

**Creditor's Adjustment Bur., Inc. v Baytree Capital  
Assoc., LLC**

2014 NY Slip Op 32592(U)

October 7, 2014

Supreme Court, New York County

Docket Number: 651675/14-E

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

CREDITOR'S ADJUSTMENT BUREAU, INC.,  
Plaintiff,

Index No.: 651675/14 - E

Motion Date: 09/23/14

- v -

Motion Seq. No.: 01 & 03

BAYTREE CAPITAL ASSOCIATES, LLC and  
MICHAEL GARDNER a/k/a MICHAEL S. GARDNER,  
Defendants.

The following papers, numbered 1 to were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Notice of Cross Motion/Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_  
Sur-Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____
4	_____

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall grant defendants' motion, styled as a cross-motion in the procedural posture of this action, to dismiss this action as initiated by plaintiff's notice of motion for summary judgment in lieu of complaint, to the extent of denying summary judgment in lieu of complaint and permitting defendants to otherwise move or serve an answer to the complaint.

Plaintiff commenced this action under CPLR 3213 by summons

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

and notice of motion for summary judgment in lieu of complaint e-filed with this court on June 2, 2014. Those initiatory papers were served upon Baytree Capital Associates LLC, according to the affidavit of service filed with this court on June 12, 2014, via the Secretary of State pursuant to CPLR 303 on June 9, 2014. Defendant Michael S. Gardner was served, according to the affidavit of service filed with this court on June 19, 2014, by "nail and mail" (CPLR 308[4]) service on June 17, 2014.

Plaintiff's notice of motion for summary judgment in lieu of complaint stated that it was returnable on July 7, 2014, and requested that answering papers be served upon plaintiff at least seven (7) days before that date.

Defendants appear by their cross motion and do not oppose the motion on its merits, but oppose the motion with respect to the procedural defect of "short" service. Defendants argue that this action should be dismissed because plaintiff's failed to comply with the requirement in CPLR 3213 that states "[t]he summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service."

Here, as the corporate defendant was served pursuant to BCL 306, CPLR 320(a) allows the corporation thirty (30) days after such service to appear, while it allows the individual defendant, served pursuant to CPLR 308(4), thirty (30) days to appear after such service is complete.

Thus as argued by defendants, with the return date of the original motion set for July 7, 2014, and the responsive papers due seven (7) days before such date (i.e., June 30, 2014), plaintiff has failed to provide the defendants with the statutorily required time to respond, the due date for the answering papers having been set for less than the "minimum time" before which the CPLR 3213 motion may be noticed to be heard pursuant to CPLR 3213. Therefore, plaintiff's motion for summary judgment in lieu of complaint must be denied. National Bank of Canada v Skydell, 181 AD3d 645 (1<sup>st</sup> Dept 1992). See also Ross Bicycles v Citibank, 149 AD2d 330 (1<sup>st</sup> Dept 1989). In accordance with the foregoing precedent in the First Department, the court does not find that the problem of late service is "jurisdictional" and so declines to dismiss the action.

Plaintiff attempted to cure its failure to provide sufficient time in the notice of motion for defendants to respond by serving an "amended" notice of motion for summary judgment in lieu of complaint.

As stated by the First Department,

[w]hile the lower court cases are in conflict over whether the filing of an amended pleading automatically abates a motion to dismiss that was addressed to the original pleading, we prefer the rule set forth in Sholom that the moving party has the option to decide whether its motion should be applied to the new pleadings. This approach also finds support in Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C3211:65, at 94. Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38 [1st Dept 1998].

Defendants press their motion against the original motion, which was short served upon them. As plaintiff does not set forth the proper predicate for a motion for summary judgment in lieu of complaint on its original motion, the defendants shall have the opportunity to answer the complaint on its merits.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the defendants' cross motion to dismiss is granted only to the extent that the plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the moving papers shall be deemed the complaint; and it is further

ORDERED that defendants shall have thirty (30) days from service of this order with notice of entry to move or answer the complaint; and it is further

ORDERED that the parties shall appear for a preliminary conference in IAS Part 59, 71 Thomas Street, Room 103, on November 18, 2014, 9:30 AM.

This is the decision and order of the court.

**Dated:** October 7, 2014

**ENTER:**

~~Debra A. James~~  
**DEBRA A. JAMES** J.S.C.