

**Board of Mgrs. of the Setai Condominium
Residences at 40 Broad St. v 40 Broad, LLC**

2015 NY Slip Op 31431(U)

July 28, 2015

Supreme Court, New York County

Docket Number: 153598/2012

Judge: Eileen Bransten

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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: IAS PART THREE

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BOARD OF MANAGERS OF THE SETAI
CONDOMINIUM RESIDENCES AT 40 BROAD
STREET ON BEHALF OF INDIVIDUAL UNIT
OWNERS,

Plaintiffs,

- against -

Index No.: 153598/2012
Motion Date: 04/14/2015
Motion Seq. No.: 004

40 BROAD, LLC, ASHER ROSHANZAMIR, AKA
ASHER ZAMIR, JOSHUA ROSHANZAMIR and
HFZ 40 BROAD STREET, LLC,

Defendants.

-----X

BRANSTEN, J.:

In motion sequence 004, Plaintiff, The Board of Managers of the Setai
Condominium Residences at 40 Broad Street, moves to hold non-party Sweet
Construction of Long Island, LLC (“Sweet Construction”) in contempt for failing to
respond to a subpoena. Sweet Construction has defaulted on the motion. Plaintiff also
sought to hold non-party Avinash K. Malhorta Architects (“Avinash”) in contempt, but
was permitted to withdraw that branch of the motion, without prejudice.

I. Background

Plaintiff commenced this action after discovering defects in the design and
construction of a condominium building located at 40 Broad Street, New York, New
York (“Building”). (Affidavit in Support of Drew Pakett (“Pakett Aff.”), at ¶ 4).

Pertinent to the instant motion, Plaintiff alleges that Sweet Construction either performed work or provided services as part of the design and construction of the Building. (Pakett Aff., at ¶ 5). Plaintiff subpoenaed Sweet Construction to obtain more information about its role. (Pakett Aff., at ¶ 6).

Plaintiff alleges that it served Sweet Construction with a subpoena duces tecum on December 1, 2014 (“Subpoena”). (Pakett Aff., Ex. D). Since that time, Plaintiff avers that Sweet Construction has not provided any documents. (Pakett Aff., at ¶ 11). On April 14, 2015, Plaintiff filed this motion seeking to compel Sweet Construction’s compliance with the Subpoena pursuant to CPLR Section 2308 and CPLR Rule 3124, to hold Sweet Construction in contempt pursuant to Judiciary Law Section 753 and CPLR Section 5251 for failing to comply with the Subpoena, and to award damages that Plaintiff sustained from Sweet Construction’s failure to comply with the Subpoena pursuant to Judiciary Law Section 753 and CPLR Section 2308.¹ Sweet Construction has not responded to the motion.

¹ It bears mentioning that the movant submitted an improper affirmation by including arguments of law. This Court’s Part Rules require that “[a]ffirmations submitted in support of or in response to dispositive motions must be separate from any memoranda of law submitted in relation to the motion. Affirmations should not include arguments of law.” Additionally, Commercial Division Rule 17 distinguishes between memoranda of law and affidavits or affirmations in addressing page limits for motion papers. 22 NYCRR 202.70(g), Rule 17. Further, Uniform Rule 202.8(c) provides that “[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law.” 22 NYCRR 202.8(c).

II. Analysis

A. *Proper Service of Subpoena is Required*

Proper service of the subpoena is necessary for an order to compel. *See Am. Reliance Ins. Co. v. Nat'l Gen. Ins. Co.*, 174 A.D.2d 591, 593 (2d Dep't 1991) ("The proper procedure to be followed in order to compel the discovery of documents is to prepare and serve a notice for discovery"); Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3124:1 ("[T]he general lesson is that a party moving under CPLR 3124 should at least be able to demonstrate that a disclosure notice was properly served on the other side and that it has not been satisfied").

Like an order to compel, proper service of the subpoena is necessary for an order holding a party in contempt. *See Matter of Jacqueline F.*, 47 N.Y.2d 215, 217 (1979) ("the [trial] court declined to hold the [party subpoenaed] . . . in contempt, finding service of process improper [T]he Appellate Division unanimously affirmed. . . . There should be an affirmance.").

B. *Standard for Proper Service of Subpoena on an LLC*

CPLR Section 2303(a) provides that a "subpoena duces tecum shall be served in the same manner as a summons." Service of a summons on an LLC, such as Sweet Construction, is governed by CPLR Section 311-a, which provides that service on any domestic limited liability company:

[S]hall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited

liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.

See CPLR § 311-a. In addition to the four numbered methods of service on an LLC, the final sentence of CPLR Section 311-a allows for service according to Limited Liability Company Law Section 303. Limited Liability Company Law Section 303 states that service may be effecting on New York's Secretary of State. N.Y. Limit. Liab. Co. § 303.

C. *Service Was Improper*

The affidavit of service indicates that Plaintiff delivered the Subpoena to Sweet Construction on December 1, 2014. *See* Pakett Aff., Ex. D, at 4. Plaintiff delivered the subpoena to Sweet Construction's office by handing the Subpoena to a "Jane Doe," the person alleged to be "apparently in charge at that address." *See* Pakett Aff., Ex. D, at 4. Plaintiff does not suggest that "Jane Doe" was or appeared to be a member or a manager of Sweet Construction pursuant to CPLR Section 311-a (i) or (ii). Sweet Construction's members or managers' identities are not revealed in the motion papers. Plaintiff also does not suggest that "Jane Doe" was authorized or designated to receive service pursuant to CPLR Section 311-a (iii) or (iv).

Here, Plaintiff does not allege that it effected service on (i) any member, (ii) any manager, (iii) any other agent authorized by appointment to receive process, or (iv) to any

other person designated to receive process. *See* CPLR § 311-a. Accordingly, service of the subpoena was improper and the motions to compel and for contempt must be denied. *See Matter of Jacqueline F.*, 47 N.Y.2d 215, 217 (1979) (denying contempt motion due to improper service of subpoena); *Am. Reliance Ins. Co. v. Nat'l Gen. Ins. Co.*, 174 A.D.2d 591, 593 (2d Dep't 1991) (proper service of subpoena required for motion to compel).

This case is akin to *Brown v. 445 East 85th Street, LLC*, where the court held that service upon the superintendent of the building owned by the LLC was not proper under CPLR Section 311-a. *See Brown*, Index No. 115994/05, 2007 WL 6496882, at *1 (N.Y. Sup. Ct. N.Y. Cnty. April 17, 2007). The affidavit of service identified the superintendent as “a person of suitable age and discretion (who) identified himself as the general agent of the defendant,” but the process server later acknowledged that the superintendent never told him he was the general agent of the LLC. *Id.*

Here, like in *Brown*, “Jane Doe,” did not identify herself as a manager, member, appointed agent or person designated by Sweet Construction to receive service. Therefore the service on “Jane Doe” does not fall within any designated categories for service in CPLR Section 311-a.

Similarly, in *Stuyvesant Fuel Service Corp. v. 99-105 3rd Avenue Realty LLC*, the court held that a summons was not validly served on a LLC when it was delivered to a “Jane Smith,” whom the process server described as the managing agent of the LLC. *Stuyvesant Fuel Serv. Corp. v. 99-105 3rd Ave. Realty LLC*, 192 Misc.2d 104, 106 (N.Y.

Civ. Ct. July 10, 2002). Members of the LLC contended that “Jane Smith” was not a member, and Plaintiff contended that she “could be” a member or manager. *Id.* The court held that unlike other sections of the CPLR which permit service on someone “in charge” of the office, CPLR Section 311–a does not authorize personal service upon an “alleged ‘managing agent’ thereof.” *Id.*

Here, the affidavit of service is even more deficient than *Stuyvesant Fuel Service Corp.* because it does not even allege that “Jane Doe” is a member or manager of Sweet Construction.

Finally, Plaintiff does not allege that service was attempted on the Secretary of State, pursuant to Limited Liability Company Law Section 303. Thus, service was not made in accordance with either CPLR Section 311-a or Limited Liability Company Law Section 303, the only two statutes providing for proper service, and was therefore improper. Since Plaintiff has not shown that Sweet Construction actually received the Subpoena, Plaintiff has failed to establish that Sweet Construction willfully neglected to obey the Subpoena, and may not compel Sweet Construction to comply, or hold Sweet Construction in contempt for failing to comply, with the Subpoena. *See Matter of Jacqueline F.*, 47 N.Y.2d 215, 217 (1979) (affirming denial of contempt motion for improper service); *Korea Chosun Daily Times, Inc. v. Dough Boy Donuts Corp.*, 129 A.D.3d 918 (2d Dep’t 2015) (denying contempt motion because plaintiff failed to properly serve subpoena pursuant to CPLR § 311-a).

Conclusion

Accordingly, it is hereby

ORDERED that Plaintiff Board of Managers of the Setai Condominium Residences at 40 Broad Street's motion for an order holding Sweet Construction of Long Island, LLC in contempt and to compel compliance is DENIED without prejudice.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 28, 2015

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.