

Fleishaker v 135th St. Realty Corp.

2010 NY Slip Op 30640(U)

March 20, 2010

Supreme Court, New York County

Docket Number: 112908/2009

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

DONALD FLEISHAKER, MARVIN
FLEISHAKER, ABBE E. FLEISHAKER AND
AARON FLEISHAKER,

Plaintiffs,

- v -

135th STREET REALTY CORP., and
LEO INSHANALLI,

Defendant.

INDEX NO.

112908/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

FILED
MAR 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

On November 19, 2007, the plaintiffs and the defendants entered into an agreement. The plaintiffs agreed to loan the defendants 250,000.00 and in exchange the defendants agreed to pay plaintiffs the principal amount of 250,000.00 with interest, beginning January 1, 2008 and ending December 1, 2008. The plaintiffs commenced this action, by motion in lieu of a complaint, pursuant to CPLR 3213, based upon the defendants failure to comply with said agreement and for an order granting summary judgment for(1) the amount of 250,000.00 plus interest and (2) setting this matter down for a hearing to determine the plaintiffs counsel fees. The defendants cross-moved for

an order dismissing the action based upon untimely service.

SUMMARY JUDGMENT STANDARD

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v NY Univ Med Ctr.*, 64 NY2d 851, 853 [1985]); see, *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]).

"Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence, the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v New York*, *supra*; see *Winegrad v New York Univ. Med. Ctr.*, *supra*).

The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If

* 3]
there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

CPLR§ 3213 Motion for summary judgment in lieu of complaint

CPLR§ 3213 states:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

DISCUSSION

In support of their motion the plaintiffs submit a copy of a Mortgage and Mortgage Note executed by the defendants. According to the terms in the Mortgage Note, the defendants agreed to pay the plaintiffs the principal amount of 250,000.00 with interest, at a rate of thirteen percent (13%) interest, to be paid monthly of the 1st day of January 2008 until December 1, 2008 (Exhibit B., page 1). The plaintiffs claim that the defendants have failed to submit any payments toward the principal amount of or any accrued interest, since November 30, 2008.

In addition, Article 20 of the Mortgage provides in part:

If the Mortgagee retains counsel for the purpose of collecting any money which may be due under this Mortgage, or to recover the mortgaged property, or to protect its interest therein by reason of the happening of any defaults or breaches set forth in this Mortgage, then and in that event the Mortgagor agrees to pay counsel fees in the amount of which is hereby expressly fixed at eighteen (18%) of the then unpaid balance of the mortgage debt.

(Exhibit B, page 3). Thus, the plaintiffs argue that pursuant to the Mortgage Note, they are entitled to collect the principal amount of 250,000.00, plus thirteen percent interest, and an additional eighteen percent for counsel fees.

In support of their cross-motion, and in opposition to the plaintiffs motion for summary judgment, the defendants argue that this court lacks jurisdiction in this action. The defendants claim that the plaintiffs service of the summons to the door of defendant Inshanall's home was invalid because no mailing was received and no affidavits of service were filed. The defendants also claim that the plaintiffs "nail and mail" service to defendant 135th Street was invalid, as such method of service is improper upon a corporation, pursuant to CPLR 311.

The defendants argue that the plaintiffs failed to comply with CPLR §320, by failing to allow the defendants a minimum of twenty days before the return date, to respond to the summons. The defendants claim that the plaintiffs commenced the action on September 11, 2009 and set the return date for September 30, 2009, and that the plaintiffs demand for responsive papers, was set for September 23, 2009, seven days prior to the return date. The defendants also claim that the plaintiffs served the summons on September 20, 2009, three days before the response was due. Thus, the defendants were in default three days after they were served.

In opposition to the defendant's cross-motion to dismiss, the plaintiffs argue that

the defendants have not suffered any prejudice as a result of the delay in service. The plaintiffs claim that they agreed to a two week adjournment in order to allow defendants time to prepare a substantive answer. The plaintiffs also claim that their motion had been adjourned, in order to allow the defendants additional time to respond and following such adjournment, the defendants filed a cross-motion. Thus, the defendants have had an adequate amount of time to respond to the motion.

The plaintiffs argue that defendant Inshanalli's attempt to avoid service resulted in a delay. The plaintiffs claim that on September 14, 2009, they attempted service upon both defendants at 145-19 Lakewood Avenue, Jamaica, New York, defendant Inshanalli's home address . The plaintiffs claim that the pleadings were not served on that date because a woman answered the door and denied knowing defendant Inshanalli. After confirming that to 145 -19 Lakewood Avenue, Jamaica, New York, was defendant Inshanalli's home address, the plaintiffs returned, on September 19, 2009, and served the pleadings by affixing copies of the pleadings to the front door. Subsequently, on September 21, 2009, the plaintiffs elected to serve defendant 135th Street Realty Corporation, by service to the Secretary of State, pursuant to CPLR 311.

The plaintiffs argue that the method of service was proper. The plaintiffs claim that, after affixing the pleadings to defendant Inshanalli's his front door, on September 21, 2009, the plaintiffs mailed a copy of the pleadings to his home. In addition, the affidavits of service were properly filed, along with the motion, in the motion support office. Thus, this court has subject matter and personal jurisdiction over the defendants.

ANALYSIS

CPLR § 308 states in part:

Personal service upon a natural person shall be made by any of the following methods:

- 1. by delivering the summons within the state to the person to be served; or
- 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence. . .

In addition, CPLR 308 (4) states in part:

- 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence. . .

As evidenced by the affidavits of service, the plaintiffs initial attempt to deliver the summons to defendant Inshanalli at his home address, failed. Accordingly, the plaintiffs served defendant Inshanalli by affixing the summons to the door of his home, in compliance with CPLR 308 (4). Thus, this court has jurisdiction over defendant Leo Inshanalli.

The method of service on defendant 135th Street Realty was proper. CPLR§ 304 states in pertinent part:

- (a) The secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served.

CLS Bus Corp § 306 [b][1]

- (b) (1) Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with [fig 1] the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service . . .

Thus, this court has jurisdiction over defendant 135th Street Realty.

In addition, there is "ample authority under CPLR 2214 (c) to overlook late service of a notice or paper if the court determines that no prejudice will ensue" (*Glasz v Glasz*, 173 AD2d 937, 938 [3d Dept 1991]). "When there is no default presumptively caused by the short service, the issue is not the lateness of the service, but whether it caused the respondent substantial prejudice" (*Plaza 400 Owners Corp. v Resnicoff*, 168 Misc. 2d 837, 839-840 [NY Civ Ct 1996]; See, *Glasz v Glasz*, *supra*). "CPLR 2214 (c) provides Supreme Court with the discretion to overlook the late service of papers if no prejudice to the moving party results from the late service (see, *Glasz v Glasz*, *supra*; *Whiteford v Smith*, 168 AD2d 885 [3d Dept 1990]).

The plaintiffs commenced this action on September 11, 2009 and the initial return date for the motion was September 30, 2009. The plaintiffs motion had been adjourned from September 9, 2009 to October 9, 2009, in order to allow the defendants additional time to respond. The defendants filed their cross-motion on October 5, 2009. Subsequently, the plaintiffs motion and the defendants cross motion were adjourned to October 16, 2009.

On December 2, 2009, this court issued an order re-assigning this action to the motion support office and extending the return date to January 7, 2010, in order to permit each party to submit a sur-reply. Thus, the defendants had almost five months to respond to the plaintiffs motion on the merits, and they failed to do so. Accordingly,

the defendants have failed to demonstrate any substantial prejudice as a result of the plaintiffs actions.

Upon the foregoing papers it is,

ORDERED the plaintiffs motion summary judgment is granted in the amount of 250,00.00; and it is further

ORDERED that the defendants cross-motion is hereby denied; and it is further,

ORDERED that the issues of (1) the amount of interest accrued from November 30, 2008 through the date of the judgment at the rate of thirteen percent (13%); plus interest thereafter at nine percent (9%) until paid and (2) the amount of plaintiff's counsel fees to be paid by defendant; are referred to a Special Referee to hear and report with recommendations, 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 the aforesaid issue; and it is further

ORDERED that the portion of this motion requesting relief for :(1) the amount of interest accrued from November 30, 2008 through the date of the judgment at the rate of thirteen percent (13%); plus interest thereafter at nine percent (9%) until paid and (2) the amount of plaintiff's counsel fees to be paid by defendant, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that the plaintiffs shall serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the

reference to a Special Referee and on all parties.

This constitutes the Decision and Order of the Court.

Dated: 3/25/2010

Enter:

[Handwritten signature of Paul Wooten]

PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: : DO NOT POST REFERENCE

FILED
MAR 26 2010
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