

<b>Visualhouse USA, LLC v Soho Thompson Realty LLC</b>
2023 NY Slip Op 34002(U)
November 9, 2023
Supreme Court, New York County
Docket Number: Index No. 655881/2020
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DEBRA A. JAMES**

**PART 59**

*Justice*

-----X

VISUALHOUSE USA, LLC,

Plaintiff,

- v -

SOHO THOMPSON REALTY LLC,

Defendant.

-----X

SOHO THOMPSON REALTY LLC,

Third-Party Plaintiff,

-against-

ROBERT HERRICK,

Third-Party Defendant.

-----X

INDEX NO. 655881/2020

MOTION DATE 06/02/2021

MOTION SEQ. NO. 001 002

**ORDER – RESETTLED  
AMENDED (MOTION RELATED)**

Third-Party  
Index No. 596075/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 18, 19, 37

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the Order of November 3, 2023, resolving motion sequence 001 and 002 in this action is VACATED, RESETTLED, AND CORRECTED pursuant to CPLR § 5019(a) [see Kiker v Nassau County, 85 NY2d 879 (1995)] as follows:

ORDERED that the motion pursuant to CPLR 3211(a)(8) of the third-party defendant ROBERT M. HERRICK to dismiss the third-party complaint for lack of personal jurisdiction (motion sequence number 001) is denied as premature; and it is further

ORDERED that the motion of the third-party defendant ROBERT M. HERRICK to dismiss the third-party complaint for lack of personal jurisdiction (motion sequence number 002) is denied; and it is further

ORDERED that the cross-motion of the defendant/third party-plaintiff SOHO THOMPSON REALTY LLC for an extension of time for service or directing service upon third-party defendant ROBERT M. HERRICK, is denied, as moot; and it is further

ORDERED that third-party defendant ROBERT M. HERRICK shall serve and file an answer to the third-party complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary discovery conference order or competing proposed preliminary discovery conference order(s) at least two days before December 19, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

#### DECISION

The motion of third-party defendant ROBERT M. HERRICK ("Herrick") to dismiss the third-party complaint for lack of

personal jurisdiction over him on the basis that he does not live or reside at the location of purported service (motion sequence number 001) is denied. Such motion is premature as it was filed prior to the expiration of the 120-day period for the defendant/third party-plaintiff SOHO THOMPSON REALTY LLC ("Soho") to effect and file proof of service pursuant to CPLR 306-b (Martin v Witkowski, 158 AD3d 131, 140-140 [4th Dept 2017]).

Herrick's second motion to dismiss the complaint for lack of personal jurisdiction on the grounds that the process server failed to exercise due diligence, as required under CPLR 308(4) prior to utilizing the "nail and mail" method of service, shall also be denied.

"[A process server's] affidavit of service. . . constitute[s] prima facie evidence of proper service" (see Reem Contracting v Altschul & Altschul, 117 Ad3d 583 [1st Dept 2014]).

In support of his motion, Herrick submits no affidavit with specific facts to rebut the affidavit of the process server, relying solely on an attorney affirmation. In light of Herrick's failure to come forward with evidence that rebuts the affidavit of the process server, the process server's statement under oath that he made three attempts to serve Herrick, on different days and different times, including a Saturday, satisfies the due diligence requirement of CPLR 308(4) (NYSCEF Doc. No. 17; see Deutsche Bank Nat. Tr. Co. v. White, 110 AD3d 759, 760 [2d Dept 2013]). On that same basis, no traverse hearing is required to determine if Herrick

was properly served, Herrick having failed to raise an issue fact with respect to the presumption of service (Deutsche, supra.)

Finally, the cross-motion of Soho to extend the time to effectuate service upon Herrick is dismissed as moot, as, for the foregoing reasons, Soho has effectuated proper service upon Herrick.

*Debra A. James*

20231109115524DJAMESECB76E543EC344D3957714F3F6F33314

11/9/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: