SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

----------X

SAMUEL HERRNSON and ROBIN HERRNSON,

Plaintiffs,

- v -

ROSENBERG & ESTIS, P.C., WARREN ESTIS, GARY ROSENBERG, DEVIN KOSAR, and LAURA DAVIDOV,

Defendants.

----------X

INDEX NO. 100969/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38

were read on this motion to/for DISMISSAL.

In this action commenced by pro se plaintiffs Samuel Herrnson and Robin Herrnson (collectively "the Herrnsons"), defendants Rosenberg & Estis, P.C. ("the firm"), Warren Estis, Gary Rosenberg, Devin Kosar and Laura Davidov move: 1) pursuant to CPLR 3211 (a)(1), (a)(7), and (a)(8) to dismiss the complaint; 2) pursuant to 22 NYCRR § 130-1.1 for a money judgment against plaintiffs in an amount to be determined by this Court, but no less than $25,000[1], representing the costs and fees, including attorneys' fees, incurred by defendants in defending this action; and 3) for such other and further relief as this Court deems just and proper. After consideration of defendants' contentions, as well as a review and analysis of the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

[1] Although defendants demand at least $25,000 in the notice of motion, they demand an amount of at least $15,000 in their supporting papers. Docs. 5-6.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, plaintiff Samuel Herrnson ("Mr. Herrnson") entered into a residential lease with 400 East 58th Street Co. c/o David Frankel for apartment 7A ("the apartment") at 400 East 58th Street in Manhattan ("the building" or "the premises"). The lease was most recently amended by a renewal lease in November 2018 between Mr. Herrnson and 400 E58 Owner LLC ("the former landlord"). Plaintiff Robin Herrnson ("Ms. Herrnson") is Mr. Herrnson's wife.

In 2018, the former landlord commenced a nonpayment proceeding against, inter alia, the Herrnsons in the Housing Part of the Civil Court of the City of New York, New York County under L & T Index Number 77100/18 ("the Housing Court proceeding"). In the Housing Court proceeding, the Herrnsons raised various defenses and asserted certain counterclaims against the former landlord, which moved for partial summary judgment against them. By order dated June 13, 2019, the Housing Court (Ortiz, J.) granted the former landlord's motion for partial summary judgment on liability against the Herrnsons and directed them to pay ongoing use and occupancy by the 10th of the month starting in July 2019, with any outstanding use and occupancy due through June, 2019 to be paid by June 30, 2019. Doc. 12. The Housing Court also dismissed the Herrnsons' defenses and counterclaims related to rent overcharge, fair market rent appeal and fraudulent deregulation. Doc. 12. Although the Herrnsons moved to renew the former landlord's motion, that application was denied on August 7, 2019. Doc. 13.

On September 20, 2019, the Herrnsons, as well as Davidov and Kosar, attorneys employed by the firm, appeared for a conference in Housing Court before the Hon. Timmie Elsner. Davidov and Kosar advised Judge Elsner that the Herrnsons had failed to pay use and occupancy as directed by the June 13, 2019 order. Judge Elsner then issued a decision and order stating, inter alia, that:

> [Samuel Herrnson] maintains he has access to funds which would enable him to satisfy any potential judgment in this proceeding. He contends he misinterpreted the orders issued by the Court. [Samuel Herrnson] is ordered and directed to pay the four months of use and occupancy outstanding pursuant to the orders of J. Ortiz by September 30, 2019 (the 6th business day from today) @ $3,903.53--total $15,614.12 and ongoing use and occupancy by the 10th of each month until conclusion of all litigation in this proceeding, @ $3,903.53 per month unless said amount is altered by court order. If the 10th of the month falls on a weekend or holiday, [Samuel Herrnson] is to pay by the following business day. Payments are to be delivered to Petitioner's office by close of business on the dates set forth herein by certified or bank check. * * * In the event [Samuel Herrnson] fails to comply with this Order his answer will be deemed a nullity, defenses stricken and Petitioner may move this Court for an immediate trial.

Doc. 14.

The same day, Judge Elsner went on the record to ensure that the Herrnsons understood their obligations, stating, inter alia, that Mr. Herrnson acknowledged that he had the funds to pay use and occupancy but failed to pay the same, instead claiming that he misunderstood the June 13, 2019 order. Doc. 15 at 11-12. Judge Elsner said that she was giving the Herrnsons one last chance to comply with the order instead of striking their answer. Doc. 15 at 12.

When the Herrnsons still failed to pay use and occupancy, the former landlord moved, by order to show cause ("OSC"), to strike the Herrnsons' remaining affirmative defenses in the Housing Court proceeding and to deem their answer a nullity in accordance with Judge Elsner's September 20, 2019 order. The Herrnsons opposed the former landlord's OSC and cross-moved to dismiss the Housing Court proceeding on the eve of trial alleging, for the first time, that the former landlord had an improper multiple dwelling registration ("MDR") for the building. The Herrnsons then withdrew the branch of their cross motion seeking to dismiss the petition without prejudice to raising their defenses at trial. By orders dated December 17 and 18, 2019, Judge Elsner granted the former landlord's motion in part, directing the Herrnsons to pay use and

occupancy and, in the event they failed to do so, they were to be precluded from presenting their defenses at trial. Docs. 16-17.

In the December 18, 2019 order, Judge Elsner directed that the order of September 20, 2019 was amended to reflect that the Herrnsons were directed to deposit with the Clerk of the Court all use and occupancy/rent pursuant to the court's September, 20, 2019 order ($15,614.12) plus all sums accruing subsequent thereto for October, November, and December 2019 ($3,903.53 x 3 =$11,710.59), a total amount of $27,324.71, by January 6, 2020. Doc. 17. Judge Elsner further ordered that, in the event the Herrnsons failed to pay the foregoing amounts, they would be precluded from presenting their defenses at trial. Doc. 17.

Despite the foregoing, the Herrnsons failed to deposit the outstanding arrears with the Clerk of the Court. Indeed, at a January 7, 2020 court appearance, Mr. Herrnson conceded that he was in default. Thus, the Herrnsons' answer, defenses and counterclaims in the Housing Court proceeding were stricken and severed without prejudice to allow the Herrnsons to raise such claims in a forum other than the Housing Court. Doc. 18.

After a trial, the Housing Court issued a decision/judgment dated January 7, 2020 in which it determined, inter alia, that: the former landlord produced evidence establishing ownership of the building in which the premises were located; the building had a current multiple dwelling registration; the premises were rent regulated, and that the rent sought was proper. Doc. 19. Based on a rent ledger introduced by the former landlord, the Housing Court awarded the former landlord "a final judgment of possession in the amount of $51,123.96 through 1/31/2020. Doc. 19. Although the Herrnsons were initially able to obtain a stay of enforcement of the judgment and warrant of eviction, they later were unable to comply with the monetary obligations necessary to maintain the stay and it was vacated. Doc. 20.

In August 2020, the Herrnsons commenced an action in this Court against the former landlord and certain of its business partners, as well as the building's managing agent, styled *Samuel Herrnson and Robin Cohen Herrnson v SL Green Realty Corp., et al.*, under New York County Index No. 100762/20. Doc. 21. Three of the five defendants named in that action, which sounded, inter alia, in breach of contract and negligence, were not parties to the Housing Court proceeding, had no privity of contract with the Herrnsons, and had no relationship to the premises.

On September 9, 2020, the building was conveyed from the former landlord to 400 East 58th Street, LLC ("the current landlord"). In November 2020, the current landlord moved to confirm the judgment and warrant obtained at the trial of the Housing Court proceeding and also moved to substitute itself in place of the former landlord in that proceeding. Doc. 22. By order dated November 30, 2020, Judge Elsner recused herself from the Housing Court proceeding due to a conflict of interest. Doc. 24. 2020. The Housing Court proceeding was then assigned to Judge Evon Asforis, before whom a conference was scheduled for December 9, 2020. Doc. 25. However, when Kosar appeared for the conference before Judge Asforis that day, Mr. Herrnson failed to appear, claiming that he was not informed about the conference date and thus did not have enough time to prepare. The Housing Court then adjourned the conference until December 23, 2020.

On or about October 26, 2020, plaintiffs commenced the instant action by summons with notice against the firm, which represented both the former landlord and the current landlord; Warren Estis and Gary Rosenberg, the founding partners of the firm; Devin Kosar, counsel to the firm and one of the attorneys of record for the landlord and former landlord in the Housing Court

proceeding; and Laura Davidov, a former associate of the firm and an attorney of record for the former landlord and the current landlord who left the firm in September 2019. Doc. 6.

In the summons with notice, the plaintiffs alleged "attorney misconduct, fraud (altering + creating documents) misrepresentation, schemes to defraud, mail and wire fraud, defamation of petitioners, lying about sending and receiving documents (motions, etc.), forging signature on documents, [and] colluding with building (instructing doorman to allow services unimpeded to Petitioner[s'] front door)." Doc. 10.

Plaintiffs then purported to serve the defendants with the summons with notice on November 4, 2020. Doc. 11. The affidavits of service indicate that the firm, Rosenberg, Estis and Kosar were served at 733 Third Avenue, New York, New York 10017 (the location of the firm) by serving "J. Diaz" and by then mailing copies of the summons to 733 Third Avenue, New York, New York. Doc. 11. Davidov was purportedly served at BLDG Management, located at 417 5th Avenue, 4th Floor, New York, New York 10016, upon serving "Q. Shatkis" and by then mailing a copy of the summons to her at that same location. Doc. 11.

After receiving the summonses, defendants demanded that plaintiffs serve a complaint. Doc. 26. Although the plaintiffs appear to have drafted a complaint, it was not verified, signed, or even filed with the Court. Doc. 10.[2]

Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a)(1) (documentary evidence), (a)(7) (failure to state a cause of action), (a)(8)(lack of personal jurisdiction); 2) for a money judgment against plaintiffs in an amount to be determined by this Court, but no less than $25,000, for the costs and fees, including attorneys' fees, incurred by

[2] The complaint was filed with this Court by defendant Kosar. Doc. 10.

defendants in defending this action; and 3) for such other and further relief as this Court deems just and proper. Docs. 5-29.

In support of the motion, defendants argue that the complaint must be dismissed based on lack of personal jurisdiction pursuant to CPLR 3211(a)(8) because they were not properly served with process. Doc. 6 at pars. 54-86. Defendants also maintain that the complaint must be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7). Doc. 6 at pars. 87-125. Further, defendants assert that plaintiffs' claims must be dismissed based on documentary evidence pursuant to CPLR 3211(a)(1). They also insist that they are entitled to reimbursement, pursuant to 22 NYCRR 130-1.1, for costs and legal fees they incurred in defending this action since plaintiffs' allegations are frivolous. Doc. 6 at pars. 141-144.

LEGAL CONCLUSIONS

Lack of Personal Jurisdiction Over The Firm

Pursuant to CPLR 3211(a)(8), a party may move to dismiss an action based on the absence of personal jurisdiction. In New York, service of process upon a corporation, such as the defendant firm, may only be made pursuant to CPLR 311(a)(1), which requires personal service upon "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service"; Business Corporation Law ("BCL") § 306 (a), which permits service upon a registered agent "in the manner provided by law for the service of a summons"; or BCL § 306 (b), which permits service upon the Secretary of State. "On a motion pursuant to CPLR 3211(a)(8) to dismiss for lack of personal jurisdiction, the party asserting jurisdiction has the burden of demonstrating 'satisfaction of statutory and due process prerequisites' (*Stewart v Volkswagen of Am.*, 81 NY2d 203, 207 [1993])" (*Matter of James v iFinex Inc.*, 185 AD3d 22, 28-29 [1st Dept 2020]).

Service of process was allegedly made on the firm by process server Edward Falcon at 733 Third Avenue in Manhattan on November 4, 2020. Doc. 11. Falcon represents in his affidavit of service that he delivered the summons with notice to "J Diaz". Doc. 11. However, since there is no indication in Falcon's affidavit of service that Diaz was "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service", plaintiffs clearly failed to comply with CPLR 311(a)(1). Nor does Falcon indicate in his affidavit of service whether Diaz was a registered agent for service, and this Court's search of the website for the New York State Department of State, Division of Corporations reflects that the firm does not have such a registered agent. Therefore, plaintiffs failed to comply with BCL 306(a) as well. Additionally, since Falcon did not serve the Secretary of State, plaintiffs failed to comply with BCL 306(b). Given that plaintiffs did not serve the firm by any of the three prescribed methods set forth above, there is no jurisdiction over the firm and the claims against it must be dismissed.[3]

Lack of Personal Jurisdiction Over Rosenberg, Estis, and Kosar

Falcon's purported affidavits of service on Rosenberg, Estis, and Kosar are defective as well. Doc. 11. Falcon's affidavits of service on these individuals indicate that he served Rosenberg, Estis, and Kosar by substituted service at 733 Third Avenue in Manhattan on November 4, 2020. Doc. 11. Although Falcon lists Rosenberg, Estis, and Kosar as the "person[s] of suitable age and discretion" on whom he effectuated service, this conflicts with the

[3] This Court further notes that the portion of the purported affidavit of service on the firm pertaining to service on a corporation is blank. Doc. 11. Instead, Falcon completed the section of the affidavit of service applicable to substituted service on *an individual*. Additionally, although the purported affidavit of service reflects that the firm was served "c/o Warren Estis", the affidavit is devoid of any indication that Estis was served on behalf of the firm. Doc. 11. Even if Estis had been served on behalf of the firm, Falcon's affidavit of service is silent regarding whether he is authorized to accept service on behalf of the firm pursuant to CPLR 311(a)(1).

portions of his affidavits in which he represents that he served process on those individuals by serving "J. Diaz". Doc. 11. Given that these purported affidavits of service are inherently contradictory regarding the individual actually served, they are invalid.

Lack of Personal Jurisdiction Over Davidov

Falcon's purported affidavit of service on Davidov is also defective. Doc. 11. That affidavit indicates that Falcon served Davidov by substituted service at "BLDG Management 417 5th Ave., 4th Fl., New York, NY 10016." Doc. 11. Although Falcon lists Davidov as the "person of suitable age and discretion" on whom he effectuated service, this conflicts with the portion of his affidavit in which he represents that he effectuated service on Davidov by serving "Q. Shatku." Doc. 11. Thus, this contradictory affidavit of service is invalid for the same reasons as those pertaining to the purported service on Rosenberg, Estis, and Kosar.

Failure To State A Cause Of Action

Even assuming, arguendo, that defendants were properly served, all claims against them must be dismissed since plaintiffs fail to state any cognizable cause of action. On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*See, 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Although a court considering a motion to dismiss pursuant to CPLR 3211 must liberally construe the complaint and draw all reasonable inferences in favor of the plaintiff (*See, Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the causes of action purportedly pleaded herein are comprised of haphazard amalgamations of elements of various tort, fraud, and contract claims. Since such vague and conclusory allegations cannot survive a motion to dismiss, the complaint must be

dismissed against defendants on this ground as well (*See generally, Kaplan v Conway and Conway*, 173 AD3d 452, 452-453 [1st Dept 2019]).

Defendants' Demand For Sanctions

Although the complaint submitted by the pro se plaintiffs is inartfully drafted, and not even signed, defendants have not established that the contents thereof are "so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1" (*Bradley v Bradley*, 167 AD3d 489, 490 [1st Dept 2018] [internal citation omitted]). Accordingly, the branch of defendants' motion seeking the imposition of sanctions is denied.

Accordingly, it is hereby:

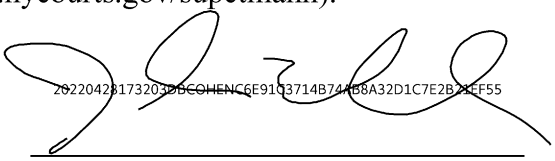
ORDERED that the branch of defendant's motion seeking to dismiss the complaint pursuant to CPLR 3211(a)(7) and (a)(8) is granted, and the complaint is dismissed in its entirety as against defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that the branch of defendants' motion seeking costs and sanctions against plaintiffs pursuant to 22 NYCRR 130-1.1 is denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the dismissal; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

*Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



4/28/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**