

517-525 W. 45 LLC v Avrahami
2016 NY Slip Op 30944(U)
May 23, 2016
Supreme Court, New York County
Docket Number: 850357/15
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

Index No. 850357/15

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517-525 WEST 45 LLC,

Plaintiff

-against-

SHIMON AVRAHAMI,,

Defendant.
-----X

JOAN MADDEN, J.:

Plaintiff 517-525 West 45 LLC (“517 West”) moves for an order granting it summary judgment, a default judgment, a Judgment Foreclosing the Right of Redemption and other relief under Real Property Actions and Proceedings Law (RPAPL) § 1352. Defendant Shimon Avrahami (“Avrahami”) opposes the motion and cross moves to dismiss (i) pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, (ii) pursuant to CPLR 306-b for failure to serve the summons and complaint within 120 days of commencement of the action, (iii) pursuant to CPLR 3211(a)(1) based on documentary evidence, (iv) pursuant to CPLR 3211(a)(7) for failure to state a cause of action, (v) CPLR 3211(a)(5) as barred by statute of limitations. Avrahami also seeks a traverse hearing or, in the alternative, an order vacating his default and permitting him to serve a late answer.

This action was brought to strictly foreclose on a mortgage lien held by Avrahami on real property located at 517-525 West 45th Street, New York, NY (“the property”). The summons and complaint were filed on November 16, 2015. According to the affidavit of service, which was filed with the court, Avrahami was personally served with the summons and complaint on December 30, 2015, at private house located at 130-36 135th Avenue, South Ozone Park, New York 11420 (“the Queens premises”). Avrahami is described as a 40 year-old man with brown skin, black hair, who is 5 feet 9 inches tall and weighs 180 pounds.

In opposition to the motion, Avrahami argues, *inter alia*, that he was never served with process in this action, and that he only learned about the action after plaintiff disclosed its existence in opposition papers in a separate action before this court. He states that the Queens premises identified in the affidavit of serve "is not my residence or last known residence. Nor is the Queens premises my actual place of business or usual place of abode. I am a resident of New Jersey and have resided in New Jersey since my return to the United States in 2013" (Avrahami Aff. ¶'s 7, 8). He further states that while a friend let him use the address at the Queens premises as a mailing address when he resided in Israel from 2009 to 2013, and the friend would open Avrahami's mail, scan and email it to him in Israel, that he stopped using the Queens premises as a mailing address when he returned to the United States. (Id, ¶'s 8, 9). Avrahami further states that he did not visit the Queens premises in 2015, and was not in Queens County on December 30, 2015 (the date on which he was purportedly served) and in support of this statement, he submits his calendar from that date and the GPS time line from his cellular phone. Avrahami also states that his description in the affidavit of service is inaccurate as he has grey hair, not black hair, is 49 years old not 40 years-old, and is 5 feet 7 inches not 5 feet 9 inches and that he weighs 200, and not, 180 pounds.

"While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory 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 v. Rabinowitz, 7 AD3d 459, 459 (1st Dept 2004). Under this standard, the statements in Avrahami's affidavit are sufficient to raise an issue of fact with respect to service of the summons and complaint so as to require a hearing on the issue of service. See Application of St. Christopher-Otilie, 169 AD2d 690, 691 (1st Dep't 1991)

(holding that “[a]n affidavit of service is not conclusive once there is a sworn denial of receipt [and that any]“marked difference in the physical description contained in the affidavit of service, as compared to that set forth in respondent's moving papers, requires that a traverse hearing be held”) (internal citations omitted).

517 West’s argument that Avrahami has failed to submit an affidavit from the person who was receiving his mail, is an issue which may bear on Avrahami’s credibility and which may be considered at the traverse hearing depending on the nature and quality of the evidence presented.

Accordingly, Avrahami’s cross motion is granted only to the extent of setting this matter down for a traverse hearing, and the balance of the cross motion and 517 West’s motion are denied without prejudice to renewal in the event service is found to be proper.

It is hereby

ORDERED that Avrahami’s cross motion is granted only to the extent of setting this matter down for a traverse hearing, and the balance of the cross motion and 517 West’s motion are denied without prejudice to renewal in the event service is found to be proper; and it is further

ORDERED that the issue of whether Avrahami was properly served with the summons and complaint is referred to Special Referee to hear and report with recommendations; and it is further

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at

www.nycourts.gov/supctmanh at the References link under Courthouse procedures), who shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for Avrahami shall on or before May 26, 2016, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the JHO/Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Dated: May 23, 2016


HON. JOAN A. MADDEN
J.S.C.