

Rivera v USA Bldrs. & Dev. Corp.

2008 NY Slip Op 30557(U)

February 25, 2008

Supreme Court, New York County

Docket Number: 0602493/2007

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 602493/2007

RIVERA, MARIA

INDEX NO. 602493107

vs

USA BUILDERS & DEVELOPMENT

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS

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 A+B

Answering Affidavits — Exhibits A-C

Replying Affidavits 1 cur. A

| PAPERS NUMBERED | |
|-----------------|--|
| 1 | |
| 2 | |
| 3 | |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 25 2008

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X

Maria Rivera and Wilson Mendez,

Plaintiff,

-against-

USA Builders & Development Corp., et al.

Defendants.

-----X

Index No. 602493/07

Decision and Order

FILED

FEB 29 2008

NEW YORK
COUNTY CLERK'S OFFICE

Shulman, J.:

Plaintiffs commenced this action by filing a summons with notice on July 24, 2007 indicating that the nature of the action is for *inter alia* breach of contract and fraud stemming from plaintiffs' purchase of certain real property located in Bronx County, New York. Defendant Bathgate Partners, LLC ("Bathgate"), one of thirteen defendants named in the summons with notice, served a demand for the complaint on plaintiffs' counsel on August 13, 2007. Upon plaintiffs' failure to timely serve a complaint, Bathgate moved to dismiss the action. In response to the instant motion, plaintiffs served a complaint, albeit untimely.¹

In addition to plaintiffs' failure to timely serve the complaint, Bathgate also argues that the action should be dismissed because the summons served did not bear the date of filing with the Clerk of the Court, as required by CPLR 305(a) and incorrectly

¹ Plaintiffs subsequently served an amended complaint naming additional defendants.

named the venue of the action as being in Bronx County rather than New York County.²

At the outset, dismissal is not warranted on these grounds.

Generally, an absence of either the index number or date of filing, or both, is excusable in the absence of any showing of actual prejudice (*Cruz v New York City Hous. Auth.*, 269 AD2d 108, 109 [1st Dept 2000]). Bathgate does not allege any prejudice as a result of this omission.

Similarly, whether an incorrect venue is a jurisdictional defect mandating dismissal depends upon the circumstances, including prejudice to the defendant (*Forte v Long Island R. R.*, 143 Misc 2d 663, 664-665, 541 NYS2d 729 [Sup Ct, NY Cty, 1989]). For instance, when the summons lacks a correct venue designation, the defendant does not know where to file its answer. *Id.* In this case, however, no answer was required since the complaint was not served and Bathgate does not allege prejudice. Here, there is a mere defect in form (*see generally Anderson v Monticup*, 124 AD2d 320, 321 [3d Dept 1986]; *Tobia v Town of Rockland*, 106 AD2d 827, 829-830 [3d Dept 1984]; *Russo v Besidine*, 93 AD2d 790, 790-791 [1st Dept 1983]; *Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289, 295-296 [1st Dept 1983], *app. disp.* 60 NY2d 585)

With respect to plaintiffs' failure to timely serve the complaint, CPLR §3012(b) provides that, if the complaint is not served with the summons, the defendant may serve a written demand for the complaint. Service of the complaint shall be made

² The caption on the summons reads "County of Bronx" and the body of the summons states that the action was brought in Bronx County based on the location of the property at issue. However, to the right of the caption, the summons states that plaintiffs designate New York County as the place of trial.

within 20 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.

In his affirmation in opposition, plaintiffs' attorney summarily states that his office did not receive the demand. No other explanation is offered. Service of papers on an attorney is complete upon mailing (CPLR 2103 [b] [2]). A properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is insufficient to rebut this presumption (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Engel v Lichterman*, 62 NY2d 943, 944-945 [1984]; *Northern v Hernandez*, 17 AD3d 285, 286 [1st Dept 2005]). Plaintiffs' papers raise no question of fact as to whether proper service was made.

For a plaintiff to avoid dismissal for failure to timely serve a complaint, a reasonable excuse for the delay and the meritorious nature of the claim must be demonstrated (*Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905 [1985]; *Man v Mantione*, 174 AD2d 710 [2d Dept 1991]; *De Vito v Marine Midland Bank, N.A.*, 100 AD2d 530 [2d Dept 1984]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (*Id.*, 100 AD2d at 530). Here, plaintiffs' opposition consists of their attorney's affirmation and the untimely complaint verified by the attorney. Neither of these is sufficient to demonstrate the legal merit of plaintiffs' claims,³ as neither was submitted by a person with personal knowledge of the underlying facts of the complaint (*see Marion v Notre Dame Academy High School*, 133

³ With respect to Bathgate, the untimely complaint alleges only that defendant USA Builders & Development Corp., who sold the properties in question to plaintiffs, acquired them from Bathgate.

[* 5]

AD2d 614 [2d Dept 1987]). In light of plaintiffs' failure to provide a reasonable excuse for the complaint's untimely service and to establish the merits of their claim, the action should be dismissed as to Bathgate.

Accordingly, it is

ORDERED that Bathgate Partners, LLC's motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant Bathgate Partners, LLC, including costs upon motion pursuant to CPLR §8106, as taxed by the Clerk of the Court; and it is further

ORDERED that the action is severed and continued as to the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for Bathgate and plaintiffs.

DATED: New York, New York
February 25, 2008



HON. MARTIN SHULMAN, J.S.C.

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE