

Spero v 3781 Broadway, LLC

2018 NY Slip Op 34515(U)

September 28, 2018

Supreme Court, Bronx County

Docket Number: Index No. 36235/2017E

Judge: Julia I. Rodriguez

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

-----X **Index No. 36235/2017E**

Ralph Spero,
Plaintiff,

-against-

DECISION & ORDER

3781 Broadway, LLC et al.,

Present:

Defendants.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion to strike affirmative defenses and defendant JD Commercial Builder Inc.'s cross-motion to dismiss the complaint pursuant to CPLR 3211(e).

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Notice of Cross-Motion, Affirmation & Exhibits	2
Affidavit in Partial Opposition	3
Reply Affirmation & Exhibit	4

In the instant action, plaintiff alleges he was injured while preparing to lay tile flooring at a Boston Market restaurant when a large temporary door installed by defendant JD Commercial ~~Builder~~ ^{Builder} Inc. ("JD") fell on him.

Plaintiff now moves to dismiss JD's 11th and 12th affirmative defenses, improper service and lack of personal jurisdiction, respectively, pursuant to CPLR 3211(e), on the ground that JD waived those defenses by not moving to dismiss the complaint on those grounds within 60 days of answering the complaint.

JD cross-moves, pursuant to CPLR 3211(a)(8) and 3211(e), for an extension of time to make a motion to dismiss on the basis of a lack of personal jurisdiction; to dismiss plaintiff's complaint due to lack of jurisdiction over JD and for failure to properly serve JD; or, in the alternative, denying plaintiff's motion to dismiss JD's affirmative defenses for improper service and lack of personal jurisdiction.

Plaintiff commenced this action by service of a summons and verified complaint filed on 12/21/17 and served upon JD, a corporation with its principal place of business in Bend, Oregon, by service upon the NYS Secretary of State on January 10, 2018, pursuant to BCL §307. On

May 11, 2018, plaintiff filed a supplemental summons and amended verified complaint via the court's e-file system.¹ A copy of same was mailed to JD by first class mail and certified mail on June 4, 2018. On May 18, 2018, JD interposed its answer to plaintiff's amended verified complaint. In its answer, JD raised 22 affirmative defenses, including improper service and lack of personal jurisdiction.

Under BCL §307, service on a foreign corporation via the NYS Secretary of State is acceptable when notice thereof and a copy of process are delivered personally to the foreign corporation or sent to such foreign corporation by registered mail with return receipt requested. BCL §307(c)(2) further provides that where service of process was effected by mailing, proof of service shall be by affidavit of compliance with this section filed, together with the process, within 30 days after receipt of the return receipt signed by the foreign corporation or other official proof of delivery, or, if delivery was refused, the original envelope with a notation by the postal authorities that acceptance was refused. JD contends, and plaintiff does not dispute, that plaintiff has not filed a signed return receipt or the original mailing envelope indicating that acceptance was refused or an affidavit of compliance with this section. Therefore, JD argues, service is improper and this court lacks jurisdiction over JD.

CPLR 3211(e) provides that an objection that the summons and complaint was not properly served is waived if, having raised such objection in a pleading, the objecting party does not move for judgment on that ground within 60 days after serving the pleading, unless the court extends the time upon the ground of undue hardship. JD did not move for judgment on the subject affirmative defenses within the requisite 60 days and now seeks an extension of the time for the making of such motion on the ground of undue hardship. In support of this application, JD's counsel states that "[i]n an attempt at cordiality and professional courtesy, your affirmant gave Plaintiff's counsel the opportunity to re-serve the Complaint properly." The extra time

¹It is unclear whether service of the supplemental complaint and amended verified complaint was effected upon the NYS Secretary of State.

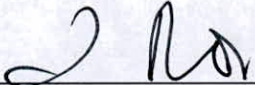
afforded to plaintiff's counsel to re-serve the complaint, counsel contends, "should constitute an undue hardship causing justifiable delay in JD's decision to move for the relief sought hereunder." A showing of "undue hardship" in this context requires proof that the motion could not have been made within the time permitted by CPLR 3211(e) by the exercise of ordinary diligence. *Worldcom, Inc. v. Dialing Loving Care*, 269 A.D.2d 159, 702 N.Y.S.2d 76 (1st Dept. 2000) citing *Abitol v. Schiff*, 180 Misc.2d 949, 691 N.Y.S.2d 753 (Sup. Ct., Queens Cty., May 18, 1999). That JD afforded plaintiff an "opportunity" to re-serve the summons and complaint does not satisfy this standard. It is also significant that the defects in service did not prevent JD from answering the complaint.

Based upon the foregoing, plaintiff's motion to dismiss JD's affirmative defenses, pursuant to CPLR 3211(a)(8) and 3211(b), is **granted**, and it is hereby

ORDERED, that JD Commercial Builder Inc.'s 11th and 12th affirmative defenses, improper service and lack of personal jurisdiction, respectively, are dismissed.

JD Commercial ~~Builder~~^{Builder} Inc.'s cross-motion, pursuant to CPLR 3211(a)(8) and 3211(e), is **denied in its entirety**.

Dated: Bronx, New York
September 28, 2018



Hon. Julia I. Rodriguez, J.S.C.