

53 Spencer Realty LLC v Fidelity Natl. Tit. Ins. Co.

2017 NY Slip Op 32314(U)

October 30, 2017

Supreme Court, Kings County

Docket Number: 520249/16

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

53 SPENCER REALTY LLC,

Plaintiff,

DECISION / ORDER

-against-

Index No. 520249/16

Motion Seq. No. 5

Date Submitted: 10/26/17

**FIDELITY NATIONAL TITLE INSURANCE COMPANY,
SPENCER FIFTY THREE LLC, EMMANUEL
SCHWARZ, ABRAHAM FRANCOZ, LAZAR
WALDMAN and CONGREGATION B'NEI MEIR MOSHE,**

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Emmanuel Schwarz's pre-answer motion to dismiss.

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits Annexed.....	<u>1-5</u>
Affirmations in Opposition and Exhibits Annexed.....	<u> </u>
Reply Affidavit and Exhibits Annexed	<u> </u>
Other: _____	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a pre-answer motion by defendant Emmanuel Schwarz, pursuant to CPLR § 3211(a)(8), that the court does not have jurisdiction over him, to dismiss the instant action as against him. Plaintiff's counsel submitted an affirmation in opposition purporting to oppose this motion, as well as four other motions seeking dismissal, which were all heard on September 7, 2017. His affirmation is e-file document #186. However, when it came time to argue this motion, it became clear that the plaintiff's "Affirmation in Opposition to all Motions" did not actually address the instant motion. The court adjourned the instant

motion at the request of plaintiff's counsel to October 26, 2017, so plaintiff could submit opposition to the instant motion. However, plaintiff's attorney failed to submit any opposition and also failed to appear on the adjourned date.

Movant contends that the court lacks jurisdiction over defendant Schwarz as service of the summons and complaint was not effectuated.

The affidavit of service on defendant Schwarz is signed by Yisroel A. Simon, a licensed process server, and states that on November 22, 2016, at 9:14 p.m., defendant Schwarz was served at 108 Wallabout Street, Apt 1B, Brooklyn, New York, with the Summons and Complaint and Notice of Pendency in the instant action pursuant to CPLR § 308(2), by delivering and leaving the papers with defendant's wife, "Jane" Schwarz, a person of suitable age and discretion, and then mailing them to him the next day by first class mail. The affidavit of service states "Jane" Schwarz is a white female with brown hair, is 5'4" to 5'8", is 36-50 years of age and 161-200 pounds.

In support of the motion, movant submits the notarized affirmation of Miriam Schwarz, movant's wife. In her affirmation, Ms Schwarz states that no such service took place. She states that she was at home with her children on that date and at that time and no one knocked on her door or rang her bell. They do not generally have visitors at night, so she would have remembered. She did not answer any door or speak to any unknown gentleman. She was handed nothing. She keeps her hair covered for religious reasons and is only 5'2" and weighs less than 130 pounds. No one in the household fits the description in the process server's affidavit.

Movant also annexes as an exhibit the affidavit of service also sworn to by Mr. Simon, the process server, with regard to his service on co-defendant Lazar Waldman. That affidavit states that on November 22, 2016, at 9:05 p.m., (9 minutes prior to the

service on Schwarz) defendant Waldman was served at 35 Skillman Street, Apt. 6E, Brooklyn, New York with the Summons and Complaint and Notice of Pendency in the instant action by leaving the papers with that defendant's wife, Chana Waldman, and then mailing them the next day to Mr. Lazar Waldman. Chana Waldman is described in the affidavit of service as a white female with brown hair, who is 5'4" to 5'8", 36-50 years of age and 161-200 pounds. This description is exactly the same in every detail as the description by Mr. Simon of "Jane" Schwarz.

Discussion

In New York, jurisdiction is acquired by service of a summons and complaint, or summons with notice pursuant to the CPLR. While there are several methods to serve an individual, known in the CPLR as a "natural person," the method claimed by the process server to effectuate service herein was delivery of the summons and complaint pursuant to CPLR 308 (2).

A process server's affidavit of service constitutes prima facie evidence that a defendant was validly served. (*US Consults v APG, Inc.*, 82 AD3d 753 [2d Dept. 2011]; *Bank of NY v Segui*, 68 AD3d 908, 909 [2d Dept. 2009]). However, a defendant can rebut a process server's affidavit with a detailed and specific contradiction of the allegations in the process server's affidavit (*Wachovia Bank, N.A. v Carcano*, 106 AD3d 726 [2d Dept 2013]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d at 344 [2d Dept 2003]; *Mortgage Access Corp. v Webb*, 11 AD3d 592 [2d Dept 2004]). Here, the affidavits of service prepared by the plaintiff's process server constitute prima facie evidence of proper service pursuant to CPLR 308 (2) (see *Wachovia Bank, N.A. v Carcano*, 106 AD3d 726; *Bank of N.Y. Mellon v Scura*, 102 AD3d 714 [2d Dept 2013]).

However, the defendant Schwarz has successfully rebutted the presumption of

proper service with his wife's affirmation which disputes the facts stated in the process server's affidavit (*Wachovia Bank, N.A. v Carcano*, 106 AD3d 726, *Scarano v Scarano*, 63 AD3d 716 [2d Dept 2009]; *Bank of N. Y. Mellon v Scura*, 102 AD3d 714 [2013]). Therefore, as her claims constitute a "non-conclusory denial of service by a defendant," it is sufficient to dispute the veracity and the content of the process server's affidavit, entitling defendant to a traverse hearing (see *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; *Omansky v Gurland*, 4 AD3d 104, 108 [1st Dept 2004]; *Haberman v Simon*, 303 AD2d 181 [1st Dept 2003]; *Ananda Capital Partners v Stav Elec. Sys.*, 301 AD2d 430 [1st Dept 2003]).

In conclusion, defendant Schwarz' motion is granted to the extent that the parties are directed to appear at a traverse hearing before a special referee on the issue of whether the service of process herein was properly effectuated upon the defendant Emmanuel Schwarz. A Referral Order which refers the traverse hearing to a Special Referee (to hear and determine), on a date to be scheduled by the court, is issued simultaneously herewith. Prior to the commencement of the hearing, the attorneys shall execute their consent to the referee hearing and determining the issues in the referral order.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
October 30, 2017

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**

For the Board of Directors
of the Corporation