| **Fuczynski v Morgan** |
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| 2021 NY Slip Op 31808(U) |
| May 28, 2021 |
| Supreme Court, New York County |
| Docket Number: 153612/2020 |
| Judge: David Benjamin Cohen |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

***Justice***

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**INDEX NO.** 153612/2020

ANTONI FUCZYNSKI,

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

ROSS MORGAN, 144 DIVISION LLC, MOONEY HOUSE LLC, and 127 MOTT LLC,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISS.

In this fraudulent conveyance action by plaintiff Antoni Fuczynski, defendants Ross Morgan ("Morgan"), 144 Division LLC ("144 Division"), Mooney House LLC ("Mooney"), and 127 Mott LLC ("127 Mott") move: 1) pursuant to CPLR 3211(a)(8), to dismiss the complaint as against Morgan; 2) pursuant to CPLR 2201, to stay the captioned action pending the resolution of a related personal injury action commenced by plaintiff; and 3) for such other relief as this Court deems just and proper. Plaintiff opposes the motion and cross-moves, pursuant to CPLR 306-b, for an order denying defendants' motion in its entirety, deeming Morgan to have been served by "affix and mail" service pursuant to CPLR 308(4) on February 15, 2021 or, in the alternative, for an extension of time to serve Morgan pursuant to CPLR 306-b, along with such other relief as this Court deems just and proper. After consideration of the parties' contentions, as well as a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the instant action by filing a summons and complaint on May 29, 2020. Doc. 1. The complaint was thereafter served on all defendants except Morgan. The attempts to serve Morgan are addressed in detail below.

In an amended complaint filed November 2, 2020, plaintiff alleged that, on or about December 14, 2007, 144 Division acquired a mixed use rental building located at 38 Canal Street a/k/a 144 Division Street a/k/a 1 Ludlow Street in Manhattan ("the 144 Division building").[1] Morgan, a member of 144 Division, was also a member of other limited liability companies ("LLCs") which owned properties in Manhattan, including Mooney, which owned and/or operated a mixed use rental building at 18 Bowery ("the 18 Bowery building"), and 127 Mott, which owned and/or operated a mixed use rental building at 127 Mott Street ("the 127 Mott building"). Doc. 3.

In 2016, 144 Division hired contractors and other professionals to make improvements to the 144 Division building and, on March 7, 2016, plaintiff was injured during construction at the premises and 144 Division and Morgan learned about the occurrence. Doc. 3. On June 6, 2016, plaintiff commenced a personal injury action ("the underlying action") against several entities, including 144 Division, seeking damages arising from the accident. Doc. 3. The action, styled *Antoni Fuczynski v 144 Division LLC and Rizco Contracting Corp.*, was filed in Supreme Court, Kings County under Ind. No. 509437/16. Docs. 3, 15.

In October 2016, Morgan restructured approximately $8 million in mortgage debt that encumbered the 18 Bowery building and/or the 127 Mott Street building. Doc. 3. Specifically, he split the $8 million in mortgage debt into a $4.5 million mortgage encumbering the 18

[1] The premises were also identified as Block 294, Lot 27. Doc. 1.

Bowery building ("Mortgage A") and $3.5 million encumbering the 127 Mott building ("Mortgage B"). Doc. 3. At the same time, Mortgage A, along with a $500,000 gap loan, was refinanced into a single loan of $5 million issued by Titan Capital I.D. ("Titan") which continued to encumber the 18 Bowery building. Doc. 3. Morgan signed the legal documents relating to the foregoing transactions as the "sole manager" of each LLC involved. Doc. 3.

Concomitantly with the restructuring discussed above, Morgan entered into a collateral mortgage agreement pursuant to which 144 Division undertook the $5 million mortgage obligation Mooney had to Titan and pledged a lien for same against the 144 Division building. Doc. 3. 144 Division received nothing of value in exchange for undertaking Mooney's $5 million obligation to Titan. Doc. 3. The effect of the above-referenced transaction was essentially to transfer a $5 million dollar debt owed by Mooney, which encumbered another building owned by Morgan through a different LLC, onto 144 Division, which Morgan allegedly intended to sell for a profit. Doc. 3.

On May 30, 2018, Morgan sold the 144 Division building to nonparty 1 Ludlow LLC for $5,250,000 and a significant share of the proceeds were used to pay off the $5 million mortgage loan that 144 Division had undertaken from Mooney. Doc. 3. Morgan transferred all remaining assets of value, including any remaining cash receipts, to himself and/or to other LLCs he owned and/or operated, leaving 144 Division without any assets or, at the very least, asserts insufficient to satisfy its known liabilities. Doc. 3. Thus, claimed plaintiff, defendants conveyed a $5 million interest in the 144 Division building, which was owned by Morgan through 144 Division, into the 18 Bowery building, which was owned by Morgan through Mooney. Doc. 3.

As a first cause of action, plaintiff alleged a violation of Debtor Creditor Law ("DCL") §273 on the ground that the aforesaid conveyances were fraudulent insofar as they rendered 144

Division insolvent and were made without fair consideration as that term is defined in DCL §272. Doc. 3.

As a second cause of action, plaintiff alleged a violation of DCL §275 on the ground that the subject conveyances were fraudulent insofar as they were made without fair consideration as that term is defined in DCL §272. Doc. 3. Specifically, alleged plaintiff, at the time the conveyances were made, defendants believed that they would incur debt in the form of a judgment in favor of plaintiff herein and that the transfers would leave them unable to satisfy the said judgment. Doc. 3.

As a third cause of action, plaintiff alleged a violation of DCL §276, asserting that the transfers were fraudulent insofar as they were made with the actual intent to hinder, delay or defraud him out of his right and ability to enforce a judgment in his favor in the underlying action. Doc. 3. Specifically, claimed plaintiff, at the time defendants made the transfers, they knew or should have known that a money judgment would be entered against 144 Division. Doc. 3.

As a fourth cause of action, plaintiff alleged the he was entitled to attorneys' fees based on defendants' violation of DCL §276-A. Doc. 3.

As a fifth cause of action, plaintiff alleged that he was entitled to a judgment, pursuant to DCL §279, granting him a judgment: a) restraining defendants from disposing of the 18 Bowery building; b) appointing a receiver to take charge of the 18 Bowery building; c) setting aside the conveyances, and/or; d) granting such other relief as it deems just and proper. Doc. 3.

As a sixth cause of action, plaintiff claimed that, as a result of the aforementioned fraudulent conveyances, defendants became fraudulent transferees of assets – specifically the interest in the 18 Bowery building. Doc. 3. Thus, he claimed, the interest transferred to Mooney

– namely the 18 Bowery building – should be placed in a constructive trust for his benefit. Doc. 3.

As a seventh cause of action, plaintiff claimed that he was entitled to pierce the corporate veil since defendants willfully and intentionally transferred assets, and/or undertook obligations, in favor of the other defendants named herein to the detriment of 144 Division. Doc. 3. He further alleged that Morgan, both personally and through his other LLC's – Mooney and 127 Mott – exercised complete dominion and control over 144 Division with respect to the alleged conveyances, and possibly others. Plaintiff also claimed that Morgan, personally and through Mooney and 127 Mott, used such dominion and control to commit a fraud or wrong against him which caused damages. Doc. 3. According to plaintiff, defendants abused the privilege of doing business in the corporate form to perpetrate a wrong and/or injustice against him. Doc. 3. Specifically, plaintiff maintained that defendants failed to adhere to the corporate formalities in conducting their business, had inadequate capitalization, commingled assets and otherwise used corporate funds for personal use and/or benefit, and/or for the benefit of other entities that were owned and/or operated by the same underlying principal(s). Doc. 3.

As a result of the foregoing, plaintiff sought a judgment seeking: 1) avoidance of any assets that were transferred by 144 Division after [his] claims arose; 2) attachment or other provisional remedy against the asset(s) transferred or other property of the transferee defendants including, but not limited to, the interest in the 18 Bowery building, presently owned by Mooney; 3) an injunction against further disposition of assets by defendants; 4) attorneys' fees and costs; 5) entry of judgment against defendants to allow plaintiff to enforce and execute his claim, or judgment rendered in the personal injury action, directly against all defendants herein;

and 6) the imposition of a constructive trust over the 18 Bowery building; and 7) such other relief as this Court deems just and proper. Doc. 3.

On the day the amended complaint was filed, plaintiff filed a lis pendens against the 18 Bowery building. Doc. 4.

On December 22, 2020, Morgan, 144 Division, Mooney and 127 Mott joined issue by their answer to the amended complaint. Doc. 11. Defendants asserted several affirmative defenses, including that this Court lacked personal jurisdiction over Morgan. Doc. 11.

On February 5, 2021, defendants moved: 1) pursuant to CPLR 3211(a)(8), to dismiss the complaint as against Morgan; 2) to stay the captioned action pending the resolution of the underlying action; and 3) for such other relief that this Court deems just and proper. Doc. 12. In support of the motion, defendants submit an attorney affirmation, an affidavit by Morgan, and the pleadings in this action and the underlying action.

In an affirmation in support of the motion, defendants' counsel argues that the action must be dismissed against Morgan pursuant to CPLR 3211(a)(8) because he was never served with the initial complaint or the amended complaint. Doc. 13. Defendants further assert that this Court should stay the instant action pursuant to CPLR 2201 on the ground that it is premature. Specifically, they assert that plaintiff cannot establish a claim for fraudulent conveyance unless he establishes that he is a creditor and that defendants are unable to satisfy their obligations to him and that, since plaintiff has not recovered a judgment in the underlying action, he cannot yet be a creditor who can make such a claim. Doc. 13. They further assert that a stay would be in the interest of judicial economy since there is no need to litigate the captioned action unless and until there is a judgment against 144 Division which cannot be satisfied. Doc. 13.

In his affidavit in support of the motion, Morgan represents that he has not been served with process. Doc. 14.

Plaintiff opposes the motion and cross-moves, pursuant to CPLR 306-b, for an order denying defendants' motion in its entirety, deeming Morgan to have been served by "affix and mail" service pursuant to CPLR 308(4) on February 15, 2021 or, in the alternative, for an extension of time to serve Morgan pursuant to CPLR 306-b, along with such other relief as this Court deems just and proper. In support of the cross motion, plaintiff's counsel argues that this Court should deem Morgan properly served by "affix and mail" service on February 15, 2021. Doc. 22. Alternatively, they claim that their time to serve Morgan should be extended for good cause or in the interest of justice pursuant to CPLR 306-b and, if such relief is not granted, then this Court should order alternative service pursuant to CPLR 308(5). Doc. 22.

In opposition to the cross motion, defendants argue that Morgan was not properly served by affix and mail pursuant to CPLR 308(4) since plaintiff served him in such fashion at 185 East Broadway, which was neither his actual place of business nor his dwelling. Doc. 38. They further assert that plaintiff is not entitled to an extension of time to serve process pursuant to CPLR 306-b because he has shown neither good cause for such an extension nor why such leave should be granted in the interest of justice. Doc. 38.

Morgan submits an affidavit in opposition to the cross motion, dated March 10, 2021, in which he avers, inter alia, that he has never been served with process in this action, that he never resided at 185 East Broadway, New York, New York, and that neither he nor any of his companies has had an office at 123 Bowery since he vacated that office over two years ago. Doc. 39.

In a reply affirmation in further support of their motion, defendants concede that plaintiff is a "creditor", as defined by the DCL, but that this does not prevent this Court from exercising its discretion to stay this action pending the outcome of the underlying action. Doc. 38. Here, urge defendants, the interest of judicial economy would be best served by staying this action until the underlying action is resolved since it must be determined whether a judgment will be rendered against 144 Division and, if so, whether 144 Division can satisfy the same. Doc. 38.

**LEGAL CONCLUSIONS**

CPLR 306-b provides that service of the summons and complaint must be made within 120 days after they are filed with the court and that, if service is not made within such time, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

> It is well settled that "[a]n extension of time for service is a matter within the court's discretion." (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). A showing of "reasonable diligence" in effecting service is relevant to demonstrate good cause, but is not required to satisfy the interest of justice standard for an extension and is "simply one of many relevant factors to be considered by the court in applying the latter standard." (*Id.* at 104; *accord Nunez-Ariza v Nell*, 161 AD3d 614, 614 [1st Dept 2018]). These factors include "expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (See Leader, 97 NY2d at 105-106.)

(*Academic Health Professionals Ins. Assn.-A Reciprocal Insurer v SB Clinical Practice Mgt. Plan, Inc.*, 2019 NY Slip Op 31266[U], *2 [Sup Ct, NY County 2019]).

CPLR 308(4) provides that, if a defendant cannot be served "with due diligence" pursuant to CPLR 308(1) (personal delivery of the summons and complaint to the person to be served) or CPLR 308(2) (service on a person of suitable age and discretion at the actual place of

business, dwelling place, or usual place of abode of the person to be served and then mailing the papers to the person's last known residence or actual place of business), then plaintiff may "affix[ ] the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state . . . and by either mailing the summons to such person at his or her last known residence or by mailing the by first class mail to the person to be served at his or her actual place of business . . ."

Here, plaintiff submits the following in an attempt to demonstrate that he diligently attempted to serve Morgan individually:

1. A document from a process serving company reflecting that Morgan could not be served *as managing member of Mooney* (emphasis added) at 123 Bowery, New York, New York on June 30th, 2020. Doc. 34. The document states "THIS FORM DOES NOT CONSTITUTE A LEGAL DUE DILIGENCE AFFIDAVIT" (emphasis provided);

2. A document from a process serving company reflecting that Morgan could not be served personally at 185 East Broadway, Apt. 1, New York, New York on November 30, 2020, containing the same disclaimer that it was not a legal due diligence affidavit (Doc. 35);

3. A document entitled "Affidavit of Attempted Service" and "Declaration of Due Diligence", dated February 10, 2021 (Doc. 36), reflecting that a process server was unable to serve Morgan at 123 Bowery, New York, New York on February 4, 2021 and that he "made contact with Greta Hite Hansen at Wolfgang & Hite and found [that Morgan] moved his business to an undetermined address";

4. An Affidavit of Service dated February 17, 2021, in which a process server represents that, on February 8, 2021, he went to 185 East Broadway, Apt. 1, New York, New York at 4:02 p.m. and, when Morgan failed to answer the door, he left a note asking Morgan to contact him. Morgan did so on February 9, 2021 and told the process server to come by the next day after 6 p.m. The process server came to 185 East Broadway, Apt. 1 on February 10 at 6:50 p.m. but Morgan was not there. The process server left another note asking Morgan to contact him and, when Morgan failed to respond, the process server affixed the supplemental summons and amended complaint to the door of Apt. 1 at 185 East Broadway on February 15, 2021 at 7:16 a.m. Doc. 37. The process server then represented that the supplemental summons and amended complaint were mailed to Morgan at his usual place of abode at 185 East Broadway, Apt. 1.

Although the process server attempted to serve Morgan at what he (the process server) appears to have believed was Morgan's actual place of business, i.e., 123 Bowery, he does not state in his affidavit of attempted service that the said address was Morgan's actual place of business. Further, the affidavit of attempted service indicates that the process server spoke with Greta Hite Hansen of Wolfgang & Hite regarding Morgan's whereabouts, and that she told him that Morgan no longer worked at 123 Bowery, but he fails to state who Hite is or how she would have had any knowledge regarding Morgan's workplace. More importantly, although Hite told the process server that Morgan no longer worked at 123 Bowery, the affidavit of attempted service fails to set forth any indication that the process server made any inquiries regarding Morgan's actual place of business once he learned that Morgan no longer worked at that address (*Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007]).

Similarly, although the process server represents that 185 East Broadway, Apt. 1 was Morgan's usual place of abode, he does not represent that he checked with the Department of Motor Vehicles to ascertain whether Morgan still lived at that address (*Spath v Zack*, 36 AD3d at 413).

Additionally, after the process server affixed the supplemental summons and amended complaint to the door of Apartment 1 at 185 East Broadway without any confirmation that said location was, as he claimed, Morgan's usual place of abode, he mailed the papers to the same address. This violated CPLR 308(4), since that statute dictates that the mailing must be to the defendant's last known residence or actual place of business. Thus, that branch of plaintiff's cross motion requesting that this Court deem Morgan properly served pursuant to CPLR 308(4) is denied. Additionally, by failing to make inquiries regarding Morgan's whereabouts and

incorrectly mailing the supplemental summons and amended complaint, the plaintiff has failed to satisfy the due diligence requirement of CPLR 306-b (*Spath v Zack*, 36 AD3d at 413).

However, in its discretion, this Court grants the branch of plaintiff's cross motion seeking an extension of time to serve Morgan pursuant to CPLR 306-b in the interest of justice (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105-106). The absence of due diligence on plaintiff's part, as well as his delay in seeking an extension of time to serve Morgan[2], is mitigated by the facts that Morgan had timely notice of the claim, as evidenced by the fact that he answered the amended complaint in December 2020 despite the fact that he had not been properly served; Morgan has failed to establish that he would be prejudiced in any way if plaintiff were granted an extension of time to serve him; plaintiff attempted to serve Morgan with the initial complaint in June 2020, within 120 days after the initial complaint was filed; plaintiff attempted to serve Morgan with the amended complaint in February 2021, within 120 days after the amended complaint was filed; and the verified amended complaint indicates the potentially meritorious nature of the claim[3] (*Pennington v Da Nico Rest.*, 123 AD3d 627, 627-628 [1st Dept 2014]; *Academic Health Professionals Ins. Assn.-A Reciprocal Insurer v SB Clinical Practice Mgt. Plan, Inc.*, 2019 NY Slip Op 31266[U] [Sup Ct, NY County 2019] [extension of time to serve granted despite process server error]).

Given that plaintiff is granted an extension of time to serve Morgan, the branch of defendants' motion seeking dismissal of this action against Morgan pursuant to CPLR 3211(a)(8) is denied as moot.

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[2] The amended complaint was filed in November 2020 and plaintiff did not seek an extension of time to serve Morgan until May 2021.

[3] The parties do not dispute that the action was timely commenced so the statute of limitations is not a factor warranting an extension of time to serve process.

Finally, the branch of defendants' motion seeking to stay the captioned action pending the resolution of the underlying action is denied. Although defendants correctly argue that CPLR 2201 allows this Court the discretion to stay an action "upon such terms as may be just", the crux of their argument in favor of a stay is that granting such relief will be in the interest of judicial economy since plaintiff will not become a creditor as defined by the DCL until a judgment is entered in his favor in the underlying action, and that this action is therefore not yet ripe for resolution. However, plaintiff correctly notes that DCL §270(d) defines a "creditor" as "a person that has a claim" and DCL §270(c) defines a "claim" as a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." Thus, defendants' contention that plaintiff cannot be a creditor until he obtains a judgment is without merit. Indeed, as noted previously, defendants concede in their reply affirmation that plaintiff was a "creditor" as defined by the DCL.

The parties' remaining contentions are either without merit or need not be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that plaintiff's cross motion is granted to the extent of allowing him an additional 120 days (from the date of service of this order with notice of entry) to properly serve defendant Ross Morgan with the supplemental summons and amended complaint pursuant to CPLR 308, and the motion is otherwise denied; and it is further

ORDERED that proof of service of the summons and complaint is to be filed with this Court and emailed to the Clerk of Part 58 at SFC-Part58-Clerk@nycourts.gov within 10 days after service of process is made; and it is further

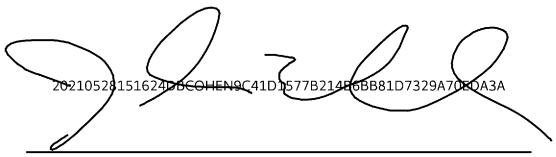
ORDERED that plaintiff's failure to properly serve Ross Morgan with process during the additional 120-day period following entry of this order shall result in the automatic dismissal of all claims against said defendant; and it is further

ORDERED that the branch of defendants' motion seeking dismissal of all claims against defendant Ross Morgan pursuant to CPLR 3211(a)(8) is denied as moot; and it is further

ORDERED that the branch of defendant's motion seeking a stay pursuant to CPLR 2201 is denied; and it is further

ORDERED that the parties are to participate in a preliminary conference on October 4, 2021 at 11:30 a.m. unless they first complete a bar coded preliminary conference form (to be provided by the Part 58 Clerk) and return the same to Part 58 at the email address above at least two business days prior to the scheduled conference; and it is further

ORDERED that plaintiff is to serve all parties with a copy of this order, with notice of entry, and file proof of such service with this Court.




5/28/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
| APPLICATION: | | GRANTED | DENIED | | GRANTED IN PART | X | OTHER |
| | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |