

Omansky v Gurland

2007 NY Slip Op 31598(U)

June 6, 2007

Supreme Court, New York County

Docket Number: 0600647/1999

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN
Justice

PART 49

Omanesky
Plaintiff
- v -
Girland, et al.
Defendant

INDEX NO. 600647/99
MOTION DATE 5/7/07
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
JUN 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

June 6 2007 Herman Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----x
LAWRENCE A. OMANSKY and 64 N. MOORE
ASSOCIATES,

Plaintiffs,

-against-

ROBERT GURLAND, MARK WINKELMAN, DRU
WHITACRE, THE SPICE BUILDING
CONDOMINIUM and 64 NO MORE, LLC,

Defendants.
-----x

Herman Cahn, J.:

Plaintiffs Lawrence A. Omansky and 64 N. Moore Associates
move for an order granting leave to re-serve the Summons and
Complaint on defendants Dru Whitacre, Dru Whitacre Media
Services, Ltd., Robert Gurland and the Spice Building
Condominium.

This is one of several actions arising from the sale of a
commercial condominium unit owned by plaintiff 64 N. Moore
Associates (64 Associates).¹ Plaintiff Omansky is a partner in
64 Associates as are defendants Robert Gurland, Mark Winkelman
and Dru Whitacre. The partnership owned the commercial unit at
issue as well as the remainder of the condominium building, known
as The Spice Building, which is also a defendant here. Gurland,
Winkelman and Whitacre own residential condominiums in The Spice

¹ The facts of this case have been set forth in detail in the
previous decisions in this action. See Omansky v Gurland, 4 AD3d
104 [1st Dept 2004].

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Building.

By decision dated June 26, 2002, the Court (Tompkins, J.) dismissed the Complaint based upon lack of jurisdiction and collateral estoppel. By decision dated February 3, 2004, the Appellate Division, First Department reversed that decision. Among other things, the Court found that factual questions existed with respect to the validity of service, which required a traverse hearing. Omansky, 4 AD3d at 108. By order dated August 13, 2004, the Court (Goodman, J.) referred the issue of whether jurisdiction was acquired over the defendants, to a Special Referee to hear and report.

In a report dated March 8, 2005, the Special Referee found, among other things, that jurisdiction was acquired over certain of the defendants pursuant to service of process on February 9, 1999. By decision dated November 7, 2005, Justice Goodman found that the record adequately supported the Special Referee's finding that jurisdiction was acquired over defendants Mark Winkelman and 64 No More LLC. However, the Court found that the record did not support a finding that jurisdiction was acquired over defendant Gurland and the Complaint was dismissed as against him. No findings were made by the Special Referee with regards to defendants Dru Whitacre, Dru Whitacre Media Services, Ltd. and the Spice Building Condominium. On June 27, 2006, the Court ordered that a traverse hearing be held with respect to those

defendants.

In a report dated December 21, 2006, the Special Referee found that service was not effected upon defendants Dru Whitacre, Dru Whitacre Media Services, Ltd. or the Spice Building Condominium. In the meantime, plaintiffs re-served Dru Whitacre and Dru Whitacre Media Services on November 30, 2006. He re-served Gurland and the Spice Building Condominium on December 8, 2006.

On March 6, 2007, the Court granted motions by defendants Dru Whitacre, Dru Whitacre Media and the Spice Building Condominium to confirm the Referee's report, and the Court declared that the prior service on those defendants was improper. The Court denied Omansky's cross-motion requesting that the Court accept the service of November and December of 2006 nunc pro tunc and find that jurisdiction was properly acquired over the defendants through such service.

Plaintiffs now move for leave to re-serve the Summons and Complaint on defendants Dru Whitacre, Dru Whitacre Media Services, Ltd., Robert Gurland and the Spice Building Condominium. Defendants oppose the motion on the grounds that the statute of limitations, as to the claims asserted in this action, has expired and they would thus be severely prejudiced by re-service of the Complaint.

Plaintiffs do not dispute that the statute of limitations

has expired. Instead, they argue that defendants would not be prejudiced by re-service of the Complaint because they have participated in the action since its inception in 1999. They also assert that leave to re-serve should be granted "in the interest of justice."

Plaintiffs' arguments are unpersuasive. First, it is clear that defendants would be severely prejudiced by being subjected to being sued herein after the statute of limitations has expired and after they have previously been dismissed from the action. Moreover, plaintiffs had ample opportunity during the course of the action to properly effectuate service on defendants before the statute of limitations expired and they failed to do so, as set forth in detail in the previous decisions in this action.

In any event, in the March 6, 2007 order, the Court already denied plaintiffs' attempts to validate the reservice of the Complaint nunc pro tunc. Plaintiffs have not set forth any reasons why the Court should now permit such re-service.

Accordingly, it is

ORDERED that plaintiffs' motion for leave to re-serve the Summons and Complaint is denied.

DATED: June 6, 2007

FILED
JUN 13 2007
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NEW YORK
Alan Cohen
J.S.C.