

Rich v Eckhardt

2009 NY Slip Op 33465(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 103866/09

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

DAVID S. RICH,

Plaintiff,

-against-

MUNA ECKHARDT, TRUSTEE OF THE NOORUDDIN ABDULLATIF FAMILY TRUST and PATRICIA L. DORAN, ESQ.,

Defendants.

INDEX NO. 103866/09

MOTION SEQ. NO. 001

FILED

SEP - 3 2009

The following papers, numbered 1 - 3 were considered on this motion to vacate the Court's order:

COUNTY CLERKS OFFICE
NEW YORK

PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	_____

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is denied for the reasons set forth below.

Defendant Muna Eckhardt, Trustee of the Nooruddin Abdullatif Family Trust ("Trustee") moves, pursuant to CPLR 2221(a)(2), to vacate the *ex parte* order of the Honorable Joan B. Carey, dated March 25, 2009 (the "Service Order"), which permitted alternative service pursuant to CPLR 308(5), and to dismiss the complaint against the Trustee. As CPLR 2221(a) permits a party moving to vacate an order to so move before any judge of the court when the motion is made with notice, although the order was made without notice, this Court issues this decision, rather than referring the motion to the Honorable Joan B. Carey.

This action arises from an alleged breach of a real estate contract, whereby plaintiff agreed to sell a condominium unit to the Trustee. The Trustee deposited with the escrow agent, defendant Patricia L. Doran, Esq., an initial deposit in the amount of \$175,500.00. When the closing did not go forward, plaintiff commenced this action, alleging that the buyer breached its obligations under the contract of

sale and seeking to compel the escrow agent to release the \$175,500.00 deposit based on the Trustee's alleged breach of contract. In order to effectuate service on the Trustee, plaintiff moved for an order permitting alternative service, which was granted, as described below.

CPLR 308(5) provides that the court may direct any method of personal service upon a natural person "if service is impracticable under paragraphs one, two and four of this section." The Service Order permitted service of the summons and complaint on the Trustee by: (1) personal service on Alvan Bobrow, Esq.; (2) regular mail at P.O. Box 3197, Dubai, United Arab Emirates; and (3) email to mancot@emirates.net.ae. See Gretchen S. Silver Affirmation, Exh G.

Movant contends that alternative service was improperly permitted, in part, because the court was not aware that the Trustee had provided a residential street address in Dubai in the "Condominium Building Purchase Application," at which address plaintiff could have served the Trustee, instead of applying to the court for an order permitting alternative service.¹ Movant does not assert, however, that such document was in plaintiff's possession and, in fact, admits that this document was in the possession of the condominium board. Further, movant contends that alternative service was improper because plaintiff did not even attempt service prior to seeking such order.

In opposition, plaintiff asserts that, during the real estate transaction, the Trustee never appeared in the United States and never provided an address other than the designated Dubai post office box as the sole address and location for the receipt of notices. Plaintiff further states that all of the documents generated in the real estate transaction and in plaintiff's counsel's possession were reviewed, and the only address listed was the Dubai post office box address. Further, plaintiff contends that he also performed internet searches to locate the Trustee's address and also contacted the Trustee's real estate broker and Alvan Bobrow, Esq., the Trustee's real estate attorney, for their client's address.

¹ While movant asserts that it was inappropriate for the court to grant an order permitting alternative service in the first instance, based on the lack of requisite showing of impracticality, movant in no way contests that the particular methods of service selected by the court were reasonable.

In granting an order for alternative service, the court did not improvidently exercise its discretion. Given that plaintiff had limited information with regard to the Trustee's address, that is, only a Dubai post office box address, and plaintiff attempted to obtain the Trustee's address, the court did not err by determining that service was impracticable and providing an alternative method of service.² In addition, it appears plaintiff conducted a reasonable search to determine the Trustee's address, and although there might have been another possible search mechanism (*i.e.* contacting the condominium board), the CPLR does not require plaintiff to exhaust *all* possibilities. The standard of "impracticality" is not as rigid as movant claims; instead, it has been determined to be less stringent than due diligence. *Liebeskind v Liebeskind*, 86 AD2d 207, 210-11 (1st Dep't 1982). Moreover, plaintiff was not required to attempt service prior to seeking an order for alternative service, if shown that it would be futile. *Franklin v Winard*, 189 AD2d 717, 717 (1st Dep't 1993); *Saulo v Noumi*, 119 AD2d 657, 658 (2d Dep't 1986). Here, clearly, since plaintiff did not have an address at which to serve the Trustee, personal service could not be attempted. Thus, the motion to vacate the Service Order is denied.

The Trustee's motion to dismiss the complaint is also denied. The motion to dismiss, based on lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), presumes that the Court has found alternative service to be improper and has granted the motion to vacate the Service Order. Thus, movant contends that, as a direct result of the vacatur of the prior order, the complaint should be dismissed since service of process as prescribed in the Service Order would not comply with the CPLR. However, since the court denied that part of the Trustee's motion to vacate the Service Order, the portion of the motion seeking to dismiss the complaint is also denied.

² The Court notes that it is disingenuous for the Trustee to assert that plaintiff moved for alternative service simply to avoid personal service of the Trustee in Dubai because it would be inconvenient, when the Trustee was in a position to provide a Dubai address where plaintiff could serve. Plaintiff contacted Alvan Bobrow, Esq., who, after speaking with the Trustee, told plaintiff that the Trustee advised him not to accept any legal papers on behalf of the Trustee and did not provide an address for the Trustee.

Accordingly, it is

ORDERED that defendant Trustee's motion to vacate the court's prior order, dated March 25, 2009, and to dismiss the complaint as to the Trustee is denied in its entirety; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon all parties; and it is further

ORDERED that all remaining discovery, as listed in the Preliminary Conference Order, dated June 26, 2009, shall be completed by September 30, 2009. (If a Demand for Discovery & Inspection has not been served, such demand shall be served on or before August 25, 2009). A compliance conference shall be held on October 2, 2009 at 9:30 AM, in Room 428, 60 Centre Street, New York, NY, only if a note of issue is not filed on or before September 30, 2009 or discovery still exists. To cancel the compliance conference, a copy of the note of issue shall be provided to the Part 36 Clerk prior to the conference date.

This constitutes the decision and order of the Court.

Dated: 8/31/09


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

J:\Service of Process\Rich.Eckhardt, vacate alternative service order - denied.wpd

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