At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on April 12, 2017.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

HOPE FOR US HOUSING CORP.,

Plaintiff,

v.

SYRACUSE HEIGHTS ASSOCIATES, LLC, THE HEIGHTS REAL ESTATE COMPANY and THE HEIGHTS MANAGEMENT COMPANY, LLC,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2016EF3747
RJI No.: 33-17-0440

APPEARANCES: **ROBERT LaPLANTE, ESQ.**
For Plaintiff

MICHAEL KAWA, ESQ.
For Defendants

The defendants have made a pre-answer motion to dismiss the complaint pursuant to CPLR § 3211(a)(5) on the ground that the causes of action contained in the subject complaint alleging wrongful eviction pursuant to Real Actions and Proceedings Law § 853 are barred by the statute of limitations. In addition, defendants move to dismiss the remaining cause of action for conversion, contending that it essentially alleges wrongful eviction and is therefore time barred. Plaintiff has cross-moved pursuant to CPLR § 306-b to extend the time for service of the summons and complaint.

The complaint alleges that defendants own property known as Green Hills Plaza Store No. 16 and that on November 1, 2009 plaintiff leased the space to operate a business which does general construction and contracting work, as well as deconstruction of building and the recycling of building materials and products. Plaintiff stored materials at the site and at a skating rink and used the tools and equipment stored there while operating its business, as well as the training of unemployed people to work in the construction trade. The lease continued from November of 2009 through September 20, 2012, when defendant Syracuse Heights brought eviction proceedings in Onondaga Town Court and on October 3, 2012 the town court issued a Warrant of Eviction. On October 22, 2012 a judgment was signed in the amount of $12,415, the amount plaintiff owed the defendants. According to the complaint, over time plaintiff remitted $21,615 in full satisfaction of the monies due under the eviction and they were paid in full as of December of 2013. Plaintiff remained in the property on a month to month tenancy and subsequently fell in arrears again, failing to make the requisite monthly rental payments. As alleged in the complaint, on July 1, 2014 defendant's representative, Daniel Gratien, sent an e-mail advising plaintiff that it owed $3,415, that the rent was past due, that if defendants did not receive payment they would be forced to take possession of the space with anything being left there becoming defendant's property. On October 2, 2014 Gratien sent an e-mail indicating that the rent was not received and that defendants would be taking possession of the space in the next two weeks, giving plaintiff time to remove its equipment. A month later on November 2, 2014 Gratien wrote that defendants took the property back, that the door had been secured and that plaintiff's only recourse was to pay back rent, plus two months security deposit and sign a new lease. On March 29, 2015 Gratien sent another e-mail again advising that plaintiff had several

chances to pay the rent and that as of April 14, 2015 defendants were taking possession. A number of e-mails were exchanged with regard to plaintiff removing its property, and plaintiff alleges that it learned in October of 2015 that all of its property had been removed from the premises. The complaint contains a causes of action for conversion and wrongful eviction pursuant to RPAPL § 853, and seeks the following in damages: $183,134.88 for the conversion of real property, $183,134.88 for defendants' violation of plaintiff's rights pursuant to RPAPL § 853; $549,446.40 as treble damages for a violation of RPAPL § 853; and $483,000 for treble damages for consequential and foreseeable losses suffered by plaintiff.

In moving to dismiss, defendants have demonstrated that the accrual date for the alleged wrongful eviction was April 15, 2015, when plaintiff was physically barred from the location and the locks were changed, as acknowledged in the complaint. Therefore absent any toll, plaintiff has one year thereafter to commence an action. *See, Gold v. Schuster*, 264 AD2d 547 (1st Dept. 1999); *see also, Jemison v. Crichlow*, 139 AD2d 332 (2d Dept. 1988). This action, however, was not commenced until September 2, 2016. The one year limitations period for wrongful eviction claims pursuant to RPAPL § 853 accrues at the time it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return. See, *Gold, supra.* Inasmuch as plaintiff failed to commence the action within one year of the eviction on April 15, 2016, the matter is barred by the statute of limitations.

With respect to the remaining cause of action alleging conversion, this Court rejects the defendants' claim that the allegations are essentially those for wrongful eviction, and that the claim is likewise time barred. There is no dispute that the statute of limitations for a claim alleging conversion is for three years. *See, Jemison v. Crichlow*, 139 AD3d 332 (2d Dept. 1988);

see also, CPLR § 214. Given the early stage of this litigation, in order to determine whether plaintiff's cause of action for conversion is one for wrongful eviction, this Court must consider the sole criterion in determining whether a pleading states any cause of action and what factual allegations can be discerned from the four corners of the complaint which taken together manifest any cause of action cognizable at law. *See, Doe v. Heath*, 198 AD2d 821 (4th Dept. 1993). A motion for dismissal must fail if there is any cognizable claim, as the allegations of a contested pleading should be liberally construed in a light most favorable to that pleading. *See, Doe, supra.* Given that liberal standard at this juncture, the cause of action for conversion will remain.

With respect to plaintiff's cross-motion to extend the time for service pursuant to CPLR § 306-b and finding service upon the two defendants, Syracuse Heights Associates and The Heights Management Company, as of January 30, 2017 to be proper and timely, plaintiff's counsel notes that he filed a summons with notice on September 2, 2016 and on December 16, 2016 he filed an amended summons with notice and a verified complaint. On December 20, 2016 he delivered to David Miller, a process server, three copies of the complaint and followed up on October 23, 2016 to find out the status of the service. Miller indicated that he had been unable to locate defendants with their office being closed, and plaintiff's counsel reminded him that December 28, 2016 was the deadline. He called Miller on December 29, 2016, who advised that the papers had been served on December 28, 2016. He asked Miller in early January of 2017 for the Affidavits of Service and on January 23, 2017 he received an envelope which contained only one Affidavit of Service for The Heights Real Estate Company. He contacted Miller, indicating that he needed three separate affidavits of service for the three defendants and on

January 31, 2017 Miller advised that service had been effectuated on the other two defendants on January 30, 2017. Counsel also notes that the three defendants share an office and that at the time The Heights Real Estate Company was served the other two defendants should have been served pursuant to his instructions and that that service was timely, within the 120 days. Plaintiff has also established that there is no prejudice to the defendants.

Pursuant to CPLR § 306-b defendants were required to have been served with the summons with notice and complaint within 120 days of the filing with the county clerk. One of the defendants, The Heights Real Estate Company, was served within that 120 days. The caption included all three defendants and counsel alleges that all three defendant are related and share an office at 368 East 62nd Street in Manhattan. Plaintiff's counsel attests that discussions were ongoing with local defense counsel from November of 2015 through February of 2016 putting defendants on notice that a lawsuit was likely if a resolution was not reached. The statute provides two separate standards to base an application for an extension of time; good cause and the interest of justice. Good cause requires that plaintiff establish that it exercised reasonably diligent efforts in attempting to affect proper serve on the defendant. *See, Leader v. Maroni, Ponzoni & Spencer*, 97 NY2d 95 (2001). The interest of justice standard is more lenient, permitting the court to consider the expiration of the statute of limitations, the meritorious nature of the action, the length of the delay in service and the promptness of a plaintiff's request for an extension of time, as well as prejudice to the defendant. *See, Swaggard v. Dagonese*, 132 AD3d 1395 (4th Dept. 2015). With respect to a meritorious claim, plaintiff has alleged that it owned property valued at approximately $180,000 which was in the leased space and removed from the property by the defendants. Given the fact that the plaintiff was diligent in attempting to

effectuate service and it appears that an error by the process server caused part of the problem and that as to the conversion cause of action the statute of limitations has not expired, the cause of action if true has merit, and that the length in delay in service is minimal and the request for the extension was in the plaintiff's cross-motion, there is no prejudice to defendants to whom it is alleged are related companies to the defendants and share the same offices. Plaintiff has established its entitlement to relief in the interest of justice as well. *See, Leader, supra.*

NOW, therefore, for the foregoing reasons, it is

ORDERED, that defendants' motion to dismiss the causes of action alleging wrongful eviction pursuant to Real Property Actions and Proceedings Law § 853 is granted, and it is further

ORDERED, that defendants' motion to dismiss the cause of action alleging conversion is denied, and it is further

ORDERED, that defendant Heights Real Estate Company is required to serve its answer within thirty (30) days of the date of this Order, and it is further

ORDERED, that plaintiff's cross-motion to extend time for service of the complaint with the remaining cause of action pursuant to CPLR § 306-b is granted.

ENTER

Dated: April 13, 2017
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendants' Notice of Motion to Dismiss, dated February 2, 2017;

2. Affirmation of Eric H. Kahan, Esq. in support of defendant's motion, dated January 31, 2017, and attached exhibits;

3. Plaintiff's Notice of Cross-Motion, dated February 21, 2017;

4. Affirmation of R. Lawrence LaPlante, Esq. in support of cross-motion, dated February 21, 2017, and attached exhibits;

5. Plaintiff's Memorandum of Law, dated February 21, 2017;

6. Affirmation of Eric H. Kahan, Esq. in opposition, dated February 27, 2017, and attached exhibits;

7. Affidavit of R. Lawrence LaPlante, Esq. in reply to defendants' opposition, dated March 2, 2017, and attached exhibits; and

8. Affirmation of R. Lawrence LaPlante, Esq. in opposition to defendants' motion, dated March 19, 2017, and attached exhibits.