

El Greco Socy. of Visual Arts, Inc. v Diamantidis

2006 NY Slip Op 30734(U)

November 20, 2006

Supreme Court, Queens County

Docket Number: 13790 2006

Judge: Marguerite A. Grays

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compliance with the Federation's bylaws. Respondents separately move for an order granting an extension of time in which to answer the petition.

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Upon the foregoing papers it is ordered that the petition and respondent's motion are consolidated for the purpose of a single decision and are decided as follows:

Respondents by way of an order to show cause dated August 1, 2006, seek an extension of time in which to answer the petition, on the grounds that the Federation's bylaws had not yet been translated from the Greek by a qualified translator, and counsel had not been able to directly contact many of the individually named respondents, as well as Vasilios Berzikis, who served as the president of the Election Committee for one week prior to the contested election. This court adjourned respondents' motion to September 19, 2006, and directed that the translation be submitted to the court by September 5, 2006, and that reply papers be submitted by September 18, 2006. Respondents' counsel asserted that as of August 9, 2006, respondent Nicolaos Diamantidis, as well as Apostolos Zoumbaniotis (the initial president of the Election Committee), Vasilios Berzikis (the president of the Election Committee), and Demetrios Demetriou (the secretary of the Federation) were all in Greece on their summer vacations and, thus, he was unable to submit a complete and thorough set of opposition papers. It was also asserted that Mr. Demetriou is in possession of the minutes of the Election Committee which are in Greek and also require translation. The petition and respondents' motion were both fully submitted on September 19, 2006, at which time a translation of the bylaws had been submitted to the court, along with respondents' opposition to the petition. Respondents' request for a further extension of time in which to serve an answer to the petition or otherwise move, therefore, is denied as moot.

The Federation is a not-for-profit corporation organized for the purpose of promoting Greek culture and heritage. Its members consist of individual societies, clubs and local organizations. The El Greco Society of Visual Arts, Inc. (Society), is a not-for-profit corporation, and a member of the Federation. The 21 individual respondents, Nikolaos Diamantidis, Demetrios Kalamaras, Demetrios Demetriou, Christos Vournas, George Paralemos, Peter Michaleas, Peter Pavlou, George Bosonis, Stephen Mavronikolas, John Goros, Anastasios Avgitidis, Vasilios Eglezos, Apostolos Skotidas, Paul Hatzikyriakos, Kyriaki Sandy Venetis, Antonios Fokas, Nicholaos Georgantzas, George Aggellakis, Dinos Rallis, George Rousakis and Panagiota Spyropoulou were all elected to the Federation's Board of Directors at the June 4, 2006 election.

Section 618 of the Not-For-Profit Corporation Law provides that any member aggrieved by an election may petition the court, provided that the person serve notice upon the persons declared elected in the contested election, the corporation, and any other such persons as the court may direct. This court, in the order to show cause dated June 22, 2006, directed that petitioner serve "said order, the RJI, and the papers appended thereto on the Federation pursuant to Section 306(b) of the N-PCL and on the individual respondents pursuant to CPLR 308" on or before June 30, 2006. The court finds that as petitioner's counsel did not enter into a written stipulation with the respondents' counsel regarding any jurisdictional defenses, such defenses have not been waived.

The affidavits of service submitted herein establish that all of the individual respondents, with the exception of John Goros, were served with the order to show cause, the RJI, the petition and supporting papers, on or before June 30, 2006, pursuant to either CPLR 308(2) or 308(4). The Federation was served pursuant to N-PCL § 306(b) on June 29, 2006. Although a process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service (see Bankers Trust Co. of Cal. v Tsoukas, 303 AD2d 343 [2003]), the court finds that the affirmation of service as regards respondent John Goros is defective on its face.


Personal jurisdiction is obtained over a respondent if the summons is delivered "to 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 summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business..." (CPLR 308 [2]). CPLR 308(2) requires strict compliance and, thus, even a respondent's subsequent receipt of actual notice of a lawsuit will not cure a defect or confer jurisdiction upon the court (see Raschel v Rish, 69 NY2d 694, 697 [1986]; Feinstein v Bergner, 48 NY2d 234, 241, [1979]). Respondent John Goros was purportedly served with process

by counsel for the petitioner after the process server was unable to locate Mr. Goros at another address which was described as an industrial facility, and not a residence, in Long Island City. Counsel's affirmation of service states that the RJI, order to show cause, petition and supporting papers were left with Apostolos Skotidas, an individual of suitable age and discretion, on June 30, 2006 at 8:05 P.M., at the Federation's office "wherein John Goros discharges the functions of a member of the Board of Directors of said Respondent, and upon information and belief usually resides(sleeps)," and that these papers were mailed to Mr. Goros at the Federation's address on July 5, 2006. The fact that Mr. Goros is a member of the Federation's Board of Directors does not, in itself, make the Federation's office his actual place of business.

It is well settled that neither the term "dwelling place" nor "usual place of abode" may be equated with the "last known residence" of a defendant or respondent for purposes of substituted service pursuant to CPLR 308(2). (See, Feinstein v Bergner, supra; Chiari v D'Angelo, 123 AD2d 655 [1986].) The terms "dwelling place" and "usual place of abode" imply a degree of permanence and stability (Feinstein v Bergner, supra). A casual stay at a given location will not suffice (see Burkhardt v Cuccuzza, 81 AD2d 821 [1981]). Therefore, counsel's statement in the affirmation of service that "upon information and belief" Mr. Goros "resides (sleeps)" at the Federation's office is insufficient on its face to establish that service was made at his "dwelling place or usual place of abode." The mailing of process to the Federation's office was also insufficient, as there is nothing in the affirmation of service which establishes that this office was Mr. Goros' "last known residence" or his "actual place of business." (see generally Bernardo v Barrett, 87 AD2d 832 [1982].)

In view of the fact that petitioner has failed to establish that all of the individuals elected on June 4, 2006, as well as the corporation, were served in the manner prescribed in the order to show cause, it may not maintain this special proceeding to set aside the election of June 4, 2006, and the within proceeding is dismissed. (See generally, In re Uranian Phalanstery 1st New York Gnostic Lyceum Temple, 155 AD2d 302 [1989]; N-PCL § 618.) The court, therefore, need not consider the remaining arguments raised by the respondents in its opposing papers.

Dated: NOV 20 2006


 J. S. J.
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