

Schmulewitz v Gray Jones Media U.S.

2025 NY Slip Op 31650(U)

March 31, 2025

Supreme Court, New York County

Docket Number: Index No. 655639/2024

Judge: Nicholas W. Moyne

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NICHOLAS W. MOYNE **PART** **41M**

Justice

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RONALD SCHMULEWITZ,

Plaintiff,

INDEX NO. 655639/2024

MOTION DATE 10/24/2024

MOTION SEQ. NO. 001

- v -

GRAY JONES MEDIA U.S., RICHARD JONES, ROBIN
GRAY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is

Plaintiff, Ronald Schmulewitz, commenced this action via summons with notice of motion for summary judgment in lieu of complaint against defendants, Gray Jones Media U.S., Richard Jones and Robin Gray, to recover amounts allegedly owed due to a breach of a Settlement Agreement. Schmulewitz seeks an order, pursuant to CPLR § 3213, granting summary judgment in his favor and against defendants in the amount of \$129,290.00, plus interest, costs, and attorneys’ fees. Although unopposed, the motion must be denied due to a lack of service and/or personal jurisdiction.

CPLR § 3213 provides that when an action is based upon an instrument for the payment of money only, such claims may “be brought on by ‘motion-action’ for summary judgment, bypassing pleading, motion and discovery delays” (*Schulz v Barrows*, 94 NY2d 624, 628 [2000] [internal citations omitted]). “The statute allows a plaintiff an expedited procedure for entry of a judgment by filing and service of a summons and a set of motion papers that contain sufficient evidentiary detail for the plaintiff to establish entitlement to summary judgment” (*Sea Trade*

Mar. Corp. v Coutsodontis, 111 AD3d 483, 484 [1st Dept 2013]). As “with a plenary action, jurisdiction is obtained over the [d]efendant by serving the [d]efendant with the summons, notice of motion and supporting papers in a method prescribed in CPLR Article 3” (*Alpine Capital Bank v Estate of Shiah*, 67 Misc 3d 1219[A] [Sup Ct 2020]). Further, even “[a]s the proponent of an unopposed motion for summary judgment in lieu of complaint, the plaintiff still [bears] the burden of establishing, inter alia, that the defendants were properly served with the summons and motion” (*TCA Glob. Credit Master Fund, L.P. v Puresafe Water Sys., Inc.*, 151 AD3d 1098, 1100 [2d Dept 2017]; see also *Cadle Co. v Ayala*, 47 AD3d 919, 920 [2d Dept 2008]).

Here, plaintiff’s motion must be denied due to the failure to demonstrate proper service of the summons, notice of motion or supporting papers on the corporate or individual defendants (*see Miller v 21st Century Fox Am., Inc.*, 180 AD3d 608, 608 [1st Dept 2020] [court properly denied plaintiff’s motion and sua sponte dismissed the complaint for lack of personal jurisdiction, as plaintiff failed to demonstrate proper service]). Considering this failure to offer any proof of service complying with the statutorily provided methods of process, “[i]n the absence of proper service, no personal jurisdiction was acquired over the defendants” (*Klein v Educ. Loan Servicing, LLC*, 71 AD3d 957, 958 [2d Dept 2010]; CPLR §§ 308, 311; Business Corporation Law § 306).

Nor has plaintiff provided proof that the defendants were served through any alternative methods, such as those plausibly agreed upon in the Settlement Agreement. Contracting parties are free to agree to means of service alternative to the statutorily required means (*People by Schneiderman v N. Leasing Sys., Inc.*, 60 Misc 3d 867, 879 [Sup Ct 2017], *affd as mod sub nom. People v N. Leasing Sys., Inc.*, 169 AD3d 527 [1st Dept 2019]). The Settlement Agreement provides that “[a]ll notices or communications under this Agreement shall be delivered by hand,

registered mail, certified mail (return receipt requested), e-mail, or overnight mail to the address of Schmulewitz's Counsel or Employer and Employer's Counsel, respectively” and provided the relevant addresses and email addresses (NYSCEF Doc. No. 4 ¶ 8).

However, while the summons and notice of motion include an email address for two of the three defendants, that email address is not the same as the one provided in the Settlement Agreement and there is no indication an email was either sent or received (*compare Korea Deposit Ins. Corp. v Jung*, 59 Misc 3d 442, 446 [Sup Ct 2017]). Additionally, while plaintiff’s counsel allegedly communicated with defendants’ counsel regarding the default(s) under the Agreement, those emails do not reference the intention to or the actual filing of this proceeding and the summons and notice of motion contain no mention of the defendants’ counsel. Therefore, there is nothing in the record to suggest that plaintiff completed service of these motion papers through any authorized or appropriate alternative means (*see Alfred E. Mann Living Tr. v ETIRC Aviation S.a.r.l.*, 78 AD3d 137, 141-142 [1st Dept 2010]; *Wynwood Capital Group LLC v Confluence Corp.*, 82 Misc 3d 1247[A] [Sup Ct 2024]). Accordingly, this lack of service of the summons and notice of motion deprives the court of personal jurisdiction (*Emirates Islamic Bank PJSC v NeoPharma LLC*, 84 Misc 3d 1217[A] [Sup Ct 2024]).

Additionally, the action must be dismissed as the motion’s return date fails to provide the defendants sufficient notice and/or time to appear (*Blue Lagoon, LLC v Reisman*, 214 AD3d 938, 941 [2d Dept 2023]). CPLR § 3213 provides that the minimum time such motion shall be noticed to be heard shall be as provided by CPLR § 320(a) for making an appearance, depending upon the method of service. Under CPLR § 320(a), if service was made by delivery to an official of the state authorized to receive service on defendants’ behalf or pursuant to CPLR § 308, an appearance shall be made within 30 days after service is complete. Service on a corporation is

complete when the papers are delivered to the authorized state official or authorized agent (*see* CPLR § 311; BCL § 306) and, under CPLR § 308, service on an individual is not complete until ten (10) days after filing proof of service with the clerk of the court. Considering that plaintiff has not demonstrated delivery of the papers to the secretary of state or an authorized agent nor filed proof of service with the clerk of the court, to date service has not been completed.

Therefore, the plaintiff set a return date for the motion that was prior to the expiration of time for defendants to appear, and defendants were not provided sufficient advance notice (*JMB Capital Partners Lending, LLC v Shin*, 74 Misc 3d 1209[A] [Sup Ct 2022]; *Alpine Capital Bank v Estate of Shiah*, 67 Misc 3d 1219[A] [Sup Ct 2020]). This failure to provide sufficient advance notice of the motion is a fatal jurisdictional defect that a court may not overlook, pursuant to CPLR § 2001 (*Segway of New York, Inc. v Udit Group, Inc.*, 120 AD3d 789, 792 [2d Dept 2014], relying on *Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010]; *Bhanti v Jha*, 140 AD3d 685, 686 [2d Dept 2016]; *Vazquez v Fifth Ave. Men's Suits LLC*, 80 Misc 3d 1226[A] [Sup Ct 2023]; *Alpine Capital Bank v Estate of Shiah*, 67 Misc 3d 1219[A] [Sup Ct 2020]).

Accordingly, it is hereby

ORDERED that motion for summary judgment in lieu of complaint by plaintiff Ronald Schmulewitz is DENIED, without prejudice; and it is further

ORDERED that the above-entitled action is dismissed in its entirety, without costs, for a lack of personal jurisdiction; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Court who is to directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

This constitutes the decision and order of the court.


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3/31/2025
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE