

Drobenko v Hamilton

2023 NY Slip Op 30025(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 655344/2021

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

-----X

NICHOLAS DROBENKO,

Plaintiff,

- v -

PAGE HAMILTON, MYOSHIN THURMAN, TYLER GRECO

Defendant.

-----X

INDEX NO. 655344/2021

MOTION DATE 01/03/2023

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, 11, 12, 13, 14, 15, 16, 17, 28, 29

were read on this motion to/for EXTEND - TIME.

Plaintiff’s motion for an extension of time to serve defendants is denied and the cross-motion by defendant Hamilton to dismiss is granted.

Background

In this landlord-tenant case, plaintiff (the landlord) seeks to recover purportedly unpaid rent from defendants pursuant to a lease with defendant Thurman. He argues that in 2008, he became aware that Thurman allegedly subletted the apartment to defendants Hamilton and Greco. No allegations in the complaint discuss what happened between 2008 and February 2021, when defendants Hamilton and Greco allegedly vacated the apartment.

In this motion, plaintiff seeks an extension of time to serve defendants. He observes that he commenced this action on September 7, 2021 and that he has had trouble finding defendants because they live in California. Plaintiff explains that various addresses he discovered for the defendants were not their residences.

Defendant Hamilton cross-moves to dismiss on the ground that plaintiff failed to demonstrate the requisite due diligence to serve defendants during the 120-day period to serve defendants. Both defendants Hamilton and Greco submit affidavits in which they claim that they live in California and have not attempted to evade service in any way. Both of these defendants point out they own homes in their own name and are registered to vote at these same addresses. They also argue that some of the purportedly outstanding arrears are time-barred.

In opposition to the cross-motion and in reply, plaintiff argues that there is no legitimate argument that he failed to exercise due diligence in serving defendants. He points out that he hired a process server and attaches an internal email concerning the service of process. Plaintiff also makes various arguments about the merits of the case.

In reply, defendant Hamilton contends that plaintiff did not justify the late date of its motion, which was filed eight months after the time to serve defendants expired.

Discussion

CPLR 306-b provides two grounds for a plaintiff seeking an extension of time to serve a defendant (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105, 736 NYS2d 291 [2001]). A plaintiff may seek an extension for “good cause” or “in the interest of justice” (*id.*). “The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the

promptness of a plaintiff's request for the extension of time, and prejudice to defendant (*id.* at 105-06).

As an initial matter, the Court finds that plaintiff failed to demonstrate that he exercised the requisite due diligence in attempting to serve defendants during the prescribed 120-day period. The Court stresses that plaintiff did not include an affidavit from its process server detailing the attempts to serve all three defendants and only offered vague claims about the various defendants' addresses. Critically, plaintiff did not explain when he tried to serve defendants or even when he realized he could not locate defendants. The absence of any details about the dates when plaintiff attempted to serve defendants renders plaintiff's due diligence arguments as without merit. Moreover, plaintiff did not explain why he waited over eight months after the time to serve these defendants had expired to make the instant motion.

For these same reasons, plaintiff failed to sufficiently demonstrate that he should be granted an extension under the interest of justice standard. The Court observes that plaintiff attached in support of his motion a letter from defendant Hamilton's attorney dated February 26, 2021 in which he suggests that Hamilton is in California (NYSCEF Doc. No. 4). That means that nearly seven months before he started this case, plaintiff had reason to believe defendant Hamilton might be in California.

While the standard for an extension of time to serve provides a Court with flexibility to grant such requests, the fact is that the 120-day deadline remains a statutorily prescribed deadline. Under the instant circumstances, it is unclear what steps plaintiff actually took within that initial 120-day period to serve defendants. Put another way, plaintiff appears to have ignored the CPLR and proceeded to pursue this case on his own timeline. The Court observes that this is not a situation where a defendant lives abroad and service is necessarily delayed

because of the Hague Convention. Two of the three defendants apparently live in California—defendant Thurman is not specifically mentioned at all in the moving papers. Living outside the state of New York could certainly justify an extension of time to effectuate service, but it is not a catchall to serve defendants more than a year after this case started.

And while the Court makes no findings on the merits of the action, the interest of justice standard provides that the meritorious nature of the cause of action can be considered. That consideration does not compel the Court to grant plaintiff’s motion. Plaintiff contends he wants to recover unpaid rent but only attaches a lease from 1999 with defendant Thurman. No lease is included for defendants Greco or Hamilton. Instead, there is a 10-day notice to quit from December 2008 in which plaintiff demands that these defendants vacate the premises. The complaint then jumps to February 2021, when counsel for defendants Hamilton and Greco apparently sent a letter stating that these defendants had vacated the property. Although the Court makes no finding that these defendants have no liability for unpaid rent, there are simply too many questions about the merits of plaintiff’s case to find that this factor compels the Court to grant plaintiff’s motion.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for an extension of time to serve defendants is denied, defendant Hamilton’s cross-motion is granted and this case is dismissed.

1/4/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE