SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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SABRINA BRUNO,

Plaintiff,

INDEX NO.: 113633/08

- against -

3 WEST 35TH COMPANY, LLC and M&S 276 CORP. d/b/a CAFÉ AU BON GOUT, INC.,

Defendants.

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EMILY JANE GOODMAN, J.S.C.

Defendant M&S 276 CORP. d/b/a Café Au Bon Gout, Inc. ("the moving defendant") moves to dismiss plaintiff Sabrina Bruno's complaint in this slip and fall action, on the grounds that the court lacks jurisdiction over the defendant under CPLR 3211 (a) (8).

For the reasons stated herein, the court orders a reference to decide: 1) whether the process server inquired if Charlie Chung was authorized to accept service on behalf of the moving defendant; 2) whether Chung replied that he was authorized to accept such service; 3) whether Chung was ever employed by the moving defendant; and 4) whether plaintiff could have, through the exercise of due diligence, determined that the Café Au Bon Gout restaurant was not owned by the moving defendant at the time service was made.

BACKGROUND

Prior to September 2007, the moving defendant operated Café Au Bon Gout, a restaurant located at 276 5th Avenue, New York, NY ("the Café"). On January 10, 2006, Plaintiff Sabrina Bruno allegedly slipped and fell at the Café. In September of 2007, the defendant claims that it sold its interest in the restaurant to Café J Inc., which continued to operate the premises as a Café Au Bon Gout restaurant. However, no evidence has been submitted indicating that the sale was a

matter of public record. On January 20, 2008, M&S 276 CORP. d/b/a Café Au Bon Gout was dissolved.

On October 2, 2008, nearly three years after the alleged incident, the Plaintiff filed a complaint against 3 WEST 35th COMPANY, LLC and M&S 276 CORP. d/b/a CAFÉ AU BON GOUT, INC., asserting that the Defendants' negligence caused her to slip and fall. On November 20, 2008, a process server served the moving defendant by leaving a copy of the complaint with an individual named Charlie Chung at the Café. While the Plaintiff had ascertained that the moving defendant had operated the restaurant at the time of the alleged incident, as evidenced by the inclusion of the corporation's name on the summons and complaint, they were apparently unaware of the change in ownership of the restaurant and of the subsequent dissolution of the defendant corporation.

The moving defendant states that it did not employ Charlie Chung at the time of service, but it is unclear whether he had ever worked for the moving defendant when it operated the Cafe. In his affidavit dated March 16, 2009, the process server stated that Chung informed him he was an agent authorized to receive service for the moving defendant. However, in reply, Chung submits an affidavit denying that he ever claimed to be authorized to receive service.

ARGUMENT

The moving defendant argues that the plaintiff's complaint should be dismissed as to it because of a failure to effectuate proper service. The process server served a non-employee of the defendant corporation, and under its view, valid service upon a corporation can only be made on a person employed by the corporation at the time of service. To sustain service on non-employees would encourage carelessness in service and increase the risk of default by defendants. Further, the moving defendant argues that even if there are situations where service

on non-employees of a corporation can be sustained, the plaintiff did not satisfy due diligence when serving the moving defendant in this case.

The plaintiff argues that service to a non-employee of a corporation can be sustained, and that whenever an improper person has been served on behalf of a corporation, the court should examine whether the process server acted with due diligence. The plaintiff cites a number of cases in which courts sustained service even though the plaintiff had not technically served the correct person (see Fashion Page, Ltd. v. Zurich Insurance Company, et al., 50 NY2d 265 [1980]; Scheib v. Curran, 227 AD2d 328 [1st Dep't 1996]; Central Savannah Riv. Area Resources Dev. Agency, Inc. v. White Eagle Intl., 110 AD2d 742 [2nd Dep't 1985]). Although most of these cases involve service on an employee, the plaintiff argues that the analysis of due diligence applies whether or not an employee was served. According to the plaintiff, because the Café still appeared to be the same business, and Chung claimed authorization to accept service on behalf of the moving defendant, the process server acted with due diligence in serving Chung, and service should be sustained.

DISCUSSION

CPLR 311 (a) provides that personal service upon a corporation shall be made by delivering the summons, " . . . upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." Delivery to these designated employees leads to a just presumption that notice to them will be notice to the corporation (Fashion Page, 50 NY2d at 272). "A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law," which provide that plaintiffs can serve the secretary of state or a registered agent on behalf of defendant corporations (CPLR 311 [a] [1]).

Corporations can appoint agents authorized to receive service under CPLR 318, which provides that agents can be appointed, "in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon" but this designation procedure is optional. "A corporation may appoint an agent to accept service without observing the formalities necessary to 'designate' an agent pursuant to CPLR 318" (Fashion Page, 50 NY2d at 272).

In Fashion Page, the Court of Appeals sustained service to an executive secretary whose position was not any of the designated positions under CPLR 311 (a) (1), by employing a two-part analysis: (1) determining whether the corporation had appointed the executive secretary as an agent authorized to receive service; and (2) determining whether the process server acted with due diligence (Id. at 272-74).

Noting that the corporation's receptionist had referred the process server to the executive secretary, that the secretary had often accepted service on behalf of the corporation in the past, and that the corporation had failed to reproach the secretary for her acceptance of service in the past, the Court of Appeals ruled that the corporation had effectively appointed the executive secretary to be an agent authorized to receive service (Id. at 273).

The Court then analyzed whether the process server acted with due diligence when serving the executive secretary (Id. at 272). "In such circumstances, if service is made in a manner which, objectively viewed, is calculated to give the corporation fair notice, the service should be sustained" (Id. at 272-73). In certain instances, process servers can rely on corporate employees to determine the proper to serve (Id. at 272). However, the Court noted that there can be situations where it is unreasonable for the process server to rely on individuals claiming the authority to accept service (Id. at 273).

Unlike Fashion Page, this case involves service on a non-employee of a corporation, and not to the wrong employee within a corporation. However, in Fashion Page, the Court of Appeals suggests there are situations where service to a non-employee will be sustained (id.). The Court stated, "[d]elivering the summons to a building receptionist, not employed by the defendant, without any inquiry as to whether she is a company employee, would not be sufficient" (id.). If there were no situations in which service to a non-employee of a corporation could be sustained, the Court would not have included proper inquiry as a factor, as the issue would be irrelevant if there was a per se invalidation of such service. Thus, the issue of employment status is not determinative in the analysis of whether or not to sustain service to a corporation.

In Central Savannah, the Second Department upheld the Supreme Court's ruling sustaining service to a non-employee who had been previously employed by the defendant corporation (Central Savannah, 488 AD2d at 742). The trial court found that the corporation had clothed the former employee with the appearance of an employee (Central Savannah Riv. Area Resource Dev. Agency v. White Eagle Intl., 117 Misc. 2d 338 [Sup Ct, Nassau County 1983]), and the Second Department found that the "the process server acted reasonably, and with due diligence, under all the circumstances present here, and that the manner of service, objectively viewed, was calculated to, and did, give the corporate defendant fair notice of the commencement of this action" (Central Savannah, 110 AD2d at 742). A business sign had made it appear to the process server that the non-employee worked for the defendant corporation, the non-employee never disputed that he was authorized to receive service, and the non-employee had previously been employed by the defendant corporation (Central Savannah, 117 Misc. 2d at 338-40). Thus, the former employee had created the impression that he was

authorized to accept service, and there was no way for the process server to know that he was not authorized to do so (id.).

Here, service was made at the same location where the plaintiff slipped and fell, in the restaurant bearing the same name, and no evidence has been submitted indicating that the sale of the restaurant was a matter of public record. Additionally, while the moving defendant states that it did not employ Chung at the time of service, the wording of the affidavits raises some suspicion that the moving defendant, like the defendant in Central Savannah, may have employed him in the past. Thus, under these limited set of facts, the moving defendant's concern, that sustaining service here would encourage carelessness in service and unwarranted defaults, is unfounded. Although it is true that the plaintiff did have the opportunity to serve the Secretary of State, serving the Secretary of State remains an alternative method for serving a corporation. To render this method of service a requirement for satisfying due diligence, as the moving defendant argues, would effectively nullify other methods of service.

It is hereby

ORDERED that the following issues are referred to a special referee to hear and report: 1) whether the process server inquired if Charlie Chung was authorized to accept service specifically on behalf of the moving defendant; 2) whether Chung replied that he was authorized to accept such service; 3) whether Chung was ever employed by the moving defendant; and 4) whether plaintiff could have, through the exercise of due diligence, determined that the Café Au Bon Gout restaurant was not owned by the moving defendant at the time service was made; and it is further

ORDERED that this motion is held in abeyance pending a motion to confirm or reject the report of the Special Referee.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2009

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED
JUL 09 2009
COUNTY CLERK'S OFFICE
NEW YORK