

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

PRESENT: STANLEY L. SKLAR, JTD

PART 93R

Index Number : 109083/2008

SPENCER CONDOMINIUM

vs

HAZAN, ELIZABETH

Sequence Number : 002

HEAR AND REPORT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

~~Upon the foregoing papers, it is ordered that this motion~~

is dismissed as of course hearing conducted on November 2 and completed December 3, 2009. Attached is the original signed by the parties and record maintained by Justice Denis King - JTD.

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Dec 3, 2009

[Signature]
JTD J-8-9

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 93

-----X
SPENCER CONDOMINIUM,

Plaintiff

Index No 10083-2008

v

ELIZABETH HAZAN,

Defendant

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SKLAR, J.H.O.:

This matter was referred to me pursuant to the order of Justice Doris Ling-Cohan dated April 13, 2009 and entered on April 14, 2009 to hear and report with respect to a traverse of service.

A hearing was commenced on November 12, 2009. The defendant started her testimony because she had to leave for a medical appointment, but did not complete her testimony and the hearing was postponed to November 23, when her counsel advised that she had a family emergency and had gone to Canada. The process server's testimony was completed on November 12. Ms. Hazan's testimony was completed on December 2, 2009.

Findings of Fact

I make the following findings of fact.

I credit the testimony of the process server as well as the testimony of the defendant.

I do so on the basis of their demeanor testimony as well as their substantive testimony.

I find that at the time of the "service" herein, defendant's domicile was (and is) in Fisher Island, Florida, where she bought her home for over \$5 million in 1998. The

house has about 4000 square feet and is located on 13,000 to 14,000 square feet of property. She testified that she paid property taxes to Florida of about \$68,000 in 2008.

She purchased apartment 1A in the Spencer Condominium building in May of 2005 for \$1,875,000. She testified that it was a rental property that she bought for investment. She rented the property to one Guillermo Rossell in December, 2006 for a two year term. However, Rossell could not move in until January 2007, and he was given an extension so that he vacated the apartment in April, 2009.

She testified that on July 5, 8 and 9, 2008 (when the process server was effecting service at the apartment), she was in Florida. She also testified at one point that she did not recall where she was on those days. However, she very clearly testified that she did not live in apartment 1A in the Spencer Condominium building in July, 2008 and could not because the apartment was rented to Rossell. Buttressing her testimony about the lease and the extension, a lease of the unit between her as landlord and Rossell as tenant was introduced into evidence. The lease was for a term from January 1, 2007 to December 31, 2008, and provided for a monthly rental of \$10,500, and for a security deposit of \$21,000. By letter agreement dated September 27, 2007, the term of the lease was extended for one year from January 27, 2008 to January 26, 2009, for the same rate of \$11,500 per month. She testified that in July or August of 2008, she came into New York City, stayed a hotel on the upper West Side, the name of which she does not recall, and that during her stay she did go to the Spencer Condominium to see the doorman and pickup whatever he might have for her, at which time she was handed a copy of the summons and complaint by the doorman. Whenever she picked up mail from the doorman, it usually consisted of mailings from brokers offering to sell her condominium unit for her.

I credit the testimony of the process server, Charles Mon, a licensed process server. On July 5, 2008, at 7:45 AM he went to the Spencer Condominium building, asked for Ms. Hazan, advised that he had papers for her on behalf of the board, and was told by the doorman that she lived in apartment 1A, and he admitted Mr Mon into the building. He knocked on the door of 1A when a neighbor, who identified himself to Mr. Mon as Mr. Cohen, asked what he was doing. Mr. Mon told him and Mr. Cohen said that Ms. Hazan lived in that apartment. He made a second try on July 8, 2008. He made his third and final try on July 9, 2008. The attempted services were at different hours. Still not receiving a response to his knocking on the door, he affixed a copy of the summons and complaint to the door of that apartment with Scotch tape. He subsequently, but timely, mailed a copy to her in an enveloped marked personal and confidential directed to her at the apartment.

1. Plaintiff argued that since Justice Carol Huff, in another matter, held that the defendant was a resident of the apartment and that the defendant should be collaterally estopped from arguing that she was not a resident of the apartment at the time of service of process upon her in this matter. That issue is one of law which is within the purview of Justice Doris Ling-Cohan. However, I recommend rejection of that argument. Justice Huff's memorandum decision of April 1, 2009 holds that a process server's affidavit constitutes prima facie evidence of proper service pursuant to CPLR 308(2). She found that Hazan failed to rebut that evidence, noting that "apparently her affidavit was merged with her attorney's affirmation, and Hazan never executed the statement." This is a procedural determination, not one on the actual merits of whether defendant resided at the apartment. Defense counsel has submitted an order to show cause to Justice Huff to vacate her decision, arguing an error by a clerk in the law firm representing defendant. Under these

circumstances, I recommend that the Court find that there is no collateral estoppel effect.

2. I find that Ms. Hazan did not live in, or stay in, the apartment in question at the time that the process server effected nail and mail service. A lease was in existence giving a tenant possession of the apartment in question for the sum of \$11,500 per month. It is presumed that the landlord may not stay in the apartment during the term of that lease. Plaintiff's counsel suggested on summation that it was theoretically possible for Ms. Hazan to stay there despite the lease, but he honorably conceded that this theoretical possibility was speculation. Simply put it is unsupported by the evidence. The testimony of the process server does not contradict this finding. He had two sources of information that Ms. Hazan lived in the apartment, both hearsay. First, the testimony that the doorman said she lived there. That testimony is consistent with the common sense reality that a doorman of a luxury condominium, wanting to cooperate with a process server who said he had papers on behalf of the Board, would rely either on a list of the owners of the apartment or his recollection of the *owners*. Second, the process server was told by a Mr. Cohen, who claimed to live in the building, that she lived there. Assuming that a Mr. Cohen made that statement, that likely, in the same fashion, was based on whatever knowledge Mr. Cohen had, that she owned the apartment.

Accordingly, I find and recommend to Justice Doris Cohan, that Elizabeth Hazan was not staying at apartment 1A of the Spencer Condominium on the dates that the process server attempted service in July 2008 and when he affixed a copy of process to the door of that apartment in July 2008. I further find and recommend to Justice Doris Ling-Cohan that the mailing to her at that apartment was not to her actual place of business, or her last known residence or her dwelling place or usual place of abode within the state. I find that

the provisions of the By Laws of the Condominium relating to where notice to Ms. Hazan should be sent are irrelevant to the command of the statute, CPLR 208(4).

In conclusion, I find and recommend that the Court find and conclude that service of process was not effected upon Elizabeth Hazan.

Dated: New York, NY
December 3, 2009



STANLEY L. SKLAR, J.H.O.

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