

<b>Codner v Kennedy Enters., Inc.</b>
2019 NY Slip Op 31591(U)
April 15, 2019
Supreme Court, Rockland County
Docket Number: 30183/2017
Judge: Kathie E. Davidson
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
KAREN CODNER,

Plaintiff,

-against-

**DECISION & ORDER**

Index No. 30183/2017  
Motion Seq. No. 4, 5

KENNEDY ENTERPRISES, INC.,

Defendant.

-----X  
DAVIDSON, J.

The following papers were read on the motion filed by defendant (Motion Seq. 4) for an order staying discovery pending determination on defendant’s instant motion for dismissal based upon lack of jurisdiction (CPLR §3211[a][8]).

Order to Show Cause - Attorney Affirmation - Affidavit of Suzan Runko -  
Affidavit of Jordan Fishbein - Affidavit of Mark Rothberg -  
Exhibits A-K  
NYSCEF Record<sup>1</sup>

The following papers were read on the cross-motion filed by plaintiff (Motion Seq. 5) for an order pursuant to CPLR §305[c], CPLR §2001 for leave to correct the case caption and affidavit of service to reflect the proper defendant name “Kennedy Enterprises” (omitting “Inc.”). Plaintiff’s motion also requests an order deeming service upon the defendant as proper or, in the alternative, an order directing a traverse hearing related to service of process or, in the alternative, granting an order extending plaintiff’s time to effectuate service upon the defendant.

Notice of Cross-Motion - Attorney Affirmation - Exhibits A-G  
Defendant’s Affirmation in Further Support of Motion and  
in Opposition to Cross-Motion  
Plaintiff’s Reply Affirmation - Exhibits A-B

Upon the foregoing papers, and all prior papers and proceedings in this action, the motions are determined as follows:

<sup>1</sup> References herein to “Doc #” are citing to the NYSCEF Record.

This action arises out of an accident that occurred on January 9, 2014, when the bathroom ceiling tile(s) fell on the plaintiff while in apartment #75P located at 75 Heightman Drive, Spring Valley, New York causing serious injuries to plaintiff. According to the complaint, plaintiff was a lawful guest of Lourdes Sosa, the tenant in apartment #75P which was owned by the defendant "Kennedy Enterprises, Inc." (hereinafter, "Defendant"). Plaintiff further alleges that as the owner of the premises, Defendant had a duty to maintain the premises in a safe condition, in good repair, and free from such defective condition. (Doc. 1).

This action was commenced by filing pleadings on January 9, 2017. According to the affidavits of service, the pleadings were served upon the Defendant via (i) the Secretary of State on February 7, 2017 pursuant to Business Corporations Law §306; and (ii) Lorin Epstein for "Kennedy Enterprises, Inc." on February 23, 2017 at #73P Heightman Drive, Spring Valley, New York. (Doc. 2, 4). Of note, plaintiff also attempted service upon Eugene Wolfson on behalf of "Kennedy Enterprises, Inc." on March 2, 2017 at a last known address located in East Brunswick, New Jersey; however, the process server noted that the current homeowner confirmed that Wolfson was deceased. (Doc. 5)

Defendant failed to timely file an answer. Plaintiff filed a motion for a default judgment against the Defendant (Motion Seq. 1). The court issued a decision dated March 26, 2018 granting plaintiff's motion for a default judgment and setting this matter for an inquest to assess damages. (Doc. 12).

Defendant subsequently filed an order to show cause to stay the inquest pending a determination of the Defendant's motion to vacate its default in appearing in this matter (Motion Seq. 2). The court signed an Amended Order to Show Cause staying the inquest scheduled for August 6, 2018 pending determination on defendant's vacatur motion. (Doc. 33).

Plaintiff filed a cross-motion (Motion Seq. 3) for leave to correct the case caption and affidavit of service to reflect the proper defendant name as "Kennedy Enterprises" (omitting "Inc."). Plaintiff's motion also requested an order deeming service upon the defendant as proper or, in the alternative, an order directing a traverse hearing related to service of process or, in the alternative, an order extending plaintiff's time to effectuate service upon the defendant. (Doc. 45).

Counsel entered into a stipulation dated September 27, 2018 'so ordered' by the court on October 4, 2018. (Doc. 55). Therein, counsel agreed to resolve Motion Seq. 2 and 3 by stipulating to vacate the Defendant's default and permitting Defendant to file an answer by October 31, 2018. Plaintiff agreed to withdraw her prior cross-motion.

Defendant filed an answer on October 26, 2018 (Doc. 58). The answer asserted general denials and, as pertinent to the instant motion, asserted the affirmative defense of lack of jurisdiction over the proper defendant. Thereafter, counsel for both parties filed the instant motions pending before this court.

*Defendant's Motion (Motion Seq. 4)*

Defendant filed an application by order to show cause requesting a stay of discovery pending determination on defendant's instant motion for dismissal based upon lack of jurisdiction (CPLR §3211[a][8]). Counsel contends that plaintiff failed to duly serve the partnership entity of "Kennedy Enterprises"<sup>2</sup>, as owner of the subject premises, in accordance applicable statutes governing service upon a partnership (*citing* CPLR §310[b]; Partnership Law-PTR §121-109 and §121-1505; CPLR §306-b). Counsel submits supporting affidavits to demonstrate that (i) Kennedy Enterprises is the owner of the subject premises where the alleged incident occurred; and (ii) Kennedy Enterprises has no affiliation with Kennedy Enterprises, Inc. (Doc. 61 at ¶13 *citing* Rothberg Affidavit ¶9, ¶12). Counsel also notes that Kennedy Enterprises Inc. dissolved on October 20, 2017, three months prior to the filing of a default judgment against it. (Doc. 72).

Counsel further contends that plaintiff is not entitled to leave to correct the jurisdictional defect pursuant to CPLR §306-b. Defendant argues that plaintiff failed to make diligent efforts to ascertain the proper defendant entity; plaintiff improperly made service attempts upon the wrong entity Kennedy Enterprises, Inc.; and plaintiff obtained a default judgment against the wrong entity, Kennedy Enterprises, Inc. Defense counsel also rejects plaintiff's affirmation of service on September 20, 2018 as an untimely last-ditch effort to comply with CPLR §310[b] for filing proof of service upon a partnership. (Doc. 73).

*Plaintiff's Cross-Motion (Motion Seq. 5)*

Plaintiff filed a cross-motion which essentially requested the same relief as previously sought in Motion Seq. 3. Namely, plaintiff requests an order pursuant to CPLR §305[c], CPLR §2001 for leave to correct the case caption and affidavit of service to properly name the defendant entity as "Kennedy Enterprises" (omitting "Inc."). Plaintiff's motion also requests an order deeming service upon the Defendant as proper or, in the alternative, an order directing a traverse hearing related to service of process or, in the alternative, granting an order extending plaintiff's time to effectuate service upon the defendant.

Counsel contends that, due to law office error, the pleadings simply misnamed the Defendant's entity by adding "Inc." to the end. Plaintiff argues that, notwithstanding the typographical error, defendant's own motion record demonstrates that the proper entity defendant Kennedy Enterprises was duly served with pleadings, apprised of the action, and actively participated in litigation. First, counsel cites the pleadings which specify that the alleged incident occurred at the subject apartment complex that is owned and operated by Kennedy

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<sup>2</sup> Specifically, counsel stated that "the subject premises upon which plaintiff's accident allegedly occurred is owned by *Kennedy Realty Co & Kennedy*, also known as *Kennedy Realty Company and Kennedy Enterprises T/A Linda Court Apartment* also known as *Kennedy Enterprises*". (Doc. 61 at ¶7 *citing* Runko Aff. ¶1, Rothberg Aff. ¶2).

Enterprises. Second, counsel cites the defendant's supporting affidavit of Suzan Runko, the property manager of Kennedy Enterprises. Runko attested to service of pleadings on February 23, 2017 upon Lorin Epstein, a former employee at Kennedy Enterprises' rental office, and a subsequent mailing of the pleadings to the rental office. Runko also stated that, upon receipt, she promptly forwarded the two copies of the pleadings, the notice of motion for a default judgment, and the court's decision granting a default judgment, all of which were promptly forwarded to Kennedy Enterprises' insurance agency (Garden Homes) (Doc. 62). Third, plaintiff's counsel notes that defendant's prior motion to vacate their default in failing to file an answer demonstrates that plaintiff obtained jurisdiction over Kennedy Enterprises, irrespective of the misnomer on the pleadings. Counsel also notes that defense counsel's affirmation states that defense counsel represents "Kennedy Enterprises i/s/h/a Kennedy Enterprises, Inc.", thereby acknowledging the lawsuit was filed against Kennedy Enterprises. (Doc. 60 ¶1).

#### Decision

"Under CPLR 305[c], an amendment to correct a misnomer will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that...the intended but misnamed defendant was fairly apprised that [the misnamed defendant] was the party the action was intended to affect...[and] would not be prejudiced by allowing the amendment" (*Smith v Garo Enters., Inc.*, 60 AD3d 751, 751-752 [2d Dept. 2009][citations omitted]; see also *Simpson v Kenston Warehousing Corp.*, 154 AD2d 1989). "Such amendments are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue" (cf. *Chambers v Prug*, 162 AD3d 974, 974-975 [2d Dept. 2018]). CPLR 305[c] is intended to correct the name of an existing party, as opposed to adding or substituting a new party altogether. (*Smith v Garo Enters., Inc.*, 60 AD3d at 752; *Chambers v Prug*, 162 AD3d at 752).

Here, the allegations contained in the complaint fairly apprised Kennedy Enterprises that it was the party the plaintiff intended to sue, rather than Kennedy Enterprises, Inc., based on the status of Kennedy Enterprises as the entity which owned, operated, managed, maintained and otherwise controlled the premises where the injuries purportedly occurred. Irrespective of the misnomer on the pleadings, service of process was effectuated upon Kennedy Enterprises pursuant to CPLR 310[b] by personal service on February 23, 2017 upon Lorin Epstein, a former employee at Kennedy Enterprises at its apartment rental office located at 73 Heightman Drive, Spring Valley, New York. (Doc. 67). The property manager of Kennedy Enterprises, Suzan Runko, confirmed the pleadings were personally service upon Epstein and mailed to Kennedy Enterprises' rental office as stated in the affidavit of service. (Doc. 62, 67). Accordingly, jurisdiction was obtained over the proper entity Kennedy Enterprises, despite the misnomer.

There is no evidence of prejudice to Kennedy Enterprises. In fact, Kennedy Enterprises' property manager Suzan Runko stated that she received two copies of the pleadings, the notice of motion for a default judgment, and the court's decision granting a default judgment, all of which were promptly forwarded to Kennedy Enterprises' insurance agency (Garden Homes) to

investigate and proceed per the entity's usual procedures (Doc. 62). Further, nothing herein prohibits Kennedy Enterprises from renewing its prior motion to vacate its default and/or taking any other further proceedings as proscribed by law.

All other arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Based on the foregoing, it is hereby

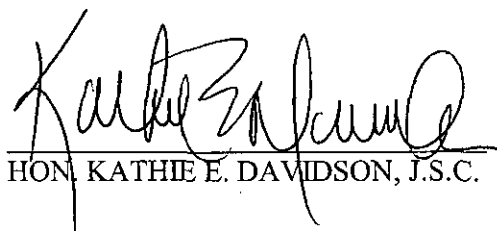
ORDERED that defendant's motion for dismissal of this action for lack of jurisdiction over Kennedy Enterprises is denied. (Motion Seq. 4). It is further

ORDERED that plaintiff's cross-motion to amend the pleadings and all filings to correct the defendant misnomer so as to reflect "Kennedy Enterprises" as the properly-named entity defendant having been duly served in accordance with CPLR 310[b] is granted. (Motion Seq. 5)

Any relief not specifically granted herein is denied and/or rendered moot by the foregoing determination.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York  
April 15, 2019

  
HON. KATHIE E. DAVIDSON, J.S.C.

TO:

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