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| Hernandez v 140 W. 28 Owner LLC |
| 2021 NY Slip Op 32696(U) |
| December 15, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 156603/2019 |
| Judge: Richard G. Latin |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

ALLAN HERNANDEZ,

Plaintiff,

- v -

140 WEST 28 OWNER LLC and OMNIBUILD
CONTRUCTION INC.,

Defendants.

-----X

140 WEST 28 OWNER LLC and OMNIBUILD CONSTRUCTION
INC.,

Third-Party Plaintiffs,

-against-

NERES WOOD FLOORING, LLC,

Third-Party Defendant.

-----X

INDEX NO. 156603/2019
MOTION DATE 12/13/21
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595791/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR.

Upon the foregoing documents, defendants/third-party plaintiffs 140 West 28 Owner LLC and Omnibuild Construction, Inc.'s motion pursuant to Uniform Rule 202.21(e) for an order to, inter alia, vacate the note of issue and permit the late service of the third-party summons and complaint on Neres Wood Flooring, LLC ("Neres") and third-party defendant Neres Wood Flooring, LLC's cross motion pursuant to CPLR 3211(a)(8), dismissing the third-party summons and complaint against third-party defendant Neres Wood Flooring are determined as follows:

Plaintiff, Allan P. Hernandez, was allegedly involved in an accident on June 4, 2019, while working at a construction site located on the 35th floor of 140 West 28th Street, New York, New York. It is alleged that at the time of the incident, plaintiff was an employee of third-party defendant, Neres, a New Jersey limited liability company, and that plaintiff became injured while working in the course of his employment. He claims that his accident occurred as a result of

tripping over a temporary lighting cover while using taping stilts to perform framing work. Plaintiff has alleged violations of Labor Law Sections 200, 240(1) and 241(6). Defendants/third-party plaintiffs herein commenced a third-party action against Neres for contractual indemnity and breach of contract.

Defendants/third-party plaintiffs now seek an order to, inter alia, permit late service of the third-party summons and complaint in Neres in the interest of justice. Third-party defendant, Neres, cross-moved pursuant to CPLR 3211(a)(8) for an order to, inter alia, dismiss the third-party summons and complaint on the basis that third-party plaintiffs failed to obtain personal jurisdiction over said third-party defendant.

By way of background, plaintiff commenced this action on July 3, 2019 and defendants filed their answer on August 26, 2019. On November 26, 2019, plaintiff served a bill of particulars identifying Neres as his employer. On April 23, 2020, plaintiff completed his deposition. It is alleged that as a result of the pandemic, plaintiff's independent medical examination was not designated until February 10, 2021. Plaintiff has since submitted to his independent medical examination conducted by Dr. Ramesh Gidumal on May 17, 2021, rendering that portion of defendants/third party plaintiff's motion moot.

The defense of third-party plaintiffs was tendered to Neres by the insurance carrier, Prosgit Specialty Insurance. Defendants/third-party plaintiffs represent that they followed up with the carrier for Neres regarding the tender but received no response to same necessitating this third-party action. On September 28, 2020, a third-party complaint was filed against Neres. On October 1, 2020, personal service was attempted on Neres. However, it is represented that the process server learned that Neres was no longer located at the business address identified in the Neres contract. On October 14, 2020, a courtesy copy of the third-party summons and complaint was also forwarded to the insurance company for Neres, Selective Insurance Company.

Months later, based on the affidavit of service submitted, service was effectuated upon Neres via the New Jersey Department of Treasury on March 16, 2021. Additionally, defendants/third-party plaintiffs also sent a courtesy copy of the third-party summons and complaint to Selective Insurance Company, the insurance carrier for Neres, after it was served via the New Jersey Department of Treasury. Neres did not answer the third-party complaint and, as a result, third-party plaintiffs served a default letter. Plaintiff filed the note of issue on April 14, 2021, two weeks prior to the court's February 2021 order. Defendants/third-party plaintiffs represent that they contacted plaintiff's counsel on April 16, 2021 to withdraw the note of issue to permit the completion of third-party discovery, however, counsel did not consent. Neres has since filed its third-party verified answer on May 3, 2021 and raised the affirmative defense of lack of personal jurisdiction.

Pursuant to CPLR §306(b):

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided

that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, 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.

Pursuant to New York Business Corporation Law §307(b):

(a) In any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil practice law and rules, a foreign corporation not authorized to do business in this state is subject to a like jurisdiction. In any such case, process against such foreign corporation may be served upon the secretary of state as its agent. Such process may issue in any court in this state having jurisdiction of the subject matter.

(b) [Eff. until Jan. 1, 2023. See, also, subd. (b) below.] Service of such process upon the secretary of state shall be made by personally delivering to and leaving with him or his deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, a copy of such process together with the statutory fee, which fee shall be a taxable disbursement. Such service shall be sufficient if notice thereof and a copy of the process are:

(b) [Eff. Jan. 1, 2023. See, also, opening par. above.] Service of such process upon the secretary of state shall be made in the manner provided by subparagraph one or two of this paragraph. Either option of service authorized pursuant to this paragraph shall be available at no extra cost to the consumer. (1) Personally delivering to and leaving with him or his deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, a copy of such process together with the statutory fee, which fee shall be a taxable disbursement. (2) Electronically submitting a copy of the process to the department of state together with the statutory fee, which fee shall be a taxable disbursement, through an electronic system operated by the department of state. Such service shall be sufficient if notice thereof and a copy of the process are:

(1) Delivered personally without this state to such foreign corporation by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made, or

(2) Sent by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff.

Pursuant to §304, service upon the unauthorized foreign limited liability company, such as the third-party defendant, may be made by personal delivery of the summons and complaint, with the appropriate fee, to the Secretary of State (see Limited Liability Company Law § 304[b]). Second, in order for the personal delivery to the Secretary of State to be “sufficient,” the plaintiff must also give the defendant direct notice of its delivery of the process to the Secretary of State, along with a copy of the process. The direct notice may be sent to the defendant by registered mail, return receipt requested, to the defendant's last known address (see Limited Liability Company Law § 304[c][2]). Third, after process has been delivered to the Secretary of State and direct notice of that service has been sent to the defendant, the plaintiff must file proof of service with the clerk of the court. That proof of service must be in the form of an “affidavit of compliance.” The affidavit of compliance must be filed with the return receipt within 30 days after the plaintiff has received the return receipt from the post office. Service of process shall be complete 10 days after the affidavit of compliance has been filed with the clerk with a copy of the summons and complaint (see Limited Liability Company Law § 304[c][2]). “Strict compliance” is required (see *Interboro Ins. Co. v Tahir*, 129 AD3d 1687 [4th Dept 2015]).

Defendants/third-party plaintiffs maintain that a New Jersey corporation, under New Jersey law, may be served by delivery to the subject corporation to the Treasurer of the State of New Jersey, who is authorized to accept service. However, under New York law, the service methodologies of New York apply and not those of the jurisdiction where the defendant is located. Neres is a New Jersey corporation that is not authorized to do business in New York. Under BCL §307, service of process upon an unauthorized foreign corporation can be made upon any official or body performing the equivalent function, as the New York's Secretary of State, in the jurisdiction of incorporation in addition to serving New York's Department of State (see *Breer v Sears, Roebuck & Co.*, 184 Misc.2d 916 [Sup Ct, Bronx County 2000]).

Here, defendants/third-party plaintiffs include an affidavit from their process server evidencing an attempt at personal service on October 1, 2020. They further submitted communications with the insurance carrier regarding service of Neres. Thereafter, on March 16, 2021, they served Neres via the New Jersey Department of Treasury. However, there is no indication that defendants/third-party plaintiffs followed up with service via registered mail, nor was an affidavit of compliance filed.

Accordingly, it is ORDERED that defendants/third-party plaintiffs' motion is granted to the extent that the Note of Issue and the Certificate of Readiness are vacated, pursuant to 22 NYCRR 202.21(e); and it is further

ORDERED that, the New York County Clerk is directed to vacate the Note of Issue; and it is further

ORDERED that, third-party plaintiffs are permitted to re-serve the third-party summons and complaint upon third-party defendant, Neres via the New Jersey Department of Treasury as well as the New York Secretary of State within 30 days from the date of entry of this order; and it is further


ORDERED that, defendants/third-party plaintiffs file their affidavit of service and affidavit of compliance pursuant to Limited Liability Company Law §304; and it is further

ORDERED that, third-party defendant's cross motion is denied; and it is further

ORDERED that, defendants/third-party plaintiffs shall serve a copy of this order with notice of entry within 30 days of the date that this order is uploaded onto NYSCEF.

ORDERED that, defendants/third-party plaintiffs' motion and third-party defendants cross motion are denied in all other respects.

This is the decision and order of the court.

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| <u>12/15/2021</u> DATE | | |  _____ RICHARD LATIN, J.S.C. | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER |
| | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | REFERENCE |
| | | | <input type="checkbox"/> | OTHER |