of Notice of Entry of this order.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice