

1150 Fifth Ave. Owners Corp. v Dolger

2011 NY Slip Op 33180(U)

December 9, 2011

Sup Ct, NY County

Docket Number: 100683/11

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla

PART 19

Index Number : 100683/2011
1150 FIFTH AVENUE OWNERS CORP
vs.
DOLGER, GEORGE
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is determined in accordance with the accompanying decision/order

FILED
DEC 12 2011
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/9/11

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
1150 FIFTH AVENUE OWNERS CORP.,

Plaintiff,

- against-

Index No.: 100683/11
Submission Date: 10/12/2011

GEORGE DOLGER AND ANN DOLGER,

Defendants.

----- X

For Plaintiff:
Echtman & Etkind, LLP
220 East 42nd Street, 6th Floor
New York, NY 10017

For Defendants:
David Rozenholc & Associates:
400 Madison Avenue, 19th Floor
New York, NY 10017

Papers considered in review of this motion to dismiss:

Notice of Motion	1
Aff in Opposition.	2
Reply Affirmation.	3

HON. SALIANN SCARPULLA, J.:

In this action seeking, *inter alia*, a declaratory judgment, defendants George Dolger and Ann Dolger move to dismiss the complaint pursuant to CPLR §3211(a)(8) for lack of personal jurisdiction.

Plaintiff 1150 Fifth Avenue Owners Corp. (“1150 Fifth Avenue”) is the owner of the apartment building located at 1150 Fifth Avenue (“the building). Defendants George and Ann Dolger (“the Dolgers”) leased Apartment 2E at the building.

1150 Fifth Avenue commenced this action seeking a judgment declaring that the lease for Apartment 2E has been terminated, an order directing the ejectment of the

Dolgers from the apartment, an injunction prohibiting part-time psychotherapist defendant George Dolger from engaging in objectionable conduct by, *inter alia*, seeing patients in the apartment, and attorneys fees.

According to the allegations of the complaint, at a special meeting of the Board of Directors of the subject building that took place on December 7, 2010, the Board determined that George Dolger engaged in objectionable conduct by seeing patients in the apartment, despite repeated notices from 1150 Fifth Avenue to stop doing so. The Board unanimously determined that the Dolgers' tenancy was undesirable, and pursuant to the terms of the lease agreement, the tenancy was terminated as of January 7, 2011. The Dolgers have not vacated the apartment and George Dolger allegedly continues to see patients there.

The Dolgers answered the complaint, and asserted three counterclaims, for unlawful tenant harassment in violation of the New York City Housing Maintenance Code, breach of the covenant of good faith and fair dealing, and for attorneys fees.

The Dolgers now move to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, arguing that the summons and complaint were improperly served. They allege that while 1150 Fifth Avenue claims to have used the "affix and mail" method of service, there is no showing of the required undertaking of due diligence before the pleadings were left at the apartment, only one copy of the pleadings was left

even though there are two defendants, and the pleadings were not actually “affixed” to the door.

In support of the motion, George Dolger submits an affidavit asserting that he and his wife were not home with the pleadings were left at the apartment. When they arrived at the apartment, they discovered one copy of the summons and complaint wedged behind the doorknob between the doorknob and the door. There was no object affixing or causing it to stick or adhere to the door. He further explains that due diligence was clearly not exercised to effectuate personal delivery because he claims that 1150 Fifth Avenue knew of another home that they owned, and was aware of an office location that he rented in the building as well. They could have been personally served at either of those two locations.

In opposition, 1150 Fifth Avenue argues that the Dolgers waived the personal jurisdiction defense by asserting two counterclaims in their answer that are unrelated to this action. 1150 Fifth Avenue first explains that the Dolgers’ counterclaim alleging harassment in violation of the Housing Maintenance Code is unrelated because New York courts do not recognize such a cause of action, and the proper remedy for such a claim is to file a complaint with the Division of Housing Community Renewal. 1150 Fifth Avenue next explains that the Dolgers’ counterclaim seeking attorneys fees is also unrelated because it is without basis. Finally, 1150 Fifth Avenue maintains that the Dolgers were properly served.

In reply, the Dolgers argue that their counterclaims are inextricably intertwined with the claims asserted in the complaint and thus, not unrelated.

Discussion

Pursuant to CPLR §308(4), where service of process cannot be made with due diligence by personal delivery, or by the deliver and mail alternative, service can be effected, inter alia, "by affixing the summons to the door of ... the actual ... dwelling place or usual place of abode within the state of the person to be served and by ... mailing the summons to such person at his or her last known residence."

Here, the Dolgers claim that (1) only a single copy of the pleadings was left at the apartment even though there are two affidavits of service claiming separate service on each defendant, (2) the pleadings were not actually affixed to the door, rather they were wedged between the doorknob and the door, (3) due diligence was not exercised in that no attempts were made to serve the Dolgers on a weekend; (4) there was no indication that any attempts were made to personally serve the Dolgers at their other residence, or George Dolger's office, which was located in the same building; and (5) the process server's claim that he spoke to the concierge who said that he had no knowledge of George Dolger's work habits or place of employment is spurious given that George Dolger maintains an office and works in the building.

While a proper affidavit of a process server attesting to service upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of

service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing. *NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459 (1st Dept. 2004); *Ananda Capital Partners, Inc. v. Stav Elec. Sys. (1994) Ltd.*, 301 A.D.2d 430 (1st Dept. 2003). Here, in his affidavit, George Dolger disputes service on numerous points, posing a clear dispute of facts which could only properly be resolved by a traverse hearing.

In addition, the Court finds that contrary to 1150 Fifth Avenue's contention, the lack of personal jurisdiction defense was not waived here. While 1150 Fifth Avenue properly notes that asserting an unrelated counterclaim waives a personal jurisdiction defense because a defendant would be taking affirmative advantage of the court's jurisdiction, the Court finds that the Dolgers counterclaims are not "unrelated" for these purposes. *See Textile Technology Exch., Inc. v. Davis*, 81 N.Y.2d 56 (1993); *Dinicu v. Groff Studios Corp.*, 215 A.D.2d 323 (1st Dept. 1995).

In accordance with the foregoing, it is hereby

ORDERED that defendants George Dolger and Ann Dolger's motion to dismiss the complaint is denied; and it is further

2012 at 11 AM

ORDERED that this proceeding is to be set down for a traverse hearing on *January 27,*
in Part 19 at 80 Centre Street, Room 279.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 9, 2011

ENTER:

Saliann Scarpulla
J.S.C.

SALIANN SCARPULLA

FILED
DEC 12 2011
COUNTY CLERK'S OFFICE
NEW YORK