

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18  
Justice

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GEORGE FUIAXIS		Number	<u>28675</u> 2006
		Motion	
		Date	<u>June 27,</u> 2007
-against-		Motion	
111 HURON STREET, LLC, etc., et al.		Cal. Number	<u>14</u>
		Motion Seq. No.	<u>1</u>
	x		

The following papers numbered 1 to 27 read on this motion by plaintiff pursuant to CPLR 6301 for a preliminary injunction enjoining defendants from expending funds, or hypothecating, encumbering or disposing of assets belonging to defendant 111 Huron Street, LLC (a/k/a 111 Huron Street Limited Liability Company) (Huron), except in the ordinary course of business for the operation of the company, pending a final determination of the action; and this cross motion by defendants pursuant to CPLR 3211(a)(1), (2), (7), and (8) to dismiss the complaint, and pursuant to CPLR 3211(c) for summary judgment.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-8
Notice of Cross Motion - Affidavits - Exhibits...	9-13
Answering Affidavits - Exhibits.....	14-22
Reply Affidavits.....	23-27

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action against defendant Huron, a domestic limited liability company, engaged in acquiring, developing and managing real property, and defendants Hentze, Sidiropoulos and Robbins, seeking judicial dissolution of defendant Huron, a judicial windup of its business, the appointment of a receiver, a permanent injunction and an accounting. In his

complaint, plaintiff alleges that he and the individual defendants are the sole members of Huron, and that he elects to voluntarily withdraw from membership in Huron. Plaintiff further alleges that it is no longer reasonably practicable for Huron to continue to carry on business due to his voluntary withdrawal, or alternatively, it is no longer reasonably practicable for Huron to continue to carry on business due to an internal deadlock presently existing between him and the other three members. Plaintiff obtained the instant order to show cause, including a temporary restraining order enjoining defendants from expending funds, or hypothecating, encumbering or disposing of assets belonging to defendant Huron, except in the ordinary course of business, pending a hearing on this motion. Plaintiff moves for a preliminary injunction pending a final determination of the action.<sup>1</sup> The order to show cause directed that service of a copy of the order to show cause and supporting papers and the summons and complaint be made upon defendants by "personal service" on or before January 19, 2007.

In lieu of serving an answer, defendants cross-move herein to dismiss the complaint pursuant to CPLR 3211(a)(1), (2), (7) and (8). They also oppose the motion by plaintiff, asserting among other things, that the order to show cause was not properly served upon them.

The Supreme Court has subject matter jurisdiction regarding an action to dissolve a limited liability company (see NY Const, art VI, § 7[a]; Limited Liability Company Law § 702). That branch of the cross motion by defendants for dismissal pursuant to CPLR 3211(a)(2) based upon lack of subject matter jurisdiction is denied.

With respect to that branch of the cross motion by defendants for dismissal pursuant to CPLR 3211(a)(8), based upon lack of personal jurisdiction due to improper service, plaintiff offers two affidavits of service, each dated January 18, 2007, of Blake Bermingham, and affidavits of service, dated January 19, 2007, of Leonard Safran and of Edwin Nolasco. The affidavit of service of Mr. Bermingham regarding service of process and the order to show cause upon defendant Huron indicates that service of a copy of the summons and complaint, and order to show cause was made by delivery to one "Anna Koutsouladakis," as the managing agent authorized to accept service on behalf of defendant Huron on

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To the extent that plaintiff also seeks the ultimate relief demanded in the complaint, his request is premature, since issue has not been joined (CPLR 3212[a]).

January 18, 2007 at 12:18 P.M. at 47-14 32<sup>nd</sup> Place, Long Island City.

Section 311-a(a) of the Limited Liability Company Law provides that personal service on a domestic limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. That section also provides that service of process upon a limited liability company may also be made pursuant to article three of the Limited Liability Company Law. Section 311-a(b) of the Limited Liability Company Law provides that if service is impracticable under subdivision (a) of section 311-a, it may be made in such manner as the court, upon motion without notice, directs.

The affidavit of service of Mr. Bermingham with respect to defendant Huron constitutes prima facie evidence of proper service of process upon defendant Huron pursuant to CPLR 311-a(a).

Defendants have raised no issue of fact rebutting this affidavit of service of Mr. Bermingham regarding service upon defendant Huron (see 126 Spruce Street, LLC v Club Cent., LLC, 15 Misc 3d 538 [2007]). They fail to claim that defendant Huron has no authorized or designated agent or person to receive service, or that Ms. Koutsouladakis was neither a member nor a manager of defendant Huron (cf. Stuyvesant Fuel Service Corp. v 99-105 3rd Avenue Realty LLC., 192 Misc 2d 104 [2002]). Under such circumstances, a hearing to determine whether process or the copy of the order to show cause and supporting papers was properly served upon defendant Huron is unnecessary (see generally Manhattan Sav. Bank v Kohen, 231 AD2d 499 [1996]; Sando Realty Corp. v Aris, 209 AD2d 682 [1994]).

The other affidavit of service of Mr. Bermingham regarding service of process and the order to show cause upon defendant Sidiropoulos indicates service by in-hand delivery of a copy of the summons and complaint at 4-74 48<sup>th</sup> Avenue, Long Island City, New York, on January 18, 2007 at 12:35 P.M. The affidavit of service of Mr. Safran indicates service of process and the order to show cause was made upon defendant Hentze by in-hand delivery of a copy of the summons and complaint and order to show cause at

111 High Farms Road, Glenn Head, New York at 7:59 P.M. The affidavits of Messrs. Bermingham and Safran constitute prima facie evidence of proper service upon defendants Sidiropoulos and Hentze, respectively, pursuant to CPLR 308(1) (see Skyline Agency, Inc. v Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [1986]).

Defendants Sidiropoulos and Hentze each aver that a copy of the papers were left at their residences, but state they never were personally served and never received a copy of the papers in the mail. According to defendant Sidiropoulos, he was not at his apartment building at the time of the alleged service by Mr. Bermingham. In view of these averments, plaintiff must establish that the court has jurisdiction over defendants Sidiropoulos and Hentze by a preponderance of evidence at a hearing (see New Island Investors v Wynne, 251 AD2d 560 [1998]; Frankel v Schilling, 149 AD2d 657 [1989]; cf. Wieck v Halpern, 255 AD2d 438 [1998]; Green Point Sav. Bank v Clark, 253 AD2d 514 [1998]), and that the service of the order to show cause upon them was in accordance with the manner specified therein.

The affidavit of service of Mr. Nolasco indicates failed attempts at personal delivery of the copy of the summons and complaint and order to show cause to defendant Robbins on January 11, 2007 at 5:15 P.M., January 16, 2007 at 7:05 P.M., and January 17, 2007 at 8:15 P.M. (Thursday, Tuesday and Wednesday, respectively), at 324 East 89<sup>th</sup> Street, New York, New York, the alleged dwelling place and usual place of abode of defendant Robbins. The affidavit of Mr. Nolasco also indicates that upon his return to that address on January 19, 2007, defendant Robbins was not there, and so Mr. Nolasco affixed a copy of the summons and complaint and the order to show cause to the door of that premises at 11:15 P.M., and on the same date, mailed a copy of the process and order to show cause to defendant Robbins at the same address.

Such affidavit fails to constitute prima facie evidence of proper service of process upon defendant Robbins. Three of the attempts at service occurred on weekdays during hours when it reasonably could have been expected that the defendant was either working or in transit to and from work (see O'Connell v Post, 27 AD3d 630 [2006]; Earle v Valente, 302 AD2d 353 [2003]; Annis v Long, 298 AD2d 340 [2002]). In addition, such affidavit of service, together with the papers submitted in opposition to defendants' cross motion, fail to demonstrate any attempt to determine the business address of defendant Robbins and to effectuate personal service at that location pursuant to CPLR 308(1) and (2) (see County of Nassau v Letosky, 34 AD3d 414 [2006]; Sanders v Elie, 29 AD3d 773 [2006]; Gurevitch v Goodman, 269 AD2d 355 [2000]; Moran v Harting, 212 AD2d 517, 518 [1995]).

Plaintiff, therefore, has failed to satisfy the due diligence requirement. Thus, that branch of the cross motion by defendants to dismiss the complaint asserted against defendant Robbins for lack of personal jurisdiction is granted.

The remaining branches of the cross motion and the motion by plaintiff for a preliminary injunction will be determined following the disposition of the traverse.

A hearing on the issue of the validity of service of process and the order to show cause upon defendants Sidiropoulos and Hentze shall be held at the Supreme Court, Queens County, 88-11 Sutphin Boulevard, Jamaica, New York, on October 30, 2007, at 9:30 A.M. in Part 18.

Dated: September 25, 2007

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J.S.C.