

<b>Brown v Argo Corp.</b>
2016 NY Slip Op 31291(U)
May 6, 2016
Supreme Court, New York County
Docket Number: 159784/2015
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice***

**PART 21**

**SIERRA BROWN,**

**INDEX NO. 159784/2015**

**Plaintiff,**

**MOTION DATE 5/2/16**

**- v -**

**MOTION SEQ. NO. 001**

**THE ARGO CORPORATION, et al.,**

**Interim Order**

**Defendants.**

The following papers, numbered 8-13; 15-19, 21, were read on this motion to dismiss and cross motion for extension of time to serve and

Notice of Motion —Affidavit —Affidavit—Exhibits A-C

**No(s). 8-13**

Notice of Cross Motion — Exhibits A-D

**No(s). 15-19**

Affirmation in Opposition to Cross Motion

**No(s). 21**

Upon the foregoing papers, it is **ORDERED** that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this Court the following individual issues of fact, which are hereby submitted to the JHO or Special Referee for such purpose:

- 1) the issue of whether service of process was properly made upon defendant The Argo Corporation;

and it is further

**ORDERED** that the powers of the JHO or 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 119 M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter to an available JHO or Special Referee to hear and report as specified as above, and it is further

**(Continued)**

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

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**ORDERED** that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 30 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (available at <http://www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/SRP-InfoSheet.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

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

**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a]) and, except as otherwise directed by the assigned JHO/Special Referee, the trial of the issues specified above shall proceed day to day until completion; and it is further

**ORDERED** that any motion to confirm or disaffirm the Report of the JHO or Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

**ORDERED** that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the Argo Corporation's motion to dismiss shall be held in abeyance pending submission of the Report of the JHO or Special Referee and the determination of this Court thereon; and it is further

**ORDERED** that plaintiff's cross motion for an extension of time to serve and for leave to amend the summons and complaint is granted; and it is further

(Continued)

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**ORDERED** that plaintiff is granted an additional 120 days after the date of entry of this decision and order to serve defendant The Argo Corporation; and it is further

**ORDERED** that the amended complaint in the form annexed as Exhibit D to the cross motion shall be deemed served upon the current parties upon service of a copy of this order with notice of entry;

**ORDERED** that the supplemental summons and amended complaint shall be personally served on FirstService Residential New York, Inc., along with a copy of this order, within 20 days of service of a copy of this order with notice of entry; and it is further

**ORDERED** that the caption is hereby amended as follows:

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**SIERRA BROWN,**

**Plaintiff,**

- v -

**THE ARGO CORPORATION, THE GRAND CHELSEA  
CONDOMINIUM, FIRSTSERVICE RESIDENTIAL NEW  
YORK, INC., BOARD OF MANAGERS OF THE GRAND  
CHELSEA CONDOMINIUM and THE NEW YORK CITY  
TRANSIT AUTHORITY,**

**Defendants.**

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**and it is further**

**ORDERED** that plaintiff must serve a copy of this order on the General Clerk's Office (60 Centre Street, Room 119) and the County Clerk, who are directed to mark their records to reflect this amendment.

In this action, plaintiff allegedly tripped and fell on July 1, 2014, on the sidewalk adjacent to the Grand Chelsea Condominium on the West 16<sup>th</sup> Street side of the building. The Argo Corporation was the

**(Continued)**

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alleged management company for the Grand Chelsea Condominium. Plaintiff commenced this action on September 23, 2015, and the Argo Corporation was purportedly served on November 3, 2015.

The Argo Corporation now moves to dismiss the complaint as against it on the ground that service was not properly made. Plaintiff cross-moves for an extension of time to effect service upon the Argo Corporation, and for leave to amend the complaint to add FirstService Residential New York, Inc. as a defendant.

Issues of fact arise as to whether service of process was properly made upon the Argo Corporation, which warrant a traverse hearing. According to an affidavit of service, the pleadings were purportedly served upon the Argo Corporation by personal delivery to a "receptionist and general agent," who allegedly refused to give his full name. (Moskowitz Affirm., Ex B.) The Argo Corporation maintains that the only person whose description somewhat fits the male receptionist described in the affidavit of service is Winston Foster. Foster states that he occasionally fills in at the reception desk. However, Foster avers that he is not a general agent for the Argo Corporation, and was not authorized to accept service of process. Plaintiff argues that service of process was proper under *Fashion Page v Zurich Insurance Co.* (50 NY2d 265 [1980].)

Therefore, the Court refers the issue of whether the Argo Corporation was properly served with the pleadings to a Special Referee or JHO to hear and report, unless the parties consent to a reference to hear and determine.

The branch of plaintiff's cross motion for an extension of time to serve the Argo Corporation is granted, for good cause shown. Plaintiff attempted to effect timely service upon the Argo Corporation with reasonable diligence. (*Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012].) The Argo Corporation does not contend that plaintiff's

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process server went to an incorrect address. (Loman Affirm., Ex B; Shenkman Rely Affirm. ¶ 9.) Plaintiff promptly sought leave for an extension of time to effect service once the Argo Corporation contested service of process, by asserting a contrary version of the circumstances under which service was purportedly made.

Therefore, plaintiff is granted an additional 120 days from the date of entry of this decision and order to effect service of the pleadings upon the Argo Corporation. The Argo Corporation should consider withdrawing its motion to dismiss, and agreeing to cancel the traverse hearing if plaintiff's further attempt to effect proper service upon the Argo Corporation is not contested.

The branch of plaintiff's cross motion to amend the summons and complaint to add FirstService Residential New York, Inc. as a defendant is granted, in the absence of any surprise or prejudice. (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005].) The Argo Corporation does not oppose this branch of the cross motion, and the proposed amendment is not patently meritless. Plaintiff submits a copy of a letter dated July 30, 2013, which states that, effective September 1, 2013, the management company for the Grand Chelsea Condominium will be FirstService Residential. (Loman Affirm., Ex C.)

The Argo Corporation has asserted that Argo Real Estate LLC was the managing agent for the Grand Chelsea Condominium until August 2013, nearly a year before plaintiff's alleged slip and fall in July 2014. (Moskowitz Aff. n 1.) In light of the letter dated July 30, 2013, the Court encourages plaintiff to explore whether the action should be discontinued as against the Argo Corporation.

Dated: 5/6/16 MICHAEL D. STANLEY J.S.C. [Signature] J.S.C.  
New York, New York

- 1. Check one:.....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:.....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE