Metro Chrysler Plymouth Inc. v Guadagno
2024 NY Slip Op 35363(U)
September 25, 2024
Supreme Court, Queens County
Docket Number: Index No. 712599/2023
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

PRESENT: **HON. PHILLP HOM** **PART 14**

Justice

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METRO CHRYSLER PLYMOUTH INC. D/B/A STAR CHRYSLER JEEP DODGE,

Plaintiff,

- v -

NICK GUADAGNO,

Defendant.

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INDEX NO. 712599/2023

MOTION DATE 02/22/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

Upon the foregoing documents, this pre-answer motion by defendant Nick Guadagno ("defendant"), seeking to dismiss plaintiff Metro Chrysler Plymouth Inc., d/b/a Star Chrysler Jeep Dodge's ("plaintiff"), complaint pursuant to CPLR 3211 (a) (1), (5), (7), and (8), and other relief, is determined as follows:

In its complaint, the plaintiff alleged that the defendant, while acting in his former capacity as sales manager and employee of plaintiff, committed multiple acts of fraud by arranging to buy vehicles owned by the defendant at such low costs that it was at a loss to the defendant, only to re-sell the same vehicles back to the defendant at a higher price than purchased. The plaintiff further alleges, that, in his capacity as sales manager, the defendant owed a fiduciary responsibility to the plaintiff, but instead enriched himself at the expense of the plaintiff. It is alleged that these actions violated not only the company policy requiring a partner in the company to approve of his transactions, but also his fiduciary duties owed to the plaintiff. The plaintiff contends that it was unaware of these fraudulent activities until less than two years prior to the commencement of this action.

CPLR 3211 (a) (8)

Defendant asserts lack of personal jurisdiction, claiming plaintiff failed to serve process in accordance with CPLR 308 (2), in that, after serving someone of suitable age and discretion, the plaintiff failed to file the proof of service within the time provided by statute. Ultimately, the affidavit of service was filed on October 25, 2023, although service upon a person of suitable age and discretion occurred on August 15, 2023, and the subsequent mailing occurred on September 1, 2023. Thus, the completion of service was not effectuated until the mailing on September 1, 2023.

CPLR 308 (2) authorizes, "[p]ersonal service upon a natural person ... by delivering the summons within the state to 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." CPLR 308 (2) further provides that "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."

"The failure to file timely proof of service does not constitute a jurisdictional defect (*see Weininger v. Sassower*, 204 AD2d 715, 716. [2d Dept 1994]). Rather, "[t]he failure to file proof of service is a procedural irregularity ... that may be cured by motion or *sua sponte* by the court in its discretion pursuant to CPLR 2004" (*Khan v. Hernandez,* 122 AD3d 802, 803 [2d Dept 2014].)" *Li v Joffe*, 210 AD3d 737, 738 [2d Dept 2022].)

Here, the defendant has not demonstrated any prejudice due to the late filing of the affidavit of service. Thus, the affidavit of service is deemed timely filed *nunc pro tunc*.

CPLR 3211 (a) (1)

A motion to dismiss under CPLR 3211 (a) (1) may only be granted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Interstate Home Loan Ctr., Inc. v United Mtge. Corp.*, 206 AD3d 708, 709 [2d Dept 2022]; *Gruber v Donaldsons, Inc.*, 201 AD3d 887, 888 [2d Dept 2022]). Such evidence must be unambiguous, authentic and of undisputed authenticity, such as judicial records, or documents reflecting out-of-court transactions such as mortgages, deeds, and contracts (*see 7 Mansion, LLC v. Calvano,* 226 AD3d 730, 731 [2d Dept 2024]).

The submissions of documentary evidence by the defendant, do not meet the documentary requirements necessary to comport to CPLR 3211 (a) (1) (*see Phillips*, 152 AD3d 806).

CPLR 3211 (a) (7)

Turning to the consideration of the motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory (*see Leon v Martinez,* 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc., v Analog Analytics, Inc.,* 149 AD3d 1003 [2d Dept 2017]). However, if it is shown that a material fact as claimed by the pleader is not a fact at all, dismissal is warranted (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]; *MJK Building Corp., v Fayland Realty Inc.*, 181 AD3d 860 [2d Dept 2020]; *Pinnacle Realty of New York, LLC, v 255 Butler, LLC*, 125 AD3d 952 [2d Dept 2015]).

CPLR 3013 provides that, "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material element of each cause of action or defense."

CPLR 3016 (b) states, "Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful deceit, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

Here, the plaintiff's complaint provides a conclusory summary of the scheme alleged, without providing any details, dates, or any particulars regarding the alleged fraud, breach of trust, or wilful deceit. The plaintiff has made a point of stating that it conducted its own investigation, and has brought suits against several other employees. The pleading requirements for specificity can be more lenient where it may be impossible at the time of pleading to ascertain the specific details of an overall scheme, however where it is not so abstruse, a modicum of specificity is required (*see Lanzi v Brooks*, 43 NY2d 778 [1977]; *Grumman Aerospace Corp, v Rice* 196 AD2d 572 [2d Dept 1993]). For this reason, it is not possible to ascertain whether discovery of the fraud was timely commenced, nor if, in fact, a "fraud, breach of trust or wilful deceit" has occurred at all.

In the amendment to *Lanzi*, 43 NY2d 778, the Court in *Lanzi v Brooks*, 43 NY2d 947 stated,

> "This determination is without prejudice to an application by the plaintiff to this court for leave to serve an amended complaint, such application to include a copy of the proposed amended complaint accompanied by a disclosure of the evidentiary facts which support the claim set forth in the proposed amended complaint and would justify the granting of such leave."

Therefore, the branch of the defendant's motion seeking dismissal of plaintiff's complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action for fraud, is granted without prejudice to the plaintiff to have the opportunity to serve and file a motion to amend its complaint pursuant to *Lanzi*.

It is unnecessary to reach CPLR 3211 (a) (5), at this time.

The court has considered the parties' remaining claims and finds them unavailing.

Accordingly, the motion is granted, however plaintiff is granted leave to move to amend its complaint pursuant to *Lanzi*, within thirty days of service of notice of entry of this order.

In accordance with the foregoing, it is **ORDERED** that the branch of the motion by defendant to dismiss the cause of action for fraud is granted, without prejudice to the plaintiff, to have the opportunity to serve and file a motion to amend its complaint pursuant to *Lanzi*, within thirty days of service of notice of entry of this order; and it is further

ORDERED that the remaining branches of the motion by defendant are denied;

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

ORDERED that plaintiff, Inc. shall serve, via NYSCEF, a copy of this Order with Notice of Entry, within ten (10) days from the date of entry.

This constitutes the Decision and Order of the Court.

Dated: September 25, 2024

PHILLIP HOM, J.S.C.

FILED
9/26/2024
COUNTY CLERK
QUEENS COUNTY