

**Klein v Octobre**

2014 NY Slip Op 30907(U)

April 7, 2014

Supreme Court, New York County

Docket Number: 155296/12

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
JUDITH KLEIN,

Plaintiff,

Index No. 155296/12

-against-

**DECISION/ORDER**

GARLINE OCTOBRE,

Defendant.

-----X

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Letter in Opposition.....	<u>2</u>
Exhibits.....	<u>3</u>

Plaintiff Judith Klein commenced the instant action against defendant Garline Octobre by filing a Summons with Notice with the court on August 8, 2012 asserting claims for legal malpractice and violation of Judiciary Law § 487. Defendant now moves for an Order pursuant to CPLR § 3012(b) dismissing the action for failure to serve a complaint. For the reasons set forth below, defendant's motion is granted.

The relevant facts are as follows. On or about August 8, 2012, plaintiff, *pro se*, filed a Summons with Notice with the clerk of this court alleging causes of action for legal malpractice and violation of Judiciary Law § 487 arising from legal representation she was provided by defendant in an underlying neglect of a minor proceeding. On December 5, 2012, plaintiff served defendant with the Summons with Notice. On January 2, 2013, defendant, who was then

*pro se*, served plaintiff with a Notice of Appearance and Demand for a Complaint. Plaintiff received the Notice of Appearance and Demand for a Complaint but rejected the documents, via two Notices of Rejection, both dated January 31, 2013, on the ground that defendant, as a party to the action, improperly served the documents herself in violation of CPLR § 2103(a). Thereafter, defendant retained counsel and served a second Notice of Appearance and Demand for a Complaint on plaintiff on May 3, 2013 and e-filed same on June 5, 2013.

On June 7, 2013, plaintiff contacted defendant's counsel via e-mail confirming her receipt of the Notice of Appearance and Demand for a Complaint and advised that the address listed on her pleadings, 1211 Atlantic Avenue, Brooklyn, New York 11216, is not her residence but rather a business service center. However, plaintiff's e-mail did not provide an alternative address for the purpose of service. On June 21, 2013, plaintiff filed a third Notice of Rejection of the second Notice of Appearance and Demand for a Complaint on the grounds that she did not receive the hard copies of the papers because of a lack of notice from the business center which receives her mail, that the Notice of Appearance and Demand for a Complaint is duplicative and that it is untimely. Additionally, on June 28, 2013, plaintiff filed a fourth Notice of Rejection of the Notice of Appearance and Demand for a Complaint on the grounds that it is duplicative, it is untimely, it was improperly served as it was mailed from without the state and that it was not electronically filed. Defendant then brought the instant motion to dismiss the action for failure to serve a complaint on the basis that her second Notice of Appearance and Demand for a Complaint was valid.

Pursuant to CPLR § 3012(b), "[i]f the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision

(a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand...The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.” Pursuant to CPLR § 320(a), “[a]n appearance shall be made within twenty days after service of the summons....”

In the instant action, defendant’s motion for an Order pursuant to CPLR § 3012(b) dismissing the action for failure to serve a complaint is granted. Defendant’s first Notice of Appearance and Demand for a Complaint, served on January 31, 2013, was invalid pursuant to CPLR § 2103(a) on the ground that said documents were served upon plaintiff by defendant herself and not by a non-party of the age of eighteen years or older. However, such defect was not fatal to the action as “[a]t any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.” CPLR § 2001. Thus, defendant was entitled to serve a second Notice of Appearance and Demand for a Complaint by the proper means, which was done on May 3, 2013. Defendant properly served the second Notice of Appearance and Demand for a Complaint on plaintiff at the address provided by plaintiff in her Summons with Notice. *See* CPLR § 2103(c)(stating that if a party has not appeared by an attorney, service upon that party may be made by mailing the papers to the address designated by that party). Plaintiff’s assertion that the address listed on the Summons with Notice is not her actual place of residence but rather that of the business center which receives her mail is unavailing. That address was the only address listed by plaintiff on the Summons with Notice provided to defendant and plaintiff has not provided defendant with any alternative address. Thus, as more than twenty days have elapsed since defendant served her

