

Harmon v Metropolitan Opera
2011 NY Slip Op 34198(U)
October 31, 2011
Supreme Court, Queens County
Docket Number: 2329/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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ELAINE HARMON and DAVID HARMON,

Index No.: 2329/2011

Plaintiffs,

Motion Date:10/27/11

- against -

Motion No.: 13

THE METROPOLITAN OPERA, LINCOLN CENTER
FOR THE PERFORMING ARTS, INC., NEW
YORK ELEVATOR AND ELECTRICAL CORP.,
and THYSSENKRUPP ELEVATOR CORPORATION,

Motion Seq.: 2

Defendants.

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QUEENS COUNTY CLERK
FILED

The following papers numbered 1 to 11 were read on this motion by defendant, THE METROPOLITAN OPERA, for an order pursuant to CPLR 3211(a)(8) dismissing the action against said defendant on the basis of lack of personal jurisdiction due to improper service of process:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 8
Reply affirmation.....	9 - 11

This is a personal injury action in which plaintiffs, ELAINE HARMON and DAVID HARMON, seek to recover damages for injuries allegedly sustained by ELAINE HARMON as a result of a trip and fall accident which occurred on February 2, 2008 on an escalator at the Metropolitan Opera.

Plaintiff commenced an action by filing a summons and complaint on January 31, 2011. Issue was joined by The Metropolitan Opera by service of a verified answer with cross-

claims on May 24, 2011. The answer, inter alia, contained an affirmative defense of lack of personal jurisdiction due to improper service of the summons and complaint.

Defendant now moves by notice of motion served on July 13, 2011, for an order pursuant to CPLR 3211(a)(8) dismissing the complaint against The Metropolitan Opera on the ground of improper service. The affidavit of service, executed by Darren LaPorte, dated March 4, 2011, states that service was made upon The Metropolitan Opera, a corporation, by personally delivering a copy of the summons and complaint on March 1, 2011 to "Ms. Ceicela, Auth. Party at 165 W. 65th St. FL. 9 , New York 10023."

In support of the motion to dismiss, defendant submits an affidavit from Evelyn Finkelstein, Associate Counsel for The Metropolitan Opera, stating that The Metropolitan Opera did not have an employee named Ms. Ceicela who was authorized to accept service. Further, Ms. Finkelstein states that The Metropolitan Opera does not maintain an office or any other facility at the location where service was made, 165 West 65th Street 9th Floor, New York, N.Y. The affidavit states that upon information and belief, the person served was Cecilia Gulchrist who is an employee of the co-defendant Lincoln Center for the Performing Arts which is a separate entity from the Metropolitan Opera. Therefore, defendant moves to dismiss the complaint on the ground that the service of the summons and complaint was not properly made as the person served was not an employee of The Metropolitan Opera and as service was not made at the premises of The Metropolitan Opera.

In opposition, the plaintiff contends that the defendant waived its affirmative defense of lack of personal jurisdiction by failing to move to dismiss within 60 days of service of the answer, as required by CPLR 3211(e). As to the merits, the plaintiff contends that service was proper as "Cecilia" purportedly held herself out as an employee of the Metropolitan Opera who was authorized to accept service on its behalf. Plaintiff submits an affidavit from process server, Darren LaPorte, dated September 30, 2011, which states that on March 1, 2011, he went to 30 Lincoln Center, New York N.Y. with the intention of serving process at that address. However, he states that when he arrived at that address he was advised by an individual that the proper address to serve a summons and complaint on The Metropolitan Opera was 165 West 65th Street 9th Floor, New York NY. He states that when he went to that address he was met by "Ms. Ceicela" who advised him that she was authorized to accept service of the summons and complaint on behalf of the Metropolitan Opera.

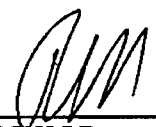
Plaintiff contends that service was proper based upon Fashion Page Ltd v Zurich Ins. Co., 50 NY2d 265 [1980], in which the Court of Appeals stated that even if service is not made upon an officer, director, managing or general agent, or cashier or assistant cashier of the corporation as specified in CPLR 311 (a) (1), service on a corporation is proper "when the process server has gone to its offices, made proper inquiry of the defendant's own employees, and delivered the summons according to their directions." Counsel claims that service was proper based upon the process server's reasonable belief that Ms. Cecelie was an employee of the Metropolitan Opera who had authority to accept service on defendant's behalf. In the alternative, counsel requests a traverse hearing to resolve the questions of fact raised by the conflicting affidavits submitted by the parties.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition, and the defendant's reply thereto, this court finds that the matter shall be set down for a traverse hearing to determine the circumstances of service, whether it was reasonable for the process server to deliver the summons and complaint as set forth in his affidavit, and whether the service was made in a manner which, objectively viewed, was calculated to give respondent "fair notice. In this respect, the Court in Fashion Page, supra. states that "in evaluating whether service is to be sustained, the circumstances of the particular case must be weighed. Delivering the summons to a building receptionist, not employed by the defendant, without any inquiry as to whether she is a company employee, would not be sufficient...Nor is it always reasonable, under all circumstances, for the process server to rely on claims of authority made by the defendant's employees" (see e.g. Miterko v Peaslee, 80 AD3d 736 [2d Dept. 2011]; Dunn v Pallett, 66 AD3d 1179 [2d Dept. 2009]; Freud v St. Agnes Cathedral School, 64 AD3d 678 [2d Dept. 2009]; Aguilera v Pistilli Constr. & Dev. Corp., 63 AD3d 765 [2d Dept. 2009]).

Plaintiff's contention that the defendant waived its affirmative defense of lack of personal jurisdiction by failing to move to dismiss within 60 days of service of the answer as required by CPLR 3211(e) is without merit. Here the defendant's answer was served on May 24, 2011 and the instant motion to dismiss, according to the annexed affidavit of service, was served on July 13, 2011 which was less than 60 days after service of the answer.

Accordingly the parties are directed to appear for a traverse hearing to be held in Room 304 of the Queens County Supreme Court, located at 25-10 Court Square, Long Island City, New York 11101, at 10:00 a.m on December 2, 2011.

Dated: October 31, 2011
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

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