

**Board of Mgrs. of 50 Pine St. Condominium v
Miodownik**

2010 NY Slip Op 33208(U)

October 26, 2010

Sup Ct, NY County

Docket Number: 110020/09

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

THE BOARD OF MANAGERS OF 50 PIN:
STREET CONDOMINIUM,

Plaintiff,

-against-

HELA MIODOWNIK, *et al.*,

Defendants.

INDEX NO. 110020/09

MOTION DATE June 22, 2010

MOTION SEQ. NO. 002

MOTION CAL. NO. 108

The following papers, numbered 1 to 10 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-5</u>
Answering Affidavits — Exhibits _____	<u>6-7</u>
Replying Affidavits _____	<u>8-10</u>

Cross-Motion: Yes No

Upon the foregoing papers, the motion of defendant Hela Miodownik for an order, *inter alia*, pursuant to CPLR § 3211 (a) (8) dismissing the complaint for lack of personal jurisdiction is decided in accordance with the accompanying decision and order.

FILED
OCT 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 61

-----X
THE BOARD OF MANAGERS OF 50 PINE
STREET CONDOMINIUM,

DECISION AND
ORDER

Index No. 110020/2009

Plaintiff,

-against-

HELA MIODOWNIK, WASHINGTON MUTUAL
BANK, FA a/k/a JP MORGAN CHASE BANK, N.A.,
and ADAM ALLAN,

Defendants.

-----X
O. PETER SHERWOOD, J.:

FILED
OCT 29 2009
NEW YORK
COUNTY CLERK'S OFFICE

In this action to foreclose a lien for unpaid common charges at a residential condominium, defendant Hela Miodownik ("Miodownik" or "defendant") moves for an order: (1) pursuant to CPLR § 3211 (a) (3) and (8) dismissing the complaint on the grounds that plaintiff lacks standing and for lack of personal jurisdiction; (2) pursuant to CPLR § 2201 staying the action until the resolution of another action pending before this court titled *JP Morgan Chase Bank, National Association v Hela Miodownik, et al.*, Index No. 118/2009; (3) pursuant to CPLR § 3001 declaring the validity of the subject condominium's by-laws and, alternatively, (3) if the action is not stayed or dismissed, granting defendant leave to serve and file an answer with counterclaims.

Background

On July 15, 2009, plaintiff, The Board of Managers of 50 Pine Street Condominium (the "Board"), commenced the instant action to foreclose its lien for unpaid common charges with regard to Unit 3S (the "Unit"), a residential condominium located at 50 Pine Street, New York, New York which is owned by Miodownik (Affirmation of Steven Einig in Opposition to Motion [Einig Affirm.], Ex. "A", Ver. Compl., ¶¶ 1-3). Thereafter, JP Morgan Chase, N.A. ("Chase"), the successor in interest to Washington Mutual Bank, F.A., served an answer, but subsequently withdrew its answer pursuant to a stipulation with plaintiff whereby the Board withdrew its claims against Chase to the extent of recognizing that Chase's consolidated first and second mortgages constitute a first lien against the Unit superior to the lien of the Condominium and any subsequent mortgage held by Chase is subordinate to the Condominium's lien (*id.* Ex. "B").

Thereafter, the Board moved for an order of reference which was granted by order dated January 25, 2010, the complaint was dismissed as against defendants "John Doe(s) through "Jane Doc(s)" and the New York Transit Adjudication Bureau and the matter was referred to Godfrey Murain, Esq., as Referee to ascertain and compute the amount due. Thereafter, on or about February 5, 2010, defendant's attorney, Adam R. Allan, Esq., filed a Notice of Appearance. However, Mr. Allan did not file an answer on Miodownik's behalf or seek an extension of time within which to do so. Mr. Allan took no formal action in this case until he filed the instant motion on or about May 21, 2010, two days before the hearing before the Referee scheduled for May 23, 2010.¹

Defendant now moves to dismiss the complaint on the grounds, *inter alia*, that the Board lacks standing to bring this action as its members were elected in contravention of the Condominium's by-laws and that the court lacks jurisdiction over defendant due to improper service and for other relief.

The court notes that two other actions were brought against Miodownik in this court after the instant action, namely, *Board of Managers of 50 Pine Street Condominium v Hela Miodownik*, Index No. 116279/2009, which sought injunctive relief to compel Miodownik to allow the Condominium's contractors into the Unit to repair a waste water leak and to enjoin Miodownik from using the bathroom fixtures until the faulty plumbing was repaired, and *JP Morgan Chase Bank, National Association v Hela Miodownik, et al.*, Index No. 118210/2009, an action to foreclose upon the consolidated first and second mortgages held by Chase encumbering the Unit.²

Discussion

1. Personal Jurisdiction

Jurisdiction is a threshold issue, which must precede all discussion of other matters (*see*

¹May 23, 2010, the date of the scheduled hearing before the Referee, was a Sunday. Accordingly, the hearing was re-noticed for May 25, 2010, but then adjourned due to the filing of the instant motion.

²By order dated February 1, 2010, the action under Index No. 116279/2009 was dismissed. The case under Index No. 118210/2009 has been adjourned without a date pending the determination of Miodownik's appeal from a decision and order of the court dated August 10, 2010, denying her motion for an order pursuant to CPLR § 3211 (a) (1) and (7) dismissing the complaint.

Moro v Mills, 70 AD3d 1269 [3d Dept 2010]; *National Union Fire Insurance Company of Pittsburgh v St. Barnabas Community Enterprises, Inc.*, 48 AD3d 248 [1st Dept 2008]). Defendant requests that the court order a traverse hearing with respect to service. In support thereof, defendant submits her own sworn affidavit stating simply “I was never personally served in this action” and also submits an affidavit of her brother-in-law Thomas T. Allan, Jr., who resides in the Unit with defendant, also stating “I was never personally served in this action” (Affirmation of Adam R. Allan in Support of Motion [Allan Affirm.], ¶ 6, Exs. “C” and “D”).

The affidavit of service annexed to the opposition papers as Exhibit “E” indicates that service of the summons, verified complaint and notice of pendency was effectuated upon Miodownik pursuant to CPLR § 308 (4) by conspicuous place service at 50 Pine Street, Unit 3S, New York, New York 10005, alleged to be defendant’s last known dwelling house, with the affixing occurring on August 6, 2009, at 7:11 a.m., after four attempts at personal service made, respectively, on July 27, 2009, at 7:55 p.m., on August 1, 2009, at 2:15 p.m., on August 4, 2009, at 7:31 p.m. and on August 6, 2009, at 7:11 a.m., failed. Thereafter, on August 20, 2009, a copy of the summons and verified complaint was mailed by first class mail to defendant at the exact same address in an envelope marked “personal & confidential”. Plaintiff then filed the affidavit of service with the New York County Clerk’s Office on August 24, 2009, within the twenty days required by CPLR § 308 (4), and service was complete ten (10) days later, *i.e.*, on September 3, 2009 (CPLR § 308 [4]). Accordingly, Miodownik had 30 days from the latter date, to wit October 3, 2009, within which to appear, answer or move with respect to the complaint (CPLR § 3012 [c]).

A second affidavit of service indicates that the summons and verified complaint were served upon Miodownik pursuant to CPLR § 308 (4) by conspicuous place service at the same address with the affixing occurring on September 24, 2009 at 7:18 p.m., after the prior attempts noted in the first affidavit of service failed and additional attempts at personal service were made on August 31, 2009, at 9:07 p.m. and on September 12, 2009, at 7:40 a.m. also failed (*id.*). A follow-up mailing of the summons and verified complaint was made on October 1, 2009 by first class mail in an envelope marked “personal & confidential” to defendant at the same residence address. Plaintiff filed the affidavit of service in the New York County Clerk’s Office on October 5, 2009, and service was complete 10 days later, *i.e.*, on October 15, 2009. Thus, if this later service is deemed to be the only

proper service made upon the defendant she had until November 15, 2009 within which to appear, answer or move with respect to the complaint (CPLR § 3012 [c]).

The sworn affidavits of service constitute prima facie evidence of proper service indicating that the process server exercised due diligence in attempting to serve Miodownik personally with the summons and verified complaint at her residence before resorting to nail-and-mail service (*see e.g. Ayala v Bassett*, 57 AD3d 387 [1st Dept 2008]). The burden then shifts to defendant to rebut the presumption of proper service (*id.*). Defendant's conclusory and unsubstantiated denial of service is insufficient to rebut the prima facie proof of proper service pursuant to CPLR § 308 (4) created by the process server's affidavit (*see Koyenov v Twin-D Transp., Inc.*, 33 AD3d 967 [2d Dept 2006]; *General Motors Acceptance Corp. v Grade A Auto Body*, 21 AD3d 967 [2d Dept 2005]). Moreover, to raise an issue of fact sufficient to require a traverse hearing, defendant must set forth specific probative facts with respect to such service (*see NYC TL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; *see also Rosario v Beverly Rd. Realty Co.*, 38 AD3d 875 [2d Dept 2007]). Here, defendant has not done so. Accordingly, the branch of defendant's motion as seeks dismissal of the complaint for lack of personal jurisdiction must be denied.

Accordingly, it is

ORDERED that the issue as to whether defendant Hela Miodownik was properly served with the summons and verified complaint in this proceeding is referred to a Special Referee for a traverse 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

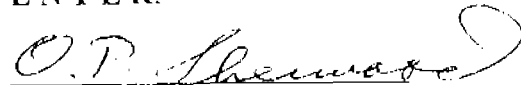
ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee; and it is further

ORDERED that counsel for defendant Hela Miodownik shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information

Sheet.³ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

DATED: 10/26/10

ENTER:



O. PETER SHERWOOD

J.S.C.

FILED
OCT 29 2010
NEW YORK
COUNTY CLERKS OFFICE

³Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.