

**1150 Broadway LLC v Classic Closeouts LLC**

2007 NY Slip Op 33383(U)

October 12, 2007

Supreme Court, Nassau County

Docket Number: 6624-06/

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

1150 BROADWAY LLC,  
Plaintiff,

TRIAL / IAS PART 32  
NASSAU COUNTY

- against -

Index No. 16624/06

CLASSIC CLOSEOUTS LLC,  
Defendant.

Motion Sequence No. 002 & 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1, 2</u>
Answering Affidavits .....	<u>3</u>
Replying Affidavits .....	_____
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant moves for an order pursuant to CPLR 3211 (a) (8) based upon lack of jurisdiction over the person of the intended defendant, and the imposition of attorney's fees and sanctions under 22 NYCRR § 130-1.1, *et seq.* The plaintiff opposes the defendant's motion to dismiss the amended complaint, and imposing sanctions against the plaintiff and the attorney for the plaintiff. The plaintiff also moves for an order pursuant to 22 NYCRR § 130-1.1, *et seq.* implementing the April 6, 2007 order of Justice Thomas Feinman which directed the defendant to reimburse the plaintiff \$350.00, and for costs and fees of this cross motion. The defendant opposes the cross motion. The nature of the underlying real property action is a landlord and tenant dispute.

The defendant previously moved for an order pursuant to CPLR 5015 (a) vacating the

default judgment, an order pursuant to CPLR 3012 (d) extending the defendant's time to answer the complaint, and compelling the plaintiff's attorney to accept the answer and discovery notices previously served, and an order granting the relief sought in paragraphs (a) and (b) pursuant to CPLR 2004 and 2005. On May 7, 2007, this Court granted the motion, vacated the default judgment, and granted the defendant time to answer the complaint provided the defendant or defense counsel provide the plaintiff's counsel with answer and the discovery notices referenced in the motion within 20 days after service of a copy of this order with notice of entry by the defense counsel. The plaintiff's counsel is directed to accept those papers.

The defense attorney states, in a supporting affirmation dated July 23, 2007, to the defense motion, this Court already addressed this action in the context of a prior motion by the defendant Classic Closeouts, LLC, a New York limited liability company, to vacate a default judgment which the plaintiff was improperly utilizing to attach assets of the defendant, a Nevada limited liability company. The defense attorney states the plaintiff served a timely amended complaint on June 27, 2007, but notwithstanding that fact the amendment is jurisdictionally defective because there are two separate entities, and it is undisputed the plaintiff served the New York limited liability company with the name, to wit CC New York formed on April 30, 2002, and never served CC Nevada formed on September 19, 2005. The defense attorney indicates that distinction between CC New York and CC Nevada was explained in Daniel Greenberg's affidavit dated April 6, 2007 which was submitted in connection with CC New York's prior motion to vacate the default judgment. The defense attorney asserts the plaintiff now proposes to amend the complaint to substitute CC Nevada in place of CC New York, and by plaintiff's counsel own prior admission, CC Nevada is not registered with the New York Department of

State, which is being corrected as of July 23, 2007, but has not yet been corrected. The defense attorney contends there is no justification for what the plaintiff's counsel seeks here, and those actions are clearly frivolous.

The plaintiff's attorney states, in an affirmation dated August 1, 2007, in opposition to the defense motion, and in support of the cross motion, the defense motion should be denied because the Court, in vacating the prior default judgment, held jurisdiction was properly acquired over the defendant, and directed the action should be tried on the merits finding the tenant had colorable meritorious defenses. The plaintiff's attorney notes, when the defendant made its prior motion to vacate the default, the defense was on notice the so-called CC Nevada did not comply with the registration requirements of the Limited Liability Companies Law Articles 2 and 8. The plaintiff's attorney contends the statutes mandate every foreign limited liability company must be registered in New York before it transacts business, and the name of the limited liability company must be sufficiently distinct so as to avoid confusing the plaintiff and the public. The plaintiff's attorney points to his affirmation dated April 10, 2007 in opposition to the defendant's motion that the alleged CC Nevada did not comply with the statutes. The plaintiff's attorney reports the defendant still refuses to comply with Limited Liability Companies Law Articles 2 and 8, and as of August 1, 2007, is still operating its business in New York State without the requisite approval of the New York State Secretary of State. The plaintiff's attorney points out the defendant, a former tenant of the plaintiff, was served with process, and the defense counsel admits in his affirmation that the defendant is transacting its business, and has its principal office at 110 West Graham Avenue, Hempstead, New York, and was a tenant of the plaintiff at 1150 Broadway, Hewlett, New York maintaining its bank accounts in New York. The plaintiff's

attorney maintains the defendant, under these circumstances, is estopped from claiming this Court did not acquire personal jurisdiction over the defendant, and Courts view with disfavor a defendant's failure to comply with statutes that require the defendant register under the applicable New York State registration laws. The plaintiff's attorney argues when the Court vacated the default judgment the Court recognized the alleged confusion articulated by the defense had been entirely created by the defendant, and the defense assertion of two distinct entities, a Nevada limited liability company, which was the tenant, and an allegedly independent New York limited liability company is conclusory and without supporting documentation.

The plaintiff's attorney claims challenges the defense assertion of acting in bad faith, and declares plaintiff's counsel reasonably relied on the public records maintained by the Secretary of State. The plaintiff's attorney avers the complaint was amended to conform to the affidavits submitted by the defendant in the prior motion, and plaintiff's refusal, as addressed in plaintiff attorney's letter dated July 20, 2007, which letter was not submitted on the prior defense motion, shows the plaintiff, in good faith, did not capitulate to the defense ultimatum to discontinue the action.

The plaintiff's attorney states on April 6, 2007, four months after the default judgment was entered, defense counsel notified this affirgant by telephone that defense counsel would present an order to show cause to the Court at 2:00 p.m. to vacate the default judgment and seek a temporary restraining order staying enforcement of the default judgment. The plaintiff's attorney states he appeared in the ex parte clerk's office at 2:00 p.m., but defense counsel did not appear until 3:15 p.m., when the clerk instructed them that the order to show cause, and the application for the temporary restraining order would be heard by Justice Feinman. The

plaintiff's attorney asserts Justice Feinman directed defense counsel to reimburse the plaintiff for one hour of lost time, and the defense counsel agreed. The plaintiff's attorney asserts his billing rate is \$350.00 per hour, and requested payment, in writing on May 9, 2007, from defense counsel in accord with Justice Feinman's order, but plaintiff's counsel never received payment.

The defense attorney states, in a reply affirmation dated August 7, 2007, in opposition to the plaintiff's cross motion for sanctions, and in reply with respect to defendant's motion to dismiss, dismissal is mandated because the plaintiff acquired jurisdiction over the defendant, a New York limited liability company, and plaintiff's initial pleading only plead a cause of action against that entity, and service was only effectuated against that entity. The defense attorney reiterates the defendant has demonstrated there are two separate and legally cognizable entities with the same name, to wit there is another entity named Classic Closeouts, LLC, which is a Nevada limited liability company. The defense attorney contends, while the plaintiff amended its pleading which it was timely permitted to do, and without the benefit of any additional service, and without leave of the Court, the defense simply changed the complaint to switch CC Nevada in place of CC New York which the defense could not do. The defense attorney asserts plaintiff's counsel has submitted nothing, in admissible form, or otherwise contradicted the filing receipts presented to this Court about the status of CC Nevada and CC New York.

The defense attorney states plaintiff's cross motion is only partially true. The defense attorney states Justice Feinman, at one point in issuing the temporary restraining order in connection with the motion to vacate the default judgment and to compel acceptance of the defendant's answer, conditioned the order to show cause upon the payment of a fee to the plaintiff's attorney. The defense attorney points to the order to show cause issued in front of both

counsel in Justice Feinman's chambers which demonstrates Justice Feinman did not condition the order to show cause upon the payment of a fee to the plaintiff's attorney. The defense attorney also notes the plaintiff's counsel never objected nor raised any issue with respect to any omission by Justice Feinman with respect to any conditions for the temporary restraining order. The defense attorney argues plaintiff counsel's approach to service of process is novel, as a mere formality, and plaintiff counsel's argument with respect to the cross motion is equally without merit, and only further demonstrates why the Court should impose attorney's fees and sanctions pursuant to 22 NYCRR § 130-1.1, *et seq.*

The Court has carefully reviewed and considered all of the parties' submissions on the motion and cross motion. CPLR 3211 (a) (8) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the court has not jurisdiction of the person of the defendant." The method of service used here to acquire jurisdiction over the defendant was resort to Limited Liability Company Law § 303 (a) which provides:

Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose.

Two New York trial courts have permitted jurisdiction by estoppel since *Gelfand*. *See, Farmingdale Steer-Inn, Inc. v. Steer Inn Realty Corp.*, 51 Misc.2d 986, 987-88, 274 N.Y.S.2d 379, 380-81 (1966) (service on defendant who represented

itself as authorized to do business in this state sufficient; “[I]t would be hostile to our State policy as expressed in statutes [General Corporation Law, § 218, Business Corporation Law § 1312] to permit the defendant to deny now that it was present in this State”); *John’s, Inc.*, 49 Misc.2d at 1091, 269 N.Y.S.2d at 236 (service on defendants who held themselves out as joint venturers constituted good and valid service of process on other corporate defendants). Thus it would appear that the *Gelfand* court holding that New York law does not permit jurisdiction by estoppel has been altered in subsequent years

*First American Corp. v. Price Waterhouse LLP*, 988 F.Supp. 353, 360, footnote 1 [SDNY,1997].

It appears to this Court the defendant here is estopped from denying now that it was not present in this State. Thus, the Court does have jurisdiction over the person of the intended defendant.

22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

22 NYCRR § 130-1.1 (b) provides:

The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

22 NYCRR § 130-1.1 (c) provides:

For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension,

modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

This Court has considered, as required by 22 NYCRR § 130-1.1 (c), whether the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and whether or not the conduct continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party. The Court finds neither party has met the burden of showing there was frivolous conduct as required 22 NYCRR § 130-1.1.

Accordingly the motion and cross motion are denied in all respects.

So ordered.

Dated: **October 12, 2007**

ENTER:



J. S. C. ANTON  
ANTONIO I. BRANDVEEN

FINAL DISPOSITION      NON FINAL DISPOSITION xxx

**ENTERED**  
OCT 18 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE