

Saleh v 50 E. 119th St., LLC

2007 NY Slip Op 33707(U)

November 14, 2007

Supreme Court, New York County

Docket Number: 0110689/2006

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER
J.S.C.
Justice

PART 5

Saleh, I

INDEX NO. 110689106

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

50 E 119 ST

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
NOV 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/14/07

EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
IBRAHIM SALEH and FAROUQ SALEH,

Plaintiffs,

Index No.
110689/06

- against -

Decision
and Order

50 EAST 119TH STREET, LLC, MAURICE ENBAR,
FLATIRON EQUITIES, LLC, ADAM ENBAR,
THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, and "JOHN DOE," said name
being fictitious and intended to designate the NYC Police
Officer(s) who tortiously entered and remained in plaintiff's
apartment and/or who committed other tortious acts against
plaintiff,

Mot. Seq. 001

Defendants.

-----X
HON. EILEEN A. RAKOWER:

Plaintiffs allege damages as a result of the eviction of Ibrahim A. Saleh from apartment 2A in premises located at 50 East 119th Street, New York, New York. Ibrahim A. Saleh alleges that he was the tenant of record, that he gave a power of attorney to his brother Farouq Saleh to act in his absence, that he went to Yemin for four months in July 2005, and that in October 2005, in Farouq Saleh's presence, the landlord changed the locks and evicted plaintiffs. Plaintiff Farouq Saleh brought an action in landlord and tenant court *pro se*, which was dismissed. Plaintiff Ibrahim A. Saleh brought an order to show cause seeking to be restored to the premises, which was heard in May 2006 and which resulted in a stipulation of settlement between those parties. Plaintiffs, on August 1, 2006, filed with the Clerk of this Court a Summons with Notice. A complaint was not filed, however, until May 15, 2007.

Defendants Maurice Enbar, Adam Enbar and Flatiron Equities, LLC ("moving defendants") bring this motion to dismiss for plaintiff's failure to properly and timely serve the complaint. Plaintiffs cross move to deem the Verified Complaint timely *nunc pro tunc*, thereby excusing any delay in filing. It should be noted that the City

defendants served an answer to the verified complaint. The motion and cross motion were initially assigned to Justice Marilyn G. Diamond, who, by Order dated October 26, 2007, referred the motion for reassignment to a City Part.

Defendants received a Summons with Notice dated July 31, 2006, bearing the following caption: "Ibrahim Saleh and Farouq Saleh against Maurice Enbar, Adam Enbar, Flatiron Equities, LLC, Green & Cohen PC, New York City, New York City Police Department, NYPD Officer "John Doe", Said Name Being Fictitious And Intended to Designate the NYC Police Officer(s) Who Responded to the Subject Apartment & Wrongfully Allowed the Co-defendant(s) to Unlawfully Change the Locks & Wrongfully Evict Plaintiffs From the Subject Apartment." While moving defendants do not concede proper service of the summons with notice, the summons with notice alerted them to causes of action for breach of contract, breach of plaintiff's leases, illegal lockout and wrongful eviction, misrepresentation, negligence, infliction of emotional distress, trespass, specific performance of a residential lease, and it sought temporary, preliminary and permanent injunctive relief.

Attorneys for moving defendants sent a notice of appearance with demand for a copy of the complaint and all supporting papers in the action, dated September 5, 2006. A verified complaint, sworn to on May 1, 2007, was finally filed with the Clerk of the Court under the above captioned index number on May 15, 2007. The verified complaint filed, however, bore the caption, "Ibrahim A. Saleh and Farouq Saleh against 50 East 119th Street, LLC, Maurice Enbar, Flatiron Equities, LLC., Adam Enbar The City of New York, New York City Police Department, and "John Doe" Said Name Being Fictitious and Intended to Designate the NYC Police Officer(s) Who Tortiously Entered & Remained in the Plaintiff's Apartment And/or Who Committed Other Tortious Acts Against Plaintiff."

CPLR 305(b) states

Summons and notice. If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default.

CPLR §3012(b) states:

Service of complaint where summons served without complaint. If 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. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

CPLR §3012(d) states:

Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

Moving defendants clearly set forth that a complaint relating to the summons with notice they received was not supplied to them pursuant to their demand. Further, the complaint that was ultimately filed bears a different caption. Plaintiffs cross move to excuse the late filing of their complaint, providing an excuse for their delay.

Plaintiffs proffer the following excuse for their late filing:

The reason for the delay in the service of the Complaint in this proceeding, was that the affirmant was waiting for a decision to be sent on an Order to Show Cause that was submitted to the landlord tenant court at the end of January 2007, but after several months of not receiving any decision by the Court, and not receiving any word from the within defendants' movants' counsel, who represented the landlord-owner in the landlord tenant proceeding, the plaintiffs herein decided that they could no longer afford to wait for any determination in the Housing Court and thereupon your affirmant drafted the within Verified Complaint, filed it with the Court on May 17, 2007, and immediately

served it on the defendants' counsel, Mr. William, Esq., and personally delivered same to the NYC Corporations Counsel's Office that same date.

Plaintiffs also concede that the captions filed were at odds with one another, and that they

duly filed an Amended Summons with the New York County Clerk's Office on July 3, 2007, a true copy of said Amended Summons is annexed hereto as Exhibit "A" and is incorporated herein by reference as though fully set forth herein at length. That Amended Summons together with the Verified Complaint is now with the process server to be served upon defendant-landlord-owner corporation, 50 East 119th Street LLC pursuant to Article 3 of the CPLR, since the defendants in their motion papers stated that Mr. Williams would not accept service on behalf of said corporation. I have faxed a true copy of said Amended Summons to Mr. Williams, Esq. At his law office, on July 5, 2007.

Plaintiffs argue that, pursuant to CPLR §§2004 and 2005, the court should extend the time to file the complaint and excuse any delay.

CPLR §2005 states:

Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.

The delay here, however, was not law office failure. Rather, it appears the delay was part of a strategy. The order to show cause which reportedly prompted the delay was not even filed until long after the time to provide the complaint pursuant to moving defendants' demand had expired. Also, the complaint was not drafted until May 2007, long after the January 2007 order to show cause. Despite plaintiff's contention that it could wait no longer for a decision, and finally proceeded in May 2007, moving defendants report that a decision on the order to show cause had been promptly rendered. They supply a copy of the Civil Court's decision dated January 26, 2007. It denied the order to show cause, stating "[r]espondent-landlord was only

obligated to 'restore' petitioner tenant to possession and respondent has complied with that obligation. Respondent was not obligated to 'renovate' the apartment."

Additionally, in lieu of an affidavit of merit to support the action here, plaintiffs provide the affidavit of Ibrahim A. Saleh, submitted in support of an order to show cause in the underlying landlord tenant action, dated March 20, 2006, which sought restoration to the apartment plaintiffs were evicted from. Indeed, it appears from the decision dated January 26, 2007 that plaintiffs received some relief in the landlord tenant action and were restored to possession.

The court, within its discretion, will not excuse plaintiffs' delay in drafting, serving and filing the complaint. Plaintiffs elected to wait before proceeding with the proposed action in the Supreme Court. Election of a strategy is not an excuse for delay.

Wherefore, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed as against Maurice Enbar, Adam Enbar and Flatiron Equities, LLC. only; and it is further

ORDERED that the cross motion to excuse the delay in filing the complaint is denied; and it is further

ORDERED that moving defendants shall serve all parties who have appeared in this action with a copy of this order with notice of entry; and it is further

ORDERED that the remainder of the action shall continue.

All other relief is denied. This constitutes the decision and order of the Court.

DATED: November 14, 2007


EILEEN A. RAKOWER, J.S.C

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NEW YORK