

Shemins v Proctor

2020 NY Slip Op 30170(U)

January 8, 2020

Supreme Court, New York County

Docket Number: 161682/2018

Judge: Doris Ling-Cohan

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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. DORIS LING-COHAN PART IAS MOTION 36

Justice

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INDEX NO. 161682/2018

ROBERT SHEMINS,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

SUSAN PROCTOR, RON HILLMAN, KAY MEDRANO,
JOHN/JANE DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 30, 31, 32, 33, 34, 35, 36, 42

were considered on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that this motion to dismiss by defendant Ron Hillman ("Hillman"), pursuant to CPLR 3211(a)(8), for lack of personal jurisdiction due to insufficient service of process, and cross-motion, seeking an extension of time in which to serve defendant Hillman, or in the alternative, to permit substitute service as to this defendant, is decided, as indicated below.

BACKGROUND

Plaintiff commenced this action against defendants Susan Proctor ("Proctor"), Hillman, Kay Medrano ("Medrano"), and John/Jane Doe for breach of contract, fraud, unjust enrichment, tortious interference, and breach of fiduciary duties. Plaintiff and defendants Proctor, Hillman, and Medrano are co-owners in a residential condominium located at 350 West 42nd Street, Apartment 35C, New York, NY ("Premises"), which they purchased together, on or about August 23, 2006. (Complaint, 6-7). The parties allegedly purchased the Premises with the

intention of renting it to one or more third parties to maximize the profit they could earn on this property (Complaint, ¶ 26). However, plaintiff claims that Proctor and Medrano allegedly pocketed the rental funds themselves, without distributing them to plaintiff and without using the funds to pay the mortgage and maintenance fees, in accordance with their prior agreement (Complaint, ¶¶ 8, 9, 12, 18, 19, 21, 24). Plaintiff also alleges that Hillman resided in the apartment at some point in time, without making rental payments (Complaint, ¶¶ 25, 29).

Defendant Hillman moves to dismiss this action on the grounds of lack of personal jurisdiction due to improper service of process. Hillman alleges that plaintiff failed to properly serve the summons and complaint on him, and, contends that plaintiff's purported service failed to comply with CPLR 308(2). Plaintiff cross moves, requesting an extension of time to serve Hillman, or in the alternative, to allow plaintiff to serve Hillman by alternate means.

The Court notes that the other defendants in this action, namely, Proctor and Medrano, have waived all jurisdictional defenses as per the stipulation dated March 18, 2019 (NY St Cts Elec Filing [NYSCEF] Doc. No. 6).

DISCUSSION

In support of his motion to dismiss for lack of personal jurisdiction, defendant Hillman proffers an affidavit, where he claims that he did not reside at the Premises or anywhere in New York State on March 8, 2019, the date that plaintiff's process server purportedly served plaintiff, and that he permanently moved out of the Premises in November 2017 (Affidavit of Service; Hillman Affidavit in Support). Defendant Hillman alleges, through an affirmation in support by his counsel, that the statement in the process server's affidavit that Ms. Christine Behring, who is currently residing at the Premises, confirmed that the Premises is Hillman's actual place of

residence at the time of service is incorrect, and that Ms. Behring is available to testify in court that she never represented such confirmation to the process server.

In response, plaintiff alleges, in an affirmation by his counsel, that Hillman asserted the following in a separate action in the State of Nevada that: (1) he is a co-owner of the Premises; (2) his address is listed as the Premises in an agreement dated February 8, 2018; (3) the Premises is his home and that he would never abandon or give up his rights to such property, as provided in an affidavit submitted in the Nevada action; and (4) Christine Behring is someone he knows. (Affirmation in Opposition to Defendant Hillman's Motion to Dismiss and in Support of Cross Motion; Ex. B, 55-58; Ex. C; Ex. D; Ex. E). Additionally, plaintiff claims that in an August 21, 2018 deposition relating to the Nevada action, Hillman testified that he "had been living in his car for the past six months, parking it in a Walmart parking lot and sleeping in the driver's seat", but in that same deposition, defendant Hillman also alleged that he lived at the Premises for "approximately eight days over the past eight months, meaning from the beginning of 2018". (Affirmation in Opposition to Defendant Hillman's Motion to Dismiss and In Support of Cross Motion at 25). Plaintiff contends that Hillman's address is unclear based on these contradictory assertions, and that it was proper to serve Hillman at the Premises, as Hillman has minimum contacts within the State of New York by virtue of his co-ownership of the Premises, at the very least.

Pursuant to CPLR 308(2), "[p]ersonal service upon a natural person shall be made ... (2) by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served". A process server's affidavit is not conclusive proof of service where there is a sworn denial of service (*see Bank of America, N.A. v Diaz*, 160 AD3d 457 [1st Dept 2018]; *Nationstar Mtge. LLC v*

McCallum, 167 AD3d 523 [1st Dept 2018]; *Johnson v Deas*, 32 AD3d 253 [1st Dept 2006].

When the affidavits of a process server conflict with the sworn non-conclusory denial of service by the defendant, a traverse hearing is required to determine if service was actually made (*see NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]; *Ananda Capital Partners v Stav Elec. Sys. (1994) Ltd. Et al.*, 301 AD2d 430 [1st Dept 2003]).

Here, it is undisputed that service of the summons and complaint were personally delivered to a tenant of the Premises, who was of suitable age and discretion, but defendant Hillman claims the Premises was not his actual place of business, dwelling place or usual place of abode at the time of such service, and despite the process server's affirmation stating that such tenant confirmed the Premises to be Hillman's actual place of residence, Hillman is prepared to produce the tenant to testify that she never confirmed such inquiry. Thus, due to the conflicting affidavits with respect to service by plaintiff's process server and movant, a traverse hearing is required. (*see First Union Mtge. Corp. v Silverman*, 242 AD2d 258 [2d Dept 1997] [the validity of service pursuant to CPLR 308 is to be established through a hearing when there are conflicting affidavits and the truth of the matter is not clearly evident]). Defendant Hillman has sufficiently refuted plaintiff's affidavit of service, warranting a traverse hearing.

Accordingly, it is

ORDERED that the motion and cross motion are decided to the extent that this matter is referred to a Special Referee for a traverse hearing to hear and report with recommendation on the issue of service of process; and it is further

ORDERED that such granting of a traverse hearing and/or referral is conditioned on defendant serving a copy of this order, within 30 days of entry, with notice of entry, upon

opposing counsel and upon the Special Referee Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar; and it is further

ORDERED that failure to serve the order on the Special Referee Clerk shall warrant a denial of defendant Hillman's motion to dismiss; and it is further

ORDERED that the cross-motion by plaintiff is held in abeyance pending the outcome of a traverse hearing.

This is the decision and order of the Court.

1/8/2020
DATE


DORIS LING-COHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE

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