

Strange v Marquee

2019 NY Slip Op 33142(U)

October 22, 2019

Supreme Court, New York County

Docket Number: 160759/2018

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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SARAH STRANGE,

Plaintiff,

- v -

INDEX NO. 160759/2018

MOTION DATE

MOTION SEQ. NO. 001

MARQUEE A/K/A MARQUEE NY, TAO GROUP,
289 TENTH AVENUE CORPORATION, 289 TENTH
AVENUE GARAGE CORP., 289 HOSPITALITY,
LLC, ALROSE 289 REALTY, LLC,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7-17, 20-28 were read on this motion to dismiss

By notice of motion, defendants Marquee i/s/h/a Marquee a/k/a Marquee NY, 289 10 Ave Corp. i/s/h/a 289 Tenth Avenue Corporation a/k/a 289 10 Ave. Corp., 289 Tenth Avenue Garage Corp., 289 Hospitality, LLC, and Alrose 289 Realty, LLC (collectively, movants) move pursuant to CPLR 3211(a)(8) and 311 and Business Corporation Law (BCL) 306(b) for an order dismissing the complaint against them for plaintiff's failure to effectuate proper service, and as service was not properly made within 120 days of the commencement of the action and the action is now time-barred.

Affidavits of service submitted by plaintiff reflect that 289 Tenth Avenue Corp., 289 Tenth Avenue Garage Corp., and Marquee were served on February 21, 2019 by hand delivery of the pleadings to an employee of Tao Group at 2 Pennsylvania Plaza in Manhattan, who told the process server that she was authorized to accept legal papers for each company. (NYSCEF 2-5).

Movants contend, through the affirmation of their counsel, that the employee was not authorized to accept service on their behalf, and thus plaintiff never properly effectuated service on them. They observe that no affidavit of service was filed as to service on 289 Hospitality, LLC and Alrose 289 Realty, LLC. (NSYCEF 8).

Plaintiff asserts that the employee served told the process server that she was authorized to accept service on movants' behalf, and that, therefore, service on her as their "authorized agent" was proper pursuant to CPLR 311 and BCL 306, and offers supplemental affidavits of service in which the process server explains that when he arrived at 2 Pennsylvania Plaza, the building's security guide refused to permit him access to defendants' offices, but told him that he would contact an authorized individual to accept service on defendants' behalf. Approximately 15 minutes later, a woman came down to the lobby, and the process server informed her that he was attempting to serve the specific entities identified in the affidavits of service and asked her if she was authorized to accept service on their behalf. She answered affirmatively and the process server handed her the pleadings. (NYSCEF 23-25). Plaintiff also submits proof of service on 289 Hospitality and Alrose on March 7, 2019 via service on the Secretary of State. (NYSCEF 21-22). Plaintiff thus argues that she timely and properly served movants.

In reply, movants reiterate their prior arguments, and complain that plaintiff has provided no discovery. (NYSCEF 28).

A process server's affidavit of service constitutes *prima facie* proof of valid service. (*Luo v Wang*, AD3d , 2019 WL 5198644 [2d Dept 2019]; *Fed. Ntl. Mtge. Assn. v David*, 172 AD3d 572 [1st Dept 2019]). Movants' denial that the person served was authorized to accept service on their behalf is conclusory as it is unsupported by an affidavit from either the employee or anyone else with personal knowledge, and is thus insufficient to rebut the presumption of

proper service arising from the affidavit. (*Doller v Prescott*, 167 AD3d 1298 [3d Dept 2018] [proper service established by affidavit in which process server stated that pleadings were delivered to person authorized to accept service on defendant's behalf, and defendant submitted no sworn evidence in rebuttal]; *Hayden v Southern Wine & Spirits of Upstate New York, Inc.*, 126 AD3d 673 [2d Dept 2015] [movants failed to rebut *prima facie* showing of proper service as opposing affidavit not based on personal knowledge or evidence in record]; *Grinshpun v Borokhovich*, 100 AD3d 551 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013] [conclusory denial of receipt insufficient; defendant's wife, who allegedly accepted pleadings, did not submit affidavit denying receipt of service]; *Baer v Lipson*, 194 AD2d 787 [2d Dept 1993], *lv dismissed* 83 NY2d 788 [1994] [movant did not rebut proof of proper service absent affidavit or statement based on personal knowledge]; *compare Finnegan v Trimarco*, 173 AD3d 691 [2d Dept 2019] [defendant rebutted presumption of proper service by principal's sworn denial of relationship with any person at service address or that any person there had authority to accept service on defendant's behalf]; *Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411 [1st Dept 2010] [affidavits of persons who accepted service denying authority to do so sufficient to warrant traverse hearing as to proper service]).

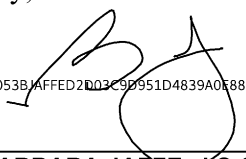
In any event, given the process server's representation that the security guard had told him he would contact a person with authority to accept the papers and the person he served represented that she was authorized to accept service on movants' behalf, the server acted reasonably in serving her with the pleadings. (*See Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265 [1980] [corporation properly served when pleadings were delivered to defendant's secretary, who had been identified by defendant's receptionist as person authorized to accept service on defendant's behalf, and secretary acknowledged authority when asked by server]; *Cellino*

& Barnes, P.C. v Martin, Lister & Alvarez, PLLC, 117 AD3d 1459 [4th Dept 2014], lv dismissed 24 NY3d 928 [2014] [court properly rejected defendant’s claim of improper service as process server submitted affidavit explaining that she entered defendant’s office and asked receptionist for authorized agent for receipt of process, and receptionist answered that she was so authorized; defendant submitted no evidence to rebut server’s allegations, including affidavit from receptionist]; Arvanitis v Bankers Trust Co., 286 AD2d 273 [1st Dept 2001] [process server reasonably relied on claim of authority from woman who accepted pleadings, after he had been directed to woman by security guard]).

Moreover, plaintiff submits proof that she served 289 Hospitality and Alrose within 120 days after commencing the action. Accordingly, it is hereby

ORDERED, that the motion to dismiss is denied in its entirety;

10/22/2019
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE