SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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TAUFEX RESTORATION, INC.,

Plaintiff,

- v -

BREND RENOVATION CORPORATION, BREND GROUP, LLC,45 EAST 62ND STREET CORPORATION, JOHNS DOES, JOHNS DOES

Defendant.

INDEX NO. 650989/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered is decided as follows.

Plaintiff seeks compensation for renovation work performed on a building in Manhattan. Defendants 45 East 62nd Street Corporation (the building), Brend Renovation Corporation (Brend Renovation) and Brend Group, LLC (Brend Group, together with Brend Renovation, the Brend defendants) move, pursuant to CPLR 3211 (1), (2) and (8), to dismiss the amended verified complaint (complaint).[1] Specifically, Brend Renovation moves for an order dismissing this action for lack of personal jurisdiction due to improper service and based on documentary evidence.[2] In

[1] Defendants' motion is a pre-answer motion to dismiss.

[2] While Brend Group also initially moved to dismiss based upon improper service, it subsequently admitted service in this motion and withdrew that portion of its motion (*see* Foster affirmation in opposition to plaintiff's cross motion and in reply to plaintiff's opposition papers, ¶ 18). Brend Renovation, Brend Group, and 45 East 67nd moved (motion sequence 001) to

the alternative, the Brend defendants move: (1) pursuant to CPLR 7503, for an order staying this action and compelling plaintiff to arbitrate the claim; and (2) for sanctions, pursuant to Part 130-1.1 of the Rules of the Chief Administrator, including attorneys' fees.

Plaintiff cross-moves: (1) pursuant to CPLR 503 (c), 507, 509, 510 (1) and 511 (a) and (b), for an order changing the venue of this action to Suffolk County and staying this case pending the change of venue; (2) pursuant to Lien Law § 76 (5), for an order compelling the Brend defendants to respond to plaintiff's demand for a verified statement of trust; and (3) for the attorneys' fees associated with the request for the verified statement of trust.

On August 25, 2016, plaintiff executed an agreement with Brend Renovation for work that plaintiff would perform on the building. Plaintiff alleges that it performed in accordance with the agreement, but has not been paid over $50,000 of the money that it is owed. The complaint's causes of action are for: (1) foreclosure on a mechanic's lien; (2) breach of contract; (3) quantum meruit; (4) unjust enrichment; (5) account stated; (6) an accounting of trust assets under Article 3-A of the Lien Law (the Lien Law); and (7) diversion of Lien Law trust assets.

When plaintiff commenced this action, it also filed a notice of pendency (NOP) in New York County. On March 24, 2017, plaintiff and the Brend defendants executed a stipulation to cancel the NOP, as, in 2016, pursuant to Lien Law § 20, the Brend defendants had deposited monies for the sum plaintiff alleges is owed, plus interest, with the New York County Clerk.

The moving papers contain a contract executed by plaintiff and Brend Renovation (the subcontract). Plaintiff seeks recovery under the subcontract, which contains an arbitration clause, but Brend Renovation challenges jurisdiction, which must be addressed first (*see Wyser-Pratte*

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dismiss the initial complaint (NYSCEF Doc. 3) but the motion was withdrawn after plaintiff amended the complaint. NYSCEF Doc. 46.

Mgt. Co., Inc. v Babcock Borsig AG, 23 AD3d 269, 269 [1st Dept 2005]). Brend Renovation argues that this case should be dismissed against it, as it has not been properly served pursuant to CPLR 311 or Business Corporation Law (BCL) § 306. The record does not indicate that plaintiff attempted to serve Brend Renovation pursuant to BCL§ 306.

"CPLR 311 (subd 1) provides that personal service upon a corporation, foreign or domestic, shall be made by delivering the summons 'to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service'" (*Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 271 [1980], quoting CPLR 311 [1]). On a motion to dismiss for improper service, plaintiff has the burden of demonstrating that proper service was effectuated (*see Stewart v Volkwagen of Am.*, 81 NY2d 203, 207 [1993]). In instances in which the person served is not authorized to accept service, and the process server makes no inquiry to determine whether the person is authorized, or what relationship the person has to the defendant, service will not be sustained (*see e.g. Fashion Page*, 50 NY2d at 273).

However, CPLR 311 is to be liberally construed (*Wells v Continuum Health Partners, Inc.*, 118 AD3d 632, 632 [1st Dept 2014]), and, under some circumstances, service on a corporation may be sustained even though the person served is not specifically authorized in CPLR 311 (a) (1) (*see e.g. Fashion Page*, 50 NY2d at 273 [service on a secretary, identified by defendant corporation's receptionist and the secretary as authorized to accept service, was proper]). Such circumstances may include instances in which a process server reasonably relies on the representation by a person at the corporation that the individual is authorized to accept service (*id.*). "In evaluating whether service is to be sustained, the circumstances of the particular case must be weighed" (*id.*).

In support of the motion, the Brend defendants submit the affidavit of Maciej Jaworski, who avers that he is an officer and employee of Brend Renovation. Jaworski also avers that, "upon information and belief," Brend Renovation was not properly served because the summons and complaint were not delivered to any "officer, director, managing or general agent, cashier or assistant cashier, or other agent" of Brend Renovation (Jaworski aff, ¶ 24). Jaworski further avers, again upon information and belief, that Brend Renovation did not receive a copy of the summons or complaint through the office of the New York Secretary of State.

In opposition, plaintiff provides a process server's affidavit of service that reflects that, on March 13, 2017, service of the original summons and complaint was made upon a "receptionist" at the front desk, named Marianna, at premises located at 310 Nassau Avenue, Suite 100, Brooklyn, New York. Although the process server indicates that service on Brend Renovation was successful, her affidavit also notes that Marianna stated that she could accept the process for a "Mathew or withhold" (plaintiff's opposition, Exhibit E; NYSCEF Doc. 62). Plaintiff also submits a second process server affidavit reflecting that, on April 24, 2017, service of the amended summons and complaint was made on Brend Renovation, at the 310 Nassau Street address, upon a "secretary" named MaryAnn Lombardo, who stated that she was authorized to accept service for Brend Renovation. Ex. O; NYSCEF Doc. 72.

Plaintiff also asserts that Brend Renovation did not address or mention the two process server affidavits, which were filed with NYSCEF prior to the filing of this motion. However, the fact that the affidavits were available to defendants through NYSCEF is not dispositive of the service issue (*Macchia v Russo*, 67 NY2d 592, 595 [1986] ["Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court"]). To the extent plaintiff argues that defendants should have addressed the affidavits in moving, and

while that might have been preferable, plaintiff does not provide authority demonstrating that Brend Renovation is precluded from challenging service on that basis.

"A process server's affidavit stating that personal service was effected by delivering a copy of the summons [and complaint] to an authorized agent, and providing a description of that person, constitutes prima facie evidence of proper service pursuant to CPLR 311 (a) (1)" *Purzak v Long Is. Hous. Servs., Inc.*, 149 AD3d 989, 991 [2d Dept 2017]; *see Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). Where such an affidavit is provided, the party contesting service must place before the court facts sufficient to rebut the presumption of proper service (*Friedman v Ramlal*, 282 AD2d 499, 499 [2d Dept 2001]).

To address the process servers' affidavits, Brend Renovation submits another affidavit from Jaworski, in which he avers that no individual named Mariana or MaryAnn Lombardo is employed by Brend Renovation or holds any of the positions listed in CPLR 307, and that no receptionist or secretary is authorized, by appointment or law, to receive or accept service of process on behalf of Brend Renovation. Ex. A to Aff. In Opp.; NYSCEF Doc. 76. Jaworski also avers that Brend Renovation does not have an office or any employees at 310 Nassau Street in Brooklyn, the location where the process servers state that they served process upon Brend Renovation. Brend Renovation argues that service of process upon a receptionist or secretary does not constitute proper service.

In 1980, the Court of Appeals made clear that service on a receptionist or secretary may constitute proper service on a corporation under certain circumstances (*Fashion Page*, 50 NY2d at 273). Furthermore, "when [a] corporation is regularly doing business in the State, it generally cannot be heard to complain that the summons was delivered to the wrong person when the process

server has gone to *its offices*, made proper inquiry of the defendant's *own employees*, and delivered the summons according to their directions" (*id.* [emphasis supplied]).

Jaworski's assertions that Brend Renovation has no employees named Marianna or MaryAnn Lombardo, and that there is no secretary or receptionist appointed to accept service at the 310 Nassau Street address, are not dispositive of the issue of service of process. This is because the assertion that the two women were not appointed to accept service would not necessarily be a bar to proper service, if they were Brend Renovation's employees and informed the process server that they were authorized to accept service. That recipients of process may not have given their real names to a process server also would not serve to prevent otherwise proper notice to the corporation.

However, Jaworski also avers that Brend Renovation does not have an office or employees at the 310 Nassau Street location. Furthermore, the first process server affidavit indicates that Marianna stated that she could accept process for "Mathew," not Brend Renovation. The second process server's affidavit indicates that the server was informed that "corporation doesn't physically exist at location. 310 Nassau Avenue, is a forwarding address and Mary[A]nn Lombardo accepted document for the corporation. However, she [MaryAnn] advised that the [ ] physical location of the business is at 60 Bayard Street, Brooklyn, NY" (Ex. O to Plaintiff's Aff. In Opp.; NYSCEF Doc. 72). Therefore, service may have been attempted at the wrong location, and on individuals who were neither employees nor agents of Brend Renovation.

Since there is no other evidence on this record regarding service, the conflicting affidavits indicate that a traverse hearing is required (*Poree v Bynum*, 56 AD3d 261, 261 [1st Dept 2008] [traverse hearing warranted in light of conflicting affidavits]; *Ortiz v Santiago*, 303 AD2d 1, 4 [1st

Dept 2003] ["if a genuine question is raised as to the proper service, the proper remedy is to direct a hearing to determine whether the service claimed was, indeed, defective"]).

The motion to compel arbitration and to change venue cannot be decided until after the jurisdiction issue is decided, since Brend Renovation, the subject of the traverse hearing, is a party to the subcontract. Until plaintiff's venue motion is decided, no determination can be made concerning Brend Group's motion to dismiss based upon documentary evidence, or plaintiff's motion for a trust statement pursuant to Lien Law § 76 (5).

While plaintiff asserts that this Court may order Brend Renovation to provide a Lien Law § 76 (5) trust statement without personal jurisdiction over that entity, it does not identify legal authority which supports the assertion that this Court may adjudicate even a summary proceeding against a party which has not been afforded notice through proper service. Plaintiff correctly asserts that, when arbitration is compelled, cases generally are stayed, and not dismissed, in order to accommodate a subsequent motion to confirm the resulting award. However, plaintiff's alternative request, for the relief of a stay of the remainder of the action if arbitration is compelled, also cannot be decided prior to the traverse hearing, and the adjudication of the venue and arbitration issues.[3]

[3] While, in moving, defendants did not provide the prime contract referred to in the arbitration provision, the arbitration provision provides for arbitration regardless of whether or not arbitration is required in the prime contract. CPLR 7503's language concerning substantial questions that may exist as to whether an agreement was "complied with," which might prevent a court direction to arbitrate, "has been interpreted as giving courts the authority to determine the two-part question whether the contract (or some statute) imposes a condition precedent to arbitration and, if so, whether such condition has been complied with" (Vincent C. Alexander, Supp Practice Commentaries, McKinney's Cons Laws of NY, 2016 Electronic Update, CPLR C7501:6 [*Threshold Questions: Has There Been Compliance With Conditions Precedent?*], citing *Matter of County of Rockland (Primiano Constr. Co.)*, 51 NY2d 1, 6-7 [1980]). No condition precedent to arbitration has been raised. Of course, nothing in this order precludes the

Finally, concerning defendant's claim for sanctions for what they assert was plaintiff's failure and refusal to cancel the NOP prior to defendants' service of this motion, the conduct demonstrated by the party refusing to cancel an NOP in *Danica Group LLC v Atlantic Ct. LLC* (23 Misc 3d 1111(A), 2009 NY Slip Op 50708(U) [Sup Ct, Kings County 2009] [court issued order cancelling improper notice]), cited by defendants, is not present here, since plaintiff stipulated to cancel the NOP after defendants' request and plaintiff confirmed that the money had been deposited with the New York County Clerk. Further, the issue of sanctions cannot be reached prior to the adjudication of the threshold issues discussed above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion is granted only to the extent of setting this matter down for a traverse hearing, as ordered below, and the remainder of the defendants' motion and the plaintiff's cross motion are denied without prejudice to renewal after the culmination of the traverse hearing; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the issue of whether or not defendant Brend Renovation Corporation was properly served with notice of this action (a traverse hearing); and it is further

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parties from seeking to arbitrate in accordance with the agreement, or to otherwise settle this case.

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of the Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "Referenced" link under "Courthouse Procedures), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of the Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for

good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that this constitutes the decision and order of the court.

12/18/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE