

Gregg v Zaliznyak

2015 NY Slip Op 30924(U)

June 2, 2015

Supreme Court, New York County

Docket Number: 150726/2014

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Diane P. Gregg,

Plaintiff,

-against-

Alexander Zaliznyak,

Defendant.
-----X

DECISION AND ORDER
Index Number: 150726/2014
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	Numbered
Notice of Motion (003), Affirmation, and Exhibits	1-11
Opposition Affirmation, and Exhibits	12-13
Reply Affirmation, Exhibits	14

In this action, defendant Alexander Zaliznyak (Zaliznyak) seeks an order pursuant to CPLR 3211 (a)(8) dismissing the complaint against him on the ground that the court lacks personal jurisdiction over him.

Factual Background

Briefly, this is a matter stemming from a landlord tenant dispute. Defendant is the tenant of record at 111 Sullivan Street, Apartment BF, New York, New York 10012 (the subject property) and is subletting it to the plaintiff. Defendant now has an actual place of business c/o ResMed, located at 9001 Spectrum Center Boulevard, San Diego CA 92123. Plaintiff alleges that the defendant overcharged her in violation of the Rent Stabilization Code by profiteering from an illegal sublet scheme. Plaintiff seeks damages as a result of the overcharge in an amount no less than \$63,071.00, and damages from failure to lawfully return a security deposit.

Mr. Vartgess, acting as process server for the plaintiff, alleges three attempts at personal service of the summons with notice upon the defendant before resorting to substituted service. On February 11, 2014, Mr. Vartgess appeared at the place of business of the defendant, 9001 Spectrum Center Boulevard, San Diego CA 92123, and served the summons with notice. Further, the affidavit of service provides that on February 11, 2014, Mr. Vartgess completed service by placing the documents in prepaid first class mail from La Jolla, CA 92037. to the address listed above for the defendant, which is the only address listed for the defendant. On or about March 14, 2014, the defendant through counsel caused a Demand for a Complaint and Notice of Appearance to be served upon counsel for the plaintiff. On or about April 10, 2014, plaintiff caused a complaint to be served and filed upon counsel for defendant.

The complaint alleges four causes of action, all of which pertain to the lease agreement between plaintiff and defendant. In the first cause of action, plaintiff alleges that defendant violated the applicable sections of the Rent Stabilization Code by overcharging him no less than Eighteen Thousand One Hundred Eighty-Two Dollars and eleven cents (\$18,182.11). In the second cause of action, plaintiff alleges that in accordance with Section 2525.6(b) of the Rent Stabilization Code he is entitled to recover treble damages on the aforementioned rental overcharge, in the amount of Thirty-six Thousand Three Hundred Sixty-Four Dollars and Twenty-Three Cents (\$36,364.23). In the third cause of action, plaintiff seeks restitution for a sum of Three thousand five Hundred Twenty-Five Dollars (\$3,525.00), a security deposit that was never returned. As for the fourth cause of action, plaintiff demands reasonable attorneys fees of not less than Five Thousand Dollars (\$5,000.00), pursuant to Section 2526.1(d) of the Rent Stabilization Code.

Arguments

Defendant seeks an order pursuant to CPLR 3211(a)(8) dismissing the complaint on the ground that the Court lacks personal jurisdiction over the defendant due to the defective nature of the summons and affidavit of service.

Plaintiff contends that defendant's motion should be denied on the basis that the service of process was properly effectuated, and that due to the defendant's failure to support its dispositive motion with any facts, he has submitted himself to the personal jurisdiction of this court.

Discussion

CPLR 3211 (a), governing motions to dismiss a cause of action states that:

"a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (8) the court has not jurisdiction of the person of the defendant". Defendant supports this application firstly, with a contention that long arm jurisdiction does not apply to him and secondly, that a lack of jurisdiction derives from a number of defects on the summons and affidavit of service. In deciding the matter, this court must consider whether the defendant's actions are sufficient for the plaintiff to secure long arm jurisdiction, and whether service of the summons met all necessary requirements."

The defendant's application for an order pursuant to CPLR 3211(a)(8) is rooted in the third defense, which asserts that the summons in the action, served in the State of California, is defective under both New York law and California law.

As a preliminary issue, plaintiff in her affirmation in opposition contends that the defendant's jurisdictional defense is void on the basis that the defendant did not move for judgment within 60 days of filing an answer containing an objection of improper service as a defense. The defendant filed his answer (jurisdictional defense within) on May 12, 2014, and subsequently filed his motion

to dismiss on July 5, 2014, (54 days), thus plaintiff's allegations of a breach of the 60-day rule is immaterial and shall be disregarded.

Long Arm Jurisdiction

CPLR § 302(a) (1) provides that;

"As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state."

Defendant alleges that his conduct does not constitute a level of "transacting business" sufficient to subject him to "long arm" jurisdiction under CPLR 302(a)(1).

The requirements for personal jurisdiction involve two basic steps. N.Y. C.P.L.R. § 302(a) provides, in pertinent part, that a court "may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent ... transacts any business within the state," so long as the plaintiff's "cause of action aris[es] from that transact[ion]." In determining whether personal jurisdiction may be exercised under section 302(a)(1) "a court must decide (1) whether the defendant 'transacts any business' in New York and, if so, (2) whether this cause of action 'aris[es] from' such a business transaction." See *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir.2012).

Defendant claims that the one time subleasing of a residential apartment cannot be equated to the transacting business standard established in the statute. Defendant states this was a one-time transaction between individuals and was entirely private and non-commercial.

Whether a non-domiciliary is "transacting business" within the meaning of 302 (a) (1) is a fact based determination, the test is not quantitative but qualitative and requires a finding that the

non-domiciliary activities were purposeful and established "a substantial relationship between the transaction and the claim asserted" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007], citing *Duetsche Bank Sec., Inc. v Montana Bd. of Invs.* 7 NY3d 65, 71 [2006]). Purposeful activities are volitional acts by which the non-domiciliary "avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws" (*Fischbarg*, 9 NY3d at 380, quoting *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967], and citing *Ford v Unity Hosp.*, 31 NY2d 464, 471 [1973]). More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York.

Defendant contracted to sub-let his apartment to the plaintiff from a period beginning in 2011 and ending in 2013. He attempts to subdue the veracity of such contract by contending that it was only for several months and that this is not sufficient contact to warrant jurisdiction. Exhibit C of the moving papers shows that plaintiff paid rent to defendant from 01/05/2011 - 02/01/2013, a period of up to 26 months. The longevity of this contract suffices to be a manifestation of a purposeful act on behalf of the defendant and creates a sufficient nexus between the defendant and the forum state. Defendant's sub-let agreement with the plaintiff constitutes a transaction in New York within the meaning of CPLR § 302(a) (1) and is the origin from which this cause of action arises, and thus provides a sufficient basis for the exercise of personal jurisdiction over the defendant in the state of New York.

Improper Service of Summons

The defendant maintains that the court lacks jurisdiction over the matter on the grounds that the summons and affidavit of service contain several fundamental defects, which ultimately render it defective. Summarily, defendant claims:

- (1) The Affidavit of service is defective on its face in that the name of the process server is illegible and no indication is given in the affidavit that such person is "authorized by law" to perform service of process;
- (2) The affidavit of service fails to include the license number of the person who allegedly effectuated service of process;
- (3) The affidavit of service specifically states that the summons was allegedly served upon the defendant at his place of business. Service of process pursuant to California code of civil procedure, section 415.10, can only be made upon an individual person and not a place of business;
- (4) The defendant is a natural Person and process at a place of business is ineffectual pursuant to California code of Civil Procedure, section 415.20, service of process is only allowed at a place of business if the defendant is a business entity, trust, incompetent person or guardian;
- (5) The affidavit of service fails to state where or to what address the alleged mailing was made;
- (6) The affidavit of service fails to state the location of the alleged earlier attempts at personal delivery, which indicates that the affidavit of service contains fatal factual errors;
- (7) The affidavit is notarized in the state of California and must be accompanied by a certificate of conformity in order to make it valid in the state of New York, pursuant to CPLR 2309(c) and real property law section 299-a.

In order for the plaintiff's service outside New York to be adequate, such service must be made in the same manner as service is made within the state. *Morgenthau v. Avion Res. Ltd.*, 11 N.Y.3d 383, 389 (2008). CPLR 313 unambiguously states, "A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney,

solicitor, barrister, or equivalent in such jurisdiction."

Morgenthau v. Avion Res. Ltd., 11 N.Y.3d 383, 389 (2008) is authority for the proposition that CPLR 313 allows for all methods of service on individuals or corporations in foreign states that are available for service inside New York, regardless of the methods the foreign state may use. Thus, CPLR 313 permits plaintiff to disregard the laws governing service of process in the state in which the defendant is served. In light of this, parts (3) and (4) of the defendant's third affirmative defense, which pertain to the plaintiff's failure to comply with Californian code of civil procedure are rendered immaterial.

With regard to the plaintiff's choice of service, CPLR 308(2) permits personal service on a natural person "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business" of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner. CPLR 308(2) requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence that service was properly made. *See, Kearney v. Neurosurgeons of NY*, 31 A.D.3d 390, 391, 817 N.Y.S.2d 502 (2d Dept.2006); *McCray v. Petrini*, 212 A.D.2d 676, 622 N.Y.S.2d 815 (2d Dept 1995); *Samuel v. Brooklyn Hosp. Center*, 88 A.D.3d 979, 931 N.Y.S.2d 675 (2d Dept.2011). CPLR 308(6) states, "For purposes of this section, actual place of business shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business."

Having reviewed exhibit E of the moving papers, it is clearly established that Mr. Vartgess on behalf of the plaintiff has complied with the necessary requirements of the Deliver-and-Mail method by: firstly, making prior attempts of personal delivery; secondly, by actual personal delivery of a copy to the defendants place of business which was served upon Ms. Becky Kenyon who

identified herself as the executive legal assistant; and thirdly, by mailing a copy in prepaid first-class mail to the same address.

With evidentiary considerations in mind, "a plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Penguin Gr. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir.2010). "[T]o survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir.2006). A process server's affidavit ordinarily constitutes a prima facie showing of proper service (see *Aurora Loan Servs., LLC v. Gaines*, 104 A.D.3d 885, 886, 962 N.Y.S.2d 316; *Sileo v. Victor*, 104 A.D.3d 669, 670, 960 N.Y.S.2d 466; *Engel v. Boymelgreen*, 80 A.D.3d 653, 654, 915 N.Y.S.2d 596). However, when a defendant submits a sworn denial of receipt of service containing specific facts to refute the statements in the process server's affidavit, the prima facie showing is rebutted and the plaintiff must establish personal jurisdiction by a preponderance of the evidence at a hearing (see *Aurora Loan Servs., LLC v. Gaines*, 104 A.D.3d at 886, 962 N.Y.S.2d 316; *Sileo v. Victor*, 104 A.D.3d at 670, 960 N.Y.S.2d 466; *Engel v. Boymelgreen*, 80 A.D.3d at 654, 915 N.Y.S.2d 596).

Defendant alleges that the service was ineffective for numerous reasons. Defendant alleges that Mr. Vartgess is not authorized by law to perform such service; however, this allegation is not substantiated by any factual evidence, nor are any of defendant's allegations pertaining to defects on the face of the affidavit substantiated. It is well settled that conclusory allegations in an answer that proper service was not made is not sufficient to rebut the facts set forth in an affidavit of service. *Clarkson Arms v Arabitz*, NYLJ July 3, 1991, 23:6 (1st Dept.).

As stated above in order to rebut plaintiff's prima facie case defendant is required to produce

substantiated factual evidence with specific facts, which he has not done. Parts 1-7 of the defendant's third affirmative defense allege specific defects on the face of the affidavit of service in an attempt to nullify jurisdiction, however defects in proof of proper service of process go to form and not to jurisdiction of court and hence may be amended so as to have record conform to true facts. It is the fact of proper service which confers jurisdiction and defects in the facts of the affidavit of service will not invalidate what was otherwise proper service of summons. Once such service has been made, an insufficient proof thereof will not take away the jurisdiction which has in fact been obtained. (*See Air Conditioning Training Corp. v. Pirrote* 270 A.D. 391, 60 N.Y.S.2d 35).

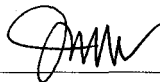
Defendant has failed to produce detailed and specific evidence and thus the defense of improper service is not properly raised. Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss the compliant pursuant to CPLR 3211 (a)(8) is denied; and it is further

ORDERED, that counsel are directed to appear for a preliminary conference on July 30, 2015, at 9:30AM in Room 304 located at 71 Thomas Street, New York, New York 10013.

Dated: June 2, 2015

ENTER:



Joan M. Kenney, J.S.C.