

**Lee v Marino**

2004 NY Slip Op 30206(U)

August 9, 2004

Supreme Court, New York County

Docket Number: 0110900/2003

Judge: Louis B. York

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

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

0110900/2003

LEE, LILLY  
VS  
MARINO, ROBERT A.

SEQ 1  
DISMISS ACTION

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

**FILED**

AUG 24 2004

COURT CLERK

OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance  
with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE \_\_\_\_\_

Dated: 8/9/04

Lilly  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 2

-----X  
LILY LEE,

Plaintiff,

-against-

Index No. 110900/03

ROBERT A. MARINO and JOSEPH CRISAFI,  
Individually and as Officers of the  
Board of Managers of Columbus Common  
Condominium,

Defendants.  
-----X

LOUIS B. YORK, J.

Motion sequence numbers 001, 002, and 003 are consolidated  
for disposition.

In motion sequence number 001, defendant Robert A. Marino  
moves, pursuant to CPLR 3211 (a) (8) and CPLR 215 (3), to dismiss  
the complaint. In motion sequence number 002, defendant Joseph  
Crisafi moves, pursuant to CPLR 3211 (a) (5), (7), and (8), CPLR  
215 (3), and CPLR 3016 (b), to dismiss the complaint. In motion  
sequence number 003, plaintiff Lily Lee moves, pursuant to CPLR  
306-b, for an order extending her time to serve the amended  
summons and amended complaint.

Plaintiff Lee is a resident of the Columbus Common  
Condominium, located at 110 West 90<sup>th</sup> St., in Manhattan;  
defendants Marino and Crisafi, at pertinent times, have allegedly  
been members and officers of the Board of Managers of the  
Condominium. In this action for defamation, Lee alleges that she  
has been defamed by both Marino and Crisafi, in connection with  
complaints which she made regarding the allegedly intolerable

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NEW YORK  
COUNTY CLERK'S OFFICE

overheating of her apartment, which is located above the building's boiler room. Lee alleges that when her complaints were not addressed by the Condominium, she ultimately filed complaints with the New York City Department of Health, the Department of Housing Preservation and Development (HPD), and the Housing Court. According to Lee, the overheating problem was ultimately addressed, as a result of action taken by HPD.

Lee alleges that in response to the complaint issued by HPD, which listed Marino as owner or agent of the building, Marino wrote the following, on the face of the HPD complaint:

Forget it. I am not wasting my time and money to notarize this form. I am NOT the owner or agent. The complainants are delusional, paranoid cranks who have annoyed fellow unit owners in the condominium. They belong in Bellvue [sic] and not here. They should sell their unit and move into the woods in another state where they can annoy the trees and not rational people. If you cannot tell from what I have written, let me be specific ... they should get real lives. RAM

Lee further alleges that on or about June 17, 2002, Marino published this statement to third parties by placing a copy of the HPD form, with his typewritten comment, on the central concierge desk in the lobby of the building, where it was visible to, and could be read by, all the tenants, staff of, and visitors to the building.

On June 13, 2003, plaintiff filed a summons and complaint with the County Clerk, naming Marino as defendant. It is

undisputed that the summons and complaint were never served on Marino. On October 3, 2003, however, Marino was served with copies of the amended summons and amended complaint, which were filed with the County Clerk on September 12, 2003, without leave of the court. The amended complaint named Joseph Crisafi as an additional defendant, and alleged that Crisafi had also defamed plaintiff by making oral and written defamatory statements to various third parties, and by "falsely attempting to ridicule and discredit Plaintiff's claims and casting defamatory aspersions on her veracity and integrity." Amended Complaint, ¶ 40. Plaintiff further alleged that

on or about September 17, 2002, as reflected in the written minutes of the Board ... Defendant Crisafi continued to imply if not state in so many words that Plaintiff's complaints were frivolous, thus defamatorily suggesting that Plaintiff was the kind of person who would lie about conditions in her unit to officials in City agencies and would baselessly and knowingly pursue fabricated claims that were costly to the building and its residents, about the overheating condition and "Class C" code violations.

Amended Complaint, ¶ 44.

#### **MOTION SEQUENCE 001**

Marino moves to dismiss on several grounds. Marino first argues that the amended summons and amended complaint do not contain the date of filing, which, he contends, is required by the CPLR. Although CPLR 305 (a) does state that a summons "shall bear the index number assigned and the date of filing with the

clerk of the court," the Appellate Division has held that a failure to comply with those technical requirements does not warrant dismissal, unless there is a showing of prejudice resulting from the defect. *Cruz v New York City Housing Authority*, 269 AD2d 108, 109 (1<sup>st</sup> Dept 2000). Here, Marino has failed to show prejudice resulting from the absence of the date of filing on the summons; therefore, his motion to dismiss on that ground is denied.

Marino next argues that the amended summons and amended complaint were improper, because they were filed without leave of the court. Pursuant to CPLR 3025 (a), pleadings may be amended once, without leave of the court, within 20 days of service of the pleadings, or any time before the period for responding to the pleading expires, or within 20 days after service of the responsive pleading. In other cases, a party's pleadings may be amended with leave of the court, which shall be freely given. CPLR 3025 (b).

Here, because the original summons and complaint appear never to have been served on Marino, the time periods set out in CPLR 3025 (a) never began to run. However, an amended summons and amended complaint were served on Marino within 120 days from the filing of the original summons and complaint, as specified in CPLR 306-b. Neither party has cited, nor has the court found,

any cases which indicate whether, under these circumstances, it is necessary to obtain leave of the court to file an amended complaint.

Lee contends, and from a cursory examination of the amended pleadings it appears, that the amended pleadings do not significantly alter the claim against Marino. Rather, the amended pleading names an additional defendant, and alleges a new cause of action against that defendant.

Marino also argues that the amended summons was not identical with that filed with the Clerk. Whereas the amended summons which, according to Marino, was served on him, merely names Robert A. Marino and Joseph Crisafi as defendants, the copy of the amended summons filed with the Clerk lists the defendants as "Robert A. Marino and Joseph Crisafi, Individually and as Officers of the Board of Managers of Columbus Common Condominium," which is the way that they are listed on the amended complaint served on Marino.

Although the litigation practice followed by plaintiff is, at best, sloppy, it is hard to see how Marino is prejudiced by having been served with that amended summons and amended complaint, rather than with the original summons and complaint, since service was made within the 120-day period, even given the minor technical irregularities in the amended summons.

Finally, since service of the amended summons was made within the 120-day period mandated by CPLR 306-b, the one-year statute of limitations governing defamation actions was met.

For these reasons, Marino's motion to dismiss is denied.

**MOTION SEQUENCE NUMBER 002**

Defendant Crisafi moves to dismiss on the following grounds: 1) pursuant to CPLR 3211 (a) (5) and 215 (3), as untimely, based on the one-year statute of limitations for defamation; 2) pursuant to CPLR 3211 (a) (8), based on lack of personal jurisdiction; and 3) pursuant to CPLR 3211 (a) (7) and 3016 (a), for failure to include the particular words alleged to be defamatory.

Crisafi contends that he was never served with the amended summons and amended complaint. If he was not, the court has no jurisdiction over his person, and it would be inappropriate to reach his other contentions; therefore, the questions of service will be addressed first.

The affidavit of service of Monica Hoyos, states that on October 4, 2003, at 6:38 p.m., she served Crisafi with the amended summons and amended complaint by leaving a copy with "Syed 'Doe', who refused to give last name." Hoyos also states that she mailed a copy of the amended summons and amended complaint to Crisafi at 110 West 90<sup>th</sup> Street, Apt. 3B, New York,

New York 10024, by first-class mail on October 6, 2003, and that the mailing bore the notification "personal & confidential," and did not indicate "legal action."

Crisafi submits the affidavit of Syed Ahmed, who states that on October 4, 2003, he was employed as a concierge for Columbus Common Condominium, that he is normally on duty on weekends from 8 a.m. until 4 p.m., that on Saturday, October 4, 2003, he was on duty until the end of his shift at 4 p.m., and that he was not given any process to deliver to Crisafi. He further states, "I was not in Mr. Crisafi's Apartment 3B on October 4, 2003 at any time, and certainly not at 6:38 p.m. to receive any process on behalf of Mr. Crisafi." Affidavit of Syed Ahmed, dated February 6, 2004. In addition, Crisafi states that at no time did he receive the amended summons and amended complaint by mail, he was not given a copy of either document by Ahmed, nor was Ahmed in Crisafi's apartment at any time on October 4, 2003.

In reply, Lee states that it is her understanding that Ahmed had recently stated that he could not recall all of the deliveries that he received many months ago, and that his affidavit was solely intended to make a point about the timing of his shift. Lee's statement however, appears to be based on double hearsay, and is insufficient to overcome Ahmed's statement.

Lee further argues that Crisafi had actual notice of the litigation, as is shown by the fact that the litigation against Marino and Crisafi was discussed in the November 4, 2003 meeting of the Condominium Board of Directors. The existence of actual notice, however, will not subject a person to the jurisdiction of the court if the requirements of service have not been met. *Bankers Trust Co. of California, N.A. v Tsoukas*, 303 AD2d 343, 344 (2d Dept 2003). Although Hoyos' affidavit of service constitutes prima facie evidence that service was proper, the sworn denials of Ahmed and Crisafi create a conflict of facts requiring a hearing to determine whether valid service was made on Crisafi. *Id.* That question will, therefore, be referred to a Special Referee to hear and report with recommendations. Pending determination of that question, the remainder of Crisafi's motion to dismiss will be held in abeyance.

**Motion Sequence Number 003**

Lee moves, pursuant to CPLR 306-b, for an extension of time, if deemed necessary, in which to serve the amended summons and amended complaint.

Because the court has determined above that service of the amended summons and amended complaint upon Marino was effective, Lee's motion for an extension of time in which to serve Marino is denied as moot. With respect to Crisafi, however, Lee's motion

is held in abeyance, pending the hearing before the Special Referee on the question of service.

Accordingly, it is hereby

ORDERED, with respect to Motion Sequence Number 001, that defendant Robert A. Marino's motion to dismiss in motion sequence number 001 is denied; and it is further

ORDERED, with respect to Motion Sequence Number 002, that the issue of whether defendant Joseph Crisafi was served with the amended summons and amended complaint in compliance with CPLR 308 is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the remaining portion of this motion will be decided, if necessary, upon a motion to affirm or reject the Referee's report pursuant to CPLR 4403, or upon a renewal of the motion if the Referee is granted the power to decide the issue by the parties, and with recommendations; and it is further

ORDERED that a copy of this order shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee; and it is further

ORDERED, with respect to Motion Sequence Number 003, that plaintiff Lily Lee's motion for an extension of time in which to serve the amended summons and amended complaint is denied as moot with respect to defendant Robert A. Marino, and with respect to Joseph Crisafi shall be decided upon renewal of the motion after the Special Referee's report is issued.

Dated: 8/7/04

ENTER: Prof  
J.S.C.

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