

Bender v Richardson
2010 NY Slip Op 30377(U)
February 25, 2010
Supreme Court, New York County
Docket Number: 114645/2008
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

IRVING AND NEIL BENDER,

Plaintiff,

-against-

KIMBERLY RICHARDSON, et al.,

Defendants.

INDEX NO. 114645/08

MOTION DATE Feb. 23, 2010

MOTION SEQ. NO. 002

MOTION CAL. NO. 51

The following papers, numbered 1 to 4 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, defendants' motion for summary judgment dismissing the complaint is decided in accordance with the accompanying decision and order.

FILED
MAR 01 2010

Dated: 2/25/10

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61**

-----X
**IRVING AND NEIL BENDER AS ADMINISTRATORS,
CTA FOR THE ESTATE OF WILLIAM GOTTLIEB**

**DECISION AND
ORDER**

Plaintiff,

Index No.: 114645/2008

-against-

**KIMBERLY RICHARDSON, ALEXANDRA ROMERO,
and LYDIA BATES GREGORY,**

Defendants.

-----X
HON. PETER O. SHERWOOD, J.S.C.:

This is an action to recover rent arrears and attorney's fees pursuant to a written lease agreement. Defendants Kimberly Richardson and Alexandra Romero move for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint. For the following reasons, the motion is granted and the complaint is dismissed.

On February 10, 2006, plaintiff, the owner of premises located at 173 Christopher Street, New York, New York, entered into a written lease agreement with defendants Kimberly Richardson ("Richardson"), Alexandra Romero ("Romero") and Lydia Bates Gregory ("Gregory") for the rental of Studio "C" at this address ("the premises") for a term of one year commencing on March 1, 2006 and expiring on February 28, 2007, at a monthly rental rate of \$3,300.00. The lease provided that the premises would be used as an office and art studio. Defendants vacated the premises on August 5, 2008, and surrendered the keys thereto that same date via Federal Express to plaintiff's attorney. The Federal Express receipt indicates that the package containing the premises keys was delivered on August 6, 2008.

On October 30, 2008, plaintiff commenced this action to recover from defendants the sum of \$36,300.00 in rent arrears alleged to be due for the period from September 1, 2007 through July 28, 2008, and attorney's fees incurred in the action to recover rent arrears. The complaint alleges that defendants vacated the premises on July 28, 2008.

A verified answer was served on behalf of defendants Richardson and Romero on or about December 8, 2009, which generally denies the allegations of the complaint, raises as affirmative defenses lack of personal jurisdiction over defendants Gregory and Romero, failure to join necessary

parties, res judicata, illegal tenancy, rent abatement, and constructive eviction and interposes counterclaims for breach of warranty of habitability, constructive eviction and an award of attorney's fees incurred in this action.

Defendants Romero and Richardson now move for summary judgment dismissing the complaint. Defendants contend that service of process was not properly effectuated upon Romero and Richardson and, therefore, the Court lacks personal jurisdiction over these defendants. The moving defendants also contend that another action for the same relief was commenced in the New York City Civil Court, New York County, and a judgment of dismissal was entered on June 26, 2008. Lastly, the moving defendants contend that the premises were illegally converted by plaintiff from a commercial to a residential use and that plaintiff cannot recover rent for such illegal tenancy. Although the motion return date was adjourned twice by stipulation, extending plaintiff's time to respond to the motion, no opposition papers have been submitted on plaintiff's behalf.

When seeking summary judgment, the moving party bears the burden of proving by competent, admissible evidence that no genuine issues of material fact exist (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). The Court finds that defendants have succeeded in meeting their burden of demonstrating their entitlement to judgment as a matter of law dismissing the complaint.

The affidavits of service annexed to the moving papers indicate that service of the summons and complaint was effectuated upon defendants Romero and Gregory pursuant to CPLR § 308 (4) by conspicuous place service at 173 Christopher Street, #1C, alleged to be defendant's "dwelling house/usual place of abode", with the affixing occurring on November 3, 2008, at 10:47 a.m., after three attempts at service made, respectively, on October 30, 2008, at 8:06 p.m., on November 1, 2008, at 11:55 a.m. and on November 3, 2008, at 10:47, failed.

4]

It is well settled that service pursuant to CPLR § 308 (4) may only be used in those instances where service under CPLR 308 (1) and (2) cannot be made with due diligence. Before “nail and mail” service (CPLR § 308 [4]) is employed, the process server should make genuine inquiries to determine a defendant’s whereabouts, work habits and place of employment (*see, Estate of Waterman v Jones*, 46 AD3d 63 [2d Dept. 2007]; *Gurevitch v Goodman*, 269 AD2d 355 [2d Dept. 2000]). The courts repeatedly emphasize that the due diligence requirement of CPLR 308 (4) must be strictly construed given the reduced likelihood that a summons served pursuant to that section will be received (*see e.g., McSorley v Spear*, 50 AD3d 652 [2d Dept. 2008], *lv denied* 10 NY3d 715 [2008], *rearg denied*, 11 NY3d 751 [2008]; *County of Nassau v Letotsky*, 34 AD3d 414 [2d Dept. 2006]). Due diligence refers to the quality of the efforts to make personal service, rather than the frequency of such efforts (*see, Estate of Waterman v Jones, supra*).

Here, the complaint alleges that defendants vacated the premises on July 30, 2008. Defendant Romero states in her sworn affidavit in support of the motion that defendants vacated the premises on August 5, 2008. Proof has also been submitted that the keys to the premises were forwarded to plaintiff’s attorney that same date. Therefore, the “nail and mail” service made upon Gregory and Romero at the premises on October 30, 2008, when Romero and Gregory no longer resided there, was ineffective to obtain jurisdiction over these defendants and the complaint must be dismissed as to them.

The defendants also seek dismissal of the complaint on the grounds that this was an illegal tenancy and, therefore, plaintiff is not entitled to recover rent. It is well settled that “[a]n owner of a de facto multiple dwelling who fails to obtain a proper certificate of occupancy or comply with the registration requirements of the Multiple Dwelling Law cannot recover rent or use and occupancy” (*Sheila Properties, Inc. v A Real Good Plumber, Inc.*, 59 AD3d 424, 425 [2d Dept 2009]; *see, Multiple Dwelling Law § 302 [1][b]*; *East 82 LLC v O’Gormley*, 295 AD2d 173 [1st Dept 2002]; *99 Commercial St. Llewellyn*, 240 AD2d 481 [2d Dept 1997]). Defendants contend that the premises were illegally converted from commercial to residential use; contained a full kitchen, three bedrooms, a living room and a bathroom; and was rented to defendants for residential use. Annexed to the answer is a copy of the certificate of occupancy which designates the premises as a commercial building consisting of offices, a factory and a janitor’s apartment. The rent ledgers for the period of

defendants occupancy indicates the rental payments as "residential market rent". The only evidence in the record which raises a question as to the leased premises intended use is the indication in the lease that the premises were being rented as an office and art studio. However, all other indications, including the allegations in the complaint that Romero and Gregory resided at 173 Christopher Street, suggest that a residential rental was contemplated. Accordingly, plaintiff is not entitled to recover rent or use and occupancy and the complaint must be dismissed on that ground.

In light of this conclusion, the Court does not address defendants' remaining contentions.

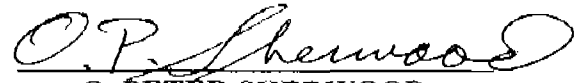
Based upon the foregoing discussion, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further;

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 2/25/10

ENTER:


O. PETER SHERWOOD
J.S.C.

COUNTY CLERK'S OFFICE

MAR 01 2010

FILED