

Juma Tech. Corp. v Servidio
2018 NY Slip Op 33347(U)
December 17, 2018
Supreme Court, New York County
Docket Number: 160372/2017
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

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JUMA TECHNOLOGY CORP., ROBERT M. RUBIN
and ANDREW RUBIN as Trustee of RUBIN FAMILY
IRREVOCABLE STOCK TRUST,

Index No. 160372/2017

Motion Seq. Nos. 001-003

Motion Date: 10/19/2018

Plaintiffs,

- against -

CAROL SERVIDIO, Solely in her Capacity as
Executrix of the Estate of ANTHONY M. SERVIDIO,
JOSEPH FUCCILLO, ROBERT THOMSON, VISION
OPPORTUNITY MASTER FUND, LTD., VISION
CAPITAL ADVANTAGE FUND, LP, VISION
CAPITAL ADVISORS, LLC, NECTAR HOLDINGS
INC. and STEVEN COHEN,

DECISION AND ORDER

Defendants.

-----X
BRANSTEN, J.:

Defendants Nectar Holdings Inc. (Motion Seq. 001), Carol Servidio, solely in her capacity as Executrix of the estate of Anthony M. Servidio (“Servidio”), and Joseph Fuccillo (“Fuccillo”) (together, the “Servidio Defendants”) (Motion Seq. 002), and Vision Capital Advantage Fund, LP (“VCAF”), Vision Capital Advisors, LLC (“VCAL”), and Robert Thomson (“Thomson”) (Motion Seq. 003)¹, move, pursuant to 3211 (a)(1), (3), (5), (7) and (8), to dismiss the Amended Complaint. Motion sequence numbers 001, 002 and 003 are consolidated for disposition herein.

¹ These defendants will be collectively referred to as the “Moving Defendants.”

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I. BACKGROUND

Plaintiff Juma Technology Corp. (“Juma”) brings this action against its former officers and directors alleging they breached their fiduciary duties to Juma by engaging in self-dealing and other wrongful conduct with defendants.

A. Factual Background

Juma was a highly specialized systems integrator, providing services for the implementation and management of data, voice, and video requirements across a range of markets, including retail, healthcare, education, and finance. (Amended Complaint (Am. Compl.) ¶ 20.) Juma is a Delaware corporation with its principal place of business in New York. In 2006, Juma acquired Nectar Services Corp., an entity that was engaged in the converged communications business. (Am. Compl. ¶ 19.)

Plaintiffs Robert Rubin (“Rubin”) and the Rubin Family Irrevocable Stock Trust (the “Trust”) are shareholders in Juma, and Rubin is a member of Juma’s board of directors. (*Id.* ¶¶ 3-5.) Defendant Servidio was a member of Juma’s board (*Id.* ¶ 7.), and Defendant Fuccillo was both a Juma employee and a board member. (*Id.* ¶ 9.)

VCAF and VCAL are Delaware corporations with their principal places of business in New York. (*Id.* ¶¶ 13-14.) Defendant Vision Opportunity Master Fund, Ltd. (“VOMF”) is a foreign corporation organized in the Cayman Islands with its principal

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place of business in New York. (*Id.* ¶ 12.)² Defendant Steven Cohen (“Cohen”) is the co-founder and Chief Executive Officer of the Vision Defendants. (*Id.* ¶ 16.)

In August 2007, Juma and Nectar Services entered into a series of financing agreements with defendants VOMF and VCAF, pursuant to which Juma and Nectar Services executed and delivered to said defendants a series of convertible promissory notes. (*Id.* ¶ 24.) As a condition of those agreements, the Vision Defendants obtained a seat on Juma’s board, and they appointed defendant Thomson. (*Id.* ¶¶ 25-26.)

On October 20, 2012, the boards of Juma and Nectar Services approved a strict foreclosure of their tangible and intangible assets. (*Id.* ¶ 44.) At that time, Juma’s assets included a federal action for copyright infringement Juma had brought against a third party, Carousel Industries of North America Inc. (“Carousel”), related to Juma’s proprietary software. The strict foreclosure was completed on October 26, 2012. (*Id.* ¶ 45.) Following the strict foreclosure, Juma transferred all of its assets, tangible and intangible, to Nectar Holding. (*Id.* ¶ 48.)

Juma subsequently settled its action against Carousel on December 20, 2012. (*Id.* ¶ 49.) Shortly thereafter, all of Juma’s key officers and personnel, including Servidio and Fuccillo, resigned from Juma and were immediately hired by Nectar Holdings. (*Id.* ¶¶ 50, 52.) Cohen and the Vision Defendants formed a new entity, also called Nectar

² VCAL, VCAF and VOMF are collectively referred to as the “Vision Defendants.”

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Services Corp., as a wholly-owned subsidiary of Nectar Holdings to carry on Juma's business. (*Id.* ¶¶ 53-54.)

In 2016, plaintiffs brought an action, captioned *Juma Technology Corp. v. Servidio*, Index No. 151483/2016 (Singh, J.) (*Juma I*), alleging that defendants had breached their fiduciary duties to Juma by failing to safeguard its property and assets and by taking actions that were detrimental to the corporation. (Affirmation of Jonathan E. Davis ("Davis Affirm.") Ex. G at 1.) By decision and order dated May 24, 2017, Justice Singh granted the defendants' motions to dismiss the complaint. Justice Singh held Juma lacked standing to maintain the action under Delaware Code Annotated, Title 8, § 510 because Juma had failed to pay its franchise taxes and Juma's charter was listed as "void" by the Delaware Secretary of State, as of March 1, 2014. (Davis Affirm. Ex. H at 4-7.) The court also dismissed the claims brought by Rubin and the Trust because the derivative claims belonged to the corporation, not its individual shareholders. (*Id.* at 7-8.) On or about June 19, 2017, Rubin submitted an application to revive Juma's charter. (Davis Affirm Ex. F at 2.)

B. The Instant Action

Plaintiffs commenced this action by filing a Summons and Complaint on November 21, 2017, which they amended on March 19, 2018. In the first through fifth causes of action, plaintiffs, purporting to act for Juma, allege that defendants breached or induced defendants to breach their fiduciary duties to Juma. The sixth cause of action,

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brought by Rubin and the Trust, seek damages for the diminution in the value of their shares in Juma. The allegations in the complaints filed in this action and in *Juma I* are identical or nearly identical. (Davis Affirm. Ex. G.) Apart from Cohen, the parties in both actions are the same as well.

II. DISCUSSION

As a threshold issue, the court must determine whether it has jurisdiction over defendants. *See Cipriano v. Hank*, 197 A.D.2d 295, 298 (1st Dep't 1994) (stating that "if the court is without personal jurisdiction over defendant . . . [then] all subsequent proceedings would be rendered null and void").

A. Jurisdiction

CPLR 3211(a)(8) states that a party may move for dismissal on the ground that "the court has not jurisdiction of the person of the defendant." On a motion brought under CPLR 3211(a)(8), the plaintiff bears the "burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction." *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 486 (1st Dep't 2017) (citations omitted).

1. *Methods of Service*

CPLR 308 describes the manner by which personal service upon a natural person may be made. The methods of service prescribed in CPLR 308 must be strictly complied

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with to obtain personal jurisdiction. *See Persaud v. Teaneck Nursing Ctr.*, 290 A.D.2d 350, 351 (1st Dept 2002). “Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.” *Williams v. DRBX Holdings, LLC*, 80 A.D.3d 534, 534 (1st Dep’t 2011), *lv. denied* 17 N.Y.3d 710 (2011) (internal quotation marks and citation omitted).

It is well settled that a properly executed “affidavit of a process server constitutes prima facie evidence of proper service.” *Matter of de Sanchez*, 57 A.D.3d 452, 454 (1st Dep’t 2008). However, a sworn non-conclusory denial of receipt contesting specific points in the process server’s affidavit is sufficient to rebut the presumption of proper service. *See NYCTL 1998-1 Trust & Bank of N.Y. v. Rabinowitz*, 7 A.D.3d 459, 460 (1st Dep’t 2004) (collecting cases).

Defendants Thomson, VCAF, and Fuccillo argue there were various defects with plaintiffs’ service of process.

a. *Thomson*

Thomson was served by substituted service pursuant to CPLR 308(2) by delivery of the summons and amended complaint on March 27, 2018 to his purported co-worker, Fernandez, at Nectar Holdings Inc., located at 366 N. Broadway, Suite 201 in Jericho, New York. (Davis Affirm. Ex. C at 2.) The pleadings were mailed to Thomson at that address the next day. (*Id.*)

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In an affidavit in support of dismissal, Thomson denies ever personally receiving the summons and amended complaint. (Thomson Affirm. ¶ 2.) He avers that he was never an employee of Nectar Holdings, that he never worked at 366 N. Broadway, Suite 201 in Jericho, and that he never received any mail at that address. (*Id.* ¶¶ 3-4.)

b. *VCAF*

CPLR 310-a(a) provides that “personal service upon . . . a foreign limited partnership shall be made by delivering a copy personally to any managing or general agent or general partner of the limited partnership in this state” As an alternative, personal service may be made under Partnership Law § 121-109.

Partnership Law § 121-109 (b) prescribes a two-step process for personal service upon a foreign limited partnership not authorized to conduct business in New York. First, service may be made by personally delivering process to the Secretary of State. Second, service must be made by personally delivering process “without this state to such foreign limited partnership by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made,” Partnership Law § 121-109 (b)(1), or by sending process to the “foreign limited partnership by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state” Partnership Law § 121-109 (b)(2). Service is complete within 10 days of filing an affidavit of compliance with the court. Partnership Law § 121-109 (b)(3) & (4).

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VCAF was served by delivery of the summons and amended complaint to the Secretary of State on April 2, 2018. (Davis Affirm. Ex. D at 2.) Service of process upon VCAF, an unauthorized foreign limited partnership, effectuated solely through the Secretary of State is plainly insufficient.

c. *Fuccillo*

Plaintiffs served Fuccillo by substituted service pursuant to CPLR 308(2) by delivering the summons and complaint on March 27, 2018 to his co-worker, Fernandez, at Fuccillo's actual place of business, Nectar Holdings Inc., located at 366 N. Broadway, Suite 201 in Jericho, New York. (D'Ercole Affirm. Ex. D at 1.) The pleadings were mailed to Fuccillo at that address the next day. (*Id.*)

Fuccillo does not contend that service of the Complaint upon him was improper. Rather, Fuccillo argues that he was never served with the amended complaint. It is well settled that an amended complaint supersedes the original. *See CRAFT EM CLO 2006-1, Ltd. v. Deutsche Bank AG*, 139 A.D.3d 638, 638-39 (1st Dep't 2016). The process server's affidavit reveals that Fuccillo was served with the original Complaint, but not the Amended Complaint.

d. *Plaintiffs' Response to the Deficiencies in Service*

In their opposing papers, plaintiffs fail to explain why Fuccillo was not served with the Amended Complaint, nor did they refute Thomson's averments that service upon

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him was defective. Similarly, plaintiffs failed to establish that service upon VCAF was proper under CPLR 310-a and Partnership Law § 121-109.

2. *Timeliness of Service*

CPLR 306-b also states, in relevant part, that “[s]ervice of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding” Moreover, “[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” CPLR 306-b. Plaintiffs commenced this action on November 21, 2017 and, thus, were required to serve Defendants by March 21, 2018.

The affidavits of service reveal that none of the defendants were served within 120 days of November 21, 2017. In their opposition to the instant motions, plaintiffs fail to address their failure to serve defendants within the timeframe set forth in CPLR 306-b. Instead, plaintiffs assert that they intend to cross-move for an extension of time to complete service. To date, plaintiffs have not filed a motion for an extension of time and have not proffered an excuse for failing to do so. (Oct. 10, 2018 Record and Transcript (“Tr.”) 20-21.) Nevertheless, plaintiffs urge the court to permit them additional time to effectuate service.

The court is authorized to dismiss the complaint in the absence of a cross-motion for an extension. *See Matter of Genting N.Y., LLC v. New York City Env'tl. Control Bd.*,

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158 A.D.3d 684, 685 (4th Dep't 2018) (finding petitioner's informal request for an extension of time to effectuate service was not properly before the court in the absence of a cross motion for such relief); *DeLorenzo v. Gabbino Pizza Corp.*, 83 A.D.3d 992, 993 (2d Dep't 2011) (concluding that an request for an extension of time must be made by way of a cross-motion); *see also Jancu v. Jancu*, 174 A.D.2d 428, 428 (1st Dep't 1991) (stating "the court should not have deemed plaintiff's opposition papers a cross-motion, since defendant had every right to rely upon plaintiff's representation that a formal cross-motion would be made and the inference that the subsequent failure to make the cross-motion was an intentional abandonment"). As plaintiffs have not cross-moved for an extension of time, the Court concludes service on defendants was untimely and the Complaint is dismissed against the Nectar Holdings, VCAL, VCAF, the Servidio Defendants and Thomson.

As service of process was not timely under CPLR 306-b, the court need not address the other grounds for dismissal raised in defendants' motions.

B. The Non-Moving Defendants

The Moving Defendants assert that VOMF has never been served with process in this action and plaintiffs have not filed an affidavit demonstrating service of process upon VOMF. (Tr. 9:10-15.) As plaintiffs have failed to demonstrate that this Court has jurisdiction over VOMF or that plaintiffs have made any attempts at serving VOMF, the claims against VOMF are dismissed.

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Plaintiffs also failed to serve process upon defendant Cohen and represented that they do not wish to proceed against him. (Tr. 4:10-15.) The Court may enforce an oral stipulation made in open court. *See In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 9 (1972) (recognizing the enforceability of oral stipulations or concessions made in open court). Therefore, the claims against Steven Cohen are dismissed.

C. The Claims Brought by the Trust and Rubin

Finally, the Court notes that plaintiffs' claims contained in the sixth cause of action asserted on behalf of Rubin and the Trust against the Vision Defendants and Cohen belong to the corporation, and may only be asserted by Rubin and the Trust derivatively. "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). A complaint that confuses a derivative and individual claim shall be dismissed. *Id.* Accordingly, the sixth cause of action is dismissed for the additional reason that plaintiffs confuse individual and derivative claims.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Nectar Holdings's motion to dismiss (Motion Seq. 001) is granted; and it is further

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ORDERED that the Servidio Defendants' motion to dismiss (Motion Sequence 002) is granted; and it is further

ORDERED that defendants Vision Capital Advantage Fund, LP, Vision Capital Advisors, LLC and Robert Thomson's motion to dismiss (Motion Sequence 003) is granted; and it is further

ORDERED the claims against Steven Cohen are dismissed; and it is further

ORDERED the claims against Vision Opportunity Master Fund, LP are dismissed.

This constitutes the decision and order of the Court.

Dated: New York, New York

December 17, 2018

ENTER:



HON. EILEEN BRANSTEN
J S C