

4-6-8, LLC v Abrams

2012 NY Slip Op 30061(U)

January 17, 2012

Supreme Court, New York County

Docket Number: 104404/11

Judge: Doris Ling-Cohan

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4001

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

4-6-8, LLC,

Plaintiff,

INDEX NO. 104404/11

-against-

FILED MOTION SEQ. NO. 001

JUDITH ANN ABRAMS,

Defendant.

JAN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1-6 were considered on this motion to dismiss:

PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

1, 2, 3
4, 5
6

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

BACKGROUND

Plaintiff commenced this action against defendant Judith Ann Abrams for injunctive relief, as well as damages, allegedly arising from trespass and private nuisance. Plaintiff seeks an injunction enjoining and restraining defendant from entering any private areas in the building located at 4-8 East 64th Street, New York, New York (the "Building"). Plaintiff is the owner of the Building and defendant is the tenant of apartment 1P/1R located in the Building.

Defendant filed the within pre-answer motion to dismiss pursuant to CPLR 3211(a)(8) and 3211(a)(7), for lack of personal jurisdiction and failure to state a cause of action, seeking to dismiss plaintiff's claims of private nuisance asserted in the Third and Fourth causes of action. Defendant alleges that plaintiff never personally served the summons and complaint on her and that plaintiff resorted to "nail and mail" service, pursuant to CPLR 308(4), without first exercising due diligence.

Defendant claims that, as a long term tenant, with the right to the apartment for the duration of her life pursuant to a stipulation, this action was brought to harass her into leaving and as retaliation for her permitting a housing inspector to enter the building, who posted numerous violations.

DISCUSSION

Preliminarily, this court must determine whether it has personal jurisdiction over defendant. Here, defendant has sufficiently raised questions of fact as to personal jurisdiction and whether she was properly served with process. Plaintiff contends that defendant was properly served and submits a process server's affidavit of service to show that, after alleged due diligence, defendant was served pursuant to the CPLR's substituted service provisions, i.e., "nail and mail" service, pursuant to CPLR 308(4). The process server's affidavit states that, after two attempts at personal service or service on a person of suitable age and discretion, he affixed two copies of the service papers, on the date of the third attempt, "to the entrance door of 8 East 64th Street, New York, New York 10065, the first of which defendant ripped off the door and the second of which was affixed to the same door thereafter." Affidavit of Service of Ricardo Quinones, Notice of Motion, Exh D. As such, defendant contends that the process server admits he was in the presence of defendant on April 14, 2011, when he attempted to serve the papers a third time, and thus, could have effectuated personal service, pursuant to CPLR 308(1). Defendant's address is listed in the affidavit of service as "8 East 64th Street, New York, New York 10065". Affidavit of Service of Ricardo Quinones, Notice of Motion, Exh D, ¶ 3. However, no apartment number is specified.

Defendant argues that "the due diligence requirement refers to the quality of the efforts made to effect personal service, and...not to their quantity or frequency." *Barnes v City of New York*, 70 AD2d 580, 580 (2nd Dep't)(internal quotations omitted), *aff'd*. 51 NY2d 906 (1980). Furthermore, although defendant admits to receiving the papers which were affixed to her door, and also the copies which were

subsequently sent by mail, defendant disputes that due diligence was used prior to resorting to “nail and mail” service. Instead, defendant asserts that while “the affidavit of...[plaintiff’s] process server claims to have attempted to personally serve...[her] on April 12 and April 13, 2011”, prior to affixing a copy to the door on April 14, 2011, she “was home on both of those dates as well as on April 14, 2011...[and that a]t no time, on any of those dates, or at any other time, was...[she] personally served with any process”. Defendant’s Aff, ¶ 11. Thus, defendant specifically refutes the process server’s affidavit of service.

In opposition, plaintiff proffers a subsequent affidavit of the process server which alleges that defendant failed to answer when he rang the doorbell, but he later encountered defendant who allegedly “ripped” the papers off the door, and that “defendant ran into the Apartment before [he] could get her to acknowledge the service or hand her another copy of the [summons and complaint].” Ricardo Quinones Affidavit, submitted in opposition, ¶¶ 17, 18, and 21. The Court of Appeals has held that “under CPLR 308 (subd 1), delivery of a summons may be accomplished by leaving it in the ‘general vicinity’ of a person to be served who ‘resists’ service. Thus, ...if the person to be served interposes a door between himself and the process server, the latter may leave the summons outside the door, provided the person to be served is made aware that he is doing so.” *Bossuk v Steinberg*, 58 NY2d 916, 918 (1983)(internal citations omitted). Neither party addresses whether the process server attempted to, or was unable to, make defendant aware of personal service after she allegedly ran into the apartment.

The court notes that the two process server affidavits are inconsistent. The first affidavit dated April 15, 2011, indicates that the process server affixed two copies on the “entrance door of 8 East 64th Street”, rather than defendant’s apartment. Affidavit of Service of Ricardo Quinones, Notice of Motion, Exh D, ¶ 3. Yet, the subsequent affidavit dated June 29, 2011, claims he posted “on the front door of the Apartment”, rather than the entrance door of the building, as he claims in the first affidavit. Quinones Affidavit, submitted in opposition, ¶ 14. According to such affidavit, after his alleged encounter with

defendant, in which “defendant had ripped my first posting off the Apartment door before I could take a photograph as additional proof of service, I posted another copy of the S&C on the door [of the apartment] out of an abundance of caution so that I could take a photograph of it, a copy of which is annexed...as Exhibit H”. Quinones Affidavit, submitted in opposition, ¶ 19, 21. However, Exhibit H does not appear to be apartment 1P/1R (defendant’s apartment), but rather the front entrance of the building as the number 8 is in the photo.

When affidavits of process servers are in conflict with the sworn statement by an opposing party, a hearing is required to determine if service was properly made. *Ananda Capital Partners v. Stav Elec. Sys. (1994) Ltd. et al.*, 301 A.D.2d 430, 430 (1st Dep’t 2003). *See also Poree v Bynum*, 56 AD3d 261, 261 (1st Dep’t 2008); *Hinds v 2461 Realty Corp. and Parkoff Mgmt*, 169 AD2d 629, 631-632 (1st Dep’t 1991). Here, due to the conflicting affidavits with respect to service and plaintiff’s process server’s inconsistent affidavits, a traverse hearing is required. *See First Union Mortgage Corp. v Silverman*, 242 A.D.2d 258 (2d Dep’t 1997)(the validity of service pursuant to CPLR 308(4) is to be established through a hearing when there are conflicting affidavits and the truth of the matter is not clearly evident.) *Id.* Notwithstanding that defendant may have received notice of the lawsuit from “nail and mail” service pursuant to CPLR 308(4), absent proper service in an action, the court lacks jurisdiction over the defendant and all subsequent proceedings are rendered null and void even if defendant subsequently receives actual notice of the lawsuit. *McMullen v Arnone*, 79 AD2d 496, 499 (2nd Dep’t 1981). Thus, defendant has sufficiently refuted plaintiff’s affidavit of service and a traverse hearing is required.

Accordingly, it is

ORDERED that defendant’s motion to dismiss is granted to the extent that this matter is referred to a Special Referee for a traverse hearing to hear and report with recommendation on the issue of service of process with respect to defendant Judith Ann Abrams, except that, in the event of and upon

the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine such issue; and it is further

ORDERED that such granting of a traverse hearing and/or referral is conditioned on defendant serving a copy of this order, within 45 days of entry of this order, with notice of entry, upon opposing counsel and upon the Special Referee Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar; and it is further

ORDERED that failure to serve the order on the Special Referee Clerk within 45 days shall be deemed an abandonment of defendant's jurisdictional claim, and a denial of defendant's motion to dismiss; and it is further

ORDERED that should jurisdiction be found, the balance of the motion may be restored to this part's motion calendar for submission, by stipulation signed by all parties or letter to the court with copies to all parties, within 30 days of issuance of the Special Referee's decision, or this case will be dismissed; and it is further

ORDERED that a copy of all motion papers shall be provided to the Special Referee at the hearing.

This constitutes the decision/order of the Court.

Dated: 1/11/12


DORIS LING-COHAN, J.S.C.

FILED
JAN 13 2012
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Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION