

Omansky v Gurland

2012 NY Slip Op 33293(U)

January 10, 2012

Sup Ct, NY County

Docket Number: 104359/11

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **(HON. CAROL EDMEAD** Justice

PART 35

Index Number : 104359/2011
OMANSKY, LAWRENCE A.
vs.
GURLAND, ROBERT, ET AL.
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 9.13.2011
MOTION SEQ. NO. _____

Motion to/for _____
_____ No(s). _____
_____ No(s). _____
_____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 001) of defendants Mark Winkelman and 64 N. Moore Associates to dismiss the complaint is granted only to the extent that a traverse hearing on the issue of whether defendants were properly served, as discussed further above, is referred 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 upon the 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, defendants may also renew the balance of the instant motion to the extent relevant; and it is further

ORDERED that counsel for defendants 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, upon the Special Referee Clerk in the Motion Support Office in Rm. 119M 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; and it is further

ORDERED that counsel for the moving defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: 1.10.2012

[Signature]
J.S.C.
HON. CAROL EDMEAD

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 35

-----X
 LAWRENCE A. OMANSKY,

Plaintiff,

-against-

ROBERT GURLAND, MARK WINKELMAN,
 SUSAN WINKELMAN, DRU WHITACRE,
 MARK OUDINE, ARLENE COLLINS, MICHAEL
 MORWITZ, ARLENE LADDEN, DONNA ALTMAN
 DESOTO, RAINIERO SOTO A/K/A RAINIERO
 DESOTO, 64 N. MOORE ASSOCIATES, A NEW
 YORK PARTNERSHIP,

Index No. 104359/11

Defendants.
 -----X

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action arising out of the sale of a commercial condominium unit by defendant 64 N. Moore Associates (64 N. Moore Assoc.), a New York general partnership in which plaintiff Lawrence A. Omansky and the individually-named defendants were partners. Defendant Mark Winkelman (Winkelman) was the managing partner of the partnership. Defendants Winkelman and 64 N. Moore Assoc. move, pursuant to CPLR 3211 (a) (1), (5), (7), and (8), to dismiss the complaint as against them.¹

Plaintiff alleges that 64 N. Moore Assoc. was the owner of the commercial space on the ground floor and first floor at 64 North Moore Street in Manhattan. According to plaintiff, in March 1999, defendants sold the space to a third party over his objection. Plaintiff claims that

¹Defendants' memorandum of law indicates that the motion was also made on behalf of defendant Suzanne Winkelman s/h/a Susan Winkelman. However, defendants' notice of motion and reply make clear that the motion was made only on behalf of defendants 64 N. Moore Assoc. and Mark Winkelman.

defendants thereafter remitted a portion of the sale proceeds to him, which was in excess of \$40,000. However, plaintiff returned his portion of the sale proceeds in order to bring a lawsuit challenging the sale as a violation of his right of first refusal and as a breach of the partnership agreement. Plaintiff alleges that after the lawsuit was disposed of in favor of defendants, he requested that defendants remit his portion of the sale proceeds.² Plaintiff claims that defendants have failed to pay the sum to him. The complaint alleges the following three causes of action: (1) breach of the partnership agreement; (2) money had and received; and (3) unjust enrichment. Plaintiff seeks in excess of \$40,000, plus interest and costs and disbursements.

64 N. Moore Assoc. and Winkelman now move to dismiss the complaint, arguing that: (1) plaintiff's claims are barred by the election of remedies doctrine; (2) plaintiff's claims are time-barred because they accrued at the latest in March 1999, and plaintiff did not bring the instant action until April 2011; and (3) the court does not have *in personam* jurisdiction over either 64 N. Moore Assoc. or Winkelman due to improper service of process. To support the latter argument, defendants submit an affidavit from Winkelman, in which he states that, on June 2, 2011, he received by mail a copy of the summons and complaint in this action, "addressed to [him] personally," which was mailed on June 1, 2011 (Winkelman Aff., ¶ 6, Exh. A). Winkelman states that he has not been served with any other copies of the summons and complaint (*id.*). Furthermore, 64 N. Moore Assoc. and Winkelman assert that plaintiff has failed to file an affidavit of service with the County Clerk.

In opposition, plaintiff contends that he is not seeking to affirm the sale of the

²The extensive litigation history between the parties is described in the First Department's decision in *Omansky v Gurland* (4 AD3d 104 [1st Dept 2004]).

commercial unit in this action; rather, he is seeking to recover his share of the sale proceeds in the amount of \$40,060.18. In addition, plaintiff argues that the prior litigation tolled any statute of limitations pursuant to CPLR 205 (a). Plaintiff further asserts that the court has *in personam* jurisdiction over both 64 N. Moore Assoc. and Winkelman because they were served by substituted service on May 12, 2011 and May 16, 2011. In support, plaintiff submits two affidavits of service from his process server.

According to the first affidavit of service from plaintiff's process server, sworn on May 15, 2011, Winkelman was served with the summons and verified complaint on May 12, 2011 at 7:27 P.M. at 64 North Moore Street, No. 2E, New York, New York by delivery to a person of suitable age and discretion, to wit "Jane Doe," who refused service (Plaintiff Aff. in Opposition, Exh. A). The affidavit indicates that a copy of the summons and verified complaint was affixed to the door (*id.*). Additionally, the process server indicates that, on May 14, 2011, he mailed a copy of the summons and verified complaint to that address by first class mail (*id.*). The process server describes "Jane Doe" as a white female between 45 and 50 years old with brown hair and glasses (*id.*). Based upon this description of "Jane Doe," plaintiff believes that the female served was defendant Suzanne Winkelman, Winkelman's wife (Plaintiff Aff., ¶ 6). Plaintiff asserts that this affidavit of service was timely filed with the County Clerk on August 11, 2011 (*id.*, Exh. A).

In the second affidavit, which appears to be sworn on August 26, 2011, plaintiff's process server states that, on May 16, 2011 at 7:45 P.M., he served the summons and verified complaint at the same address on Mark Winkelman for 64 N. Moore Assoc. by delivering a copy of each to "Jane Doe," who refused to give her name (*id.*, Exh. C). Plaintiff's process server describes "Jane Doe" as a white female around 50 years old with brown hair and glasses (*id.*). Plaintiff

also points out that Winkelman admits receiving a copy of the summons and complaint “addressed to him personally.”

In reply, 64 N. Moore Assoc. and Winkelman offer two further affidavits, one from Winkelman, and one from his wife, defendant Suzanne Winkelman s/h/a Susan Winkelman. Mark Winkelman states the following regarding the alleged service on May 12, 2011: (1) the summons and complaint were not delivered to his apartment on May 12, 2011; (2) his wife has blonde hair, although she wears glasses on occasion; (3) his wife was out of town on business and flew back to New York on the evening of May 12, 2011, and went to attend a personal engagement directly from the airport and did not get back home until about 10 P.M. (Winkelman Reply Aff., ¶ 2). Winkelman further states that no papers were affixed to the door, and that the only copy of the summons and complaint that he received by mail was in an envelope post-marked June 1, 2011, and not May 14, 2011 (*id.*, ¶ 3, Exh. D). Additionally, according to Winkelman, the summons and complaint were not served on 64 N. Moore Assoc. on May 16, 2011 because his wife was not home at 7:45 P.M. when the process server allegedly served her with the papers (*id.*, ¶ 4).

Suzanne Winkelman states that, on May 12, 2011, she was in North Carolina for the entire day, and flew back to New York that evening (Suzanne Winkelman Aff., ¶ 3). She states she attended a personal engagement straight from the airport that evening, and provides a copy of the boarding pass and a cab receipt for her travel (*id.*, Exhs. A, B). Ms. Winkelman claims that she did not return home until about 9:30 or 10 P.M. that night, and thus could not have been served with process (*id.*). Furthermore, Ms. Winkelman states that she was not at home on May 16, 2011 at 7:45 P.M. (*id.*, ¶ 4). According to Ms. Winkelman, she went to a restaurant after

work with her colleagues and did not leave the restaurant until shortly before 9 P.M., and provides a copy of a restaurant bill dated May 16, 2011 which was charged to her credit card at 8:44 P.M. (*id.*, ¶ 4, Exh. C). Ms. Winkelman further states that although she occasionally wears glasses, her hair is blonde, and that no one was home at those times on either May 12, 2011 or May 16, 2011 (*id.*, ¶ 5).

“It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void” (*Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 [2d Dept 2009] [internal quotation marks and citation omitted]). Such a defect is not cured by the defendant’s subsequent receipt of actual notice of the action, “since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court” (*Feinstein v Bergner*, 48 NY2d 234, 241 [1979]; *see also Donohue v Schwartz*, 174 AD2d 318, 319 [1st Dept 1991]).

CPLR 308 (2) provides for service:

“by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service. . . .”

Jurisdiction is not acquired pursuant to CPLR 308 (2) unless there has been strict

compliance with both the delivery and mailing requirements of the statute (*Gray-Joseph v Shuhai Liu*, – AD3d –, 2011 NY Slip Op 09592 [2d Dept 2011]; *Olsen v Haddad*, 187 AD2d 375, 376 [1st Dept 1992], *lv denied* 81 NY2d 707 [1993]).

CPLR 310 (a) provides that “[p]ersonal service upon persons conducting business as a partnership may be made by personally serving the summons upon any one of them” (*see also Foy v 1120 Ave. of the Ams. Assoc.*, 223 AD2d 232, 238 [2d Dept 1996] [substituted service methods under CPLR 308 are permitted for service on partners]; *Atkinson v D.M.A. Enters.*, 159 Misc 2d 476, 480 [Sup Ct, NY County 1993] [same]).

“While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn nonconclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing” (*NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; *see also Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 538-539 [1st Dept 2009]; *Omansky*, 4 AD3d at 108; *Ananda Capital Partners v Stav Elec. Sys. (1994)*, 301 AD2d 430 [1st Dept 2003]).

Here, defendants’ sworn denials of service are sufficient to require a traverse hearing as to whether they were properly served on May 12, 2011 and May 16, 2011 at the Winkelman residence pursuant to CPLR 308 (2) and 310 (*see Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589-590 [2d Dept 2009] [traverse hearing required where a woman allegedly served with process denied that the summons and complaint had been delivered to her, and that she was not at home at the time of the alleged service]; *Micalizzi v Gomes*, 204 AD2d 284, 285 [2d Dept 1994] [hearing required where the issue of whether service was properly accomplished turned on

issues of credibility]). Accordingly, the balance of the motion with respect to whether the complaint states a cause of action, whether plaintiff's causes of action are contradicted by documentary evidence, and whether the causes of action are barred by the applicable statutes of limitations will not be determined at this time, and may be renewed depending upon the resolution of the jurisdictional question (*see Krisilas*, 63 AD3d at 889).

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of defendants Mark Winkelman and 64 N. Moore Associates to dismiss the complaint is granted only to the extent that a traverse hearing on the issue of whether defendants were properly served, as discussed further above, is referred 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 upon the 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, defendants may also renew the balance of the instant motion to the extent relevant; and it is further

ORDERED that counsel for defendants 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. 119M at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for


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

the earliest convenient date; and it is further

ORDERED that counsel for the moving defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: January 10, 2012

ENTER:

A handwritten signature in black ink, appearing to read 'Carol Edmead', written over a horizontal line.

J.S.C.

HON. CAROL EDMead