

**Mastroianni v Rallye Glen Cove, LLC**

2007 NY Slip Op 33253(U)

October 3, 2007

Supreme Court, Nassau County

Docket Number: 3687-06/

Judge: Roy S. Mahon

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

ENTERED  
IN  
COMPUTER

TRIAL/IAS PART 11

ANTHONY MASTROIANNI,

INDEX NO. 3687/06

Plaintiff(s),

- against -

RALLYE GLEN COVE, LLC d/b/a RALLYE LEXUS,  
RALLYE GLEN COVE, INC., d/b/a RALLYE LEXUS,  
ANDREW JONES, Ind.,

Defendant(s).

DECISION AFTER HEARING

By Order dated October 16, 2006 the parties were directed to appear before this Court to conduct a traverse hearing to determine if the plaintiff validly acquired personal jurisdiction over the defendant pursuant to CPLR 311(a)(1) initially commenced in the Nassau County District Court and later conducted in the New York Supreme Court. The hearing originally set for November 8, 2006 was adjourned intermittently until August 14, 2007. At that time, both the plaintiff and defendant appeared and offered testimony and evidence at the hearing. After hearing, the Court now makes the following findings of fact and conclusions of law.

Plaintiff's sole witness was Mr. Fiore Mastroianni, son of the plaintiff pro se, who testified that on June 17, 2006 at approximately 2:40 p.m. he visited the defendant's place of business located at 20 Cedar Swamp Road, Glen Cove, NY and served a summons and complaint upon Mr. Christian Charvet. The witness stated that he entered the premises and asked a receptionist if he could speak with a general manager. Shortly thereafter, the witness testified Mr. Charvet appeared. Asked by the witness if he was a general manager, Mr. Charvet purportedly answered in the affirmative. Thereafter, the witness served upon him the summons and complaint which is the subject of the instant hearing.

Cross-examination of the witness revealed that he had no independent recollection of the date of service of the papers. Testifying further that he has served process between 12 to 24 times since September 2005 to the present, Mr. Fiore Mastroianni stated that his usual custom and practice was to employ a photograph of the person intended to be served or to inquire regarding the proper person for service. In the instant case, Mr. Fiore Mastroianni indicated that in addition to inquiring into Mr. Charvet's authority to receive service, he recognized him from a previous inquiry that day.

Introduced into evidence on the plaintiff's case was a copy of the affidavit of service and a copy of

a decision by the Hon. Margaret C. Reilly dated January 25, 2007 determining defendant's motion to dismiss pursuant to CPLR 3211(a)(4) brought in the Nassau County District Court (*see Plaintiff's #1 and #2 in Evidence*).

Plaintiff then rested his case. The defense elected to present a case. Its' first witness was Mr. Christian Charvet.

Mr. Christian Charvet testified that he was first employed by the defendant in 2005 as a sales person and in 2006 promoted to the position of sales manager, as well as a sales person. According to Mr. Charvet, he was instructed during the course of his employment that all legal process should be served upon Mr. William Finsilver. Mr. Charvet stated unequivocally that he had no recollection of ever meeting Mr. Fiore Mastroianni or of receiving any papers from him.

Cross-examination of Mr. Charvet revealed that he never spoke with Mr. Finsilver or defendant's service manager, Mr. Jones, or defense counsel Elio M. DiBerardino, Esq. in connection with the hearing. Mr. Charvet contended on cross-examination that Mr. Fiore Mastroianni was mistaken when he testified that he effectuated service upon him. Mr. Charvet also indicated that while he was working at the defendant's place of business on June 17, 2006, it was only in the capacity of acting sales manager, a position he had held since January 2006. The witness did not recall if Mr. William Finsilver was present at the workplace that day.

Mr. Charvet did state that Mr. Finsilver inquired of him as to whether he had accepted service of any papers, and was told to appear at the hearing by Mr. Finsilver.

Defendant's second witness was Mr. Jones, service manager of the defendant's place of business. He testified that he was hired in May 2003 as a service manager by Mr. William Finsilver. After he was hired, he testified that he had been instructed by the defendant's Human Resources Department and Mr. Finsilver to direct the service of legal process to Mr. Finsilver. The plaintiff decided not to cross-examine Mr. Jones.

The third witness to testify for the defense was Mr. William Finsilver, who testified that he has been employed by the defendant as a general manager for the past 18 years, which includes all of the defendant's operations, including legal matters. Among the witnesses various duties were the responsibility of receiving legal process for the defendant and working with legal counsel on cases involving the defendant. According to Mr. Finsilver, he only learned of the action which is the subject of this hearing through the mail and was never served in that action personally. Additionally, Mr. Finsilver stated he instructs employees as to the proper procedure for the defendant when receiving process, and employees are told to refer service of process to him. He also did not recall if he was working at the defendant's place of business on June 17, 2006.

Plaintiff cross-examined the witness about Kenneth Kirschenbaum, Esq., counsel for the defendant.

Defendant also introduced into evidence on its direct case the affidavit of its first witness, Mr. Christian Charvet submitted to the Court in connection with its motion to dismiss the consolidated Nassau County District Court action. (*see Defendant's A in Evidence*).

After resting its case, the plaintiff offered a rebuttal case, re-calling its sole witness, Mr. Fiore Mastroianni. Mr. Fiore Mastroianni stated that Mr. Charvet's testimony was incorrect and that after proper inquiry, service was effectuated upon him. On his rebuttal case, plaintiff introduced Mr. Fiore Mastroianni's hand written notes made somewhat contemporaneously with the alleged service upon Mr. Charvet (*see*

*Plaintiffs #3 in Evidence).*

Defendant offered a sur-rebuttal consisting of further testimony from Mr. Christian Charvet who reiterated that he did not recall meeting Mr. Fiore Mastroianni and that Mr. Fiore Mastroianni was mistaken in his testimony.

On September 17, 2007, in response to the Court's direction, plaintiff pro se and defense counsel appeared before this Court to explicate post-hearing correspondence in which the plaintiff pro se alleged perjury in the defendant's first witness' testimony and the defense counsel alleged misrepresentation in the affidavit of Mr. Fiore Mastroianni introduced at the hearing (*see Plaintiff'2 #1 in Evidence*). The Court conducted colloquy with both the plaintiff and defense counsel during which the plaintiff pro se contended that evidence adduced during the hearing so dramatically impacted upon Mr. Charvet's credibility as to amount to perjury. Also during this colloquy, defense counsel conceded that apparently no misrepresentations to the Court took place in submitting Mr. Fiore Mastroianni's affidavit at the hearing, but from the stock language calculated to meet statutorily required criteria, it could be inferred that its veracity was in question (*see Plaintiff's #1 in Evidence*).

CPLR §311(a)(1) provides:

§311. Personal service upon a corporation or governmental subdivision.

(a) Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law."

The Court credits the testimony of the plaintiff's first witness, Mr. Fiore Mastroianni. He testified plainly that he entered the defendant's place of business, asked for a general manager and was referred to Mr. Charvet who admittedly was working on June 17, 2006, the day of the purported service. While the defendant's witness Mr. Charvet, testified that he had no recollection of the service, he did not testify that the alleged service did not actually occur. Moreover, Mr. Charvet's affidavit (*Defendant's A in Evidence*), submitted in connection with the original motion to dismiss similarly state that he lacks only the recollection of the alleged service not that in fact, did not occur. It is from this lack of recollection that Mr. Charvet concludes that Mr. Fiore Mastroianni's testimony must be mistaken.

The remaining issue for the Court is whether service of the Summons and Complaint upon Mr. Charvet satisfies the applicable statute. The Court concludes that it does.

A managing agent or general agent is one who is empowered with supervisory authority and possesses judgment and discretion to take action on behalf of the corporation. (see, **Taylor v Granite State Provident Association**, 136 NY 343, 32 NE 992. Lower level employees such as receptionists or clerks are not regarded as managing agents. (see, **Acre v Sybron Corporation**, 82 AD2d 308 (2d Dept., 1981), 441 NYS2d 498.

In liberally construing the statute, as enunciated by the holding of **Fashion Page Ltd. v Lurich Insurance Co.**, 50 NY2d 265, 271, 428 NYS2d 890, 893, the Court focuses on the process server's diligence in seeking to identify a proper receipt and the reasonableness of his reliance on the representations made by the corporate employees (see, **Eastman Kodak Co. v Miller and Miller Consulting Acuaries, Inc.**, 195 AD2d 591, 601 NYS2d 10 (2d Dept., 1993)). Ultimately, it must be found that the service was made "in a manner which, objectively viewed, is calculated to give the corporation fair notice. (see, **Fashion Page Ltd. v Zurich Insurance Co.**, supra)

In the instant case, the plaintiff's process server entered the premises, inquired as to the identity of a general manager, and effectuated service. As acting sales manager, it would appear that Mr. Charvet had some degree of supervisory responsibility at the defendant's place of business. Answering to an inquiry regarding a general manager, he certainly would appear to third parties as supervisory personnel. Service on an automobile dealership's service manager has been found sufficient. (see, **Premium Channels Pub. Co. Ins. v Rolls Royce Motors, Inc.**, 172 AD2d 160 (1st Dept., 1991), 567 NYS2d 699). Where an office manager of an automobile dealer held himself out to be a person of responsibility, he was found to be acting in the capacity of a managing agent for purposes of service (see, **Buckner v D&E Motors Inc.**, 53 Misc2d 382 (1967), 278 NYS2d 902.

As stated in **Fashion Page Ltd. v Zurick Insurance Co.**, supra, "there may be cases in which the defendants employees improperly assumed authority to accept process which the process server, through past experience or present circumstances, should reasonably perceive." The Court finds that the case at bar is not one of them.

Defendant's motion to dismiss plaintiff's action for failure to effectuate service pursuant to CPLR 311(a)(1), is **denied**. This constitutes the decision and Order of the Court.

DATED: 10/3/2007

..... *Roy S. Mahon* .....  
J.S.C.

**ENTERED**

OCT 10 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE