

Dlugash v Polonia Towers LLC
2021 NY Slip Op 32553(U)
December 2, 2021
Supreme Court, New York County
Docket Number: Index No. 653540/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

-----X

ALAN DLUGASH,

Plaintiff,

- v -

POLONIA TOWERS LLC, GERARDO SANCHEZ, and
FREDERICK CAINS, ESQ.,

Defendants.

-----X

INDEX NO. 653540/2020MOTION DATE 11/30/2021MOTION SEQ. NO. 004 005 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 82, 83, 84, 85, 86, 87, 89, 90

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 92, 93, 94

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

ORDER

Upon the foregoing documents, it is

ORDERED that the motions of defendant Gerardo Sanchez (motion sequence numbers 004 and 005) for leave to reargue/renew the motion to vacate his default in answering the complaint and to disqualify Kaitlin Doran, Esq., as attorney for plaintiff and the cross motion of the plaintiff for sanctions against defendant Gerardo Sanchez (motion sequence number 004) are denied; and it is further

ORDERED that the motion to vacate the default in answering the complaint of defendant Frederick Cains, Esq. (motion

sequence number 006) is held in abeyance and the issue of whether the summons and complaint were properly served upon such defendant is referred to a Special Referee to hear and report pursuant to CPLR 4320; and it is further

This matter having come on before this court on November 30, 2021, on motion of the defendant Frederick Cains, Esq. and the plaintiff Alan Dlugash having appeared by Kaitlin S. Doran, Esq., Esq.; the defendant Frederick Cains, Esq., having appeared by pro se; and the defendant Gerardo Sanchez, having appeared pro se, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, and it appearing to the court that an appointment on consent is appropriate, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

the issue of whether personal jurisdiction was obtained over defendant Frederick Cains, Esq. pursuant to CPLR 308(2), that is, the issue whether service of process was effectuated upon defendant Frederick Cains, Esq. by deliver of the summons and complaint by process server John L. Hudak upon a doorman, purportedly named "Elardo Gomez", at the actual place of residence of defendant Frederick Cains, Esq.; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 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 (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for the plaintiff and pro se defendant Frederick Cains, Esq. shall immediately consult with each other, (and may submit the standard request for conference form [59nyef@nycourts.gov] and convene with Stacy Osborne, Esq., principal court attorney to the undersigned), and thereafter, counsel for plaintiff shall, within fifteen (15) days from the service of this order with notice of entry, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the plaintiff and pro se defendant Frederick

Cains, Esq. 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 reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, 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, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; 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 issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made, by show cause order, within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules of the Trial Courts, and

further proceedings with respect to the motion of defendant Frederick Cains, Esq., pursuant to CPLR 5015(a)(1), shall be heard with respect to such motion seeking vacatur with the oral argument on the motion to confirm or disaffirm; and it is further

ORDERED that upon filing of the standard request for conference form (59nyef@nycourts.gov), counsel for plaintiff and the pro se defendants Cains and Sanchez themselves are directed to appear for oral argument via Microsoft Teams, no less than two days and not more than five days before the return date specified in the show cause order to confirm the Report of the Special Referee with respect to the traverse hearing; and it is further

ORDERED that oral argument on the application to confirm/disaffirm the Report of the Special Referee, as well as continued oral argument on the application of defendant Cains to vacate his default shall proceed on such return date.

DECISION

With respect to reargument of his prior motion to vacate his default, to date, defendant Sanchez has not offered any excuse, let alone a reasonable one, for his failure to answer the complaint within the time frame set forth in the Stipulation dated November 18, 2020, which was signed, on his behalf, by his then attorney J. R. Skrabanek, Esq.

As for renewal, this court credits the statements in the affirmation in opposition of plaintiff's counsel dated September 10, 2021, that all times she affixed her signature to all affirmations that she docketed in this case. She is correct that electronic signatures are permitted under CPLR 2016. See Martin v Portexit Corp, 98 AD3d 63, 65-66 (1st Dept 2012). Therefore, contrary to defendant Sanchez's contention, this court was correct to consider same. However, there being no grounds to sanction defendant Sanchez, plaintiff's cross motion in that regard shall be denied.

On his motion to vacate the default judgment entered against him, defendant Cains, Esq., argues that this court lacks subject matter jurisdiction as the real estate in question is located in Orange, not New York County. In support, moving defendant Cains cites Katzen v Central Park Towers, Inc., 207 Misc 181 (Sup Ct Bronx County). Assuming for the purpose of argument at this juncture that the instant dispute concerns adjudication of an interest in real property, moving defendant misreads such decision. In Katzen, the trial court granted defendants motion to change the place of trial (i.e., venue) pursuant to section 183 of the Civil Practice Act (now CPLR § 507). The issue of venue does not implicate the subject matter jurisdiction of this court. See Shonting v Facilities Development Corporation, 223 AD2d 587 (2d Dept 1996).

However, this court determines that defendant Cains has raised an issue of fact with respect to whether this court has personal jurisdiction over him. Contrary to plaintiff's argument, NYCTL 1998-1 Trust & The Bank of New York v Rabinowitz, 7 AD3d 459 (1st Dept 2004), supports defendant Cain's position. In NYCTL 1998-1 Trust, the court found that defendant's statements that there was no male named Randy Rabinowitz at his residence and that he knew of no person in the residence fitting the description contained in the affidavit were sufficient to refute the prima facie evidence of proper service by way of the affidavit of the process server submitted by plaintiff. So too here, the statement under oath of defendant Cains that there was no doorman named "Elardo Gomez" working at his residence on the date and time in question is no mere conclusory denial of receipt, but raises an issue of fact as to the veracity of the affidavit of the process server. Therefore, the "threshold issue of personal service" must be resolved "with a traverse hearing". NYCTL 1998-1 Trust, 7 AD3d at 460.

Debra A. James
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12/2/2021
 DATE

DEBRA JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input checked="" type="checkbox"/> REFERENCE