

Stone v Kimberly Hotel Inc.

2020 NY Slip Op 32021(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 160902/2019

Judge: Barbara Jaffe

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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: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

CHRISTINA STONE,

Plaintiff,

- v -

INDEX NO. 160902/2019

MOTION DATE _____

MOTION SEQ. NO. 001 002

KIMBERLY HOTEL INC, FERRO'S RESTAURANT,
LLC, ERIC AVILEZ, ERIN FISHER, JORGE
GARCIADALBA, MARC MIRBOD,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7-9, 12
were read on this motion to _____ extend time _____.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 13-22
were read on this motion to _____ dismiss defense _____.

Plaintiff moves, on default, pursuant to CPLR 306-b for an order granting her an
extension of time within which to serve summonses and complaints on defendants Alvilez,
Fisher, Garciadealba, and Mirbod (individual defendants). She also moves pursuant to CPLR
3211(b) for an order striking defendants' answer as inadequately pleaded. Defendants Kimberly
Hotel, Inc. and Ferro's Restaurant, LLC (corporate defendants) oppose.

I. MOTION FOR EXTENSION OF TIME TO SERVE (NYSCEF 7, 8)

This action was commenced by the filing of summons and complaint on November 8,
2019; corporate defendants were served shortly thereafter. Plaintiff alleges that she does not
know the residential addresses of the individual defendants and believes that corporate
defendants, having employed the individual defendants, know them. She claims that due to the
COVID-19 pandemic, service of plaintiff's discovery demands, including demands for the

residential addresses of the individual defendants, was not effectuated until May 4, 2020, and pursuant to the New York City Human Rights Law, plaintiff has three years from the date of the complained of employment action to bring a claim. At the earliest, plaintiff alleges, the statute of limitations on her claims against the individual defendants is mid-April 2021.

Plaintiff maintains that there is good cause to extend the time within which she may serve the individual defendants, observing that in lieu of filing another action naming them, which would entail an unnecessary burden on the court, she is advancing the interests of justice by seeking an extension. She asserts that this is the first opportunity she has had to seek to serve the individual defendants, having received notice on May 4, 2020 of the reopening of the court for the filing of non-essential motions following the Chief Administrative Judge's March 22, 2020 Order AO/78/20 prohibiting such filings. Moreover, she contends, no prejudice would befall defendants, as the corporate defendants have actual notice of this action, have answered the complaint, are on notice of the instant motion, and are believed to employ and/or are in contact with the individual defendants with regard to coordinating their respective defenses. Plaintiff relies on her complaint as setting forth the merits of the action. She thus seeks a 120-day extension of time from the date of its decision.

Corporate defendants do not oppose.

Pursuant to CPLR 306-b, as pertinent here, service of the summons and complaint, must be made within 120 days after the commencement of the action, although upon motion, the court must either dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Absent opposition, and as plaintiff's delay was brief, there is sufficient justification for granting the extension.

II. MOTION TO STRIKE ANSWER (NYSCEF 10, 11, 13-22)

In support of her motion to strike the corporate defendants' answer, plaintiff alleges *in toto*:

Defendants' pleading fails to allege any facts, much less "particularly sufficient" facts, necessary to put Plaintiff on "notice of the transactions intended to be proved or the material elements of each cause of action or defense", CPLR 3013, for each of Defendants' Affirmative Defenses, One through Twenty (1-20) (Dkt. No.: 6). Therefore, each of Defendants' Affirmative Defenses, One through Twenty (1- 20), should be stricken under CPLR 3211(b) "on the ground that [the] defense[s] [are] not stated."

In opposition, defendants argue that plaintiff fails to demonstrate that the affirmative defenses are without merit as a matter of law and otherwise assert that the motion is premature, having been filed before the commencement of discovery. They also provide factual bases for all but the first affirmative defense, which they assert is sufficiently pleaded, and seek an opportunity to amend their affirmative defenses.

Although all but the first affirmative defense are not supported by factual allegations, as defendants now, in their opposition, provide factual bases for them, there is an insufficient basis for dismissing the insufficiently pleaded affirmative defenses. As permission to amend an answer must be obtained by notice of motion (*see Ran v Weiner*, 170 AD3d 425, 426 [1st Dept 2019] [plaintiff's "footnote request" for permission to amend complaint a second time to add claim improperly raised in opposition papers rather than by notice of motion]), defendants are obliged to so proceed.

III. CONCLUSION

In light of the foregoing, it is hereby

ORDERED, that plaintiff's motion for an extension of time to effect service of the summons and complaint on defendants Eric Avilez, Erin Fisher, Jorge Garciadealba, and Marc Mirbod is granted (mot. seq. one); it is further

ORDERED, that plaintiff has 120 days from the date of this decision to effect service of the summons and complaint on the individual defendants; and it is further

ORDERED, that plaintiff's motion to dismiss the affirmative defenses is denied (mot. seq. two).

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BARBARA JAFFE, J.S.C.

6/24/2020
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE