

Boswell v 706 Condominium
2022 NY Slip Op 33767(U)
November 4, 2022
Supreme Court, New York County
Docket Number: Index No. 157018/2021
Judge: Mary V. Rosado
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO

PART 33M

Justice

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INDEX NO. 157018/2021

CANDACE BOSWELL, BARBARA ANNE MARIE MARTIN,
DEBBIE CHARLES SANDERS, THOMAS BROWN,
BEVERLY BROWN, CYNTHIA FOULKS, NATALIE WARD,
KAREN FLANAGAN, ASHLEY FLANAGAN-BROWN, KIM
POWELL, WILLIAM POWELL, RYLONA WATSON, RABIYA
WATSON, DENISE PRESCOD, KYEREWAH BONSU-
ANANE, MARIA SANTIAGO, ISAAC SANTIAGO, ETHEL
MCCALL

MOTION DATE 09/28/2021

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

THE 706 CONDOMINIUM, NEWPORT MANAGEMENT,
LLC, MORDECHAI EISENBERG, RIVERSITE
APARTMENTS, LLC, ISRAEL SPIRA, BOARD OF
MANAGERS 706 CONDOMINIUM, 706 DRIVE, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS

Upon the foregoing documents, and oral argument which took place on September 6, 2022 where Robin LoGuidice, Esq. appeared for Plaintiffs Candace Boswell, Barbara Anne Marie Martin, Debbie Charles Sanders, Thomas Brown, Beverly Brown, Cynthia Foulks, Natalie Ward, Karen Flanagan, Ashley Flanagan-Brown, Kim Powell, William Powell, Rylona Watson, Rabiya Warson, Denise Prescod, Kyerewah Bonsu-Anane, Maria Santiago, Isaac Santiago, and Ethel McCall (collectively "Plaintiffs") and Jennifer Stewart, Esq. appearing for Defendants The 706 Condominium, Newport Management, LLC, Mordechai Eisenberg, Riversite Apartments, LLC, Israel Spira, Board of Managers 706 Condominium, and 706 Drive, LLC (collectively

“Defendants”), the Defendants motion to dismiss Plaintiffs’ action, with prejudice, pursuant to CPLR § 3012(b) is denied.

CPLR § 3012(b) provides that:

“If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.”

Here, Plaintiffs filed their summons with notice on July 28, 2021, but did not serve a complaint (NYSCEF Docs. 1, 3-11). Defendants did not serve a written demand for a complaint. However, Defendants did file their notice of appearance on August 9, 2021 (NYSCEF Doc. 2). Nowhere on the docket is an affidavit of service of Defendants August 9, 2021 notice of appearance. On September 2, 2021 Defendants moved to dismiss Plaintiffs’ action pursuant to CPLR § 3012(b). Plaintiffs attempted to file and serve their Verified Complaint on September 13, 2021, but Defendants filed a notice of rejection (NYSCEF Docs. 23-24). Affidavits of service filed by Plaintiffs show that service of the summons with notice was still ongoing until at least August 23, 2021 (NYSCEF Doc. 11). In fact, according to Plaintiffs’ affidavits of service, when Defendants all filed their notice of appearance on August 9, 2021, only Defendants 706 Drive LLC, The 706 Condominium and the Board of Managers had been served with a summons (NYSCEF Docs. 3, 5-6). Defendants now assert that this Court should dismiss Plaintiffs’ action due to their purported failure to file and serve a Complaint by a mere few weeks (NYSCEF Doc. 16).

As a preliminary matter, the CPLR makes no provisions for an appearance or a demand for a complaint before a summons is served (*Howard B. Spivak Architect, P.C. v Zilberman*, 59 AD3d 343, 344 [1st Dept 2009]). When Defendants filed their notice of appearance, per the affidavits of service filed, only Defendants 706 Drive LLC, The 706 Condominium and the Board of Managers had been served with a summons (NYSCEF Docs. 3, 5-6). The remainder of the Defendants, per the affidavits of service, had not yet been served with the summons, and therefore the demand for the complaint by filing a notice of appearance was premature (*Howard B. Spivak, supra; see also Micro-Spy, Inc. v Small*, 9 AD3d 122 [2d Dept 2004]).

Second, in New York, there is a strong public policy in favor of resolving cases on the merits rather than based on minor and byzantine procedural deviations from the CPLR (*Wimbledon Financing Master Fund, Ltd. V Weston Capital Management LLC*, 150 AD3d 427, 428 [1st Dept 2017] citing *Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417 [1st Dept 2016]). Indeed, the First Department has held that a misunderstanding of applicable time limits in serving a Complaint constitutes a reasonable excuse to allow for the late service of a pleading (*id.*).

Further, the Complaint was filed a little over a month after the notice of appearance and mere weeks after all Defendants were served per Plaintiffs' affidavits of service. This minor delay, prior to any discovery taking place, shows that Defendants were in no way prejudiced by Plaintiffs' purportedly late filing of the Complaint, nor have Defendants asserted that they are prejudiced in anyway in their motion papers. Moreover, the Court finds that Plaintiffs' Complaint, which alleges that Plaintiffs are all long-term, rent regulated tenants, many of whom are elderly or disabled, and are suffering violations of the Multiple Dwelling Law, warranty of habitability, New York City Human Rights Law, and the Housing Protection and Tenant Stability Law, has demonstrated sufficient potential meritorious claims against the Defendants (NYSCEF Doc. 23).

Finally, CPLR § 3012(b) expressly leaves dismissal of an action pursuant to the Court's discretion where it states "[t]he court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision." (Emphasis added). CPLR § 2001 allows the Court to permit a mistake, omission, defect or irregularity at any stage of an action, including the filing of a summons and complaint, to be disregarded if a substantial right of a party is not prejudiced. As Defendants have not shown how any substantial right would be prejudiced by allowing this action to go forward, and they have been on notice of Plaintiffs' claims since Plaintiffs attempted to file their Complaint in September of 2021, the Court will disregard any mistake or irregularity in filing the Complaint pursuant to CPLR § 2001.

Therefore, since (1) the timing of service on the Defendants is disputed, and for some Defendants the notice of appearance may have been filed prematurely; (2) the delay in filing a Complaint, if any, was relatively minor; (3) Plaintiffs have demonstrated a reasonable excuse for any potentially late filing of the Complaint and potentially meritorious claims against Defendants; (4) Defendants have not shown how they would be prejudiced at all by having to accept Plaintiffs' Complaint, and (5) CPLR §§ 2001 and 3012(b) allow the Court to exercise its discretion in excusing an irregularity in serving a Complaint so long as no substantial right is prejudiced, the Defendants' motion to dismiss is denied.

Accordingly, it is hereby,

ORDERED that the Defendants' motion to dismiss Plaintiffs' action pursuant to CPLR § 3012(b) is denied; and it is further

ORDERED that the Complaint filed on September 13, 2021 (NYSCEF Doc. 13) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendants shall file any responsive pleadings to Plaintiffs' Complaint within thirty (30) days from service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the parties are directed to appear for a preliminary conference via Microsoft Teams on December 19, 2022 at 9:30 a.m.; and it is further

ORDERED that counsel for Plaintiffs shall serve a copy of this order with notice of entry on Defendants within ten (10) days of entry of this decision and order.

This constitutes the decision and order of the Court.

11/4/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<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		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE