

Crutchfield v Sommer
2007 NY Slip Op 31805(U)
June 22, 2007
Supreme Court, New York County
Docket Number: 0109216/2006
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice

PART 55

Critchfield, M

INDEX NO.

109216/06

MOTION DATE

4/26/07

MOTION SEQ. NO.

004

MOTION CAL. NO.

Penkas Sommer

The following papers, numbered 1 to 15 were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1-4

5-13

14-15

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the entered memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUN 25 2007
NEW YORK
COUNTY CLERKS OFFICE

Dated: 6-22-07

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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MARK CRUTCHFIELD,

DECISION AND ORDER

Plaintiff,

-against-

Index No. 109216/06

PINKAS SOMMER, MEYER SOMMER, KASMUND
REALTY TRUST AND THE NEW YORK POLICE
DEPARTMENT OF THE CITY OF NEW YORK
CITY, NEW YORK,

Defendants.

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SOLOMON, J.:

This action arises from an alleged illegal lockout of Mark Crutchfield (Plaintiff) by Arie Asafu-Adjaye (Asafu-Adjaye), the tenant of record of an apartment located at 320 West 106th Street, Apt. # 3F, New York, New York. Plaintiff, an attorney appearing pro se, contends that he is entitled to a judgment for immediate possession of personal property which was allegedly stolen by the owner and manager of the apartment. Plaintiff seeks damages from the owner, manager, and title holder of the building and the New York City Police Department for losses suffered as a result of the lockout. He also seeks to recover rent allegedly paid in excess of the legal regulated amount.

Defendant City of New York (the City) moves pursuant to CPLR 3211 for an order dismissing this action. The City contends that Plaintiff failed to comply with the notice of claim requirements of section 7-201 of the New York City Administrative

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JUN 25 2007
NEW YORK
COUNTY OF NEW YORK

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Code and sections 50-e and 50-i of the General Municipal Law. The City also moves pursuant to CPLR 3211 (a) (7), alleging that Plaintiff has failed to state a claim.

Defendants Pinkas Sommer, the alleged owner of the building, Meyer Sommer, the managing agent and trustee for the landlord, and Kasmund Realty Trust (Kasmund), the landlord (collectively referred to as the Kasmund defendants), move to dismiss the complaint based on lack of personal jurisdiction, res judicata, collateral estoppel, and failure to state a cause of action. The Kasmund defendants seek the imposition of sanctions against Plaintiff for commencing a frivolous action and contend that if the complaint is not dismissed, they should be allowed to file a late answer.

With respect to the Kasmund defendants, Plaintiff cross-moves pursuant to CPLR 320 (b) and CPLR 3215, seeking a default judgment for all of the relief requested in the complaint, denying the request to file a late answer and imposing sanctions for making an untimely and frivolous motion to dismiss, including costs or attorneys fees associated with the preparation of the instant motion. As against the City, Plaintiff seeks an order, pursuant to Section 50-e (5) of the General Municipal Law, permitting him to file a late notice of claim and compelling the City to file a responsive pleading.

FACTUAL ALLEGATIONS

In 2004, Plaintiff began to sublease an apartment at 320 West 106th Street from Asafu-Adjaye, the tenant of record. As Asafu-Adjaye was residing in Accra, Ghana, he allegedly instructed Plaintiff to pay his rent directly to Kasmund. Meyer Sommer, the trustee of Kasmund, allegedly accepted direct payments of rent from Plaintiff. After taking possession of the Apartment, a rent-dispute developed between Asafu-Adjaye and Plaintiff involving a disputed overcharge for the apartment.

On May 29, 2005, Asafu-Adjaye returned from Ghana and changed the locks on the apartment without notifying Plaintiff. After finding that the locks had been changed, Plaintiff contacted the New York City Police Department (the Police Department) who restored Plaintiff to the apartment. The Police Department did not require Asafu-Adjaye to change the locks back or check that the Plaintiff's keys fit the new locks. On May 30, 2005, Plaintiff was again unable to gain access to the apartment as Asafu-Adjaye refused to provide him with keys to the new locks.

On June 8, 2005, Plaintiff commenced an illegal lockout proceeding (Index No. 074912/2005) in the Civil Court of the City of New York (the Lockout Proceeding). Plaintiff alleged that both Asafu-Adjaye and Kasmund were responsible for illegally locking him out of the apartment. A hearing was held on June 10,

2005, at which Plaintiff entered into a stipulation with Meyer Sommer absolving Kasmund of any wrongdoing in relation to the alleged illegal lockout. Asafu-Adjaye did not appear. An order was also issued which required Asafu-Adjaye to provide Plaintiff with access to the subject premises and authorizing Plaintiff to change the locks himself with the assistance of a certified locksmith and the Police Department if Asafu-Adjaye failed to comply.

Upon entering the subject apartment on June 14, 2005, Plaintiff claims that he discovered that all of his personal property and possessions were missing including digital files and hard copies of documents which belonged to his law practice. Plaintiff argues that the Kasmund defendants as well as Asafu-Adjaye have ignored requests to return the stolen property. Although Plaintiff reported the property theft to the police, the investigation was subsequently abandoned.

On June 17, 2005, Asafu-Adjaye sent Meyer Sommer an e-mail which stated that he was surrendering the apartment to Sommer as of June 7, 2005. On July 8, 2005, Kasmund served Plaintiff with a notice to quit. After Plaintiff failed to vacate the premises, Kasmund commenced a summary holdover proceeding (Index No. 83925/05) (the Holdover Proceeding) in Civil Court. The trial in the Holdover Proceeding was held on April 11, 2006, however Plaintiff failed to appear. After the

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court conducted an inquest, a final judgment of possession was entered against Plaintiff as well as a money judgment in the amount of \$11,968. On June 9, 2006, Plaintiff moved to vacate the default judgment and to dismiss the petition for lack of jurisdiction. This motion was denied and Plaintiff was evicted from the apartment on June 30, 2006.

On June 30, 2006, Plaintiff filed the verified complaint in this action alleging various causes of action, including a claim that Plaintiff was entitled to compensation from the Kasmund defendants and the City for losses suffered when he was locked out of the apartment by Asafu-Adjaye. Service was not made personally on the Kasmund defendants, and mail service upon their counsel was rejected as the summons and complaint failed to include an index number and the date of filing.

A preliminary conference was held on July 18, 2006 before another justice of this court, at which time the proceeding was transferred to a City Part. Counsel for the Kasmund defendants appeared at the preliminary conference. Another conference was held in the City Part on or about September 26, 2006, at which time counsel for the Kasmund defendants appeared and informed the part clerk that they never were served with the summons and complaint. Thereafter, the proceeding was adjourned until November 2006 to allow the Kasmund defendants and the City time to file motions to dismiss.

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The City and the Kasmund defendants each moved to dismiss the complaint (motion sequences 002 and 003, respectively). The City's motion to dismiss was granted on default. Once the case was transferred to me as a result of the dismissal of the case against the City, I issued an interim order on February 16, 2007, which vacated plaintiff's default on the City's motion; restored the City's motion to the calendar; restored the motion to dismiss of the Kasmund defendants to the motion support calendar, together with the City's motion and a cross motion by Plaintiff which included his opposition to the City's motion, all under motion sequence 004. Defendants were given an opportunity to serve replies to Plaintiff's cross-motion and opposition.

DISCUSSION

The City alleges that the Plaintiff's failure to follow the notice of claim requirements of section 7-201 of the New York City Administrative Code and sections 50-e and 50-i of the General Municipal Law require that Plaintiff's claims against the City be dismissed. Plaintiff opposes the motion, arguing that proper notice was made and requests that if such notice is found to be inadequate, that he be given permission to file a late notice of claim.

Section 50-i of the General Municipal Law requires that a notice of claim be filed with the Comptroller as a pre-

condition to all actions sounding in tort. Section 50-e (1) further requires that a notice of claim be filed within ninety days from when the claim arises.

According to Section 50-e (5), upon application, the court can extend the time period to serve a notice of claim, but the extension cannot exceed one year and ninety days after the action accrued, unless the statute has been tolled. The service of a timely notice of claim is jurisdictional, and the courts lack any power to extend the time to file a notice of claim if application therefor has not been made prior to the expiration of the applicable statutory period. See *Pierson v City of New York*, 56 NY2d 950, 954 (1982); *Goffredo v City of New York*, 33 AD3d 346, 347 (1st Dept 2006).

Plaintiff admits that he never filed a notice of claim with the Comptroller and did not timely file a motion requesting leave to file a late notice of claim (Crutchfield Aff., ¶ 80). While Plaintiff contends that he did give notice to the Public Advocate of the City of New York, the Public Advocate's office was simply copied on a letter Plaintiff wrote to the commanding police officer of the 24th Precinct on June 7, 2006, almost a full year after the alleged incident requesting that all evidence be preserved in the matter.

"The requirements of General Municipal Law § 50-e (2) are not fulfilled when a plaintiff or an attorney writes a letter

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to a City agency suggesting that unmet demands might lead to litigation. If they were, the City would be placed in an untenable position since any number of everyday disputes between citizens and City agencies will inevitably yield streams of similar, vaguely threatening correspondence. Section 50-e does not abet notice of claim by stealth." *Rosenbaum v City of New York*, 8 NY3d 1, 11-12 (2006). Therefore, this letter does not constitute a notice of claim.

In opposition to the motion to dismiss, Plaintiff argues that a notice of claim was not required for this action as it is "fundamentally one that sounds in equity- that is for the recovery of [a] chattel" (Crutchfield Aff., ¶ 88). Plaintiff asserts that the heart of his complaint requests the return of the property and monetary compensation only in the alternative. In addition, Plaintiff requests that the Defendants be constrained from continuing to tortiously interfere with his law practice (Crutchfield Aff., ¶ 91).

"The requirement to file a formal notice of claim with the municipality does not apply to an action in equity to restrain a continuing act, and to demands for money damages which are merely incidental to such equitable claims." *American Pen Corp. v City of New York*, 266 AD2d 87, 87-88 (1st Dept 1999); see also *Dutcher v Town of Shandaken*, 97 AD2d 922 (3d Dept 1983). While Plaintiff demands in his first cause of action the recovery

of his property from all defendants, Plaintiff has not presented any evidence that the City or the Police Department are in possession of the belongings which he alleged were stolen from the apartment. The prayer for relief states that if the property cannot be returned, Plaintiff should receive judgment against the defendant in the sum of \$87,500 and damages of \$519,788 for the other causes of action. In addition, the prayer for relief seeks punitive damages in the amount of \$1,214,576. As the action against the City is not equitable in nature and as there is no claim that the Police Department has Plaintiff's property, any recovery against the City or the Police Department can only be monetary.

Plaintiff also argues that the tort against plaintiff is a continuing one and shall continue until the property converted is returned. A continuing tort is a tort in which a continuing course of conduct exists. *Demas v Levitsky*, 291 AD2d 653 (3d Dept 2002); see also *Bloomfield Bldg. Wreckers, Inc. v City of Troy*, 41 NY2d 1102 (1977); *New York Seven-Up Bottling Co. v Dow Chemical Co.*, 96 AD2d 1051 (2d Dept 1983), affd 61 NY2d 828 (1984). Here, there was only one tortious act complained of. The act which gave rise to Plaintiff's cause of action against the Police Department and the City occurred on May 29, 2005 when the Police Department restored Asafu-Adjaye to the apartment without assuring that Asafu-Adjaye changed the locks back or that

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Plaintiff had a set of keys for the new locks. Therefore, there exists no continuing tort by the City or the Police Department that would serve as a justification to extend the notice of claim requirement dates.

In asserting claims against the City and the Police Department, Plaintiff had an obligation to file a timely notice of claim. By failing to meet this requirement as well as failing to file a motion for leave to file a late notice of claim, Plaintiff's claims against the City and the Police Department are barred. Therefore, the City's motion to dismiss based upon Plaintiff's failure to comply with the notice of claim requirements under sections 50-e and 50-i of the General Municipal Law and sections 7-201 of the New York City Administrative Code is granted. Plaintiff's cross motion compelling the City to file a responsive pleading and extending Plaintiff's time to respond to the City's motion to dismiss is denied.

The Kasmund defendants argue that this court lacks personal jurisdiction based upon Plaintiff's improper service of the underlying summons and complaint. In his cross motion, Plaintiff requests that the court enter a default judgment against the Kasmund defendants and deny them the opportunity to file a late answer.

On July 12, 2006, Plaintiff sent a copy of the summons

and complaint by mail to each of the Kasmund defendants and to the attorney who had represented Kasmund Realty Trust in the Holdover Proceeding. This allegedly was done as a means of effecting service of process under CPLR 312-a. On July 13, 2006, Ita R. Flug, counsel for the Kasmund defendants, wrote to Plaintiff and rejected service of the summons and the complaint as it failed to include the index number and the date of filing as required by CPLR 305 (a). Despite rejecting service by mail, counsel for the Kasmund defendants appeared at the July and September 2006 conferences, and also before me on February 14, 2007. Counsel for the Kasmund defendants claim only to have learned of the November conference by checking "e-courts", and not by notification from Plaintiff. They say that the case was adjourned to November to allow the City and the Kasmund defendants time to file motions to dismiss.

Once the case was referred to me for the calendaring of a conference, after the City's motion was granted, I learned of the outstanding motion to dismiss and related issues. At the February 14, 2007 conference, counsel for the Kasmund defendants stated that their office never received a copy of the cross motion filed by Plaintiff. An interim order was prepared so all of the motions could be addressed by all parties.

The Kasmund defendants argue that the court lacks jurisdiction as the summons and complaint did not bear an index

number or the date of filing. CPLR 305 (a) states, "[a] summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff's address, and also shall bear the index number assigned and the date of filing with the clerk of the court." The First Department has held that although an index number or a date of filing has not been included on a summons, "a failure to comply with the technical requirements of CPLR 305 (a) does not warrant dismissal unless there is a showing of prejudice caused by such defect." *Cruz v New York City Hous. Auth.*, 269 AD2d 108, 109 (1st Dept 2000).

Here, the Kasmund defendants fail to demonstrate how they suffered any prejudice as a result of not knowing the index number or the filing date. On July 14, 2006, two days after receiving the summons and complaint, the Kasmund defendants received a notice of the preliminary conference which included the index number. Furthermore, the acknowledgment form of the receipt of summons and complaint accompanying the summons also included the index number (Flug Affirm., ex. O). Therefore, the dismissal of the complaint based on the technicality of the summons not containing the index number or filing date is not warranted in the absence of a showing of prejudice.

The Kasmund defendants also argue that service was not complete as the acknowledgment form was not signed and returned

to Plaintiff and Plaintiff failed to effectuate service by some other means. Service is complete once the acknowledgment form is delivered to the sender. *Ananda Capital Partners, Inc. v Stav Elec. Sys. (1994) Ltd.*, 301 AD2d 430 (1st Dept 2003). "If the acknowledgment of receipt is not mailed or returned to the sender, the sender is required to effect personal service in another manner." *Shenko Elec. v Hartett*, 161 AD2d 1212, 1213 (4th Dept 1990); see also *Patterson v Balaquiot*, 188 AD2d 275 (1st Dept 1992) (holding that defendants are not under an obligation to sign an acknowledgment form).

Here, counsel for the Kasmund defendants rejected service by not returning the acknowledgment form. Once Plaintiff became aware that the Kasmund defendants had not accepted service under CPLR 312-a, it became Plaintiff's responsibility to serve the summons and complaint in a different manner. As the Kasmund defendants were not under any obligation to sign the acknowledgment form sent under the present circumstances, and as there is no evidence presented that Plaintiff attempted new service of the summons and complaint, service was incomplete.

Plaintiff argues that even if service of the summons and complaint is found to be defective, the appearance at the preliminary and compliance conferences by the Kasmund defendants is equivalent to personal service of the summons and complaint and therefore jurisdiction is conferred. CPLR 320 (a) provides

that a defendant may formally appear in an action "by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." The courts also recognize informal appearances. An informal appearance occurs when a defendant, without making a formal appearance under CPLR 320 (a), participates in the case in some way relating to the merits. The First Department has held "[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." *Rubino v City of New York*, 145 AD2d 285, 288 (1st Dept 1989); see also *Feola v Moore McCormack Lines, Inc.*, 173 AD2d 256 (1st Dept 1991) (holding that defendant informally appeared by serving a reply and participating in the defense of an action for eleven years without raising any jurisdictional objection); *USF&G v Maggiore*, 299 AD2d 341 (2d Dept 2002) (holding that insurance companies which were named in the interpleader complaint, but failed to serve an answer appeared informally by making a late claim).

Here, the Kasmund defendants have not made an informal appearance as they did not attend the conferences in order to argue the merits of the case. Instead, the Kasmund defendants alerted the court that the conferences should be adjourned as the parties were not properly served. The only result of the preliminary conference was that the matter was transferred to the

City Part. At the September 26, 2006 compliance conference, counsel for the Kasmund defendants notified the part clerk that the Kasmund defendants had not been properly served with the summons and complaint and the case was adjourned until November to allow motions to dismiss to be filed.

Therefore, the motion to dismiss the complaint based upon a lack of personal jurisdiction is granted, and Plaintiff's cross motion seeking the entry of default judgment and denying the Kasmund defendants the right to file a late answer is denied.

Both Plaintiff and the Kasmund defendants seek the imposition of sanctions against one another. The Kasmund defendants seek sanctions against Plaintiff pursuant to NYCRR § 130-1.1 for commencement of this action and the Plaintiff seeks sanctions for the filing of the motion to dismiss.

Section 130-1 (c) defines conduct as frivolous if it (i) is completely without merit and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, (ii) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, or (iii) it asserts material factual statements that are false. There is no basis for the imposition of sanctions against the Kasmund defendants, who have filed a meritorious motion to dismiss on procedural grounds.

The motion by the Kasmund defendants for sanctions also

is denied in the court's discretion. The allegations in the complaint are plainly inconsistent with Plaintiff's statement in the so-ordered stipulation, and with the order of the court in the Lockout Proceeding. If the action were not dismissed on jurisdictional grounds, it almost certainly would be dismissed as against the Kasmund defendants under the doctrine of collateral estoppel. Also, Plaintiff alleges that the subject apartment is rent regulated, that he was overcharged, and that he should have become the primary tenant of record, but these matters are not properly before this court. Since the complaint is dismissed on jurisdictional grounds and the merits of the complaint (or complete lack thereof) are not relevant to that determination, no further sanction is required. Accordingly, it hereby is

ORDERED that the City of New York's motion seeking the dismissal of the complaint of Plaintiff Mark Crutchfield is granted; and it further is

ORDERED that the motion of defendants Pinkas Sommer, Meyer Sommer and Kasmund Realty Trust to dismiss the complaint of Plaintiff is granted; and it further is

ORDERED that the cross motion of the Plaintiff seeking the entry of default judgment against the Kasmund defendants is denied; and it further is

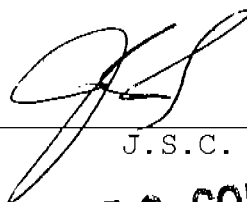
ORDERED that the cross motion of the Plaintiff against the City of New York is denied; and it further is

ORDERED that the requests for sanctions by Plaintiff, Pinkas Sommer, Meyer Sommer and Kasmund Realty Trust are denied; and it further is

ORDERED that the Clerk of the Court is directed to enter judgment dismissing this action in its entirety, with taxable costs and disbursements to defendants.

Dated: June 22, 2007

ENTER:



J.S.C.
JANE S. SOLOMON

FILED
JUN 25 2007
NEW YORK
COUNTY CLERK'S OFFICE