

Smith v Columbus Manor, LLC
2010 NY Slip Op 30242(U)
January 27, 2010
Supreme Court, New York County
Docket Number: 110729/08
Judge: Louis B. York
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SCANNED ON 2/3/2010

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

LOUIS B. YORK

PRESENT: _____ J.S.C.

PART 2

Index Number : 110729/2008
SMITH, TONI
VS.
COLUMBUS MANOR
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

- 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

FILED

FEB 03 2010

NEW YORK
COUNTY CLERK'S OFFICE

~~IN~~

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

Note change in caption of third party action

Dated: 1/27/10

Rey

LOUIS B. YORK 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 2**

-----X
TONI SMITH and MOSES SMITH,

Plaintiffs,

-against-

COLUMBUS MANOR, LLC., a/k/a COLUMBUS MANOR
STOCK, LLC., and STELLAR MANAGEMENT, LLC.,

Defendants.

-----X
COLUMBUS MANOR, LLC., a/k/a COLUMBUS MANOR
STOCK, LLC., and STELLAR MANAGEMENT, LLC.,

Defendants/Third-party Plaintiffs,

-against-

CONCORD BUILDING SERVICES, INC., ARIES
MANAGEMENT, ARIES MANAGEMENT
COLLECTIONS, INC., and ARIES MANAGEMENT, INC.,

Third-party Defendants.

-----X
Louis B. York, J.S.C.:

Index No. 110729/08

DECISION/ORDER

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

This is a motion to dismiss for failure to properly serve the third-party summons and complaint upon the third-party defendants. Support for this motion has been submitted by Mark R. Kook of Vandenberg & Feliu, LLP on behalf of Concord Building Services, Inc., Affordable Housing, LLC., sued as "Aries Management", and Aries Management Collections, Inc. (collectively, "movants"). No appearance has been made on behalf of third-party defendant Aries Management, Inc.

For the reasons that follow, the Court denies in part and grants in part movants' motion to dismiss for failure to properly serve the third-party defendants.

Service of the summons and complaint must be completed within 120 days of commencing a third-party action under C.P.L.R. 306-b. Respondents in this case commenced the third-party action by purchasing an index number on March 24, 2009. Service of the third-party summons and complaint was to be completed, therefore, by July 22, 2009.

Service upon a corporation may be completed in one of two ways: personal service upon "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" under C.P.L.R. 311(a)(1), or personal service upon "the secretary of state as agent of a domestic or authorized foreign corporation" under Business Corporation Law (BCL) 306(1)(a).

Aries Management Collections, Inc. and Concord Building Services, Inc.

C.P.L.R. 306 requires adequate proof of service to set forth the date of service. Respondents submit affidavits purporting to establish service upon the secretary of state on behalf of Aries Management Collections, Inc. and Concord Building Services, Inc. (Taustine Aff. in Opp. Exs. A, B). Although, neither affidavit states the date of service on its face, respondents also attach Receipts of Service from the Department of State setting forth the date of service on each

entity as April 30, 2009. (Taustine Aff. in Opp. Ex. D.) Taken together, the Affidavits of Service and the Receipts of Service establish sufficient proof of service through the secretary of state on Aries Management Collections, Inc. and Concord Building Services, Inc.

Aries Management

Respondents claim successful service upon Aries Management based on personal service of Prena Curanaj on two separate occasions. The affidavits of service reflect delivery of the summons and complaint to Emma Pozzi at 150 Glover Avenue in Yonkers, NY on April 8, 2009 and to a "Jane Doe" at 35 Ostego Street in Yonkers, NY on April 10, 2009. In her Affidavit, Ms. Prena Curanaj admits she was an employee of Aries Management for a period of time until June 2006. She also states that although she once lived on Ostego Street in Yonkers and her parents continue to live at 160 Glover Street in Yonkers, she was not living at either address in April of 2009. (Curanaj Aff.) According to a print-out from the NYS Division of Corporations, Prena Curanaj is the contact on file with the secretary of state for DOS Process for Aries Management Collections, Inc. (Taustine Aff. in Opp. Ex. A.) However, even if Ms. Curanaj were personally served with the summons and complaint, this would be insufficient to prove successful service upon Aries Management because Ms. Curanaj was not "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to

receive service” at the time of attempted service. The fact that Ms. Curanaj continues to be listed as the DoS Service contact for Aries Management Collections, Inc., a different entity entirely, does not deem her eligible to receive personal service on behalf of Aries Management. Therefore, respondents have failed to serve Aries Management with process within the 120-day window and, as a result, movants’ motion to dismiss must be granted with regard to Aries Management.

For the reasons given above, the motion to dismiss is denied with respect to Aries Management Collections, Inc, and Concord Building Services, Inc.; and it is further

Ordered that the motion to dismiss with respect to Aries Management is granted and the complaint is dismissed in that regard; and it is further

Ordered that the Clerk is directed to enter judgment accordingly.

The caption of this action is amended as follows:

-----X
TONI SMITH and MOSES SMITH,

Plaintiffs,

-against-

COLUMBUS MANOR, LLC., a/k/a COLUMBUS MANOR STOCK, LLC., and STELLAR MANAGEMENT, LLC.,

Defendants.
-----X

-----X
COLUMBUS MANOR, LLC., a/k/a COLUMBUS MANOR
STOCK, LLC., and STELLAR MANAGEMENT, LLC.,

Defendants/Third-party Plaintiffs,

-against-

CONCORD BUILDING SERVICES, INC., ARIES
MANAGEMENT COLLECTIONS, INC., and
ARIES MANAGEMENT, INC.,

Third-party Defendants.
-----X

Dated: 1/27/10

ENTER:

Lly
Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE