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[*1]

650 Victory Blvd. LLC v Monteleone
2023 NY Slip Op 50251(U)
Decided on March 21, 2023
Civil Court Of The City Of New York, Richmond County
Helbock Jr., J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 21, 2023

Civil Court of the City of New York, Richmond County

650 Victory Boulevard LLC, Plaintiff,

against

Michael Monteleone, Defendant.

Index No. CV-5160-21/RI

Robert E Judge PC for Plaintiff
Defendant appearing pro se

Robert J. Helbock, Jr., J.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this application:

Papers/Numbered
Notice of Motion and Affirmation/Affidavit annexed 1-2

Upon the foregoing cited papers, the decision on Defendant's Motion to Dismiss is as follows:

Plaintiff, 650 VICTORY BOULEVARD LLC (hereinafter "Plaintiff") instituted this

action against Defendant MICHAEL MONTELEONE (hereinafter "Defendant") to recover damages in the amount of \$6,946.00 for unpaid rent. On December 17, 2021, Defendant filed a *pro se* oral answer with the Clerk's Office. After two pre-trial conferences, the matter was set for trial on January 24, 2023.

At the start of trial, the Defendant made an oral application to dismiss the instant action [*2] on the basis that he was not properly served with the summons and complaint in this matter. The Court issued a briefing schedule regarding the instant motion. Pursuant to the briefing schedule, the Defendant filed formal motion papers on February 3, 2023, and the Plaintiff filed opposition on March 10, 2023. The motion was argued before the undersigned on March 15, 2023.

Defendant moves to dismiss the complaint arguing that he was not properly served with the summons and complaint, as alleged in the Defendant's Answer. The Defendant argues that the affidavit of service was never filed with the Court and outside of the 20-day period dictated under CPLR 308. The Defendant also argues that since the affidavit of service was never filed, his time to respond has not begun to run; and therefore, he should be excused from moving to dismiss the complaint within 60-days of filing his Answer.

The Court first takes notice of the various errors made by the Plaintiff in prosecuting this claim. The service of the Summons and Complaint was attempted by the process server but never completed. An affidavit of service showing a completed service of process was never filed with the Clerk of the Court. While the Plaintiff may have been aware the Defendant was no longer residing at the address of the attempted service, the Plaintiff took no further action to complete service of process. In addition to these errors, the Plaintiff was directed by Court Order, dated January 24, 2023, to file its Affirmation in Opposition to the Defendant's Motion to Dismiss by February 28, 2023, but did not file its papers until March 2, 2023 without seeking an extension of time from the Court, nor providing an excuse for the late filing. [EN1] The Court finds the Plaintiff made no effort to comply with the applicable statutes and rules of the Court heretofore, and therefore denies Plaintiff's request to accept the late filing of the opposition papers.

The Court also notes that the Defendant is appearing *pro se*. The Second Department has consistently held that parties appearing *pro se* "acquire[] no greater right than any other litigant" (*Roundtree v Singh*, 143 AD2d 995 [2d Dept 1988]) (internal citations omitted). While the Defendant may complain about the equities of that principle, the law is very clear. Therefore, the Defendant is bound by the law and rules, even if the *pro se* litigant is not

familiar with them. With these principals in mind, the Court now addresses the Defendant's motion to dismiss.

The Defendant first argues that the complaint must be dismissed due to the Plaintiff's failure to file an affidavit of service. However, such a failure would only extend the time for which a defendant would have to file an answer ([See *Estate of Perlman v Kelley*, 175 AD3d 1249](#), 1250 [2d Dept 2019]). If, for instance, the Defendant failed to appear in this matter, he could not be held in default without the filing of an affidavit of service. Here, the Defendant filed an answer on December 17, 2021. As part of his answer, the Defendant raised that he was not properly served with the summons and complaint.

The Defendant next argues that the complaint must be dismissed since the Plaintiff failed to file the affidavit of service with the Court within 20 days of completing service. Indeed, CPLR 308(2) dictates that "proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing." However, the Civil Court Act requires that the affidavit of service "shall be filed with the clerk of the court in the county in [*3] which the action is brought" (CCA 409). Indeed, the Second Department has held that the 20-day requirement to file proof of service is inapplicable for matters commenced in Civil Court ([See *Rodriguez v Rodriguez*, 103 AD3d 117](#), 123 [2d Dept 2012]). Therefore, it is not a fatal defect that Plaintiff failed to file proof of service with the Court.

Lastly, Defendant argues that he should not be held to CPLR 3211(e), which states that a party must move to dismiss for improper service within 60 days of filing his answer. The Defendant argues that he should not be bound to the 60-day rule since the Plaintiff never filed an affidavit of service and "the clock never started" for the Defendant to file an answer. However, the language of CPLR 3211(e) is very straightforward. The relevant section of the statute states

". . . an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days ***after serving the pleading***, unless the court extends the time upon the ground of undue hardship. . ." (CPLR 3211) (emphasis added)

The timeframe for which the motion must be filed is dictated by the service of the pleading (in this matter, the answer), rather than the filing of the affidavit of service. While the Defendant did raise lack of proper service in his answer, he did not move to dismiss the

claim until the start of trial, well over a year after the answer had been served. The Defendant also has made no showing of any undue hardship for this court to excuse his untimely motion. The Second Department has repeatedly stated that a defendant waives any objection to service if he does not move within the specific 60-day period ([See U.S. Bank N.A. v Rogue, 172 AD3d 948](#), 950 [2d Dept 2019]).

The Defendant, by filing an answer and failing to move to dismiss the complaint within 60 days thereof, has submitted himself to the jurisdiction of the Court. The Defendant has waived any objection to improper service.

Accordingly, it is hereby

ORDERED that the Defendant's motion to dismiss is **DENIED** in its entirety; and it is further

ORDERED that the matter shall proceed to trial in Part 11 on April 18, 2023, at 9:30 am; and no further adjournments will be entertained absent good cause shown.

The foregoing constitutes the Decision and Order of the Court.

Date: March 21, 2023
Staten Island, New York
Hon. Robert J. Helbock, Jr.
Judge, Civil Court

Footnotes

Footnote 1: During oral argument, when asked why the papers were filed late, the plaintiff's counsel stated "law office failure" but did not know the reason for the failure. The Court finds this unacceptable.

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