

**Moses v Deroche-Williams**

2023 NY Slip Op 34326(U)

December 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 530670/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York; on the 11th day of December 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
NATASHA MOSES,

Plaintiff,

- against -

**DECISION AND ORDER**

Index No.: 530670/2022

YARNELL DEROCHE-WILLIAMS; WILKINS B WILLIAMS, and Jane Doe and John Doe 1 through 10 said names being fictitious and is intended to represent the spouse of Yarnell Deroche-Williams, the heirs-at-law next of kin, of Yarnell Deroche-Williams, lienors, creditors, successors-in interest and generally all persons having or claiming under, by or through purchase, inheritance, lien or otherwise of any right, or interest in and to the premises known as 1423 East 88 Street, Brooklyn, NY 11236, Block 8085, Lot 26, all of whose names and addresses are unknown, to Plaintiff at this time,

Defendants.

-----X  
Recitation in accordance with CPLR 2219 of the papers considered on the order to show cause filed by plaintiff Natasha Moses on October 24, 2022, under motion sequence number one, (hereinafter OTSC 1) for an order: (1) directing defendants Yarnell Deroche-Williams and Wilkins B. Williams, to turn on the lights at the premises known as, 1423 East 88 street, Brooklyn, New York; and (2) declaring that the plaintiff is entitled to an immediate payment of \$10,000 to cover the attorney's fees, costs and disbursements; (3) transferring any landlord-tenant action the defendants commenced in Kings County against the plaintiff to the Supreme Court; (4) enjoining the defendants from taking any further steps of self-help as against the plaintiff's interest in the premise; (5) granting a declaratory judgment in the plaintiff's favor on the issue of constructive eviction; and (6) granting an award for treble damages for the actions and omissions that led to the constructive eviction. This motion was opposed.

- Order to Show Cause
- Affirmation in Support
- Affidavit in Support

- Exhibits A-H<sup>1</sup>

Recitation in accordance with CPLR 2219 of the papers considered on the order to show cause filed by plaintiff Natasha Moses on May 5, 2023, under motion sequence number two, (hereinafter OTSC 2) for an order granting, among other things, a stay of the landlord-tenant action now pending in Kings County Civil Court under Index Number LT-325366-22/ pending the outcome of the motion; and (2) enjoining the defendants from taking any further steps of self-help as against the plaintiff's interest in a certain premises in Brooklyn, New York. This order to show cause is opposed.

- Order to Show Cause
- Affirmation of Urgency, in Compliance with CPLR 2217, and 22 NYCRR 202.7(f)
- Affirmation in Compliance with CPLR 2217
- Affirmation in Compliance with 202.7(f)
- Affirmation of Counsel in Support
- Affidavit in Support.
  - Exhibits A-L

Recitation in accordance with CPLR 2219 of the papers considered on the cross-motion filed by Yarnell Deroche Williams (hereinafter Yarnell W.) and Wilkins Williams (hereinafter Wilkins W.) (hereinafter collectively as defendants) on August 30, 2023, under motion sequence number three, for an order pursuant to CPLR 325(d) transferring this entire action to the Kings County Landlord and Tenant court.

- Notice of Cross-Motion
- Affidavit in Support & Opposition to the Order to Show Cause
- Memorandum of Law in Support & Opposition to the Order to Show Cause

## BACKGROUND

On October 22, 2022, plaintiff Natasha Moses (hereinafter plaintiff or Moses) commenced the instant action for, among other things, damages due to an illegal eviction, by filing a summons, verified complaint, and a notice of pendency with the Kings County Clerk's Office (KCCO). The verified complaint alleges one hundred and sixty-six allegations of fact in support of fourteen denominated causes of action. The first cause of action seeks a declaratory judgment of the plaintiff's rights to certain property located in Brooklyn, New York (hereinafter

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<sup>1</sup> The plaintiff's motion sequences number one and two were opposed by the defendants' cross-motion under motion sequence number three.

the subject premises). The second cause of action is for the specific performance of a lease agreement. The third cause of action is for conversion. The fourth cause of action is denominated as one for attorney's fees, costs, and disbursements. The fifth cause of action is denominated as one for trespass to chattel. The sixth cause of action is for fraud. The seventh cause of action is illegal and unlawful eviction. The eighth cause of action is for negligent infliction of emotional distress. The ninth cause of action is for intentional infliction of emotional distress. The tenth cause of action is for tortious interference with contracts. The eleventh cause of action is for libel and slander. The twelfth cause of action is denominated as one for harassment. The thirteenth cause of action is denominated as acting in concert conspiracy. The fourteenth cause of action is denominated as one for bullying.

On January 24, 2023, the defendants jointly filed a notice of appearance. On August 21, 2023, the defendants interposed and filed a joint verified answer with counterclaims. On October 14, 2023, the plaintiff interposed and filed a reply to the defendants' counterclaims.

## LAW AND APPLICATION

### *The Plaintiff's Order to Show Cause Motion Sequence No. 1*

On November 1, 2022, Supreme Court Justice Pamela L. Fisher signed OTSC 1 and set the return date for November 9, 2022. Justice Fisher declined to issue a temporary restraining order based on the plaintiff's failure to comply with 22 NYCRR 202.7(f)<sup>2</sup> and issued the following directions on service. The defendants and or their respective attorneys were to be

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<sup>2</sup> 22 NYCRR 202.7(f) provides as follows.

Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.

personally served with a conformed copy of the OTSC and the affirmations, affidavits, exhibits, and attachments pertinent thereto on or before November 3, 2022, and proof of such service was to be filed with the Clerk of this Court on or before the return date of the motion.

On November 8, 2022, the plaintiff filed two affidavits of service of OTSC 1 with the KCCO under NYSCEF document number 33. The affidavit of service of John Oliveri, the plaintiff's process server, (hereinafter Olivieri) demonstrated that service on defendant Wilkins W. was made pursuant to CPLR 308 (2). On November 3, 2022, Olivieri personally delivered the papers to an individual named Elivera at a specific address which was Wilkins W.'s place of abode. On the same date, Olivieri mailed the papers addressed to Wilkins W. at the same address where the delivery was made. On November 8, 2022, the affidavit of service upon Wilkins W. was filed with the KCCO under NYSCEF number 33. In accordance with CPLR 308 (2), service of process on Wilkins W. was completed on November 18, 2022, and not by November 3, 2022, as directed by Justice Fisher.

Olivieri's attempted service on Yarnell W. was made pursuant to CPLR 308 (4). Olivieri made two attempts to serve the papers upon Yarnell W. at the defendant's place of abode. The first attempt was made on Thursday, November 3, 2022, at 7:50 a.m., and the second was on November 5, 2022, at 7:10 p.m. These two attempts proved unsuccessful, on November 7, 2022, at 2:00 p.m. Olivieri affixed the papers to the door of the residence. Olivieri's affidavit of this particular service was also filed with the KCCO on November 8, 2022. Without addressing whether service of the papers pursuant to CPLR 308(4) was proper, the Court nevertheless, finds that in accordance with CPLR 308 (4), service of process on Yarnell W. was completed on November 18, 2022, and not by November 3, 2022, as directed by Justice Fisher.

The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with (*Matter of Streng v Westchester County Bd. of Elections*, 131 AD3d 652, 653 [2d Dept 2015]). The plaintiff did not comply with the method of service of OTSC 1. Accordingly, the Court has no jurisdiction over the motion, and it is denied.

***The Plaintiff's Order to Show Cause Motion Sequence No. 2***

On May 5, 2023, Supreme Court Justice Carolyn E. Wade signed OTSC number two, set the return date for June 7, 2023, in Part 84, and issued a temporary restraining order staying the landlord-tenant action pending in Kings County Civil Court under Index Number LT-325366-22 pending the outcome of the motion. Justice Wade directed personal service of OTSC 2 upon the defendants and or their respective attorneys of a conformed copy of the order and the affirmations, affidavits, exhibits, and attachments pertinent thereto, be made upon the defendants and or their respective attorneys, on or before the 17<sup>th</sup> day of May 2023.

On May 5, 2023, the plaintiff filed an affirmation of service of OTSC 2 with the KCCO under NYSCEF document number 59. The affirmation was prepared by Ronald S. Nir (hereinafter Nir) of the Law Office of Carol Gray and Associates, P.C. Nir incorrectly stated that he was counsel for the respondents. The Law Office Carol Gray and Associates, P.C. are counsel for the plaintiff as established by a substitution of counsel filed on January 25, 2023, with the KCCO under NYSCEF document number 36.

Nir affirmed that on May 5, 2023, he served OTSC 2 by email to the Law Offices of K.C. Okoli, P.C. at [KCOKOLI@VERIZON.NET](mailto:KCOKOLI@VERIZON.NET) and to the Law Office of Azoulay Weiss LLP at [OAZOULAYa@AZOULAYWEISS.COM](mailto:OAZOULAYa@AZOULAYWEISS.COM) and to the Law Office of DeVon Fitzgerald Clarke at [DEVONCLARK@GMAIL.COM](mailto:DEVONCLARK@GMAIL.COM). Nir also averred that he mailed a copy of OTSC 2 to each one of these law firms on May 5, 2023, by regular USPS mail.

Personal service upon an individual is made pursuant to CPLR 308. Nir's action in serving the motion papers by e-mailing and by regular mail was not in compliance with the directions of service ordered by Justice Wade. The plaintiff did not comply with the method of service of OTSC 2. Accordingly, the Court has no jurisdiction over the motion, and it too is denied.

Thereafter, on May 15, 2023, Justice Wade issued an order recusing herself from the matter before the branch of order to show cause seeking a preliminary injunction staying the landlord-tenant action pending in Kings County Civil Court under Index Number LT-325366-22 had been decided.

On October 26, 2023, OTSC 1 and OTSC 2 were scheduled in Part 52 for oral argument. After reviewing the motion papers submitted and hearing the oral arguments of counsel, OTSC 1 and OTSC 2 are denied in their entirety for the reasons set forth herein.

***The Defendants' Cross Motion Pursuant to CPLR 325(d)***

The defendants have made the instant unopposed motion seeking an order pursuant to CPLR 325(d) transferring the plaintiff's action and their counterclaims to the King County Landlord and Tenant Court.

CPLR 325(d) provides in pertinent part as follows:

(d) Without consent to court of limited jurisdiction. The appellate division, if it determines that the calendar conditions in a lower court so permit, may by rule provide that a court in which an action is pending may, in its discretion, remove such action without consent to such lower court where it appears that the amount of damages sustained may be less than demanded, and the lower court would have had jurisdiction but for the amount of damages demanded. If the action is so removed, then the verdict or judgment shall be subject to the limitation of monetary jurisdiction of the court in which the action was originally commenced and shall be lawful to the extent of the amount demanded within such limitation. A waiver of jury trial in the first court is inoperative after the removal.

The Court has the authority to transfer an action to a lower court pursuant to CPLR 325(d) without the consent of all parties under appropriate circumstances. However, if the parties are seeking equitable or declaratory relief, which is almost always beyond the subject matter jurisdiction of the lower civil courts, removal pursuant to CPLR 325(d) is not permissible (*W.H.P. 20. Inc. v Oktagon Corp.*, 251 AD2d 58, 59 [1<sup>st</sup> Dept 1998], citing *Chung v Kim*, 170 AD2d 232 [1<sup>st</sup> Dept 1991]).

In the case at bar, the plaintiff's first cause of action is for a declaratory judgment and the second cause of action is for specific performance. These are causes of action for equitable and declaratory relief. Accordingly, the defendants' unopposed motion for an order pursuant to CPLR 325(d) transferring the action to the King County Landlord and Tenant Court is denied.

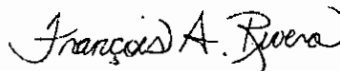
#### CONCLUSION

The order to show cause filed by plaintiff Natasha Moses on November 1, 2022, under motion sequence number one, seeking various reliefs is denied for lack of jurisdiction.

The order to show cause filed by plaintiff Natasha Moses on May 5, 2023, under motion sequence number two, seeking various reliefs is denied for lack of jurisdiction.

The cross-motion by defendants Yarnell Deroche Williams and Wilkins B. Williams filed on August 30, 2023, under motion sequence number three for an order pursuant to CPLR §325(d), transferring this entire action to the Kings County Landlord and Tenant court is denied.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA  
J.S.C.