

Windsor St. Capital, L.P. v Jin
2019 NY Slip Op 32870(U)
September 26, 2019
Supreme Court, New York County
Docket Number: 652675/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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WINDSOR STREET CAPITAL, L.P. f/k/a
MEYERS ASSOCIATES, L.P.,

Index No.
652675/2019

Petitioner,

**Decision
and Order**

-against-

Mot. Seq. 1, 2

BARRY JIN, MICHAEL LAVOLPE,
WILLIAM LEONARD, JOSEPH VALENTI,
MATTHEW DEBLOIS, BRENT PORGES,
MATTHEW SILIATO AND
DAVID SHEPPARD,

Respondents.

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HON. EILEEN A. RAKOWER, J.S.C.

Under Motion Sequence 1, on May 6, 2019, Petitioner Windsor Street Capital, L.P. f/k/a Meyers Associate, L.P. (“Petitioner”) filed a Petition pursuant to CPLR Article 75 seeking to confirm the arbitration award (“the Award”) rendered against all Respondents on March 13, 2019 in an arbitration before FINRA Dispute Resolution entitled *Windsor Street Capital, L.P. f/k/a Meyers Associates, L.P. v. Barry Jin et. al.*, FINRA Case No. 17-01716 (the “Arbitration”).

Pursuant to CPLR 306-b, Petitioner had until September 3, 2019 to serve all Respondents in this matter (120 days from May 6, 2019). Under Motion Sequence 2, Petitioner states it has only been able to serve three of the eight Respondents Joseph Valenti (“Valenti”), Matthew Deblois (“Deblois”) and Matthew Siliato (“Siliato”). Petitioner states that it has been unable to serve Barry Jin (“Jin”), Michael LaVolpe (“LaVolpe”), William Leonard (“Leonard”), Brent Porges (“Porges”), or David Sheppard (“Sheppard”). Petitioner moves for an Order permitting Petitioner to (a) serve Leonard by email at williamleonard@gmail.com; (b) serve Porges by electronic notice to his Facebook account; (c) serve Sheppard’s ex-wife at the last known address; (d) serve Jin and LaVolpe at their last known

addresses on file with FINRA; (e) sever Jin, LaVolpe, Leonard, Porges and Sheppard from this action until such service is accomplished; and (f) allow the hearing on the Petition to proceed as to Valenti, Siliato and Deblois. Petitioner's counsel Benjamin Suess, Esq., submits an affirmation and supplemental affirmation in support of the motion.

Suess states that each of the Respondents were obligated to keep a current address on file for two years pursuant to FINRA Rule 1210 even if they were not currently a broker. Suess details the attempted methods to serve the five unserved respondents, as set forth below.

Jin reported a home address of 161-20 65th Avenue, 3rd Floor, Fresh Meadows, New York 11365, to FINRA. Petitioner's correspondence to this address was returned undelivered with no forwarding address. A process server was unable to serve Jin at this address. The process server's affidavit states that "the given address is a private house where the respondent's name does not appear on any bell or mailbox" and the respondent was "unknown" to the tenants who resided there. Suess states that he searched for Jin's address on a number of websites, including "a person finder website; reviewed Jin's BrokerCheck report with FINRA; and checked social media websites including Facebook, Twitter and LinkedIn." Suess states that he is currently searching for cell phone numbers or email addresses for Jin.

LaVolpe reported a home address of 8801 Shore Road, Apt. 6H South, Brooklyn, New York 11209, to FINRA. Correspondence that was delivered to this address was returned undelivered and no forwarding address was provided. A process server was unable to serve LaVolpe at this address. The process server's affidavit states that "the given address is a private house where the respondent's name does not appear on any bell or mailbox" and that respondent was "unknown" to the female tenant who resided there. Suess states that he has "checked the public records database in Westlaw; a couple of person finder websites; reviewed Mr. LaVolpe's BrokerCheck listing with FINRA; and social media websites including Facebook, Twitter and Linked, as well as "entering a cell phone number we obtained for Mr. LaVolpe and [making] several telephone calls to building managers in the neighborhood to locate the rental agent for the building." Suess states that none of these methods were successful in reaching LaVolpe and he is continuing to search for any cell phone numbers or email addresses for him.

Leonard reported a home address of 436 West Front Street, No. 106, Memphis, Tennessee 38103, to FINRA. Suess states that a process server was unable to serve Leonard at this address. The process server stated that the "location

is believed to be vacant.” Suess states that he has an email address for Leonard, which is williamleonard@gmail.com.

Porges reported a home address of 1309 Mitchel Field Way, Garden City, New York 11530, to FINRA. Suess states that correspondence that was delivered to this address was returned undelivered and no forwarding address was provided. In addition, Suess states that a process server was unable to serve Porges at this reported address. The process server’s affidavit states that “the given address is an apartment building where the respondent’s name does not appear on any bell, mailbox or directory” and tenants “had no information pertaining [to] the whereabouts of the respondent.” Suess states that he has been able to locate a “Brent Porges” on Facebook “who appears to be the Respondent.” Suess states that Petitioner is searching for any cell phone numbers and email addresses for Porges.

Sheppard reported a home address, 31 Nancy Dr., Ashland, Massachusetts 01721, to FINRA. The process server attempted to serve Sheppard at this address but reported that “Location is the home of ex-wife. She would not give forwarding address.”

Legal Standard

CPLR § 306–b provides that service of the summons and complaint shall be made “within 120 days after the filing of summons and complaint”. The Court in its discretion has the power to either dismiss the action without prejudice or “upon good cause shown or in the interest of justice, extend the time for service.”

Pursuant to CPLR §308(5), if service is impractical under the methods set forth within that section, upon motion without notice, Plaintiff can seek an alternative means of service from the Court. “An application for alternative service under CPLR §308(5) can be granted only upon a sufficient showing that personal service, ‘substitute service,’ or ‘nail and mail’ service would prove ‘impracticable.’” *Corram Holdings, LLC v Mehler*, Docket No. 162155/2018, 2009 WL 4457783 [N.Y. Sup Ct, New York County 2019]. “A plaintiff can demonstrate that service by conventional means is ‘impracticable’ on a defendant by making diligent current, albeit unsuccessful efforts, to obtain information regarding a defendant’s current residence, business address, or place of abode.” *Arch Specialty Ins. Co. v ATR Consultants Inc.* [N.Y. Sup Ct, New York County 2018] [citing to *Franklin v. Winard*, 189 A.D.2d 717 [1st Dept 1993]].

In order to satisfy due process, the alternate method of service must be one that is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Harner v County of Tioga*, 5 N.Y. 3d 136, 140 [2005]. Courts have permitted service by email or Facebook when the plaintiff made the requisite showing that such service was “reasonably calculated” to apprise the defendant of the lawsuit and therefore satisfied the requirements of due process. *See e.g., Baidoo v. Blood-Draku*, 48 Misc. 3d 309 [N.Y. Sup Ct, New York Count 2015 (finding that the wife’s service of a divorce summons to the husband through a private message to his Facebook account satisfied the due process requirements of being reasonably calculated to provide him with notice of the divorce, where the wife verified that the account belonged to the husband and that he regularly logged onto his account, the wife and her attorney could leave a telephone or text message alerting him to check his account); *Safadjou v Mohammadi*, 105 AD3d 1423, 1423 [4th Dept 2013] (court held that “plaintiff made the requisite showing that service by email was ‘reasonably calculated to apprise defendant of the pending lawsuit and thus satisfie[d] due process’” where the record established that the plaintiff and defendant had been communicating by e-mail for several months before the application for alternative service was made).

Discussion

The Petition to confirm the Arbitration Award rendered by the FINRA Arbitration Panel in the Arbitration is granted only as it pertains to Respondents Valenti, Siliato and Deblois. Petitioner has demonstrated proof of service of the Petition on these Respondents, and they have not opposed the Petition.

Turning to Motion Sequence 2, Petitioner seeks leave to serve Leonard by email, Porges via his Facebook account, Sheppard via his ex-wife at Sheppard’s last known address on file with FINRA, and Jin and LaVolpe via their last known addresses on file with FINRA where they no longer reside.

Petitioner’s attorney details efforts to serve Respondents at the addresses they reported to FINRA. Petitioner’s attorney also details efforts to try to locate Respondents through an internet search. However, Petitioner does not detail any efforts to locate their current home addresses or business addresses through means other than an internet search. Furthermore, Petitioner has not shown the proposed alternative service on Leonard by email, Porges by social media, Sheppard via his ex-wife, and Jin and LaVolpe at addresses where they no longer reside “is reasonably

calculated” to notify them of this action. There has been no showing that the proposed email address for Leonard or Facebook account of Porges are active and currently being accessed by them. There is no showing that Sheppard and his ex-wife communicate in such a way that the ex-wife would notify him of the pending action. Lastly, there is no showing that service on former addresses where Jin and LaVolpe no longer reside would be “reasonably calculated” to apprise them of the action.

Wherefore, it is hereby

ORDERED that the Petition to confirm the Arbitration Award (Motion Sequence 1) rendered by the FINRA Arbitration Panel in the Arbitration is granted only as it pertains to respondents Joseph Valenti, Matthew Siliato and Matthew Deblois; and it is further

ORDERED and ADJUDGED that Petitioner Windsor Street Capital, L.P. f/k/a Meyers Associates, L.P., shall have judgment and recover against Respondent Joseph Valenti in the amount of \$10,000.00, with interest at the statutory rate of 9% per annum until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED and ADJUDGED that Petitioner Windsor Street Capital, L.P. f/k/a Meyers Associates, L.P., shall have judgment and recover against Respondent Matthew Siliato in the amount of \$63,280.31, with interest at the statutory rate of 9% per annum until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED and ADJUDGED that Petitioner Windsor Street Capital, L.P. f/k/a Meyers Associates, L.P., shall have judgment and recover against Respondent Matthew Deblois in the amount of \$10,000.00, with interest at the statutory rate of 9% per annum until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

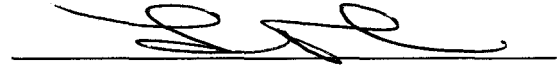
ORDERED that Petitioner’s motion (Motion Sequence 2) seeking permission to serve Respondents Barry Jin, Michael LaVolpe, William Leonard, Brent Porges and David Sheppard through alternate means is denied; and it is further

ORDERED that Respondents Barry Jin, Michael LaVolpe, William Leonard, Brent Porges and David Sheppard be severed from this action. Petitioner shall be

granted an additional 60 days from the date of this Order to serve the Petition upon said Respondents and file proof of service with the Court.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: SEPTEMBER 26, 2019



EILEEN A. RAKOWER, J.S.C.