

Sardis v Frankel

2011 NY Slip Op 32381(U)

August 11, 2011

Sup Ct, NY County

Docket Number: 115328/10

Judge: Eileen A. Rakower

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

HON. EILEEN A. BAKOWER

PART 15

Index Number : 115328/2010

SARDIS, JEFFREY

vs.

FRANKEL, SOFIA

SEQUENCE NUMBER : 001

DISMISS ACTION

Justice

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, read on this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED | |
|-----------------|-------|
| 1 | _____ |
| 213 | _____ |
| 4 | _____ |

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

AUG 17 2011

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 8/16/11

HON. EILEEN A. BAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 15

-----X
JEFFREY SARDIS, LAUREN SARDIS,
and JAS HOLDING CORPORATION,

Index No.
115328/10

Plaintiffs,

**DECISION
and ORDER**

-against-

Mot. Seq. 001

SOFIA FRANKEL and MICHAEL FRANKEL,

FILED

Defendants.

AUG 17 2011

-----X
HON. EILEEN A. RAKOWER:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs bring this action against defendants alleging that Sofia Frankel fraudulently conveyed to her son Michael Frankel a luxury condominium while she was indebted to Plaintiff's for more than \$2.5 million as a result of an arbitration award confirmed by the Supreme Court and later affirmed by the First Department.

Presently before the court is a motion by defendant Michael Frankel (hereinafter "Michael") for dismissal pursuant to CPLR §3211(a)(8) on the grounds that Plaintiffs have failed to properly serve process upon Michael. Michael points to the January 24, 2011 affidavit of attempted service and March 16, 2011 affidavit of process server Darryl Green. Green's January 2011 affidavit states that on December 20, 21, 22, 2010, and January 3, 6, 11, 17, and 19, 2011, he attempted to serve Michael at his residence at 160 West 66th Street, Apartment 16B, but was advised by a desk clerk who called up to Michael's apartment that there was no response on each occasion. In the March affidavit, Green states that, on March 5, 2011, a concierge again placed a call up to Michael's apartment but received no response. Green then states that he subsequently delivered the summons and complaint to the concierge, identified and described as "Jane Doe," "a white female, approximately 50 years of age ... approximately 5 feet, 4 inches tall, weighs approximately 100 pounds with black hair and brown eyes." Green further states that, on March 11, 2011, he mailed copies of the summons and complaint to Michael at the above address in a sealed and postpaid envelope with the words "PERSONAL AND CONFIDENTIAL" written thereon.

Michael argues that Green failed to properly serve him in accordance with CPLR §308(2) because there is no indication in the affidavit that Green was denied access to Michael's apartment. Indeed, Michael annexes a January 22, 2010 decision from Judge Solomon dismissing a prior lawsuit by Plaintiffs against the defendants asserting the same claims herein based upon failure to properly serve Michael. In that decision, Judge Solomon found that Plaintiffs failed to personally serve Michael by service upon a concierge because there was no showing that the process server was denied access to Michael's apartment.

Plaintiffs oppose the motion and cross-move for leave to amend their affidavit of attempted service and affidavit of service pursuant to CPLR §305(c). The amended affidavits are virtually identical to the previous ones, with the exception that they state that, on each occasion Green attempted to serve Michael, and at the time he served the concierge, Green was denied access to Michael's apartment.

Plaintiffs also annex the March 17, 2011 affidavit of process server Michael Rocco, which states that Rocco served Michael at his place of business at 20 S.E. 3rd Avenue, 3rd Floor in Miami, Florida by serving "Igal," and subsequently mailing the summons and complaint to that address in an envelope bearing the words "Personal & Confidential." The affidavit further notes that Igal advised Rocco that he knew Michael, and that Michael was "not in the office." Plaintiffs state that Michael is the managing member of two LLCs with their principal address at 20 S.E. 3rd Avenue in Miami. Plaintiffs annex a printout of the "Electronic Articles of Organization For Florida Limited Liability Company" for Lazar Capital LLC. The document is electronically signed by Michael, designates Michael as the LLC's registered agent at the 20 S.E. 3rd Avenue, 3rd Floor address, and lists him as one of the LLC's two managing members/managers (the other being his father Yan). In addition, Plaintiffs annex a "2010 Limited Liability Company Annual Report" filed with the Florida Secretary of State for Applied Medicals LLC. Listed at the three managing members/managers are Michael, defendant Sofia Frankel, and Igal Zakhodin. Plaintiffs also provide correspondence from Applied Medicals indicating that its address is 20 S.E. 3rd Avenue, 3rd Floor in Miami.

CPLR 3211(a)(8) provides that a party may move for dismissal of an action on the ground that "the court has not jurisdiction of the person of the defendant" CPLR §305(c) provides that, "[a]t any time, in its discretion and upon such terms

as it deems just, the court may allow any ... proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.”

It is well settled, and all parties herein acknowledge, that a doorman or concierge may be a person of suitable age and discretion for purposes of CPLR §308(2) when the process server is denied further access to the building (*see Al Fayed v. Barak*, 2007 NY Slip Op 3353 [1st Dept. 2007]). Here, Plaintiffs have submitted affidavits clarifying that the process server was denied access to the building. Plaintiff points out that an affidavit of attempted service in the prior action stated that the process server had been able to gain entry into the building. Still, the affidavits constitute “*prima facie* evidence that defendant was properly served with the summons” (*Caba v. Rai*, 2009 NY Slip Op 5252, *4 [1st Dept. 2009]). Moreover, there is nothing *per se* suspect or unreasonable about a building’s management or security granting a process server access to the building and denying access on a subsequent occasion (*see F.I. Du Pont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794, 795-96 [1977]). While Michael questions the veracity of the amended affidavits, “he fails to swear to specific facts to rebut the statements in the process server’s affidavits” (*U.S. Bank, Nat’l Ass’n v. Arias*, 2011 NY Slip Op 5487, *3 [2nd Dept. 2011]).

Moreover, even if the court did not find that Plaintiffs obtained jurisdiction over Michael from the service at his building, it would find that Plaintiff was properly served at his actual place of business in Florida, based on his status as a manager of two companies at the 20 S.E. 3rd Avenue, 3rd Floor address (*see Columbus Realty Inv. Corp. v. Weng-Heng Tsiang*, 226 A.D.2d 259 [1st Dept. 1996]) (“We agree with the IAS Court that inasmuch as appellant was an officer and co-owner of the business where *CPLR 308 (2)* service was made, giving rise to a clear identification of the work performed by her with that place of business, it is not significant that she worked mainly from her house rather than the place of business”).

Wherefore, it is hereby

ORDERED that Michael’s motion to dismiss is denied; and it is further

ORDERED that Plaintiffs’ cross-motion is granted, and the amended affidavits of service are deemed to be filed *nunc pro tunc*; and it is further

ORDERED that Michael shall serve an answer to the complaint within ten days of receipt of a copy of this order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 11, 2011



EILEEN A. RAKOWER, J.S.C.

FILED

AUG 17 2011

**NEW YORK
COUNTY CLERK'S OFFICE**