

Romano v Rizzotto
2024 NY Slip Op 35287(U)
March 11, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 620567/2023
Judge: Jerry Garguilo
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E-FILE

SHORT FORM ORDER

INDEX NO. 620567/2023

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY****PRESENT:****HON. JERRY GARGUILO
SUPREME COURT JUSTICE****ORIG. RETURN DATE: 2/22/24
FINAL SUBMITTED DATE: 2/22/24
MOTION SEQ# 001, 002
001-MD
002-MD****BENEDETTO ROMANO,****Plaintiff,****-against-****ANTHONY RIZZOTTO,****Defendant.****ATTORNEY FOR PETITIONER
BARNES & BARNES PC
445 Broadhollow Road, Ste 226
Melville, NY 11747****ATTORNEY FOR RESPONDENT
DAVID BOLTON PC
666 Old Country Road, Ste 509
Garden City, NY 11530**

The Court has considered the following in consideration of its determination:

1. Notice of Motion (Mot. Seq. 001), Affidavits, Exhibits, (Doc 4 - 8)
2. Notice of Cross Motion (Mot. Seq. 002), Opposition to Motion, Affirmation, Exhibits (Doc. 11 - 15)
3. Affirmation in Opposition to Cross Motion, (Doc 16)

It is

ORDERED that the Defendant's motion (Mot. Seq. 001) pursuant to CPLR 305 (b) to dismiss the action is denied; and it is further

ORDERED that the Plaintiff's cross motion (Mot. Seq. 002) to amend the Summons with Notice pursuant to CPLR 305 (c) is denied as moot; and it is further

ORDERED that the Defendant is directed to serve and efile an answer within twenty days of this Order; and it is further

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ORDERED that counsel for the parties are directed to prepare and email a Preliminary Conference Order to the chamber of the undersigned prior to the next conference with clients on Thursday, May 9, 2024, at 10:30 a.m.

In this action, the Plaintiff seeks a judgment declaring that the Defendant is not a shareholder of Collision Ltd, that the Defendant is only entitled to the return of his initial \$200,000 investment and that the shares issued to the Defendant are null and void. The record reveals that after signing the Stockholders Agreement, the Defendant expressed to the Plaintiff that he did not wish to be restricted upon leaving employment, among other things. The Parties purportedly agreed to modify the Stockholders Agreement but never did so in writing. Subsequently, the Defendant went to work for a competitor and allegedly took customers from the Plaintiff. This action was commenced on February 15, 2024, by a Summons with Notice.

The subject Summons with Notice contains the following:

The nature of the action is: Claims for declaratory relief as to the rights of obligations of parties to a Stockholder Agreement, accounting, breach of agreement and corporate dissolution.

The relief sought is: Declaratory relief accounting and corporate dissolution.

The Defendant now moves to dismiss the Summons with Notice pursuant to CPLR 305 (b) on the ground that the Notice fails to describe the nature of the matter and relief sought. The Plaintiff cross-moves to amend the Summons with Notice pursuant to CPLR 305 (c).

In support, the Defendant contends that the Notice contains an insufficient description of the matter which requires dismissal of the action, citing *Drummer v Valeron Corp.* (154 AD2d 897, 546 NYS2d 52 [4th Dept 1989]). The Defendant further claims that the complaint does not include claims for declaratory relief as to the “rights of obligations of parties to a Stockholder Agreement, accounting, breach of agreement and corporate dissolution and it does not seek declaratory relief. Therefore, the Defendant states, the Notice does not provide sufficient notice of the claims being asserted in this action, resulting in the lack of jurisdiction.

In opposition, the Plaintiff cites *Darrow v Krzys*, 261 AD2d 778, 689 NYS2d 773 [3d Dept 1999]), which held that a liberal construction of the statutory requirement of the

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contents of the notice accompanying a summons served without a complaint is consistent with the general policy of the CPLR. The case also states that “absolute precision is not necessary, if the notice provides the defendant with basic information concerning the nature of the plaintiff’s claims and the relief sought” (*Id.*). The Plaintiff argues that the Notice sufficiently appraised the Defendant of the basic information concerning the nature of the Plaintiff’s claim and relief sought.

Pursuant to CPLR 305(b), what is required for the commencement of an action is the proper service of a summons, and the summons, when unaccompanied by a complaint, must itself or by an attachment furnish to the defendant basic information concerning the nature of plaintiff’s claim and the relief sought (see *Parker v Mack*, 61 NY2d 114, 115, 472 NYS2d 882 [1984]). Consequently, the “complete absence of the notice requirements contained in CPLR 305 (b) is a jurisdictional defect which renders the summons insufficient not only for the purposes of taking a default judgment, but also to obtain jurisdiction over the defendant and commence the action” (see *Frerk v Mercy Hospital*, 99 AD2d 504, 470 NYS2d 673 [2d Dept 1984], *affd* 63 NY2d 635; see also, *Farkas v Tarrytown Lumber, Inc.*, 133 AD2d 251, 519 NYS2d 49 [2d Dept 1987]).

Initially, this motion to dismiss is premature since a summons with notice is not a pleading pursuant to CPLR 3011. The statute provides that the Court may only review the complaint to determine whether there are factual allegations which satisfy the jurisdictional requirements of CPLR 3211 (a) (2) (see *NGH Assoc., Ltd. v United Parcel Serv., Inc.*, 17 Misc3d 746, 842 NYS2d 896 [NY Sup Ct Nassau County, October 1, 2007]).

In any event, the Summons with Notice adequately states the Plaintiff’s theory of recovery and sufficiently complies with CPLR 305 (b). That the Plaintiff omitted certain legal theories in the complaint is not fatal, as case law is more concerned with changing or adding legal theories in the Complaint that were not stated in the Notice (see *Flomenhaft v Finkelstein*, 44 Misc3d 1215(A, 997 NYS2d 668 (NY Sup. Ct. July 22, 2014)). Moreover, as the court held in *Fitzpatrick v Slagowitz*, (201 AD2d 614, 607 NYS2d 973 [2d Dept 1994]), the plaintiff’s failure to also set forth in the notice an additional theory arising from the same incident was not a jurisdictional defect since the verified complaint alleging an additional theory was served within one year of the incident. The Court finds the same circumstances to be present here and is constrained to deny the motion.

Inasmuch as the Defendant’s motion to dismiss has been denied, the Court denies the Plaintiff’s cross motion to amend the Summons with Notice as moot.

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Accordingly, it is

ORDERED that the Defendant's motion (Mot. Seq. 001) to dismiss the action pursuant to CPLR 305 (b) is denied; and it is further

ORDERED that the Plaintiff's cross motion (Mot. Seq. 002) to amend the Summons with Notice pursuant to CPLR 305 (c) is denied as moot; and it is further

ORDERED that the Defendant is directed to serve and efile an answer within twenty days of this Order; and it is further

ORDERED that counsel for the parties are directed to prepare and email a Preliminary Conference Order to the chambers of the undersigned prior to the next conference with clients on Thursday, May 9, 2024, at 10:30 a.m.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: March 11, 2024


HON. JERRY GARGUILO, JSC