

684 Dean Partners, LLC v Newman

2024 NY Slip Op 32702(U)

July 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 519908/2023

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 29th day of July 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
684 Dean Partners, LLC

Index No: 519908/2023
Motion Seq. 1-2

Plaintiff(s)

-against-

Peter K. Newman and Lindsay R. Newman,
-----X
Defendant(s)

ORDER

The following e-filed papers read herein:

Notice of Motion/Petition/Affidavits Annexed
Exhibits Annexed.....
Notice of Cross-Motion/Affidavits Annexed/Exhibits Annexed.....

NYSCEF Nos.:

3-18
21-30

In this matter, 684 Dean Partners, LLC (“Petitioner”) moves (Motion Seq. 1) by Order to Show Cause pursuant to Real Property Actions and Proceedings Law (“RPAPL”) 881 for an access order and license to enter upon Peter K. Newman and Lindsay R. Newman’s (“Respondents”) property located at 680 Dean St. Brooklyn, New York to re-install protective devices and equipment in connection with a construction project. Respondents have cross-moved (Motion Seq. 2) to dismiss Petitioner’s Verified Petition pursuant to CPLR 3211 on the grounds of lack of personal jurisdiction, breach of contract, and for damages to their property allegedly caused by Petitioner.

This action stems from two special proceeding actions. Originally, the Special Proceeding was commenced under Index No. 502311/2022, before Justice Capell captioned *684 Dean Partners LLC v Peter K. Newman and Lindsay R. Newman*, (“*Capell Proceeding*”) wherein the issue of service was being challenged. Thereafter, an action was brought before Justice Rothenberg with the same caption under Index #505010/2022 (“*Rothenberg Proceeding*”). Petitioner states in its Affirmation in Support in the action before Justice Rothenberg, that at a conference with the Principal Law Clerk, that parties determined that the Capell Proceeding under Index No. 502311/22, would be withdrawn without prejudice and Petitioner would immediately refile and request an order pursuant to CPLR 308(5) allowing service by email to Respondents via email at Peter Newman’s email, with a copy sent to their Counsel Jared Rich’s email address.¹ Respondents however still cross-moved challenging in part improper service and lack of jurisdiction. The Special Proceeding before Justice Rothenberg was ultimately discontinued with prejudice after parties executed a limited license and indemnity agreement dated April 26, 2021 (“*Access Licensing Agreement*”).

¹ See Affirmation in Support, NYSCEF Doc. #8 under Index #505010/2022.

In support of its current motion, Petitioner asserts that after the Access Licensing Agreement was executed, that protective devices and equipment were installed on the Respondents' property in accordance with the terms of the agreement during the demolition of a prior structure on Petitioner's property. Petitioner states that the demolition phase required less than 30 days of access onto the Respondents' property, and that the protection measures were removed on May 27, 2022. Petitioner now argues that additional judicial intervention is necessary because protection measures need to be re-installed on the Respondents' property for the construction phase of the project, and that Respondents have threatened to restrict access if Petitioner does not pay license fees owed. Petitioner contends that it has made good faith attempts to resolve the dispute by offering an additional month of license fees in the amount of \$4,000.00, which Respondents have rejected and refused to negotiate. Additionally, Petitioner states that while the Respondents' property is located in Brooklyn, New York, that the Respondents live in England at an undisclosed location and that in the prior proceeding Petitioner was permitted to use alternate service pursuant to CPLR 308(5). Petitioner filed an Order to Show Cause for such relief on October 11, 2023, which was signed by Justice Frias-Colon on behalf of Justice Joseph.²

In opposition, and in support of their cross-motion, Respondents argues that Petitioner's action should still be dismissed for lack of personal jurisdiction. Respondents state that service under CPLR 308(5) should not have been permitted because the representations made by Petitioner that the court relied upon for such service were false. Respondents contend that that the Petitioner failed to establish that service under CPLR 308(1), (2), and (4) were impracticable and did not show proof of prior failed attempts of service, thus the court does not have jurisdiction over them. Respondents state that their actual place of resident and business was disclosed and available and that Petitioner has knowledge of both via the Access License Agreement. Additionally, Respondents argue that the Verified Petition should be dismissed because the parties have already entered in a RPAPL 881 license agreement, and that the issues in this case were already litigated. Respondents contend that Petitioner has breached their agreement in failing to provide vibration monitoring reports and proper notice of an interim period and that assuming arguendo that the Petitioner did give notice, that it failed to comply with the notice terms in Paragraph 7 of the agreement. Furthermore, Respondents state that Petitioner has breached the agreement by failing to pay license fees as agreed upon. Respondents assert that Petitioner was to pay \$4,000.00 per month and a \$10,000.00 security deposit, and that subsequent payments were to be made quarterly. Respondents contends that Petitioner has paid the first quarter fee and security deposit but that they are owed fees for the

² The court notes, in an email dated May 31, 2022, submitted by Respondents in support of their motion, Petitioner states that all protective equipment was removed from the Respondents' property on May 27, 2022, and that they will no longer use the Respondents' property for the next phase of the project. Petitioner's papers do not address whether or not the need of an access order is still necessary, and Petitioner has not moved to withdraw its action.

quarters of August 2022, November 2022, February 2023, May 2023, and August 2023, totaling \$50,000.00. Respondents argue that the Access License Agreement further provides that the license fee increases by 10% if Petitioner fails to pay after notice of default, which was sent in April 2023, thus an additional \$2,400.00 is owed since 2023, for a total of \$42,400.00 in arrears through October 2023. Respondents also seek additional damages for property damaged caused by the Respondents and submit a list of damage in support.

CPLR § 3211(a) (8) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court does not have jurisdiction over the person of the Defendant. When a defendant objects to the court's exercise of personal jurisdiction, the ultimate burden of proof rests upon the plaintiff (*Atlman v DiPreta*, 204 AD3d 965 [2d Dept. 2022]; citing *Lowy v Chalkable, LLC*, 186 AD3d 590 [2d Dept. 2020]; *Am./Intl. 1994 Venture v Mau*, 146 AD3d 40 [2d Dept. 2016]). However, in opposing a motion to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of jurisdiction, a plaintiff need only make a prima facie showing that such jurisdiction exists (*Lowy* at 591; *Mau* at 51; *Jacobs v 201 Stephenson Corp.*, 138 AD3d 693 [2d Dept. 2016]).

Pursuant to CPLR 308(1) and (2), personal service upon a natural person may be made, inter alia, by delivering the summons to the person to be served, or a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served and by mailing the same. Where service under CPLR 308(1) and (2) cannot be made with due diligence, service may be made by affixing the summons to the door of either the actual place of business, dwelling place, or usual place of abode of the person to be served and by mailing the same (CPLR 308[4]), or in such manner as the court, upon motion without notice, directs, if service is impracticable under CPLR 308(1), (2), and (4) (CPLR 308[5]). Whether service is impracticable pursuant to CPLR 308(5), depends on the facts and circumstances surrounding each case (*MTGLQ Investors, L.P. v Mayers*, 209 AD3d 1009 [2d Dept. 2022]; *Wells Fargo Bank, NA v Patel*, 175 AD3d 1350 [2d Dept. 2019]; quoting *Liebeskin v Libeskind*, 86 AD2d 207 [1st Dept. 1982]). The standard of impracticability does not require the applicant to satisfy the more stringent standard of due diligence under CPLR 308(4), nor a showing that actual prior attempts to serve a party under each and every method provided in the statute have been undertaken (*Bayview Loan Servicing, LLC v Cave*, 172 AD3d 985 [2d Dept. 2019]; *Astrologo v Serra*, 240 AD2d 606 [2d Dept. 1997]; *Kelly v Lewis*, 220 AD2d 485 [2d Dept. 1995]). However, the fact that the defendants reside in a foreign country does not, by itself, relieve the plaintiff of her obligation to make a reasonable effort to effectuate service in a customary manner before seeking relief pursuant to CPLR 308(5) (see *JPMorgan Chase Bank v Kothary*, 178 AD3d 791 [2d Dept. 2019]; *Tetro v Tizov*, 184 AD2d 633 [2d Dept. 1992]).

Here, with respect to the issue of personal jurisdiction before this court, as the two prior actions are now discontinued, the court finds that Petitioner has failed to demonstrate attempts to serve Respondents at

their residence in England prior to seeking relief pursuant to CPLR 308(5). Pursuant to the Access License Agreement, which was also submitted in Index #505010/2022, and also referenced in email correspondence regarding the draft agreement submitted in the action under Index # 502311/2022, Respondents' London address was disclosed and known to Petitioner. Additionally, Petitioner states knowing Respondent Peter K. Newman's place of business in his submitted order to show cause. However, Petitioner has failed to proffer evidence that service by the ordinary methods would be unduly burdensome or that prior attempts at personal service were made (see *Tetro* at 635; *Rivera v Mazzola*, 169 AD2d 827 [2d Dept. 1991]; *Parisi v Fretta*, 151 AD2d 653 [2d Dept. 1989]; *Badenhop v Badenhop*, 84 AD2d 771 [2d Dept. 1981]). Thus, Plaintiff has not established its burden that jurisdiction has been properly acquired over the Respondents.

Accordingly, it is hereby,

ORDERED, Petitioner's action is dismissed for lack of personal jurisdiction pursuant to CPLR 3211(a)(8).

Issues not addressed are either without merit or moot.

This constitutes the decision and order of this court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**