

8th Hill Inc. v Grunberg 77, LLC
2020 NY Slip Op 33509(U)
October 21, 2020
Supreme Court, New York County
Docket Number: 656691/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. CAROL R. EDMOND****PART****IAS MOTION 35EFM***Justice*

-----X

8TH HILL INC.,

INDEX NO. 656691/2019**MOTION DATE** 9/24/2020

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

GRUNBERG 77, LLC, MICHAEL GRUNBERG, ARIEL
GRUNBERG**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 24

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 25

were read on this motion to/for

STRIKE PLEADINGS

Upon the foregoing documents, it is

ORDERED that the motion of defendants Michael Grunberg and Ariel M. Grunberg to dismiss the complaint as against them, for lack of personal jurisdiction (motion seq. 001) is granted; and it is further

ORDERED that the motion of defendant Grunberg 77, LLC, pursuant CPLR §§ 3124 and 3126, to compel production of previously served discovery demands, or to dismiss the Complaint for non-compliance, or to preclude plaintiffs from relying upon the potential evidence sought (motion seq. 002), is granted, to the extent that plaintiff is ordered to respond to these two discovery instruments within 45 days of service of a copy of this order with notice of entry thereof, and, upon failure to so comply, plaintiff will be precluded from submitting any evidence that had been sought in those discovery devices either at trial or on any summary judgment motion; and it is further

ORDERED that the complaint is dismissed as against defendants Ariel M. Grunberg and Michael Grunberg and continues against defendant Grunberg 77, LLC; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry on all parties within thirty (30) days of entry on all counsel.

MEMORANDUM DECISION

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this action arising from a ten-year commercial lease for a restaurant in Manhattan, executed in May 2018, defendants Michael Grunberg and Ariel M. Grunberg (the Grunbergs), the principals of the defendant landlord, move, in motion sequence 001, pursuant to CPLR §§ 3211 I(a)(8) and 321 (e), to dismiss the verified complaint (the Complaint) as against them for lack of personal jurisdiction, on the ground that the Complaint was not served upon either of them by any lawful means. The motion is granted. The only affidavit of service filed by plaintiff indicates that defendants were successfully served, but does not check the box that the Grunbergs were personally served, but rather checked the box that the process server left a copy with “Susan,” who was allegedly authorized to accept service, as a “managing agent” or “registered agent” (Michael Grunberg aff, exhibit B).

The Grunbergs each submitted an affidavit stating that they were never personally served. Plaintiff has defaulted on both motions. On its face, standing alone, the affidavit of service is insufficient to establish personal service on either of the Grunbergs pursuant to CPLR § 308. Therefore, the motion is granted and the action is dismissed as against the Grunbergs.

In motion sequence 002, defendant Grunberg 77 LLC (Grunberg 77), the only remaining defendant, moves, alternatively, pursuant to CPLR §§ 3124 and 3126 to compel production of previously served discovery demands, or to dismiss the Complaint for non-compliance, or to preclude plaintiffs from relying upon the potential evidence demanded in the notice of production, and the interrogatories. Those discovery instruments request evidence related to plaintiff’s allegations concerning, inter alia, defendants’ alleged predatory business practices,

alleged misrepresentations about the condition of the premises, as well as expenditures alleged to have been made by plaintiffs on improvements and repairs to the premises.

Given plaintiff's complete failure to respond to either the notice of discovery and inspection, that was due on March 17, 2020, or to respond to defendant's interrogatories, and plaintiff's further default on this motion, the motion is granted to the extent that plaintiff is ordered to respond to these two discovery instruments within 45 days of service of a copy of this order with notice of entry thereof. Upon the failure of plaintiff to comply with this order, plaintiff will be precluded from presenting any evidence at trial or on any summary judgment motion with respect to any item of discovery sought in those two instruments as to which plaintiff failed to respond.

While the determination of the appropriate sanction for failing to comply with discovery demands lies within the discretion of the court, absent evidence of willful or contumacious refusal to comply, striking the complaint is not warranted (*see JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehs.*, 119 AD3d 903 [2d Dept 2014]; *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488 [1st Dept 1996]).

CONCLUSION

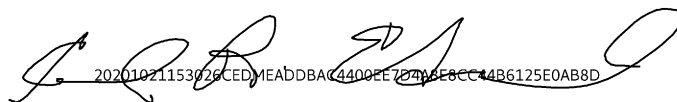
Accordingly, it is

ORDERED that the motion of defendants Michael Grunberg and Ariel M. Grunberg to dismiss the complaint as against them, for lack of personal jurisdiction (motion seq. 001) is granted; and it is further

ORDERED that the motion of defendant Grunberg 77, LLC, pursuant CPLR §§ 3124 and 3126, to compel production of previously served discovery demands, or to dismiss the Complaint for non-compliance, or to preclude plaintiffs from relying upon the potential evidence sought (motion seq. 002), is granted, to the extent that plaintiff is ordered to respond to these two discovery instruments within 45 days of service of a copy of this order with notice of entry thereof, and, upon failure to so comply, plaintiff will be precluded from submitting any evidence that had been sought in those discovery devices either at trial or on any summary judgment motion; and it is further

ORDERED that the complaint is dismissed as against defendants Ariel M. Grunberg and Michael Grunberg and continues against defendant Grunberg 77, LLC; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry on all parties within thirty (30) days of entry on all counsel.


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<u>10/21/2020</u>		<u>CAROL R. EDMAD, J.S.C.</u>	
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE