

Clinton Capital Corp. v 635 Realty Corp.

2015 NY Slip Op 30614(U)

April 17, 2015

Supreme Court, New York County

Docket Number: 652608/14

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39
-----X
CLINTON CAPITAL CORPORATION,

Plaintiff/Judgment Creditor

-against-

Index No. 652608/14

635 REALTY CORP. & MASSUD RAHBAR,

Defendants/Judgment Debtors.

-----X
SALIANN SCARPULLA, J.:

Plaintiff/judgment creditor Clinton Capital Corporation (“Clinton”) moves, pursuant to CPLR 5014, for an order renewing the entry of the money judgment for plaintiff and against defendants/judgment debtors 635 Realty Corp. (“635 Realty”) and Massud Rahbar (“Rahbar”), which was entered on July 24,1996 under *Clinton Capital Corp. v 635 Realty Corp. and Massud Rahbar*, Index No. 15461/96 in the amount of \$1,217,420.23, plus interest thereon, on the ground that this action is based upon the judgment, which remains unsatisfied.

Rahbar cross-moves, pursuant to CPLR 3211 (a) (8), for an order dismissing this action as against Rahbar on the ground that this court does not have personal jurisdiction over Rahbar.

For the reasons set forth below, Rahbar’s cross-motion is granted, and the action is dismissed.

In 1990, Clinton brought an action to foreclose a mortgage against Rahbar and 635 Realty. *See Clinton Capital Corp. v 635 Realty Corp. and Massud Rahbar*, Index No. 15461/90 (Sup Ct, NY County 1990). In connection with its foreclosure action, Clinton obtained a deficiency judgment against Rahbar and 635 Realty, jointly and severally in the amount of \$1,217,420.23. The judgment was filed and docketed in the New York County Clerk's office on June 24, 1996. The judgment remains unsatisfied.

Discussion

“While a money judgment award is enforceable for 20 years (*see* CPLR 211 [b]), a real property lien resulting from the judgment is viable for just 10 years (*see* CPLR 5203 [a]).” *Gletzer v. Harris*, 12 N.Y.3d 468, 471 (2009). Accordingly, Clinton's judgment ceased to be lien on real property in 2006. Clinton now brings this action under CPLR 5014 (1) to renew the lien of the judgment.

Pursuant to CPLR 211, “[a] money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to enforce it.” “Since a money judgment is viable for 20 years, but a lien on real property is only effective for 10 years (*see* CPLR 211 [b], 5203 [a]), the Legislature enacted CPLR 5014 to allow a judgment creditor to apply for renewal of the lien by commencing an action for a renewal judgment.” *Schiff Food Prods. Co. v M&M Import Export*, 84 AD3d 1346, 1347-1348 (2d Dept 2011). The statute permits commencement of an action for a renewal judgment during the last year of the pendency of the original

lien. *Gletzer*, 12 N.Y.3d at 473. If the renewal judgment is awarded within the 10-year lien period, the lien takes effect upon the expiration of the first 10-year lien period, thus allowing the judgment creditor to avoid a lien gap. *Id.* However, CPLR 5014 (1) also permits a judgment creditor to commence an action for a renewal judgment where 10 years “have elapsed since the judgment was originally docketed.” *Schiff Food Prods. Co.*, 84 A.D.3d at 1348. In that circumstance, the judgment creditor is not prevented from obtaining a renewal judgment, but will not be entitled to avoid a lien gap by operation of CPLR 5014. *Id.*

Clinton brings this action under CPLR 5014 (1) to renew the lien of the judgment. Clinton brought this action by way of a motion for summary judgment in lieu of complaint, pursuant to CPLR 3213. CPLR 3213 is a hybrid procedure incorporating certain elements of an action and certain elements of motion practice. *Beach House Condominium Assn. of Key W., Inc. v Williams*, 40 Misc. 3d 1240(A) (Sup. Ct. Kings Co. 2013); *Goldstein v Saltzman*, 13 Misc 3d 1023, 1025 (Sup. Ct. Nassau Co. 2006). “As with a plenary action, [personal] jurisdiction is obtained over the [d]efendant by serving the [d]efendant with the summons, notice of motion and supporting papers in a method prescribed in CPLR Article 3.” *Goldstein*, 13 Misc. 3d at 1025. Thus, pursuant to CPLR 3213:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the

defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended time period of time, not exceeding ten days, prior to such hearing date.

With respect to an individual defendant, the summons and the motion in lieu of complaint must be served in the manner set forth in CPLR 308. CPLR 308 provides that personal service upon a natural person shall be made by either delivering the summons within the state to the person to be served (*see* CPLR 308 [1]), or by using substituted service, (a/k/a the “leave and mail” method) (*see* CPLR 308 [2]).

Pursuant to the “leave and mail” method, the summons must be delivered “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.” *Id.* Delivery and mailing must be effected within 20 days of each other, and proof of service must be filed with the clerk of the court within 20 days of either such delivery or mailing, whichever is effected later. Service on the defendant is not complete until 10 days after proof of service is filed.

Here, the affidavits of service demonstrate that service was attempted pursuant to CPLR 308 (2), by delivering the papers to Rahbar at his residence, leaving them with a security guard, and then by mailing a copy of them to his last known residence.

Where, as here, a plaintiff proceeds under CPLR 3213 and substituted service is used, the process becomes complicated, and it may be difficult to satisfy the time requirements of CPLR 3213. Failure to comply with these requirements results in dismissal of the action. *See Mashantucket Pequot Gaming Enterprises v Ping Lin*, 27 Misc 3d 216, 222 (Sup Ct. Kings Co. 2010)

Pursuant to CPLR 305, “[a] summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff’s address and also shall bear the index number assigned and the date of filing with the clerk of the court.” Review of the summons reveals that it is defective on its face. The summons, which is dated August 8, 2014, does not bear the index number assigned, or the date of filing with the court.

In addition, the summons contains an improper venue designation. With respect to venue, CPLR 503 states that “the place of trial shall be in the County in which one of the parties resides when it was commenced” A domestic corporation is deemed a resident of the county in which its principal office is located. *Id.* The summons here is defective because it states only that “[t]he basis of the venue designated is New York County, New York, as it is the place of business and the transaction took place in New

York County.” The summons does not state the identity of the party who allegedly has the place of business on which venue is based. Indeed, no party’s residence or address is specified on the summons. It is undisputed that Rahbar resides in Nassau County. Additionally, Clinton admits that 635 Realty is defunct, and the records of the New York State Department of State indicated that 635 Realty was dissolved by proclamation in 1998 – 17 years ago. Accordingly, 635 Realty’s residence cannot be the basis for venue in New York County.

Moreover, there is an additional, serious, defect with the motion papers, in that the summons creates an ambiguity as to the time required for Rahbar to answer. The summons states that Rahbar is “required to submit to plaintiff’s attorney answering papers on this motion within the time provided in the notice of motion annexed [thereto].” The notice of motion is dated August 8, 2014, and states that “[u]pon the summons, dated August 8, 2014 . . . all answering papers shall be served on the undersigned on or before the 10th day after *personal delivery* of the summons to you.” (Emphasis added).

Clinton did not personally deliver the summons and notice of motion to Rahbar. Rather, Clinton utilized substituted service under CPLR 308 (2). Applying Clinton’s specific direction to Rahbar, the time to answer is measured from the date of personal delivery to Rahbar, and not the return date of the motion. Because Clinton did not personally deliver the papers to Rahbar, the direction in the notice of motion creates an ambiguity as to when Rahbar must serve his answer, *i.e.*, whether he must wait for

personal delivery in order to do so.¹ Therefore, Clinton has created a patent ambiguity, rendering its action jurisdictionally defective, and requiring both denial of the motion, and dismissal of the action. *See Mashantucket Pequot Gaming Enterprise*, 27 Misc. 3d at 222 (“[a] failure to give the defendant the statutorily mandated time to appear and answer a motion for summary judgment in lieu of complaint compels not only a denial of the motion but also a dismissal of the action”); *accord Beach House Condominium Assn. of Key W., Inc*, 40 Misc 3d 1240[A], 2013 NY Slip Op 51496[U],* 3.

The affidavits of service filed by Clinton also demonstrate that no jurisdiction was obtained over Rahbar. The first proof of service is a two-page document containing two affidavits sworn to by Nasser Atrash on August 15, 2014, both of which contain the wrong index number. The second page of this document states that service was effected on Rahbar by leaving an “R.J.I. ADDENDUM AND NOTICE OF MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT . . . with index number and date endorsed thereon,” at Rahbar’s residence, with “MRS. CRYSTAL, SECURITY OF MASSUD RAHBAR, a person of suitable age and discretion.”

The Atrash affidavit does not state, as is required, that the summons was served together with the stated documents. In addition, the Atrash affidavit incorrectly states that the “index number and date” were endorsed on the documents served. Neither the

¹ After the original notice of motion was rejected, on September 8, 2014, Clinton filed a new notice of motion. However, the new notice of motion contains the same ambiguous directive as to when answering papers were to be served.

summons nor the notice of motion contain an index number or date of filing. This affidavit of service therefore fails to satisfy the requirements of CPLR 308 (2).

Rahbar also submits the affidavit of Keith C. Northridge, Clinton's attorney, sworn to on August 22, 2014. In this affidavit, Northridge states that he served an attorney for 635 Realty Corp and Rahbar Corp. by "overnight mail." However, personal jurisdiction over a defendant cannot be obtained by serving papers to that defendant's attorney by "overnight mail." Rather, only if the defendant designates an agent by a writing executed and acknowledged in the same manner as a deed, with the consent of the agent thereon, and complies with certain filing requirements, can service of process be effected on someone other than the defendant. *See* CPLR 318.

Rahbar also submits an "Affidavit of Mailing" of Salisha Hosein, sworn to August 19, 2014, in which Hosein avers that, on August 19, 2014, she:

served the within R.J.I. ADDENDUM AND NOTICE OF MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT FOR RENEWAL OF JUDGMENT AGAINST DEFENDANTS/JUDGMENT DEBTORS PURSUANT TO CPLR 5014 with index #/date endorsed thereon on 635 REALTY CORP. by mail in a first class and post paid envelope that bore the legend 'Personal and Confidential.' The envelope was properly addressed to 635 REALTY CORP., 227 IBIS COURT, MANHASSET NY 10030 by regular first class mail with a certificate of mailing. Said envelope was deposited in an official depository under the exclusive care and custody of the U.S. Postal Service.

However, mailing anything to a corporation known to be defunct has no legal effect.

Accordingly, even if Clinton complied with the "leaving" requirement of CPLR 308 (2), there is no proof that he complied with the mailing requirement. Absent

compliance with both, personal service cannot be effectuated, and the action must be dismissed for lack of personal jurisdiction. *See Wilber Natl. Bank v F&A Inc.*, 301 A.D.2d 706, 707 (3d Dept 2003) (proper service was never effectuated over defendant where affidavit failed to show that lender complied with mailing requirement for substituted service); *see also Qing Dong v Chen Mao Kao*, 115 AD3d 839, 840 (2d Dept 2014).

Clinton also failed to served a Request for Judicial Intervention (“RJI”), together with the papers left with “Mrs. Crystal, Security,” on August 15, 2014. As a motion, a CPLR 3213 application must include an RJI, which is the court document which gets an action assigned to a judge. *See* 22 NYCRR § 202.6. Service of the RJI together with the motion papers is a prerequisite to judicial assignment of the action. As required under 22 NYCRR § 202.8, proof of service of the RJI must be filed within five days of service on the other parties. The RJI must also be a form authorized by the Chief of the Courts. *See* 22 NYCRR § 202.6.

Here, Clinton failed to serve an RJI together with the papers served on Rahbar. Affixed to Clinton’s notice of motion was merely the “Request for Judicial Intervention Addendum,” together with a request for Commercial Division assignment. Neither item contains the return date of the underlying motion. In addition, the Atrash affidavit states that he only served the “RJI ADDENDUM.” Indeed, the RJI was not filed until

September 8, 2014. Moreover, the record in this action does not contain any proof of timely service of the RJI.

Clinton's failure to comply with the RJI service and filing requirements constitutes an additional, and separate, reason for denial of Clinton's motion to renew the judgment. *See Commerce Commercial Leasing, LLC v B.H.I. Group, Inc.*, 23 Misc 3d 1122[A], 2009 NY Slip Op 50895[U], *1 (Sup Ct. Kings Co. 2009) (because "[p]laintiff did not file the request for judicial intervention, with proof of service upon all other parties, within five days of service upon the other parties. . . . the motion is . . . denied without prejudice for failure to comply" with the requirements of 22 NYCRR 202.8[b]).

For all of the foregoing reasons, Clinton's motion for summary judgment in lieu of complaint is denied, and the action is dismissed, without prejudice, for lack of personal jurisdiction. The court has considered the remaining arguments, and finds them to be without merit.

In accordance with the foregoing it is

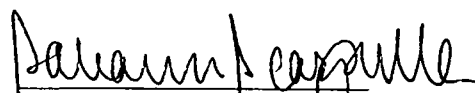
ORDERED that plaintiff Clinton Capital Corporation's motion pursuant to CPLR 3213 for summary judgment in lieu of complaint for renewal of the judgment against defendants pursuant to CPLR 5014 is denied; and it is further

ORDERED that defendant Massud Rahbars' cross-motion pursuant to CPLR 3211(a)(8) to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action.

This constitutes the decision and order of the Court.

Date: New York, New York
April 17, 2015

ENTER:


Saliann Scarpulla, J.S.C.