

**Spencer Condominium v Hazan**

2009 NY Slip Op 30815(U)

April 13, 2009

Supreme Court, New York County

Docket Number: 109083/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 109083/2008  
**SPENCER CONDOMINIUM**  
VS.  
**HAZAN, ELIZABETH**  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. 109083/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for dismiss

PAPERS NUMBERED

1, 2, 3  
4, 5

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

Cross-Motion:  Yes  No

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

**FILED**  
APR 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

HON. DORIS LING-COHAN

Dated: 4/13/09

[Signature]  
J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

----- X  
THE SPENCER CONDOMINIUM,

Plaintiff,

Index No. 109083/08

-against-

Motion Seq. No. 001

ELIZABETH HAZAN, et al.,

**FILED**  
APR 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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Defendants.

**DORIS LING-COHAN, J.:**

Defendant Elizabeth Hazan moves to dismiss this action for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), on the ground that she was not properly served with the summons and complaint.

Plaintiff The Spencer Condominium brought this action to foreclose on a condominium apartment owned by defendant at 1 East 62nd Street in Manhattan (the "building"), based on defendant's failure to pay common charges, base rent, assessments and other charges (e.g., late fees) for her unit since February 2008, and to satisfy plaintiff's \$13,425.00 lien.

The only issue at bar is whether the manner in which plaintiff served defendant warrants dismissal of the action for lack of personal jurisdiction.<sup>1</sup> Defendant, who avers that she does not use the apartment in the building as her primary residence but rather resides and is domiciled in Florida's Fisher Island, argues that the action must be dismissed because she did not receive the summons and complaint until she visited New York and the building's doorman handed a copy of the pleadings to her, which constitutes improper service of process (Def Aff, ¶ 3, included as part

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<sup>1</sup> Defendant's default is not a concern since plaintiff has agreed to extend defendant's time to answer (*see* Pl Exh C).

of Exh A to moving papers). Defendant also avers that she never received a copy of the pleadings through the mail or personal delivery, either in Florida or New York (*id.*, ¶ 5).

Plaintiff counters that defendant was validly served pursuant to CPLR 308(4). In addition, plaintiff contends that defendant was properly served in accordance with the condominium documents. Defendant's proprietary lease provides that all "notices" to unit owners are to "be personally delivered or sent by registered or certified mail to the Property address ... or to such other address as may have been designated by such Unit Owner from time to time, in writing, to the Condominium Board and the Residential Board" (Pl Exh G, ¶ 5.1; *see also* condominium by-laws, Pl Exh H, § 11.1).<sup>2</sup>

The burden on this motion is on plaintiff, not defendant. Although defendant is the moving party, the burden of establishing jurisdiction is borne by the party asserting it, in this case plaintiff (*Jacobs v Zurich Ins. Co.*, 53 AD2d 524, 525 [1st Dept 1976]).

Agreements contained in a lease to effect service of process by means other than those provided by CPLR 308 are enforceable; service effected in accordance with a lease is valid and confers personal jurisdiction over defendant (*Credit Car Leasing Corp. v Elan Group Corp.*, 185 AD2d 109, 109 [1st Dept 1992]). What is required is that defendant "clearly consented to personal jurisdiction in New York and to service [in the manner specified in the agreement]" (*Marine Midland Bank, N.A. v United Missouri Bank, N.A.*, 223 AD2d 119, 124 [1st Dept 1996]), and that "the means selected for providing notice was reasonably calculated, under all the

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<sup>2</sup> After the initial submission of this motion, the court, in an interim order, directed the parties to provide memoranda of law on the issue of whether service completed in accordance with the terms of the parties' written agreements is sufficient to confer personal jurisdiction over defendant.

circumstances, to apprise interested parties of the pendency of the action" (*Beckman v Greentree Sec., Inc.*, 87 NY2d 566, 570 [1996] [internal quotations omitted], rearg den 87 NY2d 1056 [1996]). The clauses in the proprietary lease and the condominium by-laws speak only to notices and do not mention service of process with regard to the commencement of legal proceedings. General language, such as that present in those documents, cannot be held as clear consent of service of process of a legal proceeding in the manner prescribed therein. As such, defendant never waived the state's statutory personal service requirements under the CPLR.

Therefore, the only issue that remains is whether defendant was properly served pursuant to the CPLR. It is undisputed that defendant was not personally served (*see* CPLR 308[1], 313). Plaintiff attempted to personally serve defendant at the Aventura, Florida address designated by her as her legal mailing address (*see* Pl Exh I), but was unsuccessful because defendant had apparently vacated the premises at least a month earlier (*see* Pl Exh E). Plaintiff then attempted service at the Fisher Island address given by defendant as her actual address in connection with this motion, but was thwarted when the process server was denied access to the private island by its private security and local police (*see* Pl Exh F).

Plaintiff, unable to personally serve – or even find – defendant, proceeded with the CPLR's substituted service provisions. The process server's affidavit states that defendant was served pursuant to CPLR 308(4) by "nail and mail" at the condominium unit – defendant's "usual place of abode within the state" (Pl Exh D; *see Estate of Waterman v Jones*, 46 AD3d 63, 65-66 [2d Dept 2007]). This is contradicted by defendant, who states that she never received a copy in the mail either in New York or in Florida, where presumably her New York mail was forwarded (Def Aff, ¶ 5). Defendant avers that she only received the summons and complaint on August 7,

2008, when she visited New York and the building's doorman handed them to her (*id.*, ¶ 7).

Furthermore, defendant does not state that the summons and complaint were affixed to her door; she states that she received process from the doorman personally.

A process server's affidavit is not conclusive proof of service if, as here, there is a sworn denial of receipt (*Empire Nat'l Bank v Judal Constr. of New York*, 61 AD2d 789, 789-790 [2d Dept 1978]), but is evidence to be considered by the court in determining the validity of service (*see Laurence v Hillcrest Gen. Hosp.-GHI Group Health Inc.*, 119 AD2d 808, 809 [2d Dept 1986]). When affidavits of process servers are in conflict with the sworn denial by the defendant that process was received, a hearing is required to determine if service was actually made (*Green Point Savings Bank v Taylor*, 92 AD2d 910, 910-911 [2d Dept 1983]).

Due to conflicting affidavits, a traverse hearing is required. The validity of service pursuant to CPLR 308(4) is to be established through a hearing when, as here, there are conflicting affidavits and the truth of the matter is not clearly evident (*see First Union Mortgage Corporation v Silverman*, 242 AD2d 258, 258 [2d Dept 1997]). Although the court's decision to hold a hearing is discretionary (*see De Vore v Osborne*, 78 AD2d 915, 915 [3d Dept 1980]), failing to hold a jurisdictional hearing is an improvident exercise of that discretion where, as here, "[t]here are numerous issues of fact regarding service of process upon the defendant[]" (*Fabrizio, Radmin, Buskbaum & Co. v Hendler & Murray, P.C.*, 216 AD2d 520, 520 [2d Dept 1995]), particularly when one of the issues is whether the place of service was defendant's actual dwelling place (*Thomas v Maloney*, 289 AD2d 222 [2d Dept 2001]).<sup>3</sup>

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<sup>3</sup> Should defendant decide to waive her personal jurisdictional objection, a time-consuming and costly hearing would not be required, especially given that if this action is ultimately dismissed based upon improper service, plaintiff can simply commence another action shortly thereafter. If defendant waives such hearing, she shall promptly notify counsel and the

Accordingly, it is

ORDERED that the motion is 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, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine such issue; and it is further

ORDERED that **such granting of a traverse hearing and referral is conditioned on defendant Hazan serving a copy of this order, within 30 days of entry of this order, with notice of entry, upon all parties and upon the Special Referee Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar<sup>4</sup>; and it is further**

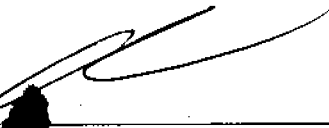
**ORDERED that failure to serve the order on the Special Referee Clerk shall be deemed an abandonment of such jurisdictional claim, and a denial of defendant's motion to dismiss; and it is further**

ORDERED that this matter, which is scheduled on the Part 36 calendar on 4/24/09, is adjourned to 6/19/09 at 10:00 AM, as a control date for counsel to advise the court as to status of the referral, which may be done by joint letter or letter with copy to the other side.

This constitutes the decision and order of the court.

DATED: April 13, 2009

**FILED**  
APR 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

  
\_\_\_\_\_  
Hon. Doris Ling-Cohan, J.S.C.

J:\JURISDICTION\SPENCER.HAZAN, traverse hearing

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court within 30 days. Conversely, should plaintiff seek to discontinue this proceeding and re-serve, plaintiff shall promptly so notify within 30 days.

<sup>4</sup> If plaintiff seeks to expedite the hearing, plaintiff may also serve the Clerk to schedule.