

Sharestates Invs. LLC v 33 Nevins St LLC

2022 NY Slip Op 32777(U)

August 11, 2022

Supreme Court, Kings County

Docket Number: Index No. 506714/20

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of August, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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SHARESTATES INVESTMENTS LLC SERIES
BC2017-001246,

Plaintiff,

- against -

Index No. 506714/20

33 NEVINS ST LLC, ZALMEN WAGSCHAL, NYC
ENVIRONMENTAL CONTROL BOARD,

“JOHN DOE 1-10”, said names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in, or lien upon the premises described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

14-20
21-28
29

Upon the foregoing papers in this action to foreclose a commercial mortgage encumbering the property at 33 Nevins Street in Brooklyn (Property), a vacant lot, defendants 33 Nevins St LLC (33 Nevins or borrower) and Zalmen Wagschal (Wagschal or guarantor) move (in motion sequence [mot. seq.] two) for an order: (1) dismissing the

complaint for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8), and canceling the notice of pendency filed against the Property, or, alternatively, (2) granting defendant 33 Nevins a 30-day extension of time to answer or otherwise respond to the complaint, pursuant to CPLR 3012 (d).

Background

On March 17, 2020, at the beginning of the Covid-19 pandemic, plaintiff Sharestates Investments LLC Series BC2017-001246 (Sharestates) commenced this action to foreclose a consolidated mortgage executed in its favor in July 2017, by filing a summons, a verified complaint and a notice of pendency against the Property (*see* NYSCEF Doc Nos. 1-3). Essentially, the complaint alleges that defendant 33 Nevins executed a consolidated first lien mortgage on the Property on July 17, 2017, in favor of Sharestates in the amount of \$2.75 million and that Sharestates “has failed to comply with the conditions of said mortgage by omitting to pay the mortgage in full at the maturity date of 12/31/19, and same not having been paid, plaintiff has declared the entire amount due” (NYSCEF Doc No. 1 at ¶ 17). The complaint asserts a cause of action to foreclose the Property and a cause of action against Wagschal, the guarantor, to collect under the personal guarantee of the loan.

On December 9, 2020, Sharestates filed an affidavit of service attesting that its process server served 33 Nevins with process by delivering two copies of the summons and complaint upon Sue Zouky at the New York Secretary of State on December 2, 2020, more than 120 days after the action was commenced (*see* NYSCEF Doc No. 7).

On October 12, 2021, Sharestates filed an ex parte order for leave to serve defendant Wagschal by publication based on Sharestates' inability to serve him by any other prescribed method (*see* NYSCEF Doc No. 8). Sharestates' request was supported by an affirmation stating that defendant Wagschal cannot be found and must be served by publication, and an affidavit of due diligence showing the attempts to serve Wagschal.

About two weeks later, on October 25, 2021, defendants 33 Nevins and Wagschal moved to dismiss the complaint for lack of personal service over them, pursuant to CPLR 3211 (a) (8), and to cancel the notice of pendency, or, alternatively, granting defendant 33 Nevins a 30-day extension of time to answer or otherwise respond to the complaint.

Defense counsel asserts that Sharestates served the summons and complaint upon 33 Nevins 260 days after the commencement of this action. Regarding Wagschal, defense counsel asserts that attempts were similarly made after the 120-day limit expired, and that plaintiff did not exercise due diligence in attempting to serve him.

Sharestates, in opposition, submits an affirmation arguing that Governor Cuomo's Executive Order 202.8, issued on March 20, 2020 (three days after the commencement of this action on March 17, 2020) in response to the Covid-19 pandemic, extended the statutory deadlines for "any specific time limit for the commencement, filing, or service of any legal action . . . prescribed by the procedural laws of the state, including . . . the civil practice law and rules . . ." until April 19, 2020, and that the tolling period was further extended to November 3, 2020. Service under CPLR 306-b was similarly extended, it is argued, and therefore service on 33 Nevins on December 20, 2020 by service upon the

Secretary of State was timely. Regarding Wagschal, it is argued, multiple attempts were made, the due diligence standard was satisfied, and the request to serve by publication should be granted.

Upon due consideration, the Court finds that plaintiff should be allowed the benefits of the extensions of time and allowances made in the Executive Orders and Court Rules during the Covid-19 pandemic, and that therefore its service on 33 Nevins was timely. Assuming arguendo plaintiff was technically late by serving after the 120-day limit of CPLR 306-b, the Court finds that plaintiff has adequately shown good cause for the late service, or, alternatively, it has adequately shown entitlement to an extension of time to serve in the interest of justice. Accordingly, while the branch of defendants' motion to dismiss the complaint as to 33 Nevins is denied. In the interest of fairness, 33 Nevins will be given an opportunity to answer the complaint, and therefore the branch of the motion to allow 33 Nevins 30 days to file an answer is granted.

As for Wagshal, the Court finds that plaintiff adequately demonstrated due diligence in its attempts to serve Wagshal, and that under the circumstances of the pandemic, the request to order service by publication is timely. The Court rejects defendant's suggestion that plaintiff is not entitled to the pandemic extensions because the request for publication was made ex parte rather than by formal motion, either by order to show cause or notice of motion. The Court will sign the ex parte order together with this decision and order.

In sum, defendants' motion is granted only to the extent that 33 Nevins is allowed 30 days from the date of this order to serve and file an answer. The order for publication for service upon Wagshal will be signed with this order.

The forgoing constitutes the decision and order of the court.

E N T E R,

J. S. C.



**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**