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Gariboglu v. 1505 Third Ave. LLC

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Gariboglu v 1505 Third Ave. LLC

2023 NY Slip Op 33630(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 161029/2020

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

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

<p>PRESENT: <u>HON. MARGARET A. CHAN</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>GARIBOGLU, TOLGA</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>1505 THIRD AVENUE LLC</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART 49M</p> <p>INDEX NO. <u>161029/2020</u></p> <p>MOTION DATE <u>05/09/2023, 05/19/2023</u></p> <p>MOTION SEQ. NO. <u>002 003</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 66, 76, 77

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants' respective motions to dismiss are granted.

Plaintiffs, tenants in Apartment 1D at 200 East 85th Street, New York, NY 10028 (the Building), bring this action against 1505 Third Avenue LLC (1505 Third), the owner of the Building, and German News, Inc., the triple net lessee of the Building (German News, and together with 1505 Third, defendants), seeking, among other relieves, a declaration that Apartment 1D is subject to rent stabilization and that plaintiffs are its rightful tenants. 1505 Third, in MS 002, and German News, in MS 003, separately file a pre-answer motion to dismiss the complaint under CPLR 3211(a)(8) and CPLR 306-b for failure to serve defendants within the 120-day period. German News further moves to dismiss under CPLR 3211(a) (1) and (a) (7) for failure to state a cause of action based on documentary evidence. Plaintiffs oppose both motions.

Background

Defendant 1505 Third informs that it owns the building and land, and pursuant to the lease between it, as successor-landlord, and German News, as successor tenant, German News leases the entire building and land for a term expiring on August 31, 2027 (NYSCEF # 53, 1505 Third MOL at 1). Plaintiffs entered into two one-year leases with German News; the first lease began on August 1, 2014 (NYSCEF # 85); the second lease began on August 1, 2015 (NYSCEF

86). Plaintiffs state, upon information and belief, that Apartment 1D (the Apartment) was last registered with the Division of Housing and Community Renewal (DHCR) in 2008 (NYSCEF # 46 and # 81, Compl ¶ 11). Plaintiffs allege that “[d]efendants fraudulently rented the Apartment to [them] as an ‘Apartment . . . Not Subject To The Rent Stabilization Law.’” (*id.* ¶ 13).

In December 2018, a fire broke out in the Building, which seriously damaged the Building and caused the New York City Department of Buildings to issue a vacate order for the Building (Compl. ¶ 14). Plaintiffs relocated to another apartment during this time, and when the Apartment was repaired, defendants refused to allow plaintiffs back in the Apartment (*id.* ¶ 15).

Plaintiffs subsequently commenced this action on December 18, 2020, alleging that, as rent regulated tenants, they are entitled to re-occupy the Apartment (*id.* at ¶ 19). Thus, plaintiffs seek (i) a declaration that they are entitled to the protections of the rent stabilization law; (ii) an injunction restoring them to the Apartment and enjoining defendants from interfering with their rights to the Apartment; and (iii) treble damages pursuant to RPAPL § 853 for unlawful eviction (*id.* at ¶¶ 17-20, 24, 27).

Upon filing the complaint, plaintiffs moved by order to show cause for a preliminary injunction and temporary restraining order (TRO). Oral argument was held on January 11, 2021. Based on plaintiffs and German News’ stipulation, and over 1505 Third’s opposition, an interim order was issued to enjoin and restrain defendants “from leasing the Apartment or interfering with or disposing of any personal property or fixtures still present in the Apartment belonging to plaintiffs” pending resolution on the preliminary injunction (NYSCEF # 16). Plaintiffs’ preliminary injunction motion was denied on February 8, 2022 (NYSCEF # 33).

Discussion

Defendants assert that the court lacks personal jurisdiction over them because of plaintiffs’ improper service of process pursuant to CPLR 3211(a)(8) as plaintiffs failed to timely serve defendants within 120 days after the commencement of an action pursuant to CPLR 306-b (NYSCEF # 53 at 7-9; NYSCEF # 68 at 4-5). 1505 Third asserts that in its opposition papers to plaintiff’s OSC, it reminded plaintiffs that it had not been served with the summons and complaint but to date, plaintiffs took no action to date (NYSCEF # 43, DeFunis aff ¶ 19). Plaintiffs oppose the motions arguing that defendants waived their personal jurisdiction defense by actively participating in this litigation for over two years (NYSCEF # 66 at 7-12; NYSCEF # 95 at 7-11).

“A defendant may waive the defense of . . . personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of

personal jurisdiction in an answer or pre-answer motion to dismiss” (*Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 628 [2d Dept 2014]; see also *NYRU, Inc. v Forge Restaurant, LLC* 92 AD3d 511, 511 [1st Dept 2012]) or shows a clear intent to participate (*Rubino v City of New York*, 145 AD2d 285, 288 [1st Dept 1989]; *Taveras v City of New York*, 108 AD3d 614, 617 [2d Dept 2013]). “[W]hen a defendant participates in a lawsuit on the merits, he indicates his intention to submit to the court’s jurisdiction over the action” even with improper service (*Rubino*, 145 AD2d at 288 [1st Dept 1989]). Concerning improper service, courts will determine if a party was prejudiced and consider the extent of participation in the lawsuit (see *Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012] [finding that defendants were aware of the lawsuit and were not prejudiced by the service errors to grant a motion to dismiss]. Courts will also look to the parties’ actions during the litigation to determine an intent to participate in the lawsuit, as well as whether the parties demonstrated that they were aware of the lawsuit with ample time to address improper service (*id.*).

Plaintiffs point out that defendants have substantively responded to plaintiffs’ motion for a preliminary injunction and extensively participated with multiple appearances before the court including the oral argument held via Microsoft Teams (NYSCEF # 93). Plaintiffs add that defendants had participated in the seven conferences via Microsoft Teams with the court’s law clerk on January 11, 2021,¹ April 13, 2022, July 14, 2022, October 6, 2022, December 6, 2023, March 9, 2023, and April 19, 2023 (*id.*). Plaintiffs thus conclude that such participation manifests a “clear intent to participate” in these proceedings (NYSCEF # 93). Plaintiffs note that defendants were aware and informed about the lawsuit given their extensive participation, and had sufficient notice and opportunities to timely raise an issue of service at any point during the two years (NYSCEF # 66 at 9; NYSCEF # 95 at 9-10). Relying on *Feola v Moore McCormack Lines, Inc.* (173 AD2d 256 [1st Dept 1991]) and *HSBC Bank USA, N.A. v Taub* (170 AD3d 1128, 1130 [2d Dept 2019]), plaintiffs argue that defendant waived the improper service.

Contrary to plaintiffs’ waiver argument, the actions taken in this litigation is not lengthy or involved the merits of the case in contrast to plaintiffs’ above cited cases. The defendant in *Feola*, engaged in the litigation for more than eleven years and asserted a cross claim, thus warranting a finding of a waiver of plaintiff’s improper service (173 AD2d 256). In *HSBC*, the statutory time to answer had expired and the defendant had filed a cross motion (170 AD3d at 1130). In contrast to *Feola* and *HSBC*, defendants here were not properly served with a complaint to be obligated to answer, nor did they file any cross motions or motions that could be deemed a waiver (see *Rubino*, 145 AD2d at 288).

¹ The oral argument on plaintiffs’ TRO was held on January 11, 2021; there was no order to reflect a conference with the court’s law clerk was held that day.

The record in this case shows that defendants responded to and argued against plaintiff's motion by order to show cause for a preliminary injunction and a TRO, and attended six discovery status conferences. While defendants had to respond to the preliminary injunction motion based on the urgency of the TRO, or be in default, 1505 Third's opposition to the motion noted to plaintiffs that it was not served with a summons and complaint. Upon a careful review of the status conference orders, the court finds that in the course of a year, from April 13, 2022 to April 19, 2023, there was a lack of meaningful participation from defendants. The status conference orders show delays on responses, demands for depositions, and debates on how the depositions should be conducted whether virtually or in-person (NYSCEF # 34, 35, 36, 37, 38, 40). Also, 1505 Third's attorney avers that 1505 Third neither served nor received any discovery demands or deposition notices (NYSCEF # 43, DeFunis aff ¶ 22). In most, if not all, the orders extended discovery deadlines. Critically, none of the status conference orders indicate that defendants participated in arguing or addressing the merits of the case.

Accordingly, upon consideration of defendants' weak participation in the proceedings to date, plaintiffs' failure to serve defendants over the course of two years, and the lack of any indication that the parties addressed the merits of this case, defendants' respective motions to dismiss under CPLR 3211(a)(8) and CPLR 306-b are granted, and the complaint is dismissed without prejudice. As such, German News' remaining grounds for dismissing the complaint will not be addressed.

Conclusion

In view of the above, it is

ORDERED that the separate pre-answer motions to dismiss plaintiff's complaint by 1505 Third Avenue LLC (MS 002) and German News Inc. (MS 003) are granted, and plaintiffs' complaint is dismissed without prejudice; and it further

ORDERED that defendants are serve a copy of this order with notice of entry upon plaintiffs and the Clerk of the Court within 20 days of the date of this order.

10/12/2023
DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: