

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 8595/08
CLINTONVILLE PLAZA, LLC,	Motion
Plaintiff,	Date August 5, 2008
-against-	Motion
	Cal. No. 9
DOTHEKA GROUP CORP. d/b/a PAWFECT	Motion
PUPPIES and ANDREW CHRISTODOULIDES,	Sequence No. 1
Defendants.	

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-5
Opposition.....	6-9

Upon the foregoing papers it is ordered that the motion by defendants is determined as follows:

Plaintiff commenced this action seeking, *inter alia*, to collect unpaid rent arrears and additional rent owed for breach of a lease agreement, and to collect on a personal guaranty signed by one individual. Defendants now move to dismiss the complaint.

A. CPLR 3211(a)(8)

That branch of defendants' motion to dismiss plaintiff's cause of action pursuant to CPLR 3211(a)(8) is denied.

It is well settled that "personal jurisdiction is a prerequisite to the court's exercise of its discretionary authority." (*Lamb v. Mills*, 296 AD2d 697, 699). "[A] defendant who is otherwise subject to a court's jurisdiction, may seek dismissal based on the claim that service was not properly effectuated." (*Keane v. Kamin*, 94 NY2d 263). A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2) (*Lattingtown*

Harbor Prop. Owners Assn., Inc. v. Agostino, 34 AD3d 536, 538). However, "where there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of evidence at a hearing." (*Rox Riv 83 Partners v. Ettinger*, 276 AD2d 782). When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents (see, *Macchia v. Russo*, 67 NY2d 592; *McDonald v. Ames Supply Co.*, 22 NY2d 111, 115).

Plaintiff has produced an affidavit of service that indicates services was allegedly made through substituted service pursuant to CPLR 308(4). However, although the affidavit provided prima facie evidence of proper service, defendant Christodoulides submitted a sworn affidavit in support of the motion to dismiss, in which he denies being served with the summons and complaint. This sworn affidavit is sufficient to rebut the prima facie evidence of proper service. A hearing is therefore required to determine whether proper service was made on defendant Christodoulides.

Accordingly, this matter shall be set down for a traverse hearing to be held on Tuesday, December 9, 2008, 2:15 P.M., IAS Part 22, courtroom 21, 88-11 Sutphin Blvd., Jamaica, New York. Counsel are directed to contact the clerk of Part 22 at (718) 298-1210 on Monday, December 8, 2008, to ascertain the availability of the court. All proceedings are stayed in the interim.

B. CPLR 3211 (a) (1)

That branch of defendants' motion to dismiss plaintiff's cause of action pursuant to CPLR 3211(a) (1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***." In order to prevail on a CPLR 3211(a) (1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.)

Defendants do not specifically state the grounds under CPLR

3211(a)(1) upon which they are moving. However, to the extent the motion is based upon all of plaintiff's causes of action which are grounded in an assignment and assumption of lease agreement, and a personal guaranty agreement, this documentary evidence is insufficient to dispose of these causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the information or any lack of information in the lease agreement is insufficient to dispose of the causes of action.

C. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint as against defendants Dotheka Group Corp. d/b/a Pawfect Puppies and Andrew Christodoulides for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see, Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (*see, Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (1455 *Washington Ave. Assocs. v. Rose & Kiernan*, *supra*, 770-771).

Applying these principles in this case, the court decides as follows:

(1) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action is denied, as the complaint adequately states a cause of action for breach of a lease agreement.

(2) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action is denied, as the complaint adequately states a cause of action to recover upon a personal guaranty and for damages for breach of a lease.

(3) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the third cause of action is denied, as the complaint adequately states a cause of action for payment of legal fees pursuant to the lease agreement.

Defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra*).

CPLR 3211 (a) (5)

That branch of the motion by defendant Andrew Christodoulides to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (5) based upon the Statute of Frauds is denied.

General Obligations Law § 5-703 (2) states: "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing." Assuming plaintiff's fact to be true that a valid signing of the lease agreement by Clintonville Plaza, LLC took place, defendant has not made a sufficient showing of the lack of a signing to maintain a dismissal of this action based on CPLR 3211(a)(5).

Plaintiff here has sufficiently alleged a signing by Clintonville Plaza, LLC. Assuming plaintiff's allegation to be true, dismissal of the complaint would be improper.

The foregoing constitutes the decision and order of this Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: October 16, 2008

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Howard G. Lane, J.S.C.