

Bishop v Doyle & Brouman, LLP

2013 NY Slip Op 33346(U)

April 5, 2013

Sup Ct, Bronx County

Docket Number: 251947/2011

Judge: Norma Ruiz

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This opinion is uncorrected and not selected for official publication.

[* 1]

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PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

BISHOP, SAMAAD

Index No. 0251947/2011

-against-

Hon. NORMA RUIZ

DOYLE & BROUMAND, LLP

Justice.

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**Noticed on May 18 2012 and duly submitted as No. _____ on the Motion Calendar of 1-7-13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.Dated: 4 10 13

Hon. _____

WR
NORMA RUIZ, J.S.C.

C.

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK Index No.: 251947/2011
COUNTY OF BRONX

SAMAAD BISHOP, In Propria Persona

Plaintiff,

-against-

Present:
HON. NORMA RUIZ

DOYLE & BROUMAN, LLP., et al

Defendants.

The following papers numbered 1 to 22 Read on this motion DISMISSAL
Noticed on _____ and duly submitted as No. __ on the Motion Calendar of 1/7/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
Notice of Motions and Affidavits Annexed.....		1- 10
Answering Affidavits.....		11-15
Replying Affidavits		16
Memorandum of Law		17-22

Other:

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants Andre Clanagan ("Clanagan"), Stevenson Commons Associates, LP ("Stevenson Commons"), Michael B. Doyle ("Doyle"), Heidi Broumand ("Broumand"), Doyle & Brouman, LLP ("Doyle & Brouman"), Midtown Moving & Storage, Inc. ("Midtown"), Danny Weinheim City Marshall # # ("Weinheim City Marshall"), and Cambridge Security Services Corporation ("Cambridge") all make a pre-answer motion to dismiss the complaint. Upon a review of the moving papers and opposition submitted thereto, the motions are decided as set forth below.

This action arises from a lawful eviction of the plaintiff from his apartment located at 755 White Plains Road, Apartment 20D in the Bronx (the plaintiff signed a stipulation in which he acknowledged he was lawfully evicted). On November 26, 2008, the plaintiff's landlord defendant

Stevenson Commons took possession of the plaintiff's apartment. On that same day, it hired Midtown to move the plaintiff's possessions from the premises. Midtown alleges it took a full inventory of the items it removed from the plaintiff's apartment. Midtown further alleges that on November 27, 2008, it provided the plaintiff notice of its warehouseman's lien pursuant to Uniform Commercial Code ("UCC") §7-210.

On December 22, 2008, the plaintiff retrieved his possessions from Midtown's warehouse. Plaintiff alleges that not all his possessions were noted in the inventory sheet. Many of his possessions were missing and/or damaged. He commenced an action on November 28, 2011 against Boyle & Broumand, Boyle, Stevenson Commons, Clanagan in his individual and official capacity as occupancy manager of Stevenson Commons, Broumand, Midtown, Weinheim City Marshal #3 and John Does 1-10 who packed, transported, loaded and stored plaintiff's property for conversion (first cause of action) and breach of bailment contract (second cause of action).

On exactly the 120th day after he commenced this action, plaintiff served the summons and complaint along with a supplemental summons and amended verified complaint. The amended complaint adds Cambridge as a defendant. In addition, it adds the following causes of action: negligent hiring and Title 42 USC1983 fourth amendment violation.

The defendants contend that the amended complaint is null and void since the plaintiff failed to seek leave prior to amending his pleadings. CPLR § 3025 states that a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it. Since technically the amended pleadings were served within twenty days after service of the summons and complaint (they were served simultaneously) plaintiff complied with the statute. Thus, the amended pleadings are not null and void.

Motion by Clanagan, and Stevenson Commons

Defendants Clanagan and Stevenson Commons move pre-answer pursuant to CPLR §§ 3211(a)(5) and 3211 (a)(7). Both defendants allege they were never served with process.

In opposition, the plaintiff argues that the defendants were duly served and their "bare denial

is insufficient to overcome the prima facie evidence of proper service established by the affidavit of the process server.” The Court notes that the plaintiff failed to annex the affidavits of service to his opposition papers. However, he submitted loose affidavits of service at oral argument. Upon a review of the affidavits of service, the Court finds that these moving defendants were not properly served. According to the affidavits of service, the process server served Clanagan on March 27, 2012 at 2:30 pm at his place of business, namely the offices of Steven Commons located at 755 White Plains Road in the Bronx. Upon arrival, the process server was informed by a security guard that the office closed early and any legal papers had to be placed in the Steven Commons’ mail box. The process server then placed the summons, complaint, supplemental summons and amended complaint in the Stevens Commons office mail box. Service on an individual is governed by CPLR § 308 and it does not authorize service by leaving a copy of the summons and complaint in the mailbox at a person’s usual place of business after the business is closed. Clearly, service on Clanagan was improper, hence, this Court lacks jurisdiction over this defendant.

Defendant Steven Commons was also served by placing a copy of the summons, complaint, supplemental summons and amended complaint in its mailbox after the office was closed. Service on a limited liability company is governed by CPLR § 311-a. § 311-a does not authorize service on a limited liability company by placing a copy of the summons and complaint in a mailbox of a closed office. Similarly, Steven Commons was also improperly served. Thus, this Court does not have jurisdiction over Steven Commons.

Accordingly, the motion is granted and this action is dismissed as against defendants Clanagan and Steven Commons.

Motion by defendant Cambridge Security

Cambridge Security moves to dismiss on the grounds that plaintiff failed to properly serve it pursuant to CPLR § 311(a)(1). The Court agrees it will not address the merits of the additional grounds of the motion.

Since Cambridge is a corporation, service of process is governed by CPLR § 311(a)(1). This section sets forth that “[p]ersonal service upon a corporation...shall be made by delivering the

summons as follows: 1. Upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.” On March 27, 2012, the process server served the summons, complaint, supplemental summons and amended complaint on Janice Lindsay, “a person of suitable age and discretion.” The affidavit does not allege that Janice Lindsay was an authorized agent as set forth in CPLR § 311(a)(1). Since the process server failed to serve an authorized person as set forth in CPLR § 311(a)(1) the service is defective and this Court does not have jurisdiction over this defendant (see *Faravelli v. Bankers Trust Co.*, 85 AD2d 335, 340 [1st Dept 1982]).

Defendant Cambridge Security’s motion to dismiss for lack of jurisdiction is granted. This action is likewise dismissed as against defendant Cambridge Security.

Motion by defendants Doyle, Broumand and Doyle & Broumand

Defendants move to dismiss the complaint on the grounds that service was improper, the actions are time barred by the statute of limitations and the complaint fails to state a cause of action as against the moving defendants. This motion is denied without prejudice with leave to renew for the reasons set forth below.

Defendants’ motion is based on the allegations and causes of action that are contained in the complaint and not the amended complaint. Since this Court found that the amended complaint is not null and void, after the defendants made their pre-answer motion to dismiss, the Court will grant these moving defendants leave to renew. The Court also notes that the defendants did not have a copy of the relevant affidavits of service at the time they made this motion. Contrary to the plaintiff’s contention, the affidavits of service can not be located in the court scanned records. The only affidavit of service scanned into the Bronx County Clerk’s website for this case is the affidavit of service for defendant Cambridge Security. Since the Court no longer maintains paper files for cases, the affidavits of service are not obtainable through the Bronx County Clerk’s website and the plaintiff did not annex a copy of the affidavits of service for Doyle, Brouman, and Doyle & Brouman to his opposition papers, the Court directs the plaintiff to serve a copy of the affidavits of

service on the moving defendants within 20 days from the entry of this order. Defendants may renew this application upon proper papers within 30 days from receipt of the affidavits of service from the plaintiff.

Motion by defendant Midtown

Midtown moves to dismiss this action as against it on the grounds that it was not properly served and the actions are barred by the statute of limitations.

A review of the amended complaint indicates that the plaintiff has alleged the following causes of action against defendant Midtown: negligent hiring, unlawful conversion and breach of bailment contract.

Movant contends that since the plaintiff filed its summons and complaint on November 28, 2011, three years and two days after it took possession of his property that the causes of action for negligent hiring and unlawful conversion are barred by the three year statute of limitations. In opposition, the plaintiff correctly notes that November 26, 2011 was a Saturday and as such the court was closed. Since the period within which these causes of action had to be commenced expired on a Saturday, November 26, 2011, plaintiff had until Monday, November 28, 2011 to commence his action pursuant to § 25-a(1) of New York's General Construction Law (*see also Cyens v. Town of Roxbury* (40 AD2d 915 [4th Dept 1972])). Thus, the claims for negligent hiring and unlawful conversion are not time barred.

With respect to service of process, Midtown notes that the summons, complaint, supplemental summons and amended complaint were served on the company's secretary, Doris Gil, ("Gil") a person who was not authorized to accept service on behalf of Midtown. It annexed an affidavit from Gil in which she avers that a person came into the office and handed her papers. She was not asked her name, nor was she asked if she was authorized to accept service on behalf of Midtown. She further averred that she was not an officer, director, managing or general agent, cashier or assistant cashier or any other agent authorized by appointment or by law to receive service. Movant contends that since the plaintiff failed to serve ^a a person authorized to accept service as mandated by CPLR § 311(a)(1) service was defective and this action should be dismissed.

In opposition, the plaintiff relies on the affidavit of his process server, which states that Ms. Gil was asked if she was authorized to accept service and she said yes, to argue that service on Gil was proper on the basis of apparent authority. While it is true that a process server may rely on a corporate employee's identification as the proper person for service (*Fashion Page, LTD. v. Zurich Ins. Co.*, 50 NY2d 265 [1980]), here Gil denies making such representations. As such, the Court sets this motion down for a traverse hearing on June 17, 2013 at 2:00 pm in Part 22 (room 401).

Accordingly, the motion is set down for a traverse hearing as set forth above.

Motion by defendant Weinheim City Marshall

Defendant Weinheim City Marshall moves pro-se to dismiss this action as against him on the grounds that it is barred by the statute of limitations.

Movant contends that he lawfully evicted the plaintiff on a duly authorized warrant of eviction. Movant aptly notes that an action arising out of an act in his official capacity is governed by the one year statute of limitations pursuant to CPLR § 215 (*Jemison v. Crichlow*, 74 NY2d 726 [1989]).

In *Jemison, supra*, the plaintiff sued the City Marshall for negligence, prima facie tort, wrongful eviction and conversion. The Court of Appeals held that they were all time barred. It noted that CPLR 215 applied to City Marshalls and, as such, all actions against a City Marshal for acts done in an official capacity, or by omission of an official duty and based on common law, must be instituted within the one-year period provided by CPLR 215 (1) (Id at 727).

Accordingly, the motion is granted and this action is dismissed as against Weinheim.

This constitutes the decision and order of the Court.

Dated:

4/05/13
Bronx, New York



HON. NORMA RUIZ, J.S.C.