

So v So

2008 NY Slip Op 32675(U)

September 2, 2008

Supreme Court, New York County

Docket Number: 106730/07

Judge: Jacqueline W. Silbermann

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

PRESENT: Hon. JACQUELINE W. SILBERMANN **PART** 50L
Justice

Sophia So,
Plaintiff,

INDEX NO. 106730/07

-v-
Roxy Hipman So, Raymond So,
Andy So and Faith Li, *defendants.*

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to ~~for~~ dismiss action.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-5</u>
Answering Affidavits — Exhibits _____	<u>6-7</u>
Replying Affidavits _____	<u>8-12</u>

Cross-Motion: **Yes** **No**

Upon the foregoing papers, it is ordered that this motion *is decided in accordance*
with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____
J.S.C.

FILED
SEP 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: September 2, 2008

J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 50-L

-----X

SOPHIA SO,

Plaintiff,

Index No. 106730/07

-against-

M.S. #001
Decision and Order

ROXY HIPMAN SO, RAYMOND SO, ANDY SO
and FAITH LI,

Defendants.

-----X

Jacqueline W. Silbermann,

J.:

FILED
SEP 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

The Defendants bring this motion to dismiss claims made by the Plaintiff (hereinafter the "Wife") against them to void four allegedly fraudulent transfers of real property. The motion is brought under CPLR §3211(a)(8) on the basis that the Plaintiff failed to effect proper service of process and, therefore, the Court lacks personal jurisdiction over the Defendants. Defendants also move to dismiss under CPLR §3211(a)(5) on the basis that the applicable statute of limitations has run.

Plaintiff opposes the motion and cross-moves for a default judgment pursuant to CPLR §3215 or, alternatively, for an extension of time to serve the summons and complaint against all of the Defendants pursuant to CPLR §306-b. The Plaintiff also requests permission to effect substituted service of process upon the Defendants' counsel or to effectuate service abroad pursuant to the Hague Convention¹ and reimbursement of the counsel fees and costs to effectuate service on the Defendants.

¹Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 U.S.T. 361), hereinafter the "Hague Convention."

At oral argument of these motions the Court found that no personal service was effected on any of the Defendants pursuant to CPLR §308(1) through (4), and dismissed the claims against all four Defendants. This decision addresses the statute of limitations issues and the issues raised in Plaintiff's cross-motion.

This action was commenced on May 17, 2007 by the filing of a summons and verified complaint with the Clerk of the Court on that date. The gravamen of Plaintiff's complaint is that the Defendant Roxy Hipman So (hereinafter the "Husband"), who is alleged to be the Plaintiff's husband, transferred his interest in four parcels of real property to his sons, Defendants Raymond So and Andy So, and to his niece, Faith Li, without consideration, for the purpose of avoiding his obligation to pay child support to the Plaintiff. According to the complaint, the Husband made the following four property transfers either to his sons or to his niece:

(1) In November of 1996, 71 Park Ave., Apt. 10AB, New York, NY was purchased with funds from the Husband and Wife, as their marital residence, but shortly thereafter title to the apartment was placed in the name of Defendant Faith Li, the Husband's niece;

(2) On March 9, 2001, Unit 8-22 at 150 West 51st St., New York, NY was transferred by the Husband to his son, Defendant Andy So without consideration;

(3) On March 15, 2001, Unit 18-21 at 150 West 51st St., New York, NY was transferred by the Husband to his son, Defendant Raymond So without consideration; and

(4) On September 19, 2003, Unit 18-18 at 150 West 51st St., New York, NY was transferred by the Husband to his son, Defendant Andy So without consideration.

The Wife asserts that she did not discover the above-described property transfers until June 2006 when the Wife received notice that Defendant Faith Li had commenced a proceeding against the Wife to evict her from the apartment at 71 Park Ave. The Wife further asserts that, after she received the eviction notice, she obtained, for the first time on June 29, 2006, information from the New York City Department of Finance indicating that the three units at 150 West 51st St., formerly owned by the Husband, had been transferred to his sons, the Defendants Raymond So and Andy So.

THE STATUTE OF LIMITATIONS

It is uncontested that the statute of limitations for the Wife's causes of action based upon fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud or could with reasonable diligence have discovered it." CPLR §213(8).

The Defendants assert, without contradiction, that the Wife signed over her rights to the apartment at 71 Park Avenue to Defendant Faith Li in an agreement dated November 5, 1996. The Wife had actual notice of the transfer as of that date. The 6-year limitations period expired on November 5, 2002. The Wife contends that she did not discover the fraudulent transfer of the 71 Park Ave. apartment until Faith Li instituted an eviction proceeding against her in 2006, and that the 2-year discovery extension of the statute of limitations, as set forth in CPLR §213(8) and CPLR 203(g) should apply. That contention is not credible.

Defendants submit compelling evidence that, in a letter dated August 29, 2000, the Wife's attorney at that time wrote a letter to Ms. Li's attorney stating that any efforts to evict

the Wife from the apartment at 71 Park Ave. would be "vigorously opposed." That letter indicates that the Wife had notice, in 2000, of Ms. Li's adverse title to the apartment and could have discovered the status of ownership at that time. As a result, the Wife's claim of fraud with regard to the apartment at 71 Park Ave. is barred by the 6-year limitation period whether measured from the 1996 agreement or the 2000 letter opposing eviction. This action was filed on May 17, 2007, more than 6 years after either of those dates. Thus, no good cause may be shown for and the interests of justice will not be served by an extension, pursuant to CPLR §306-b, of the Wife's time to serve process on Defendant Faith Li. As a result, the Wife's motion for an extension of time within which to effect service of process upon Defendant Faith Li pursuant to CPLR §306-b is denied.

The Wife's claims regarding the apartments transferred on March 9, 2001 and March 15, 2001, are beyond the 6-year limitations period of CPLR §213(8). However, the Wife asserts that the 2-years-from-discovery limitation period set forth in CPLR §213(8) and CPLR §203(g) should apply to the transfers made in 2001. While the Wife had notice in 1996 and 2000 that the Husband had transferred his interest in the apartment at 71 Park Ave, to his niece, she could not have discovered the property transfers made in 2001 until after they had occurred. Thus, her argument, that she did not discover the 2001 transfers until 2006, when Ms. Li began proceedings to evict her from the apartment at 71 Park Ave., is more compelling.

The 2-year limitations period provided in CPLR §213(8) and CPLR §203(g) begins to run at the time from which it "conclusively appears that the plaintiff has knowledge of facts which should have caused her to inquire and discover the alleged fraud." *Baratta v.*

ABF Real Estate Co., 215 A.D.2d 518, 519 (2d Dep't 1995), quoting *Rattner v. York*, 174 A.D.2d 718, 721 (2d Dep't 1991). While the burden of establishing that the fraud could not have been discovered before the 2-year period prior to the commencement of the action rests with the Plaintiff [See, *Enderveldte v. Slade*, 214 A.D.2d 456 (1st Dep't 1995)], where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of facts. See, *Oggiani v. Oggiani*, 46 A.D.3d 646, 648-49 (2d Dep't 2007), citing *Trepuk v. Frank*, 44 N.Y.2d 723, 725 (1978).

The evidence submitted on these motions does not conclusively establish that the Wife had knowledge of facts from which she could reasonably have discovered the Husband's 2001 property transfers to his sons, prior to May 17, 2005 (2 years before she commenced this action). As a result, the Defendants' motion to dismiss the Wife's claims relating to the real estate transfers made by the Husband in 2001, is denied without prejudice to renewal at trial, if appropriate.

There is no statutory bar to the Wife's claim that the real estate transfer made by the Husband to his son, Defendant Andy So, in 2003. The 2003 property transfer was made within the 6-year limitations period. As a result, the Defendants' motion to dismiss the Wife's claims relating to the 2003 real estate transfer from Roxy Hipman So to Andy So is denied.

RELIEF UNDER CPLR §306-b

Plaintiff requests additional time to serve the summons and complaint pursuant to CPLR §306-b. The Court has discretion to extend Plaintiff's time to serve the summons and complaint under CPLR §306-b "upon good cause shown or in the interest of justice."

Citing *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001), the Defendants argue that Plaintiff has not demonstrated reasonable diligence in attempting service and, therefore, the extension under CPLR §306-b should be denied. There are disputed allegations regarding whether each of the Defendants had actual notice of this action well before the 120-day period prescribed by CPLR §306-b expired. The affidavits submitted by both sides on this issue indicate that the Plaintiff did make diligent efforts to locate and serve the Defendants, with the exception of Faith Li,² at locations within the state of New York, without success.

The *Leader* decision supports an extension of time to serve under CPLR §306-b where the interests of justice will be served. *Id.* at 200. In *Leader*, the Appellate Division, Second Department found that the facts that the statute of limitations had expired after commencement of the action, that the plaintiff had a meritorious cause of action and that there was no prejudice to the defendant supported the extension in the interests of justice, even though it explicitly found that good cause for the delayed service was lacking. *Id.*

In the present case, the Plaintiff presents evidence that she has made diligent efforts to locate and serve the Defendants whom she believed had residences in New York. The Husband asserts that his residence has been in Hong Kong since March, 2000. Defendant Andy So asserts that his residence is in Beijing, China. Defendant Raymond So asserts that his residence is in Los Angeles, California. Raymond So and Andy So also

² Because the Plaintiff's claims against Ms. Li relate only to the 71 Park Ave. apartment, which are barred by the applicable statute of limitation, as discussed above, the issue of an extension of time to serve Ms. Li is moot. As a result, Plaintiff's motion under CPLR §306-b is denied with regard to Defendant Faith Li.

assert that the apartments owned by them in New York City are not their residences and are leased to unidentified tenants. None of the Defendants points to any way in which an extension of time to serve the summons and complaint under CPLR §306-b would prejudice them. Under all of these circumstances, the Court finds that an extension of Plaintiff's time to effect service of process upon the Defendants Roxy Hipman So, Raymond So and Andy So will serve the interests of justice.

ALTERNATE SERVICE UNDER CPLR §308(5)

The only remaining questions are whether and in what manner alternate service under CPLR §308(5) should be permitted. CPLR §308(5) gives the Court discretion to direct an alternate method of service of process if service via the methods described in CPLR §308(1) through (4) is impracticable. Each of the remaining Defendants asserts that he does not reside within the State of New York. The methods of service provided in CPLR §308(1) through (4) describe service "within the state." Since the Defendants claim to reside outside the state, service upon them pursuant to CPLR §308(1) through (4) is inherently impracticable.

Defendant's reliance upon *Yamamoto v. Yamamoto*, 43 A.D.3d 372 (1st Dep't 2007) for the proposition that Plaintiff must prove that effectuating service in a foreign country would be impracticable is misplaced. Instead, the Appellate Division, First Department in *Yamamoto* affirmed Justice Drager's decision finding that the interests of justice warranted an extension of time to effectuate service under §306-b and that alternate service under CPLR §308(5) in the foreign country pursuant to the Hague Convention was appropriate.

43 A.D.3d at 373-74. The Appellate Division also held, under a substantially fact pattern, that:

given defendant's alleged removal to Japan and his alleged failure to provide any support for his infant daughter, who allegedly lives in Manhattan with her mother, the court providently granted plaintiff leave to apply for funds to defray the additional expenses of effectuating personal service upon the defendant in Japan.

Id. at 374.

The reasoning applied in *Yamamoto* applies with equal force in the present action. The Plaintiff does not submit evidence that service on the Defendants who reside in China is not practicable under the Hague Convention. Therefore, Plaintiff's request for an order directing that service on those Defendants be effectuated by personal delivery of process upon their attorneys must be denied. However, Plaintiff's request for permission to effect service on the Defendants in China pursuant to the Hague Convention is granted. In addition, Plaintiff is granted leave to apply for funds to defray the expense of effectuating service upon the Defendants in China. Plaintiff also is granted leave to effectuate service of Defendant Raymond So in the State of California or in such other jurisdiction where he may be found in accordance with CPLR §313.

Any relief requested in this application that is not specifically addressed herein has been considered by the Court and is denied.

Based upon the foregoing, it is:

ORDERED that Plaintiff's claims against the Defendant Faith Li are hereby dismissed with prejudice. The name of Faith Li shall be stricken from the caption of this action; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158, 60 Centre St., New York, NY), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the Plaintiff's request for an extension of time to serve the Summons and Complaint in this action upon Defendants Roxy Hipman So, Raymond So and Andy So is granted for a period of 120 days from the date of this order; and it is further

ORDERED that Plaintiff may effect service of process upon Defendants Roxy Hipman So and Andy So pursuant to CPLR §313 and pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 U.S.T. 361); and it is further

ORDERED that Plaintiff may effect service of process upon Defendant Raymond So pursuant to CPLR §313; and it is further

ORDERED that Plaintiff is granted leave to apply for funds to defray the expense of effectuating service upon the Defendants in China.

This constitutes the decision and order of the court.

Dated: September 7, 2008


Jacqueline W. Silbermann
Justice of the Supreme Court

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