

<b>Matter of Rosen v Buzz Me, LLC</b>
2009 NY Slip Op 30211(U)
January 27, 2009
Supreme Court, New York County
Docket Number: 601988/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

YEHOSHUA ROSEN,

Petitioner,

- v -

BUZZ ME LLC,

Respondent.

INDEX NO. 601988/08

MOTION DATE 11/25/08

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 35 were read on this petition for judicial dissolution

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-5; 6-8

X-mot: 9; 10-29

30; 31-35

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this petition and cross-motion are decided in accordance with the accompanying decision and order.

**FILED**  
FEB 02 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/27/09

JBL  
JOAN B. LOBIS, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of

YEHOSHUA ROSEN

Petitioner,

Index No. 601988/08

FOR THE DISSOLUTION OF BUZZ ME, LLC  
Pursuant to Section 702 of the  
Limited Liability Company Law

**Decision, Order  
and Judgment**

- against -

BUZZ ME, LLC d/b/a STREAMPAY and SAM  
CHANIN a/k/a SAMUEL CHANIN,

Respondents.  
-----X

**JOAN B. LOBIS, J.S.C.:**

**FILED**  
FEB 02 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner, Yehoshua Rosen, brings this special proceeding, by order to show cause, seeking the judicial dissolution of Buzz Me, LLC, d/b/a Streampay (the "LLC"), pursuant to the provisions of New York's Limited Liability Company Law § 702. He also seeks the appointment of a receiver to continue the operations of the LLC throughout the litigation or, in the alternative, a temporary restraining order preventing respondent, Sam Chanin a/k/a Samuel Chanin, and his employees and/or agents from interfering with the business of the LLC, conducting business under the name of the LLC, or competing with the business of the LLC; the issuance of a restraining order preventing respondent and his employees and/or agents from making any reference to petitioner; the opportunity for petitioner's accountant to review the books and records of the LLC; and, an award of damages in the sum of \$500,000, including punitive damages, representing monies owed to petitioner by Mr. Chanin and/or the LLC. Respondents cross-move for an order dismissing the petition pursuant to C.P.L.R. § 404(a) and Rule 3211(a), for lack of personal jurisdiction based on

improper service (Rule 3211[a][8]), failure to join necessary parties pursuant to C.P.L.R. § 1001 (Rule 3211[a][10]), and failure to state a cause of action (Rule 3211[a][7]); sanctioning plaintiff for willful and contumacious behavior, pursuant to Rule 130 of the Rules of the Chief Administrator; and, enjoining petitioner from interfering with the business of the LLC, utilizing misappropriated trade secrets, infringing on intellectual property rights, and competing with the LLC.

The LLC is a company that markets and sells prepaid calling cards and “bill pay services.” It was formed on January 3, 2005, and is owned equally by its two sole members, Outside Ventures, LLC (“Outside Ventures”), and petitioner. Mr. Chanin is the Chief Executive Officer of Outside Ventures. According to Mr. Chanin’s affidavit, the LLC never adopted a written operating agreement.

This action was commenced by the filing of an order to show cause, together with a petition and affirmation in support, on July 7, 2008. The order to show cause was signed by the Hon. Martin Schoenfeld and was made returnable in this part, Part 6, on July 29, 2008. Justice Schoenfeld directed that the petition was to be served “by serving a copy of th[e] order and the papers on the Respondent by personal service to Sam Chainin [sic] and Buzz Me LLC at 1560 [sic]<sup>1</sup> Broadway New York NY on or before July 11th, 2008.” When respondents failed to appear on July

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<sup>1</sup> Respondents, in their memorandum of law which accompanied their cross-motion, assert that the order to show cause was defective because it required service of process upon respondents at 1560 Broadway, which respondents assert is neither respondent’s address. It is unexplained whether “1560 Broadway” is merely a typographical error and should be “150 Broadway”, which is the address listed for the LLC on its Articles of Organization, or whether “1560 Broadway” was the address petitioner intentionally provided in the order to show cause.

29, 2008, this court adjourned the return date to August 12, 2008, and requested that petitioner obtain a copy of the duly recorded Articles of Organization of the LLC, which were not included as an exhibit to the original petition. Petitioner submitted an affirmation by his attorney, Michael Garber, dated August 5, 2008 (the "August Affirmation") that the petition had been duly served on respondents. Annexed to the August Affirmation were affidavits of service for the LLC and Mr. Chanin; a copy of the Articles of Organization of the LLC; and, a copy of a letter, dated August 5, 2008, from Mr. Garber to Daniel B. Faizakoff, respondents' attorney, informing Mr. Faizakoff that petitioner is of the belief that service of the order to show cause was made properly by a duly licensed process server, and that the matter had been adjourned to August 12, 2008. According to the court's computerized case management files, this matter was subsequently adjourned on four more occasions until November 25, 2008. In the interim, respondents brought their cross-motion for the aforementioned relief.

Turning first to respondents' motion to dismiss for lack of personal jurisdiction over the respondents due to improper service, the C.P.L.R. sets forth that "[a]notice of petition shall be served in the same manner as a summons in an action." C.P.L.R. § 403(c). Pursuant to the rules regarding service of a summons, personal service on a natural person may be accomplished

*by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . of the person to be served and by . . . mailing the summons by first class mail to the person to be served at his or her actual place of business . . . within twenty days [of the delivery]; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; . . ."*

C.P.L.R. § 308. Personal service on a partnership may be made by delivering the summons to an

“agent or employee of the partnership authorized by appointment to receive service.” C.P.L.R. § 310(d).

Petitioner provides affidavits of service for the LLC and Mr. Chanin. The process server, Harry Torres, avers that on Friday, July 11, 2008, at 10:20 a.m., he served the order to show cause and supporting documents on the LLC by delivering a true copy to Stephanie Pagan on the third floor of 150 Broadway, and that Ms. Pagan said that she was authorized to accept service on behalf of the LLC. On the same date, at the same time and place, Mr. Torres also served Mr. Chanin by delivering a true copy of the order to show cause and supporting documents to Ms. Pagan, who is described as a “co-worker” and a person of suitable age and discretion. Mr. Torres sets forth that the premises at 150 Broadway is Mr. Chanin’s actual place of business. Mr. Torres also states that he completed service on Mr. Chanin on the same date by mailing a copy of the order to show cause and supporting documents to Mr. Chanin.

By sworn affidavit, Mr. Chanin states that Stephanie Pagan was a receptionist employed by one of Outside Venture’s subsidiaries at 150 Broadway, but that her employment was terminated on June 11, 2008, and as such she could not have possibly been present at the premises one month later, on July 11, 2008, in order to receive any papers. Annexed to respondents’ cross motion is a copy of a letter from Michael Berman, Chief Operating Officer of Outside Ventures, to Stephanie Pagan, dated June 11, 2008, explaining that Ms. Pagan’s employment with “Merchant Operations and Administaff” was terminated effective June 11, 2008, and that her salary and benefits would extend to June 13, 2008. Also annexed is a copy of an “Employee Termination” form for Ms.

Pagan from "Administaff," detailing that Ms. Pagan was laid off effective June 13, 2008. Mr. Chanin further states in his affidavit that even if Ms. Pagan had still been employed on the dates of purported service, she would not have been authorized to accept service on behalf of either Mr. Chanin or the LLC. Mr. Chanin avers that at no time did he receive a copy of the papers allegedly served by petitioner, and that a copy had to be obtained from the court file in order to respond to the petition.

While a process server's sworn affidavit of service constitutes prima facie evidence of proper service (Johnson v. Deas, 32 A.D.3d 253, 254 [1st Dep't 2006]), "[a]n affidavit of service is not conclusive once there is a sworn denial of receipt." In re St. Christopher-Ottilie, 169 A.D.2d 690, 691 (1st Dep't 1991), citing Empire Nat'l Bank v. Judal Constr. of New York, Inc., 61 A.D.2d 789 (2d Dep't 1978). Where there is a

sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing. Even if a defendant eventually acquires actual notice of the lawsuit, actual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service.

Bankers Trust Co. of Cal., N.A. v. Tsoukas, 303 A.D.2d 343, 344 (2d Dep't 2003) (internal citations omitted).

Here, the process server's affidavits that he served respondents by substituted service on Ms. Pagan are directly contradicted by Mr. Chanin's sworn denial that personal service was effected. Given Mr. Chanin's assertion that Ms. Pagan was not employed at the time the papers were purportedly served on her and his sworn denial that he received a copy of the papers, a traverse hearing is warranted. Accordingly, it is

ORDERED that the issue of proper service of process upon respondents is referred to a special referee to conduct a traverse hearing and to hear and report with recommendations; except that, in the event of and upon the filing of a stipulation by the parties, as permitted by C.P.L.R. § 4317, the special referee shall determine the aforesaid issue; and it is further

ORDERED that the remaining portions of the petition and cross motion are denied with leave to renew in conjunction with a motion pursuant to C.P.L.R. Rule 4403; and it is further

ORDERED that within fifteen (15) days of the date of notice of entry of this order, petitioner is to serve a copy of this order with notice of entry, together with the Special Referee Information Sheet, on the Special Referee Clerk (Room 119) to arrange a date for the reference to a special referee.

In the event the parties do not agree to hear and determine, then, in accordance with C.P.L.R. Rule 4403 and 22 N.Y.C.R.R. § 202.44(a), following the filing of the report and notice to each party of the filing of the report, petitioner shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If petitioner fails to do so, then respondent shall so move within thirty (30) days after notice of the filing is given. See Gould v. Venus Bridal Gown and Accessories Corp., 148 Misc.2d 589 (Sup. Ct. N.Y. Co. 1990).

This constitutes the decision and order of the court.

Dated: January 27, 2009

**FILED**  
FEB 02 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

  
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JOAN B. LOBIS, J.S.C.