

Metz v Roth

2010 NY Slip Op 30190(U)

January 27, 2010

Supreme Court, New York County

Docket Number: 103414/09

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

MARY METZ

INDEX NO. 103414/09

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

STEVEN ROTH, et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

JAN 28 2010

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of defendants Steven Roth, Vornado Realty Trust, Vornado Management Corp, Beacon Court Condominium, Board of Managers of Beacon Court Condominium, and Rose Associates Inc. seeking to dismiss the Complaint of plaintiff Mary Metz for lack of jurisdiction due to plaintiff's failure to timely file the Affidavits of Service, pursuant to CPLR §§3211(a)(8) and 308, is denied; and it is further

ORDERED that the branch of defendants' motion for dismissal, pursuant to CPLR §3211(a)(1), and (a)(7) is denied without prejudice, at this juncture; and it is further

ORDERED that the branch of defendants' motion for an order extending their time to file a motion to dismiss based on improper service against plaintiff is granted; and it is further

ORDERED that plaintiff's cross-motion for leave to file the Affidavits of Service *nunc pro tunc* is granted; and it is further

ORDERED that defendants shall serve and file their motion to dismiss based on improper service by Monday, February 22, 2010; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 1/27/10 This constitutes the decision and order of the Court.

[Signature] J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

HON. CAROL EDMEAD
 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: PART 35

-----X
MARY METZ,

Plaintiff,

Index # 103414/09

-against-

STEVEN ROTH, VORNADO REALTY TRUST,
VORNADO MANAGEMENT CORP., BEACON COURT
CONDOMINIUM, BOARD OF MANAGERS OF BEACON
COURT CONDOMINIUM, and ROSE ASSOCIATES INC.,

Defendants,

-----X

STEVEN ROTH, VORNADO REALTY TRUST,
VORNADO MANAGEMENT CORP., BEACON COURT
CONDOMINIUM, BOARD OF MANAGERS OF BEACON
COURT CONDOMINIUM, and ROSE ASSOCIATES INC.,

Third-Party Plaintiffs,

-against-

PELLI CLARKE PELLI ARCHITECTS, LLP, SLCE
ARCHITECTS, LLP, BERARDI STONE SETTING, INC.,
BOVIS LEND LEASE LMB, INC., and PHILIP HABIB &
ASSOCIATES,

Third-Party Defendants.

-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Third-Party
Index # 500683/09
FILED
JAN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this personal injury action, plaintiff Mary Metz ("plaintiff") seeks to recover against defendants Steven Roth ("Mr. Roth"), Vornado Realty Trust ("Vornado Trust"), Vornado Management Corp. ("Vornado Management"), Beacon Court Condominium ("Beacon Court"), Board of Managers of Beacon Court Condominium (the "Board"), and Rose Associates Inc.

(“Rose”) (collectively “defendants”).¹

Defendants now move to dismiss plaintiff’s action as against them, pursuant to CPLR §§308, and 3211(a)(8), and to dismiss the action as against Vornado Trust, Vornado Management, Rose and Mr. Roth, pursuant to CPLR §3211(a)(1), and (a)(7).

In response, plaintiff cross moves for leave to file the Affidavits of Service *nunc pro tunc*.

Background²

On March 13, 2006, plaintiff allegedly sustained serious injuries after she tripped and fell on a curb ramp on the sidewalk in front of 1 Beacon Court, 151 East 58th Street, New York (the “premises”). Alleging that defendants were negligent in their ownership and control of the premises, plaintiff filed this action with the Court on March 11, 2009.

In their motion, defendants first argue that plaintiff’s Complaint should be dismissed on the ground that she failed to file proof of service with the Clerk. As to the corporate defendants, plaintiff was required to serve the summons and complaint pursuant to CPLR §311, which requires service be completed in accordance with BCL §306, *i.e.*, upon a registered agent pursuant to CPLR §308 (pertaining to natural persons) as if the registered agent was a defendant, or upon the Secretary of State. Defendants contend that the Court file fails to reveal that plaintiff filed the Affidavits of Service (within 20 days of service of the Summons and Complaint) as required under CPLR §308(2), and that the Secretary of State advised the defendants that there is no record of filing of an Affidavit of Service related to this matter. A failure to comply with this

¹Defendants also seek common-law and contractual indemnification or contribution from third-party defendants Pelli Clarke Pelli Architects, LLP, SLCE Architects, LLP, Berardi Stone Setting, Inc., Bovis Lend Lease LMB, Inc., and Philip Habib & Associates.

²As the Court’s decision rests on the threshold issue of jurisdiction, only the portions of the parties’ arguments relevant to jurisdiction are provided.

requirement is a procedural defect and defendants seek dismissal pursuant to CPLR §3211(a)(8) as there is no proof that plaintiff acquired jurisdiction over the named defendants.

Defendants also contend that, as to the five corporate defendants, pursuant to CPLR §306(b), plaintiff had 120 days following the filing of her Summons and Complaint to complete service on defendants. However, there is no evidence that such service was ever completed on defendants, as plaintiff failed to properly file Affidavits of Service. Thus, defendants contend, they have been "prejudiced and are unable to properly contest service of the Summons and Complaint." Defendants request that the Court provide an extension of time, as to the issue of service beyond the 120 days for service, should such Affidavits be provided and reveal that service was "not timely completed."

Further, should the Court not dismiss plaintiff's Complaint, defendants seek leave for an extension of time to file a motion to dismiss the Complaint based on improper service. Defendants contend that although a motion to dismiss based on lack of jurisdiction must be made within 60 days from the filing of a responsive pleading, the Court may extend the time period on the ground of undue hardship. Defendants argue that plaintiff's failure to adhere to CPLR §308 "has impeded [defendants] ability to file the within motion." Defendants contend that "it is clearly undue hardship on [defendants] to even begin to address the issue of service," as defendants have "no inkling as to the timeliness or method of service in this matter."³

³The balance of defendants' motion comprises arguments that the Complaint should be dismissed as against Vornado Trust, Vornado Management, and Mr. Roth on the ground that plaintiff fails to state a claim upon which relief can be granted, pursuant to CPLR §3211(a)(7), and as against Rose, based on documentary evidence, pursuant to CPLR §3211(a)(1).

In response, plaintiff cross moves for an order deeming plaintiff's Affidavits of Service timely filed, contending that the court file reveals "that affidavits of service were indeed filed with the clerk" on September 21, 2009. Plaintiff asserts that the failure to timely file an Affidavit of Service is an irregularity that should be cured by deeming it filed *nunc pro tunc*.

Plaintiff also argues that the purpose of requiring filing of proof of service pertains solely to the time within which a defendant must answer, and does not relate to the jurisdiction acquired by service of the summons. Thus, there is no basis for defendants' argument that the affidavits of service deprive this court of jurisdiction. Accordingly, there is no basis for defendants' argument that plaintiff's failure to file same deprives this Court of jurisdiction.

Also, plaintiff does not object to defendants' request for more time to file a motion to dismiss based on improper service.⁴

In their reply, defendants point to plaintiff's failure to advise the Court that the filing of the Affidavits of Service, comes, at a minimum, 40 days after the CPLR allows for such filing, and after defendants filed their motion. Further, plaintiff failed to attach copies of the Affidavits of Service to her motion, and, more importantly, she failed to offer a reason for her delinquency. Therefore, the Court should deny plaintiff's cross-motion. Defendants also note that plaintiff does not oppose the branch of defendants' motion seeking leave for an extension of time to file a motion to dismiss plaintiff's Complaint based on improper service.

In her reply, plaintiff provides a letter dated September 21, 2009 addressed to the Clerk requesting that the six Affidavits of Service attached thereto be filed. Plaintiff then contends that

⁴The balance of plaintiff's opposition contests defendants' arguments seeking to dismiss the claims against Vornado Trust, Vornado Management, Rose and Mr. Roth.

“[a]ccording to the affidavits of service, only three were required to be filed with the Clerk: those pertaining to individual defendants” Mr. Roth (served by suitable age and discretion), Beacon Court (served *via* authorized agent David “Smith”), and the Board (served *via* authorized agent David “Smith”). “The other three affidavits” pertaining to Vornado Trust, Vornado Management, and Rose “were not required to be filed.” For actions commenced on or after January 1, 1998, there is no general requirement that proof of service be filed. Rather, the requirement that proof of service be filed in such actions turns on the method by which process was served. Pursuant to CPLR §311, there is no requirement for filing and pursuant to CPLR §308(2), there is a requirement for filing. Therefore, defendants’ motion concerning any untimely filing of affidavits of service must be denied as to these latter three defendants: Mr. Roth, Beacon Court, and the Board, as there is no requirement that the affidavits pertaining to their service be filed. In turn, the request by the defendants for an enlargement of time to move to dismiss on personal jurisdiction grounds on behalf of these three defendants must also be denied. They cannot rely on any argument concerning the affidavits of service.⁵

Discussion

Failure to File Affidavits of Service

Here, it is undisputed that plaintiff did not file the Affidavits of Service with the Clerk until September 21, 2009, after the 120 days to file same expired.⁶

However, although CPLR §3211(a)(8) permits a party to move to dismiss for lack of

⁵The Court notes that plaintiff does not explain how she served process on each of the six defendants, or whether she did so pursuant to CPLR §311 or CPLR §308(2).

⁶The Court notes that the Court records indicate that the six Affidavits of Service annexed to the letter defendants served upon the Clerk were received by the Clerk on September 22, 2009.

personal jurisdiction, contrary to defendant's arguments, the filing of proof of service "pertains solely to the time within which the defendant must answer, and does not relate to the jurisdiction acquired by service of the summons" (*Lancaster v Kindor*, 98 AD2d 300, 306 [1st Dept 1984], *affd*, 65 NY2d 804 [1985]). Therefore, the branch of defendants' motion seeking to dismiss plaintiff's Complaint for lack of jurisdiction due to plaintiff's failure to timely file the Affidavits of Service, pursuant to CPLR §§3211(a)(8) and 308 is denied.

Further, because a delay in the filing of proof of service "is merely a procedural irregularity," it "may be corrected *nunc pro tunc* by the court" in the absence of prejudice (*Lancaster* at 306; *see also Mortgage Electronic Registration Sys., Inc. v Folkes*, 18 Misc 3d 1138, 859 NYS2d 896 [Sup Ct, New York County 2008]; *Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442, 443 [1st Dept 1998]).⁷ Defendants failed to demonstrate that they have been prejudiced by plaintiff's failure to timely file the Affidavits of Service, except to the extent that they have been unable to determine whether they have a basis to move to dismiss for improper service, which the this Court may rectify by extending defendants time to so move. Thus, defendants' request for an extension of time to file a motion to dismiss based on improper service is granted.

Consequently, as there is no prejudice by plaintiff's failure to file the Affidavits of Service,⁸ the Court grants plaintiff's cross-motion to deem the Affidavits of Service timely filed *nunc pro tunc*. As plaintiff has already filed the Affidavits of Service, and the Court has deemed

⁷The Court in *Lancaster* went on to deem the filing of proof of service to have been timely, *nunc pro tunc*, even though the plaintiff failed to move for such an action, "in light of plaintiff's proceeding as a *pro se* litigant, who may be granted procedural liberties not generally afforded attorneys representing clients at the bar" (*id.* at 307).

⁸Defendants only allege, without more, that they "have been prejudiced and are unable to properly contest service of the Summons and Complaint" (motion, ¶ 9).

the Affidavits of Service timely filed *nunc pro tunc*, plaintiff's argument that she was not required to file same for all six defendants is moot.

Finally, in light of the above grant of defendants' time to file a motion to dismiss based on improper service, which would raise an issue as to this Court's jurisdiction over the defendants, the Court does not reach the balance of the arguments raised in defendants' motion, at this juncture.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of defendants Steven Roth, Vornado Realty Trust, Vornado Management Corp, Beacon Court Condominium, Board of Managers of Beacon Court Condominium, and Rose Associates Inc. seeking to dismiss the Complaint of plaintiff Mary Metz for lack of jurisdiction due to plaintiff's failure to timely file the Affidavits of Service, pursuant to CPLR §§3211(a)(8) and 308, is denied; and it is further

ORDERED that the branch of defendants' motion for dismissal, pursuant to CPLR §3211(a)(1), and (a)(7) is denied without prejudice, at this juncture; and it is further

ORDERED that the branch of defendants' motion for an order extending their time to file a motion to dismiss based on improper service against plaintiff is granted; and it is further

ORDERED that plaintiff's cross-motion for leave to file the Affidavits of Service *nunc pro tunc* is granted; and it is further

ORDERED that defendants shall serve and file their motion to dismiss based on improper

service by Monday, February 22, 2010; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 27, 2010


Hon. Carol R. Edmead, J.S.C.
HON. CAROL EDMEAD

FILED
JAN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE