

Vox Funding, LLC v Empanada Maker Rests. Inc.
2025 NY Slip Op 35458(U)
January 21, 2025
Supreme Court, Nassau County
Docket Number: Index No. 602272/2024
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Supreme Court Justice

VOX FUNDING, LLC,

Plaintiff,

- against -

THE EMPANADA MAKER RESTAURANTS INC. d/b/a
THE EMPANADA MAKER MISSION VIEJO,
THE ELITE GROUP REAL ESTATE
PROFESSIONALS INC., BLUE RESTAURANT
& BAR, LLC, THE EMPANADA MAKER
FRANCHISING GROUP LLC and
CAMERON DAVIS a/k/a CAMERON MALIN DAVIS,

Defendants.

TRIAL/IAS PART 27
NASSAU COUNTY

Index No.: 602272/2024
Motion Seq. Nos.: 01, 02
Motion Dates: 07/11/2024
07/11/2024

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation, Memorandum of Law	<u>1</u>
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	<u>2</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants move (Seq. No. 01), pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiff's Verified Complaint.

Plaintiff opposes the motion (Seq. No. 01) and cross-move (Seq. No. 02), pursuant to CPLR § 306-b, for an order enlarging its time for service upon

defendants The Elite Group Real Estate Professionals Inc. and Blue Restaurant & Bar, LLC.

No opposition was submitted to the cross-motion (Seq. No. 02).

In support of defendants' motion (Seq. No. 01), their counsel submits, in pertinent part, that, "[t]his action was commenced on February 7, 2024, by Plaintiff filing a Summons and Complaint (herein 'Complaint') ..., pursuant to the Court's electronic filing system.

On March 18, 2024, I filed a Notice of Appearance and demand for service of the Complaint on behalf of all the Defendants.... On April 25, 2024, Plaintiff filed an Affidavit of Service for Defendant DAVIS stating Defendant DAVIS was served via substituted service by delivering the Complaint to the Defendant via nail and mail service at 101 Tivoli Lane, Lake Forest, CA 92630.... On May 2, 2024, Plaintiff filed an Affidavit of Non-Service for Defendant DAVIS stating Defendant DAVIS did not reside at 101 Tivoli Lane, Lake Forest, CA 92630 and therefore was not served.... On April 25, 2024, Plaintiff filed an Affidavit of Non-Service for Defendant BLUE. The Affidavit specifically states the Defendant was not served...

On April 25, 2024 Plaintiff filed an Affidavit of Service for Defendant FRANCHISING stating they served at 26131 La Paz Road # 83, Mission Viejo, CA 92691.... On April 25, 2024 Plaintiff filed an Affidavit of Service for Defendant MISSION VIEJO stating they served at 26131 La Paz Road # 83, Mission Viejo, CA 92691.... On May 9, 2024, Plaintiff filed an Affidavit of Non-Service for Defendant ELITE. The Affidavit specifically states the Defendant was not served.... Based on the filings by Plaintiff the only Defendants claimed to be effectively served in this matter are Defendants MISSION VIEJO and FRANCHISING. Therefore, dismissal is demanded for Defendants BLUE, ELITE and DAVIS for failure to obtain personal jurisdiction through valid service of process. All the named Defendants are residents of the State of California with no ties to the State of New York.

Plaintiff admits in paragraphs 2 through 6 of their Complaint that the Defendants are foreign entities and residents of the State of California.... Plaintiff's Complaint fails to allege how this Court maintains personal jurisdiction over the non-resident Defendants.

Plaintiff attached an Agreement to their (*sic*) Complaint and that Agreement does contain language stating New York law would be controlling and that New York would be considered an Acceptable Forum. The only problem is the Agreement is not executed by any of the Defendants and[,] therefore, Plaintiff cannot rely on the terms of that Agreement to establish personal jurisdiction in New York over these California residents, even once service was properly effectuated." *See* NYSCEF Document Nos. 1, 4 and 7-11.

Counsel for defendants further contends, in pertinent part, that, "Defendants are located outside the State of New York and are residents of the State of California. The Defendants do not have a residence or office within the State of New York and they derive no income and have no contacts within the State of New York. Plaintiff fails to allege how the Court has personal jurisdiction over the non-resident Defendants that were properly served. Assuming the Plaintiff was going to rely on the Agreement annexed to Complaint as Exhibit A, which contains jurisdiction terms for the State of New York, personal jurisdiction is still not obtained over any of the Defendants as the Agreement is not executed by any of the Defendants and therefore, none of the Defendants consented to the jurisdiction terms of the Agreement. The Defendant entities named are all foreign companies existing under the laws of the State of California. They are not registered or authorized to transact business in the State of New York. Plaintiff failed to serve Defendants BLUE, ELITE and DAVIS in accordance with CPLR § 308 or by any other method. Plaintiff allegedly served Defendants MISSION VIEJO and FRANCHISING but fails to establish how this Court maintains

personal jurisdiction over the California residents with no ties to the State of New York....

Should this Honorable Court find it does have personal jurisdiction over the Defendants and that Plaintiff has standing, then it is respectfully requested that Defendants' time to interpose an Answer be extended by thirty (30) days from the date of the Court's Order pursuant to CPLR § 2004."

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for plaintiff asserts, in pertinent part, that, "[o]n February 7, 2024, Plaintiff commenced this action by filing the Complaint and purchasing Index No. '602272/2024'.... On March 18, 2024, Defendants filed a Notice of Appearance.... On April 11, 2024, service of the Complaint upon Blue Restaurant was attempted. The corresponding Affidavit of Non-Service ... was filed on April 25, 2024.... On April 11, 2024, service of the Complaint upon Davis was attempted at 2298 Orange Avenue, #C, Costa Mesa, California 92627. The corresponding Affidavit of Non-Service ... was filed on May 2, 2024.... On April 12, 2024, Franchising Group was served with the Complaint. The corresponding Affidavit of Service ... was filed on April 25, 2024.... On April 12, 2024, Merchant was served with the Complaint. The corresponding Affidavit of Service ... was filed on April 25, 2024.... On April 15, 2024, service of the Complaint upon Elite Group was attempted. The corresponding Affidavit of Non-Service ... was filed on May 9, 2024.... On April 16, 2024, Davis was served with the Complaint at 101 Tivoli Lane, Lake Forest, California 92630. The corresponding Affidavit of Service ... was filed on April 25, 2024.... Defendants' Motion rests upon bald and unsubstantiated assertions that Plaintiff has failed to establish personal jurisdiction over the Defendants. Defendants agreed to the jurisdiction of New York courts and waived any and all objections to jurisdiction or venue.

Defendants Merchant, Franchising Group, and Davis were properly served.

While Plaintiff concedes that it was unable to serve Defendants Blue Restaurant and Elite Group within the statutory period, Plaintiff believes it has good cause and that it is in the interest of justice to enlarge the time to properly serve these Defendants.

Accordingly, for these reasons and those further set forth below, Defendants' Motion should be denied in its entirety and Plaintiff's Cross-Motion should be granted."

See Plaintiff's Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits A-F; NYSCEF Document No. 4.

Counsel for plaintiff further contends, in pertinent part, that, "New York courts have enforced valid forum selection clauses as a basis for personal jurisdiction over a nonresident defendant, unless enforcement of said clause would be 'unreasonable and unjust or that the clause is invalid because of fraud or overreaching'. [citations omitted]. In this case, the Agreement provides: Any suit, action or proceeding arising hereunder, or the interpretation, performance, or default of this Agreement, shall, if [Plaintiff] so elects, be **instituted in any court sitting in New York**, (the 'Acceptable Forums'). Merchant agrees that the Acceptable Forums are convenient to it and **submits to the jurisdiction of the Acceptable Forums and waives any and all objections to jurisdiction or venue....** (emphases added). Accordingly, Defendants have waived any and all objections to Nassau County as an acceptable forum and the Agreement that Defendants agreed to explicitly allows for this Court to maintain personal jurisdiction over the Defendants. In Defendants' Motion, Defendants' counsel repeatedly makes false claims that Defendants did not execute the Agreement. Defendants' claims are not made by anyone with personal knowledge and unsubstantiated by any support. These claims are flatly contradicted by

the documentary evidence submitted by Plaintiff, including the Agreement executed by Cameron Davis in his capacity both as owner of the Merchant and as Guarantor....

A quick search of the California Secretary of State reveals that Davis is the sole or main officer and/or agent for all Corporate Defendants.... Thus, as a principal representing authority and/or agent with authority of Elite Group, Blue Restaurant, and Franchising Group, Davis had actual and/or apparent authority to bind them to the Agreement....

Bald and unsubstantiated claims by a party with no knowledge cannot be sufficient to refute the documentary evidence submitted by Plaintiff, and therefore Defendants' Motion should be denied.... Service upon Davis was attempted at two addresses: 101 Tivoli Lane, Lake Forest, California 92630 ('101 Tivoli Lane') and 2298 Orange Avenue, #C, Costa Mesa, California 92627 ('2298 Orange Avenue'). Service upon Davis was unsuccessful at 2298 Orange Avenue. Pursuant to the corresponding Affidavit of Service, the Cimino family lives there now and do not know Davis.... However, Davis was properly served at 101 Tivoli Lane, pursuant to CPLR 308(4).... The Affidavit of Service contains sworn allegations of the process server's attempts to serve at different times on different days and inquiry with a neighbor confirming Davis's residence at 101 Tivoli Lane....

The Affidavit of Service also contains sworn allegation of the process server's additional mailing of the Complaint to Davis at 101 Tivoli Lane, as required by CPLR 308(4). Defendants attempt to mislead this Court confusing the two attempts of service upon Davis. Defendants do not dispute service upon Merchant and Franchising Group. By reason of the foregoing, Merchant, Franchising Group, and Davis have all been properly served in this action."

See Plaintiff's Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits A, G and H.

Counsel for plaintiff adds, in pertinent part, that, "Plaintiff concedes that it was unable to serve Elite Group and Blue Restaurant within the statutory period but seeks that its Cross-Motion be granted for an additional one hundred twenty ("120") days to serve Elite Group and Blue Restaurant for good cause and in the interest of justice.... As set forth in the corresponding Affidavit of Non-Service, service was unsuccessful upon Blue Restaurant at 27412 Via Garcia, Mission Viejo, California 92692 ('27412 Via Garcia')..... Pursuant to this Affidavit of Non-Service, 'Cameron Davis, agent for Blue Restaurant & Bar, LLC was the previous owner. The Nogle family lives here now.' ... Davis is the Agent for Blue Restaurant and the most recent Statement of Information lists 27412 Via Garcia as the address for Blue Restaurant.... Per the California Secretary of State, Blue Restaurant has been suspended and inactive since 2014. As set forth in the corresponding Affidavit of Non-Service, service was unsuccessful upon Elite Group at 129 Cabrillo Street, #100, Costa Mesa, California 92627 ('129 Cabrillo Street')..... Pursuant to this Affidavit of Non-Service, 'Perspire Sauna is at 129 Cabrillo St #100, Costa Mesa, CA now.' ... Davis is the CEO, the Secretary, the CFO, the sole Officer, the sole Director, and the Agent for Elite Group, and the most recent Statement of Information lists 129 Cabrillo Street as the address for Elite Group.... Furthermore, the website for Franchising Group lists 129 Cabrillo Street as its address. The Empanada Maker Franchise, <https://theempanadamakerfranchise.com>. Davis is the CEO, the Secretary, the CFO, the sole Officer, the sole Director, and the Agent for Merchant.... Davis is one of two members of and the Agent for Franchising Group.... Plaintiff made reasonably diligent efforts to effectuate service upon Elite Group and Blue Restaurant at the addresses provided in the Agreement and listed by the California Secretary of State. Plaintiff respectfully submits that

the Agreement was entered into in September 2023 and Defendants defaulted thereunder in December 2023, and thus, this action was commenced promptly and well within the applicable Statute of Limitations for breach of contract. In addition, Plaintiff respectfully submits that its action against the Defendants is meritorious, as set forth comprehensively in the Complaint. Accordingly, Plaintiff respectfully requests an enlargement of time to serve Defendants Elite Group and Blue Restaurant. Furthermore, Plaintiff respectfully submits that should further attempts at service upon Elite Group and Blue Restaurant be unsuccessful, that service upon Davis as agent should be accepted, as it is clear that Davis is the only principal of or one of two members for all of the Corporate Defendants.” See Plaintiff’s Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits A, B, F and H.

As previously indicated, no opposition was submitted to the cross-motion (Seq. No. 02).

Forum selection clauses, like the one contained in the subject Future Receipt Sale Agreement, are *prima facie* valid and should be enforced unless the resisting party clearly proves that enforcement would be unreasonable and unjust, or that the clause arises from fraud or overreaching, or that enforcement would contravene strong public policy of the forum where the suit is brought. *Trump v. Deutsche Bank Trust Co. Americas*, 65 A.D.3d 1329, 887 N.Y.S.2d 121 (2d Dept. 2009). Any alleged overreaching, which is an exception to the general rule that forum selection clauses are *prima facie* valid, must be based on something more than the mere fact that the clause was a boilerplate provision printed on the back of a form contract. Under the fraud exception, a forum selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion. Contractual forum selection clauses are *prima facie* valid and should be enforced

absent some compelling reason to the contrary. *See Bernstein v. Wysoki*, 77 A.D.3d 241, 907 N.Y.S.2d 49 (2d Dept. 2010).

In the instant matter, the subject Future Receipts Sale Agreement contains a forum selection clause that defendants were aware of when they executed said Agreement. *See* NYSCEF Document No. 2. The Court finds that defendants have not made the requisite strong showing that the subject Future Receipts Sale Agreement was the product of overreaching or was unreasonable, or that its enforcement would be unjust. *See DiRuocco v. Flamingo Beach Hotel & Casino, Inc.*, 163 A.D.2d 270, 557 N.Y.S.2d 140 (2d Dept. 1990).

Therefore, based upon the above, defendants' motion (Seq. No. 01), pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiff's Verified Complaint, is hereby **DENIED**. And it is further

ORDERED that defendants shall serve an Answer upon plaintiff within thirty (30) days from the date of this Decision and Order.

CPLR § 306-b states, in part, "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

In order to be entitled to an extension of the one hundred twenty (120) day deadline for the service of process for "good cause," plaintiff must, at the very least, establish that he or she had been reasonably diligent in their attempts to serve process on the defendant. *See Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 736 N.Y.S.2d 291 (2001). Reasonable diligence should be found to exist where plaintiff had actually "served" process within the one hundred twenty (120) day period and then promptly sought an extension

when defendant contended that the service might be defective. *See Stryker v. Stelmak*, 69 A.D.3d 454, 892 N.Y.S.2d 102 (1st Dept. 2010).

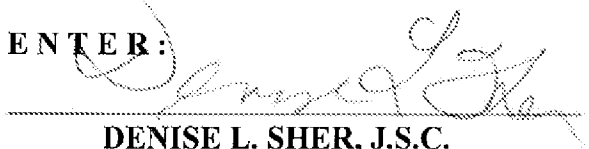
The alternative “interest of justice” standard is more flexible and broader than the “good cause” standard and can apply to late service that results from any mistake, confusion, oversight or other law office failure, as long as there is no prejudice to the defendant. *See Leader v. Maroney, Ponzini & Spencer, supra*. The “interest of justice standard” causes the court to analyze the entire factual setting of the case and to balance all of the competing interests presented by the parties. In addition to due diligence, factors considered by the courts in applying the “interest of justice” standard include the expiration of the statute of limitations, the meritorious nature of the cause of action, the promptness of plaintiff’s motion for an extension and the presence of prejudice to the defendant; also, the reason for plaintiff’s failure to timely serve, the potential impact of granting the motion on any pending judicial proceedings and whether the plaintiff acted in good faith. *See id.* In short, courts will focus on all the equitable arguments that either side is capable of mustering. For example, a CPLR § 306-b extension has been granted, in the “interest of justice,” where timely service of process has been made but subsequently found to be defective. *See Chiaro v. D’Angelo*, 7 A.D.3d 746, 776 N.Y.S.2d 898 (2d Dept. 2004).

Based upon the above, plaintiff’s cross-motion (Seq. No. 02), pursuant to CPLR § 306-b, for an order enlarging its time for service upon defendants The Elite Group Real Estate Professionals Inc. and Blue Restaurant & Bar, LLC, is hereby **GRANTED**. And it is further

ORDERED that plaintiff shall serve the Summons and Verified Complaint upon
defendants The Elite Group Real Estate Professionals Inc. and Blue Restaurant & Bar, LLC,
on or before May 21, 2025.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, J.S.C.

Dated: Mineola, New York
January 21, 2025

ENTERED

Jan 27 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE