

Flaherty v Rose Assoc.
2014 NY Slip Op 30869(U)
April 3, 2014
Sup Ct, New York County
Docket Number: 651436/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MARIE FLAHERTY,

Plaintiff,

Index No.651436/2013

-against-

DECISION/ORDER

ROSE ASSOCIATES, ET. AL.,

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1, 2, 3, 4</u>
Answering Affidavits and Cross Motion.....	<u>5,6,7,8</u>
Replying Affidavits.....	<u>9,10,11,12</u>
Exhibits.....	_____

Plaintiff Marie Flaherty has commenced this action by service of a summons with complaint upon numerous defendants. She has asserted claims pursuant to the Racketeer Influenced Corrupt Organizations Act (“Rico”) and common law tort claims. Various defendants have now brought four separate motions before the court to dismiss the action on the grounds, *inter alia*, that plaintiff has never served these defendants with a complaint despite their demand that she do so and that service of the summons and complaint has not been completed within the time prescribed by law. Plaintiff has brought a cross-motion in response to each of these motions in which she requests, *inter alia*, that the motions be stricken and that she be provided additional

time to serve a complaint in this matter. All of the motions and cross-motions are consolidated for disposition. As will be explained more fully below, all of the motions to dismiss this action are granted on the ground that plaintiff has not served a complaint in this action after a demand was made that she do so and on the ground that service of the summons and complaint has not been completed within the time prescribed by law. The cross-motions to extend plaintiff's time to serve a complaint is denied.

The present action commenced by plaintiff is one of numerous actions commenced by and against plaintiff arising out of her tenancy and subsequent eviction from an apartment in Stuyvesant Town based on her failure to pay rent. She has commenced this action against numerous defendants, including three different Judges who presided over the civil court action in which she was evicted. Although she has never served a complaint in this action, she alleges in the summons and notice that she filed in this action that all of the defendants, including the three Judges who presided over the action against her in civil court in which she was evicted, are all involved in a RICO conspiracy against her. She has also previously commenced an action in Supreme Court by filing a summons with notice and a subsequent 59 page complaint, in which she alleged sixteen causes of action, including RICO claims, against many of the same defendants which are being sued in the present action. The court dismissed that complaint with prejudice and plaintiff has appealed that decision.

After plaintiff commenced this action by filing a summons with notice on April 10, 2013, she mailed copies of the summons and complaint to the defendants on August 20, 2013 with a request for acknowledgment of service pursuant to CPLR 312-a. None of the defendants completed the acknowledgment of receipt or mailed it back to plaintiff. Instead, the three Judge

defendants, Lau, Lebovits and Spears, served plaintiff with the demand for service of the complaint in September and October of 2013. Defendant Belkin Burden Wenig & Goldman, LLP served plaintiff with a demand for service of the complaint in September 2013. Defendant Midtown Moving & Storage, Inc. served plaintiff with a demand for service of the complaint in August of 2013. The defendants represented by Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. have brought the present motion to dismiss the complaint pursuant to CPLR section 306-b on the ground that service of the summons with notice has not been completed within the time prescribed by law.

Initially, the court finds that all of the defendants have standing to move to dismiss plaintiff's action even though they never mailed her the acknowledgment of receipt by mail pursuant to CPLR section 312-a. CPLR section 312-a provides a plaintiff with an alternative method of serving a summons and a complaint or a summons with notice in an action by mailing the summons along with a statement of service by mail and acknowledgment of receipt with a return envelope. However, the "effectiveness of service under CPLR 312-a depends upon the defendant's willingness to return a signed 'acknowledgment of receipt', which is one of the forms that must accompany the process." Practice Commentaries, CPLR section 312-a. If the defendant does not return the acknowledgment within thirty days of receipt of the mailed process, then plaintiff must still serve process using one of the traditional methods of service. *Id.* The only penalty imposed upon a defendant for not acknowledging receipt of the summons is that it can be taxed with the cost of plaintiff's follow up service. *See* CPLR 312-a. However, there is no effective service under CPLR section 312-a where the defendant does not acknowledge the service. *Id.* Based on the foregoing, there is no basis for not allowing defendants to proceed

with their various motions to dismiss this action based upon failure to serve a complaint simply because they did not acknowledge receipt of the summons with notice that was mailed by plaintiff.

Moreover, there is no basis for plaintiff's argument that defendants are precluded from making their motions to dismiss based on their failure to appear in the action. CPLR section 320 (a) specifically provides that a defendant appears in an action by serving an answer or a notice of appearance or by making a motion which has the effect of extending the time to answer. Since all of the defendants have made a motion which would extend their time to answer to the extent that they had any obligation to answer a complaint which has never been served, they have now appeared in the action for the limited purpose of making the present motions.

The three judge defendants, Belkin Burden Wenig & Goldman and Midtown Moving & Storage, Inc. are entitled to a dismissal of the complaint based on plaintiff's failure to serve a complaint in response to their demand. CPLR section 3012 (b) provides that if the summons is served without a complaint, the defendants "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." It is further provided in CPLR section 3012 that the court upon motion may dismiss the action if service of the complaint is not made after it is demanded. Since the plaintiff has not served a complaint in response to defendant's demands which were served in August and September of 2013, has not attached a proposed complaint in response to the present motion to dismiss despite serving voluminous cross-motions and has failed to establish that she actually has a meritorious claim in this action, this court exercises its discretion to dismiss the complaint and to not allow plaintiff any additional time to

serve the complaint in this action.

The action must also be dismissed as against all defendants on the ground that plaintiff failed to serve the summons and complaint or summons with notice within 120 days of the commencement of this action. An action is commenced by the filing of a summons with notice pursuant to CPLR section 304. CPLR section 306-b provides that service of the summons with notice shall be made within one hundred and twenty days after the filing of the summons with notice. If the service is not made within the time provided in the section, the court, upon motion, can either dismiss the action without prejudice as to the defendant which has not been served or extend the time for service upon good cause shown or in the interest of justice. CPLR section 306-b.

In this case, plaintiff's action is dismissed as she still has not served any of the defendants with a summons and notice even though more than 120 days have passed since she commenced this action by filing the summons and notice. Plaintiff commenced her action by electronically filing a summons with notice on April 20, 2013. However, she did not even attempt to serve the summons with notice until August 20, 2013 and she still has not served the summons with notice up to the present date. Her service by mailing pursuant to CPLR section 312-a was ineffective since the defendants never acknowledged receipt of the summons with notice. The defendants are therefore entitled to a dismissal of the complaint based on plaintiff's continued failure to serve the summons with notice up to and continuing through the present day. Moreover, plaintiff has failed to establish that her time to serve the summons with notice should be extended for good cause or in the interest of justice.

Finally, the request by defendants for a protective order barring plaintiff from bringing

further actions arising from her tenancy or subsequent eviction at Stuyvesant Town is granted to the extent that plaintiff is enjoined from initiating any further litigation with respect to her tenancy or subsequent eviction without prior approval of the Administrative Judge of the court in which plaintiff seeks to bring the action. The court has the power to grant this injunctive relief designed to forestall further vexatious litigation. *See Capogrosso v. Kansas*, 60 A.D.3d 522 (1st Dept 2009); *Harbas v. Gilmore*, 244 A.D.2d 218 (1st Dept 1997). Based on plaintiff's actions in this litigation and the other actions concerning her tenancy and eviction and based on the various court's determinations in those actions, the court finds that such injunctive relief is necessary. Accordingly, it is hereby

ORDERED that plaintiff is enjoined from initiating any further litigation against the defendants pertaining to plaintiff's tenancy at Stuyvesant Town and her eviction from such tenancy without prior approval of the Administrative Judge of the court in which plaintiff seeks to bring that action. Moreover, the action is dismissed in its entirety. The clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 4/3/14

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.