

Key Bank N.A. v Mammoth Sporting Goods Inc.

2016 NY Slip Op 30118(U)

January 21, 2016

Supreme Court, New York County

Docket Number: 653983/2014

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

**KEY BANK NATIONAL ASSOCIATION,
successor by merger to KEY EQUIPMENT
FINANCE INC.,**

Plaintiff,

- v -

**MAMMOTH SPORTING GOODS INC.,
PHILLIP HERTZOG, and JUDI
HERTZOG,**

Defendants.

INDEX NO. **653983/2014**

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

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

1-3

Key Bank National Association, as successor by merger to Key Equipment Finance Inc. (“Plaintiff”), brings this action to recover for breach of a Master Lease Agreement and Continuing Guaranty executed by Defendants.

Plaintiff moves for an Order pursuant to CPLR § 308(5), making an ex parte request that the Court “devise a method of service on Judi Herzog by serving her brother, Philip Herzog, at his place of business, Value Sports, located at 1331 Rocking W Drive, Bishop, California 93514 as service has been impracticable under paragraphs one, two and four of CPLR § 308.”

This action was commenced on December 31, 2014, upon the filing of Summonses and a Complaint. Defendants, Mammoth Sporting Goods, Inc. (“Mammoth”), and Phillip Hertzog (“Mr. Hertzog”), were duly served the Summons and Complaint on January 16, 2015. Plaintiff has unable to locate Ms. Hertzog to effectuate service.

On October 5, 2015, this Court entered an order extending time to serve Judy Hertzog pursuant to §411 of the New York City Civil Court Act and CPLR § 2004 until December 15, 2015.

On or about February 10, 2015, Plaintiff negotiated a settlement with Mr. Hertzog and Mammoth wherein they agreed to pay Plaintiff \$28,000 as full satisfaction of the debt over time (the "Settlement"). Mammoth and Mr. Hertzog subsequently made two (2) payments: \$13,000.00 on February 27, 2015, and \$1,000.00 on April 2, 2015, for a total of \$14,000.00 or half of the total settlement agreement. Plaintiff's attorney states, "In order to complete the settlement, the undersigned counsel requested Ms. Hertzog's signature and Mr. Michaels [Mammoth's representative] agreed to secure her signature, but indicated he was having difficulty locating her Costa Rica, where she resides."

Plaintiff's attorney states,

Based on Mr. Michaels' representations and defendants' two (2) monthly installment payments the undersigned counsel did not seek alternative service, expecting Mr. Michaels to secure Ms. Hertzog's signature on the settlement papers and return them as soon as practicable.

Mr. Michaels never produced the executed settlement or provided any information to leading to Ms. Hertzog's precise location in Costa Rica as promised in his correspondence of March 2, 2015. Mr. Michaels never produced the executed settlement or provided any information to leading to Ms. Hertzog's precise location in Costa Rica as promised in his correspondence of

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To date, my office has not received another payment on behalf of defendants and they are in default. On May 26, 2015, Mr. Michaels confirmed in writing that he was not an attorney and no longer representing defendants in any capacity.

Plaintiff's attorney states on May 26, 2015, based on Mr. Michaels' correspondence, Plaintiff sent notices to cure and default to defendants at their last known residential and business addresses. The notices were mailed to: 1331 Rocking W Drive, Bishop, California 93514, the location of Mammoth, and Phillip Hertzog's

place of business indicated on the draft payments received by Plaintiff on February 27, 2015, and April 2, 2015.

As to Ms. Herzog, Plaintiff sent notices to her at her last known address of 890 Cordova Street, San Diego, California, 92107, that were returned and marked unable to forward. Thereafter, on or about July 23, 2015, Plaintiff's office ordered a Skip Trace based on Ms. Hertzog's last known address of 890 Cordova Street, San Diego, California 92107. Plaintiff states that the notices sent to 1331 Rocking W Drive, Bishop, California 93514 were not returned.

Mr. Hertzog and Mammoth have not responded to the notices to cure and KeyBank moved for default against Mr. Hertzog and Mammoth only on July 14, 2015.

Plaintiff's attorney states:

Because Mr. Hertzog never provided my office with Ms. Hertzog's contact information in Costa Rica through Mr. Michaels as promised, it is impracticable for KeyBank to serve Ms. Hertzog in Costa Rica. Nevertheless, the undersigned counsel reasonably believes that Mr. Hertzog continues to operate a sporting goods retail store at 1331 Rocking W Drive, Bishop, California 93514 which is also where he was served on January 16, 2015, because the settlement draft made payable to Wong Fleming on April 2, 2015, bears the same address, and lastly, Value Sports is listed as retail sporting goods store owned by Philip Hertzog and Steven Hertzog at the same address on Manta.com and other websites.

Accordingly, Plaintiff makes this motion for an Order pursuant to CPLR § 308(5), making an ex parte request that the court to devise a method of service on Judi Herzog by serving her brother, Philip Herzog, at his place of business, Value Sports, located at 1331 Rocking W Drive, Bishop, California 93514 as service has been impracticable under paragraphs one, two and four of CPLR § 308.

CPLR §308(5) states that "Personal service upon a natural person shall be made by any of the following methods":

(5) in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two or four of this section.

When service is impractical by traditional means, the Court is permitted to fashion a means of service which are reasonably calculated to provide the party with notice of the action. (*Tremont Fed Sav. & Loan Assoc. v. Ndanusa*, 144 A.D.2d [1st Dept 1968]; *Franklin v. Winard*, 189 A.D.2d 717 [1st Dept 1993]).

Here, there is no reason to believe that Ms. Hertzog's brother is authorized to accept service on Ms. Hertzog's behalf and by Plaintiff's own statement, Plaintiff is having difficulty locating Ms. Hertzog's brother. Thus, service upon Ms. Hertzog's brother is unlikely to put Ms. Hertzog on notice of these proceedings.

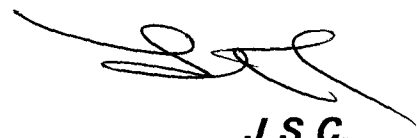
Wherefore, it is hereby,

ORDERED that Plaintiff's motion is denied.

This constitutes the decision and order of the court. All other relief requested is granted.

Dated JANUARY 21, 2016

JAN 21 2016



J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE