

Nan Yang v Rong Chen
2021 NY Slip Op 30754(U)
March 8, 2021
Supreme Court, New York County
Docket Number: 158011/2020
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

-----X

NAN YANG,

Plaintiff,

- v -

RONG CHEN,

Defendant.

INDEX NO. 158011/2020
MOTION DATE 01/25/2021
MOTION SEQ. NO. 001

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 (Motion 001)

were read on this motion to/for DISMISS ACTION/CROSS MOTION TO EXTEND
TIME TO SERVE COMPLAINT/CONSOLIDATION .

In this action to recover damages for assault and battery, commenced by summons with notice, the defendant moves pursuant to CPLR 3012(b) to dismiss this action on the ground that the plaintiff failed to serve the complaint within 20 days after the defendant served a demand for the complaint. The plaintiff opposes the motion and, in the alternative, cross-moves pursuant to CPLR 3012(d) to extend the time for service of the complaint. She further cross-moves pursuant to CPLR 602 to consolidate this action both with an action entitled *Chen v Yang*, pending before this court under Index No. 158182/2020 (hereinafter Supreme Court Action No. 2), and a proceeding to recover possession of a leasehold entitled *Matter of Chen v Yang*, pending in the Civil Court, New York County, Landlord-Tenant Part, under Index No. L&T 074042/2019 (hereinafter the Civil Court proceeding). The defendant's motion is denied, as the complaint in this action was timely served in accordance with the tolling provisions that are set forth in the Governor's Executive Order 202.67. That branch of the plaintiff's cross motion seeking to extend her time for service and filing of the complaint is thus denied as unnecessary.

That branch of her cross motion seeking consolidation is granted to the extent of joining this action with Supreme Court Action No. 2 for discovery and trial, and is otherwise denied.

The plaintiff commenced this action on September 29, 2020 by filing a summons with notice. On October 9, 2020, the defendant timely served a demand for service of a complaint. The plaintiff served the complaint on November 3, 2020 by uploading it to the NYSCEF electronic filing system.

CPLR 3012(b) requires that where, as here, a plaintiff commences an action by filing a summons with notice, he or she must serve the complaint within 20 days of the defendant serves a demand for service of a complaint. That subsection also provides that “[t]he court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.” Here, under normal circumstances, the plaintiff was required to serve the complaint within 20 days of October 9, 2020, or by October 29, 2020, and her service of that pleading on November 3, 2020 would have been 5 days beyond the deadline fixed by the CPLR. Here, the plaintiff reasonably argues that several executive orders issued by the Governor in response to the COVID-19 pandemic tolled and extended the service and filing deadline for her complaint, that her service and filing on November 3, 2020 was thereby rendered timely, and that the defendant’s motion should be denied on that ground.

Pursuant to Executive Law § 28(1), a Governor generally has the authority to declare a disaster emergency on his or her own initiative. Pursuant to L 2020, ch 23 (eff Mar, 3, 2020), the Legislature authorized the Governor to issue, by executive order, any directive necessary to respond to a state disaster emergency in connection with the COVID-19 pandemic. Specifically, section 2 of that session law amended Executive Law § 29-a, so that it now provides as follows:

“the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster. The governor, by executive order, may issue any directive during a state disaster emergency declared in the following instances: . . . epidemic, disease outbreak . . . Any such directive must be

necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive.”

On March 20, 2020, the Governor, pursuant to the authority delegated to him under the Executive Law and L 2020, ch 23, issued Executive Order (EO) 202.8, which provided, in relevant part:

“In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules . . .*, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, *is hereby tolled from the date of this executive order until April 19, 2020.*”

(emphasis added). The terms of that EO, including the tolling deadlines set forth therein, were extended 13 times between March 20, 2020 and October 4, 2020. On October 4, 2020, the Governor issued EO 202.67, again extending the tolling deadline set forth in EO 202.8 until November 3, 2020, the date on which the plaintiff finally served and filed the complaint in the instant action.

An executive order adopted pursuant to a specific delegation of statutory authority granted by the Legislature has the force of law (see *Clark v Cuomo*, 66 NY2d 185, 193-194 [1985] [Jasen, J., dissenting]; *Subcontractors Trade Assn. v Koch*, 62 NY2d 422, 429 [1984]). A remedial provision that has the force of law, such as that articulated in the executive orders described above, must be liberally construed to accomplish its salutary goals (*Kimmel v State of New York*, 29 NY3d 386, 396 [2017]; McKinney’s Cons Laws of NY, Book 1, Statutes § 321), particularly where it is procedural in nature (see, e.g., *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 24 [1984]). Inasmuch as the relevant executive orders tolled the filing deadline for all sorts of legal papers, and not merely initiatory papers, it is thus reasonable to conclude that it applies to the complaint here. A complaint may be characterized as a species of “notice” because a complaint in a civil action must give the defendant “notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each

cause of action or defense” (CPLR 3013 [emphasis added]; see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 n 3 [New York generally applies a “notice pleading” standard to complaints]; *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014] [same]; *V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 723 [2d Dept 2013] [test of a pleading’s sufficiency is “whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved”]; *New York Univ. v Turner Constr. Co.*, 2020 NY Slip Op 51030[U], 68 Misc 3d 1219[A] [Sup Ct, N.Y. County, Sep. 1, 2020]). The complaint also could reasonably be characterized as an “action” since, even though it is the filing of a summons that commences an action (see CPLR 304[a]), CPLR 3011 mandates that “[t]here shall be a complaint” in order to prosecute an action.

Accordingly, this court holds that the plaintiff’s October 29, 2020 deadline for the service and filing of a complaint was tolled until November 3, 2020 by virtue of EO 202.67, that, thus, the complaint was timely served and filed on that date, and that the defendant’s motion pursuant to CPLR 3012(b) must be denied.

In light of the foregoing, that branch of the plaintiff’s cross motion seeking to extend her time to serve and file the complaint must be denied as unnecessary. Were the court nonetheless to have considered the application, it would have exercised its discretion and granted that branch of the cross motion.

Contrary to the plaintiff’s contention, in connection with her cross motion, she would not have been able to rely on the decision of the Appellate Division, Third Department, in *Mills v Niagara Mohawk Power Corp.* (216 AD2d 828, 829 [3d Dept 1995]) as to the showing she needed to make to obtain a discretionary extension of time to serve a complaint in response to a CPLR 3012(b) demand. The Court there held that where “the delay [is] relatively brief (approximately six days) and there is no evidence that defendant was prejudiced by this initial delay, plaintiff was not required to tender an excuse for the delay nor establish a meritorious cause of action to avoid dismissal under CPLR 3012(b).” This court, however, is only bound to

apply the precedent established by the appellate division in another judicial department where a contrary rule has yet to be established by the Appellate Division, First Department, or by the Court of Appeals (see *D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]). The First Department has repeatedly required a litigant in the plaintiff's situation to demonstrate a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action, regardless of the brevity of the delay (see *Gear Up, Inc. v City of New York*, 140 AD3d 515, 515 [1st Dept 2016]; see also *Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt., LLC*, 150 AD3d 427, 428 [1st Dept 2017]; *Nolan v Lechner*, 60 AD3d 473, 473 [1st Dept 2009]).

The Second Department, in applying the same requirements as the First Department, explained that

“[g]enerally, the determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court; . . . While the court has the discretion to accept law office failure as a reasonable excuse, a conclusory, undetailed, and unsubstantiated claim of law office failure does not amount to a reasonable excuse”

(*Trokaik Realty, Inc. v HP Yuco HDFC, Inc.*, 188 AD3d 1281, 1282 [2d Dept 2020] [citations omitted]; see *Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty, LLC*, 95 AD3d 789, 790 [1st Dept 2012] [rejecting excuse of law office failure as “perfunctory and unsubstantiated”]). The court recognizes that claims of law office failure that are successfully invoked usually involve the miscalendaring of deadlines and court appearances, the misplacement of papers, computer failures, and the like, and that mere “misguided strategy” is insufficient to invoke law office failure as a reasonable excuse for failing to meet a filing deadline (*Bank of N.Y. Mellon Trust Co., N.A. v Talukder*, 176 AD3d 772, 774 [2d Dept 2019]). To the extent that the plaintiff's attorney's interpretation of the Governor's executive orders may ultimately turn out to be incorrect, her attorney's reliance on the deadlines set forth in those executive orders would have presented a proper and excusable instance of law office failure. Attorneys and the courts have been operating in uncharted territory during the pandemic, leading to much confusion and uncertainty amongst the bench and bar. These are extraordinary times, and the drastic

outcome of dismissal, based on a possible misinterpretation of language in an emergency executive order, should not result in denying the plaintiff her day in court in this action, especially where the delay in serving the complaint was minimal and the defendant has demonstrated no prejudice.

In any event, even if this action were dismissed, the plaintiff, should she be so advised, could timely assert her claims in this action as counterclaims in Supreme Court Action No. 2.

CPLR 203(d) provides, in relevant part, that

“[a] defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.”

The defendant commenced Supreme Court Action No. 2 on October 5, 2020. The defendant's alleged assault upon the plaintiff occurred on October 7, 2019. Hence, on the date that the defendant commenced Supreme Court Action No. 2 against the plaintiff, any cause of action that she may have had to recover for assault and battery was not barred by the applicable one-year limitations period of CPLR 215; such a cause of action thus may be asserted as a counterclaim in that action regardless of when it is actually interposed (*see Long v Sowande*, 27 AD3d 247, 248 [1st Dept 2006]). Even were the plaintiff's assault and battery cause of action barred as of October 5, 2020, it arises from the same series of transactions and occurrences that form the basis of the defendant's claims in Supreme Court Action No. 2 and, hence, she would still be able to assert a counterclaim for the same amount as the defendant seeks in that action under the theory of equitable recoupment (*see Rusi Holding Corp. v Inner City El.*, ____AD____, 2021 NY Slip Op 01344 [1st Dept, Mar. 4, 2021]; *Oneida Indian Nation v Hunt Constr. Group, Inc.*, 108 AD3d 1195, 1196 [4th Dept 2013] [recovery under theory of equitable recoupment requires a “legally subsisting cause of action [or counterclaim] upon which” the defendant “could maintain an independent claim”). Hence, a discretionary dismissal here would

not shield the defendant from having to defend against an assault and battery counterclaim in Supreme Court Action No. 2.

This action should be consolidated with Supreme Court Action No. 2, but only to the extent of joining the two actions for discovery and trial.

“Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, ‘unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right’”

(*Raboy v McCrory Corp.*, 210 AD2d 145 [1st Dept 1994], quoting *Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]). Contrary to the defendant’s contention, this action and Supreme Court Action No. 2 arise from the same occurrences and transactions as each other; in this action, the plaintiff alleges that the defendant assaulted and battered her; in Supreme Court Action No. 2, the defendant here alleges that the plaintiff had him falsely arrested for that alleged assault and battery, and claims that there was no assault and battery. The defendant here also asserts in that action that the plaintiff used her superior knowledge of English wrongfully to secure occupancy rights to the apartment that they shared, in which he was the named tenant. He also alleged that the plaintiff improperly converted his personal property in the apartment by wrongfully excluding him from the leasehold pursuant to an order of protection issued shortly after the alleged assault, and breached a settlement agreement between the two of them arising from their ongoing dispute by failing to pay him pursuant to its terms. Hence, this action presents questions of law and fact common to Supreme Court Action No. 2 (see CPLR 602; *DeSilva v Plot Realty, LLC*, 85 AD3d 422 [1st Dept 2011]; *Kern v Shandell, Blitz, Blitz & Bookson*, 58 AD3d 487 [1st Dept 2009]).

Moreover, those two actions are at similar procedural stages, inasmuch as this order is determining a motion to dismiss in the instant action, while the court recently granted in part and denied in part a motion to dismiss the complaint in Supreme Court Action No.2, and there is no

indication that consolidation will prejudice a substantial right of any party (see *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337 [1st Dept 2006]).

Nonetheless, “in order to avoid jury confusion the actions should not be consolidated if that results in a party being both plaintiff and defendant as is the effect in the instant case” (*Geneva Temps, Inc. v New York World Communities, Inc.*, 24 AD3d 332, 335 [1st Dept 2005] see *M & K Computer Corp. v MBS Indus.*, 271 AD2d 660 [2d Dept 2000]). The plaintiff’s motion to consolidate this action with Supreme Court Action No. 2 should thus be granted only to the extent of ordering a joint trial (see *Geneva Temps, Inc. v New York World Communities, Inc.*, 24 AD3d at 335; *Bass v France*, 70 AD2d 849 [1st Dept 1979]; *Padilla v Greyhound Lines, Inc.*, 29 AD2d 495, 499 [1st Dept 1968]).

The defendant, however, correctly argues that the Civil Court proceeding should not be removed to this court and consolidated or joined either with this action or with Supreme Court Action No. 2. The Civil Court is the preferred forum for landlord-tenant and tenant-subtenant disputes (see *Langotsky v 537 Greenwich, LLC*, 45 AD3d 405, 405 [1st Dept 2007]; *44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]; *Scheff v 230 E. 73rd Owners Corp.*, 203 AD2d 151, 152 [1st Dept 1994] [recognizing “a strong rule against staying a summary [landlord-tenant] proceeding, or removing it, such as for purposes of consolidation or joint trial with some proceeding in the supreme court or some other superior court”). “Civil Court has jurisdiction of landlord tenant disputes . . . and when it can decide the dispute, as in this case, it is desirable that it do so” (*Post v 120 E. End Ave. Corp.*, 62 NY2d at 28). Where a petitioner in a Civil Court proceeding simply seeks to recover money, and the Civil Court is thus is not called upon to exercise its special jurisdictional role in determining the right to possession of real property, consolidation may be warranted (see *Atherton v 21 E. 92nd St. Corp.*, 149 AD2d 354, 355 [1st Dept 1989]). Where, as here, the Civil Court proceeding does not merely seek to recover rent, but seeks possession of the subject leasehold, and no party has shown that

consolidation is necessary, removal and consolidation are not warranted (see 44-46 W. 65th Apt. Corp. v Stvan, 3 AD3d at 441).

Accordingly, it is

ORDERED that the defendant's motion to dismiss the action is denied; and it is further,

ORDERED that the plaintiff's cross-motion is granted to the extent that this action, entitled Yang v Chen, pending under New York County Index No. 158011/2020, is joined for discovery and trial with an action entitled Chen v Yang, pending under New York County Index No. 158182/2020, this action and that action shall proceed under individual index numbers, and, upon completion of discovery, the plaintiff in each action shall be required to file a note of issue in connection with the action that he or she commenced, and the cross motion is otherwise denied; and it is further,

ORDERED that the caption of the actions joined for discovery and trial shall read as follows:

NAN YANG

v

Plaintiff,

Index No. 158011/2020
Action No. 1

RONG CHEN

Defendant

RONG CHEN,

v

Plaintiff,

Index No. 158182/2020
Action No. 2

NAN YANG,

Defendant;

and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the Trial Support Office (60 Centre Street, Room 158, New York, NY 10007), and shall file the

notice required by CPLR 8019(c) and a completed Form EF-22 with the New York County Clerk's office, and the Trial Support Office shall thereupon mark the court records accordingly.

This constitutes the Decision and Order of the court.

3/8/2021
DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	OTHER
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	OTHER