

Harry Weiss, Inc. v Moskowitz

2010 NY Slip Op 33804(U)

March 15, 2010

Supreme Court, New York County

Docket Number: 109435-09

Judge: Joan M. Kenney

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

JOAN M. KENNEY

PART _____

Index Number : 109435/2009
HARRY WEISS, INC.
VS.
MOSKOWITZ, MENDEZ
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

Justice

INDEX NO. 109435-09
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read 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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MAR 18 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/15/10

J.S.C.

JOAN M. KENNEY
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 8

-----X
HARRY WEISS, INC. and E.W. INTERNATIONAL
DIAMONDS, INC.,

Plaintiffs,

Index No. 109435/09

-against-

DECISION & ORDER

MENDEZ MOSKOWITZ, BMW DIAMONDS, INC.,
SAUL BAWABAH d/b/a B.B. JEWELRY,
B.B. JEWELRY, INC., ELI HANONO d/b/a
ELEGAN JEWELRY, and ELEGANT JEWELRY,
INC.,

Defendants.

-----X
KENNEY, JOAN, M., J.S.C.

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FILED
MAR 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to dismiss:

Papers	Numbered
Notice of Motion, Affidavit, Affirmation, and Exhibits	1-5
Opposition Affidavits, with Exhibits	6-20
Reply affidavit	21

Defendants B.B. Jewelry, Inc. (BB), and Saul Bawabah (Bawabah), d/b/a BB, move, pursuant to CPLR 3211 (a) (7) and (8), for an Order dismissing the complaint.

FACTUAL BACKGROUND

Plaintiffs, Harry Weiss, Inc. and E.W. International Diamonds, Inc., are domestic corporations in the diamond trade. Plaintiffs claim that defendants were involved in a fraudulent scheme, whereby defendant Mendez Moskowitz (Moskowitz), using the name BMW Diamonds, Inc. (BMW), obtained two diamonds from plaintiffs on consignment, purportedly for sale to his

customers. Moskowitz, in actuality, pawned one of the stones with his co-conspirators, Bawabah, BB's president, Eli Hanono (Hanono), president of Elegant Jewelry, Inc (Elegant).

Plaintiffs bring the instant action, asserting eight causes of action: conversion (first and second), fraudulent scheme (third), unjust enrichment (fourth), injunction (fifth), violations of General Business Law § 349 (sixth), negligence (seventh) and recovery for bounced checks (eighth). The first, and third through seventh causes of action are asserted against movants Bawabah and BB.

As a threshold issue, defendants BB and Bawabah move to dismiss the complaint asserted as against them, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction, claiming that service of process on them was not in conformity with the CPLR.

In opposition to movants' argument, plaintiffs proffer an affidavit by William Lester, the individual who purportedly served the summons and complaint on Bawabah and BB. In his affidavit, Lester alleges that, on July 2, 2009, he went to BB, located at 37 West 47th Street, Room 701, New York, New York; that "a person who identified himself as Robbie Cohen, an officer of BB, refused to open the door when [he] told him [he] was there to serve legal papers for [Bawabah] and [BB]" (Lester Affidavit in Opposition dated 10/5/09). He further asserts that Cohen requested that he "slip the papers through the mail slot," and he "slipped two copies of the summons and complaint through the mail slot" (*id.*). He also states that, "on the same day, [he] mailed a copy of the summons and complaint to Babawah in a plain envelope marked 'personal and confidential'," and mailed a copy to BB.

In reply, movants' counsel claims that no one by the name Robbie Cohen is employed in Babawah's office.

DISCUSSION

The burden of establishing personal jurisdiction over the defendants is upon the plaintiffs (*see Schorr v Persaud*, 51 AD3d 519 [1st Dept 2008]). Proof of service is governed by CPLR 306, which requires that “[p]roof of service shall specify the papers served, the person who was served and the date, time, address” (CPLR 306 [a]). It further provides that whenever service is made “by delivery of the summons to an individual, proof of service shall also include, in addition to any other requirement, a description of the person to whom it was so delivered including, but not limited to, sex, color of skin, hair color, approximate age, approximate weight and height, and other identifying features” (CPLR 306 [b]). Further, a process server’s sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308 (2) (*see Matter of de Sanchez*, 57 AD3d 452 [1st Dept 2008]). The party contesting service must place before the court facts sufficient to rebut the presumption of service (*Freidman v Ramlal*, 282 AD2d 499 [2d Dept 2001]).

With respect to Babawah, Lester’s affidavit purports to demonstrate that service was made, pursuant to CPLR 308 (2). This section authorizes service, *inter alia*, by delivery of the summons within the state to a person of suitable age and discretion at the defendant’s actual place of business and then mailed the summons by first class mail to that defendant at his last known residence or actual place of business. While the proffered affidavit, as well as the affidavit of service filed with the County Clerk, state that substitute service was purportedly made on an individual who identified himself as Robbie Cohen (Cohen) at Babawah’s actual place of business, both affidavits fail to include Cohen’s descriptive information as required by CPLR 306 (b). The only description noted of the individual allegedly served is that of a “male,” without any other identifying traits or

characteristics. However, this is not a jurisdictional defect, if, in fact, service was properly made (*Best v City of New York*, 101 AD2d 847 [2d Dept 1984]).

While movants' counsel alleges that there is no individual at Babawah's office named Cohen, there is no indication that such an assertion was made by anyone with personal knowledge, nor is there any denial by Babawah that Cohen was present at his office. However, since the affidavits of service upon Babawah do not conform with the requisites of CPLR 308(2), in that they do not contain Cohen's description, the record is insufficient to determine whether service was properly made on a person of suitable age and discretion at Babawah's actual place of business. Thus, a traverse hearing is required to determine whether there was proper service on Babawah, pursuant to CPLR 308(2) (*Best v City of New York*, 101 AD2d 847, *supra*).

Movants also claim that service was not properly served on BB. CPLR 311(a)(1) provides, in relevant part, that personal service upon a corporation shall be made by delivering the summons "to 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"

Here, the proffered affidavit and the affidavit of service filed with the County Clerk on July 7, 2009 state that service was made upon BB by delivery on Cohen. Cohen is inconsistently identified by Lester as a purported officer of BB (see opposing papers, Lester's affidavit dated October 5, 2009), and, as a purported manager (affidavit of service dated July 2, 2009). It is claimed that service was made by delivery to an individual, in compliance with CPLR 306(b) is required (CPLR 306[b]). With the exception of the single description of "male," the affidavit of service fails to include any of the other requisite identifying features as required by CPLR 306(b). Thus, since there is a question as to whether service on BB was proper, the proper remedy is to direct a traverse

hearing to determine if service was properly effectuated (*see Poree v Bynum*, 56 AD3d 261 [1st Dept 2008]; *see also Ortiz v Santiago*, 303 AD2d 1 [1st Dept 2003]).

Therefore, the motion by Babawah and BB for an order dismissing the complaint, pursuant to CPLR 3211(a)(7) and (8), is granted to the extent of referring the issues to a Special Referee of whether service was properly made on Babawah, pursuant to CPLR 308(2), and BB, pursuant to CPLR 311(a)(1).

Accordingly, it is

ORDERED that the motion by defendants Saul Babawah and B. B. Jewelry, Inc. for an order dismissing the third-party complaint, pursuant to CPLR 3211 (a) (7) and (8), is granted to the extent of referring the issue of whether service was properly made on defendant Saul Babawah, pursuant to CPLR 308 (2), and on defendant B. B. Jewelry, Inc., pursuant to CPLR 311 (a) (1), 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 balance of 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 or the designated referee; and it is further

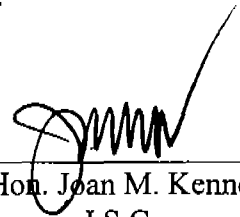
ORDERED that the party or counsel for the party seeking the reference or, absent such party, counsel for the third-party plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place

¹Copies are available in Rm. 119 at 60 Centre Street and on the Court's Website.

this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: March 15, 2010

ENTER:



Hon. Joan M. Kenney
J.S.C.

FILED
MAR 18 2010
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