

Kasan v Perlin

2009 NY Slip Op 33409(U)

April 6, 2009

Supreme Court, Nassau County

Docket Number: 15880/08

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

GARY KASAN,

Motion Sequence #2
Submitted January 13, 2009

Plaintiff,

- against -

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MARILYN S. PERLIN and ELISE KASAN,

Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Affidavit in Opposition.....	3
Reply Affirmation.....	4

Requested Relief

Counsel for defendants, MARILYN S. PERLIN and ELISE KASAN, moves for an order, pursuant to CPLR §3211(a)(8), dismissing the action for lack of personal jurisdiction.

Counsel for plaintiff, GARY KASAN, opposes the motion, which is determined as follows:

Background

In this action, plaintiff seeks to impose a constructive trust over certain real estate located at 60 Christopher Street, Woodbury, New York, owned by defendant, MARILYN S. PERLIN, allegedly in trust for her daughter, defendant ELISE KASAN, and her now

estranged son-in-law, plaintiff GARY KASAN. The Court notes that a prior motion was interposed by defendants to vacate a notice of pendency filed by plaintiff on said property, on the ground that, *inter alia*, the service of the complaint had not been made upon defendant PERLIN at her residence in Florida and, therefore, the notice of pendency had expired. In that motion, defendants argued that the subject property was presently under contract for sale, in the sum of \$1,600,000.00, and that the closing on the sale of the property was scheduled for October 2008 but the existence of the notice of pendency was a cloud on title preventing the closing of the transaction. By Short Form Order, dated January 30, 2009, the Court noted that there was a factual dispute concerning service of process on MARILYN S. PERLIN at her gated community in Florida in that she challenged the contents of the affidavit of service. However, in an effort to be practical, the Court declined to direct a traverse hearing because the cost of producing witnesses from Florida, and the fact that there was no time bar precluding the filing of another notice of pendency and service within thirty (30) days, would have made any such relief purely illusory. Instead, the Court fashioned a procedure for defendants to obtain the very relief they were seeking, vacatur of the notice of pendency, by posting a bond in the sum of \$200,000.00 which, based upon a fair reading of the complaint, was the maximum amount which the plaintiff was entitled to recover if successful on the trial of the action. It was the Court's preference to facilitate the sale of the Florida residence in these uncertain times by removal of the notice of pendency, and to address the issues raised by the plaintiff in the constructive trust action, which, in essence, provided relief to both parties.

Notwithstanding same, the Court is now faced with a motion by defendants, in which both counsel completely ignore the practicalities of the prior order of the Court, and seek

to argue on purely technical and procedural grounds.

In support of the motion, counsel for defendants again argues that Ms. PERLIN was never served with the summons and complaint, which was filed on August 25, 2008, and that a failure to serve the summons within thirty (30) days of filing mandates its cancellation. Affidavits from Ms. PERLIN and Carolyn Lombardo, the property manager at the gated community where Ms. PERLIN resides, claim that there are no records of the process server entering the community on the dates in question. Ms. PERLIN states that she was at home at the time of alleged attempts to serve her.

In opposition to the motion, counsel for plaintiff and the process server assert that several unsuccessful attempts to personally serve Ms. PERLIN were made at her residence, and that the summons, verified complaint and notice of Pendency were affixed to Ms. PERLIN's door, on September 19, 2008, with follow up mailing on said date. The affidavit of the process server, Pennie Cain, annexed to the instant motion, states unequivocally that she attempted to personally serve defendant PERLIN on three (3) days, that she rang the bell and knocked on the door but no one answered, that she was unable to find a person of suitable age and discretion, and that the documents were posted on the door. Ms. Cain states that she has been to the community before, that she is known to the attendant at the gate, and that she is customarily permitted entry to the gated community without signing in. It is counsel's position that the Affidavit of Service makes a *prima facie* showing of proper service and that this motion is untimely. Further, counsel points out that neither defendant has interposed an answer and that a notice of default has been sent to defendants' counsel.

After a careful reading of the submission herein, given counsels' unwillingness to proceed on the merits without challenges to jurisdiction, it appears to the Court that an evidentiary hearing is required to determine whether effective service of the summons and complaint has been obtained upon MARILYN S. PERLIN. It is therefore

ORDERED, that the prior order of the Court, dated January 30, 2009, is stayed pending determination of the jurisdictional issues raised herein; and it is further

ORDERED, that this matter is specifically referred to the Calendar Control Part for a traverse hearing and shall appear on the calendar of CCP on July 28, 2009 at 9:30 A.M., subject to the approval of the Justice there presiding; and it is further

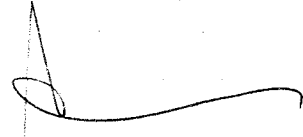
ORDERED, that defendants, MARILYN S. PERLIN and ELISE KASAN, shall file a Note of Issue within ninety (90) days from the date of this order and shall serve plaintiff's counsel a copy of same by certified mail, return receipt requested; and it is further

ORDERED, that the failure to file a Note of Issue as directed may be deemed an abandonment of the claims giving rise to the traverse hearing.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 6, 2009



WILLIAM R. LaMARCA, J.S.C.

ENTERED
APR 09 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE