

Specialized Realty Servs., LLC v Maikisch
2010 NY Slip Op 33971(U)
August 19, 2010
Supreme Court, New York County
Docket Number: 24189/09
Judge: Roy S. Mahon
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ENTERED
IN
COMPLIANCE

Present:

HON. ROY S. MAHON
Justice

SPECIALIZED REALTY SERVICES, LLC,

TRIAL/IAS PART 7

Plaintiff(s),

INDEX NO. 24189/09

- against -

**MOTION SEQUENCE
NO. 1 & 2**

DAVID MAIKISCH,

**MOTION SUBMISSION
DATE: June 23, 2010**

Defendant(s).

The following papers read on this motion:

- Notice of Motion** **X**
- Cross Motion** **X**
- Affirmation in Support** **X**
- Affirmation in Reply** **X**

Upon the foregoing papers, the motion by the defendant for an Order for dismissal of the Complaint dated November 25, 2009, etc and the cross motion by the plaintiff for an Order dismissing the plaintiff's motion(sic) ab initio and granting a default judgment pursuant to CPLR 3215 in favor of plaintiff and against the defendant; denying the plaintiff's motion to dismiss in its entirety; staying this proceeding pursuant to CPLR 2201 pending the result of the plaintiff's appeal in the 2007 declaratory judgment action if this Court should agree with the defendant's res judicata argument in his motion to dismiss; deeming that the plaintiff's affidavit of service be filed within 120 days of the purchase of the index number nunc pro tunc if this Court should agree with the defendant that the affidavit of service should have been filed with the Clerk within 120 days of the purchase of the index number and granting plaintiff leave to amend its complaint with greater particularity if this Court should agree with the defendant's claim in respect to the defendant's fiduciary duty to plaintiff, are both determined as hereinafter provided:

The Court initially observes that the defendant's affidavit of service of the motion sets forth:

"STATE OF NEW YORK)
: SS.:
COUNTY OF ORANGE)

1. I am not a party to the action, am over 18 years of age and reside at Washingtonville, New York.

[* 2]

2. On April 23, 2010, I served a true copy of the annexed Notice of Motion in the above entitled action by mailing same in the Federal Express depository within the State of New York, prior to the latest time designated by that service for overnight delivery, addressed to the last known address of the addressee(s) as indicated below:

Howard T. Schaub, Esq.
PO Box 1481
135 Rockaway Avenue
Valley Stream, NY 11582

_____/s
Lori Shevenell"

The Court further observes that the Summons to which the defendant's requested relief is addressed states that the plaintiff's counsel is:

"_____/s
HOWARD T. SCHAUB, ESQ.
Attorney for Plaintiff
Office Address:
P.O. Box 1481
Valley Stream, NY 11582"

The Court notes that CPLR §2103(b)(1)-(7) provides:

"Rule 2103. Service of papers

...

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:

1. by delivering the paper to the attorney personally; or
2. by mailing the paper to the attorney at the address designated by that attorney for that purpose, or, if none is designated, at that attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period; or
3. if the attorney's office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if the attorney's office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box; or

4. by leaving it at the attorney's residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at the attorney's residence unless service at the attorney's office cannot be made; or

5. by transmitting the paper to the attorney by facsimile transmission, provided that a facsimile telephone number is designated by the attorney for that purpose. Service by facsimile transmission shall be complete upon the receipt by the sender of a signal from the equipment of the attorney served indicating that the transmission was received, and the mailing of a copy of the paper to that attorney. The designation of a facsimile telephone number in the address block subscribed on a paper served or filed in the course of an action or proceeding shall constitute consent to service by facsimile transmission in accordance with this subdivision. An attorney may change or rescind a facsimile telephone number by serving a notice on the other parties; or

6. by dispatching the paper to the attorney by overnight delivery service at the address designated by the attorney for that purpose or, if none is designated, at the attorney's last known address. Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery. Where a period of time prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the prescribed period. "overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state; or

7. by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the court by rule and, unless such rule shall otherwise provide, such transmission shall be upon the party's written consent. The subject matter heading for each paper sent by electronic means must indicate that the matter being transmitted electronically is related to a court proceeding."

Amongst other things, the plaintiff's counsel sets forth:

"The defendant self selected an address of 135 Rockaway Avenue, Valley Stream, NY 11580 as my delivery address despite this not being the address designated on the plaintiff's paper and it not being my office address for eight years. The defendant did not contact me to confirm said self selected address as a good delivery address or ask me for an address for Fed Ex delivery. Because the defendant did not pay for overnight delivery on Saturday April 24, 2010, as required by CPLR 2103, the first attempted delivery by Fed Ex at the address self selected by the defendant was not until April 26, 2010. Since said address is not my address Fed Ex redirected its delivery and somehow, on April 27, 2010, it was left between the storm door and front door of my personal residence without any signature required."

The defendant in reply states:

"14. In a subsequent call to Federal Express, the carrier indicated that it was unable to deliver the package to the law office address, and that it was able to obtain a home address for Mr. Schaub. Defendant's notice and motion were delivered to that address, which turned out to be Mr. Schaub's address, on April 27, 2010."

To the extent that service may be made at an attorney's residence, subdivision 4 of the CPLR §2103 states:

"4. by leaving it at the attorney's residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at the attorney's residence unless service at the attorney's office cannot be made; or"

In light of the fact that the defendant has not submitted an affidavit of service attesting to service of the defendant's application pursuant to CPLR §2103(b)(4) as to service upon a person of suitable age and discretion to controvert the plaintiff's counsel's contention as to the manner of service (supra), the defendant has not established valid service of the defendant's application. As such, the defendant's application for an Order for dismissal of the Complaint dated November 25, 2009, etc., is dismissed.

To the extent that the plaintiff seeks an Order granting a default judgment pursuant to CPLR 3215 in favor of plaintiff and against the defendant, said application is denied without prejudice to renew if the defendant does not comply with the provisions of CPLR §3211(f).

Based upon the Court's determination as to the service of the defendant's motion, those branches of the plaintiff's motion which respectively seek Orders denying the plaintiff's motion to dismiss in its entirety; staying this proceeding pursuant to CPLR 2201 pending the result of the plaintiff's appeal in the 2007 declaratory judgment action if this Court should agree with the defendant's res judicata argument in his motion to dismiss; deeming that the plaintiff's affidavit of service be filed within 120 days of the purchase of the index number nunc pro tunc if this Court should agree with the defendant that the affidavit of service should have been filed with the Clerk within 120 days of the purchase of the index number and granting plaintiff leave to amend its complaint with greater particularity if this Court should agree with the defendant's claim in respect to the defendant's fiduciary duty to plaintiff, are all respectively denied as moot.

SO ORDERED.

DATED: 8/19/2010

Roy S. Malena
.....
J.S.C.

ENTERED

AUG 23 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE