

**764 Metro. 1B LLC v Robinson**

2024 NY Slip Op 33379(U)

September 24, 2024

Supreme Court, New York County

Docket Number: Index No. 652238/2023

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M

Justice

-----X INDEX NO. 652238/2023

764 METROPOLITAN 1B LLC

Plaintiff,

MOTION DATE 05/10/2023, 07/21/2023

- v -

MOTION SEQ. NO. 001 002

SEAN ROBINSON,

Defendant.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

As set forth more fully hereinbelow, the plaintiff's motion for summary judgment in lieu of complaint is denied and the defendant's motion to dismiss for lack of jurisdiction is granted.

Background

Plaintiff is the owner of an apartment located at 764 Metropolitan Avenue, Apartment 1B, Brooklyn, New York 11211 (hereinafter the "premises" or the "apartment"). The defendant is the former tenant of the apartment. The plaintiff contends that the term of the lease commenced on October 1, 2022 and expired on December 31, 2023. Plaintiff further contends that defendant unilaterally terminated the lease in January of 2023 and that the last month that defendant paid rent was January of 2023. Accordingly, the plaintiff seeks eleven months of unpaid rent at the rate of \$5,200 per month for a total of \$57,200. Additionally, plaintiff contends that on or about December 23, 2022, the Defendant turned off the heat within the apartment thereby causing water pipes to burst, damaging the apartment. Plaintiff therefore also seeks the \$38,187.63 it paid to repair the damage to the premises.

### **Summary Judgment in Lieu of Complaint**

Plaintiff brought this action as a motion for summary judgment in lieu of complaint pursuant to CPLR § 3213. CPLR § 3213 is only available when the “action is based upon an instrument for the payment of money only or upon any judgment” (CPLR § 3213). “Where the instrument requires something in addition to defendant’s explicit promise to pay a sum of money, CPLR 3213 is unavailable” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). Here, the plaintiff seeks damages based upon defendant’s purported negligence in turning off the thermostat in the apartment, thereby allowing the water pipes to freeze and burst. A showing of negligence is required in order to hold the defendant liable for the full amount sought. Accordingly, this action is not “based upon an instrument for the payment of money only.” Therefore, this action was improperly commenced as a motion for summary judgment in lieu of complaint, and should be denied for this reason alone. However, as set forth more fully below, the action is dismissed for lack of jurisdiction.

### **The defendant was not given sufficient time to properly oppose the motion for summary judgment in lieu of complaint**

A motion for summary judgment in lieu of complaint shall be noticed to be heard as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service (see CPLR 3213). Pursuant to CPLR § 320(a), a defendant needs to appear within twenty (20) or thirty (30) days after service, depending on the method of service. As is set forth more fully below, the defendant was never properly served. However, even if the service had been proper, the notice of motion was served less than twenty (20) days before the return date of the motion. The papers were purportedly served on May 31, 2023 (see Aff. of Service, NYSCEF Doc. 13). The notice of motion indicates that the return date of the motion for summary judgment in lieu of complaint is June 13, 2023 – a mere 13 days after the attempted service (see Notice of Motion, NYSCEF Doc. No. 2). Courts have held that such short notice of a motion for summary judgment in lieu of complaint warrants denial of the motion (see *Tokyo Leasing (U.S.A.) Inc. v G-IV Wash, Clean & Dry, Inc.*, 4 Misc 3d 164, 166 [NY Dist Ct Nassau County 2004]; *Putnam County Nat. Bank of Carmel v Bischofsberger*, 82 Misc 2d 915, 916 [NY Co Ct 1975]) or the court should exercise its discretion in giving the defendant additional time to answer (see *Flushing Nat. Bank v Brightside Mfg. Inc.*, 59 Misc 2d 108, 110 [Sup Ct Queens County 1969]).

### **The defendant did not waive the defense of lack of personal jurisdiction**

On the return date of the motion, defendant’s counsel filed three items: 1) a notice of appearance (NYSCEF Doc. No. 14); 2) a letter application (motion) (hereinafter “letter application”) to dismiss the action for lack of personal jurisdiction or, alternatively for an extension of time to answer or file a more formal motion to dismiss (NYSCEF Doc. No. 15); and a demand to change venue (NYSCEF Doc. No. 16).

Plaintiff contends that defendant filed a notice of appearance and did not object to the court’s jurisdiction in an answer or motion, and therefore the defense is waived.

However, this position is clearly belied by the letter application, which was filed together with the notice of appearance. The letter application clearly asks the court to dismiss for lack of personal jurisdiction despite not having been filed as a formal motion. Furthermore, the letter application asks for additional time to make a formal motion if the court chooses not to dismiss the action. Clearly, the defendant had no intention of abandoning his jurisdictional defense. In light of the short notice, as set forth above, and the clearly meritorious defense of lack of personal jurisdiction, the request for an extension of time to make a formal motion to dismiss is granted.

“Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed” (CPLR § 2004). A court providently exercised its discretion in extending the time to answer or appear when the nature of the delay is brief, there is little prejudice to the plaintiff, a reasonable excuse for the delay, evidence of meritorious defenses, the lack of evidence of a willful default or intent to abandon any defenses to the action, and public policy which favors the resolution of cases on the merits (see *City Line Auto Mall, Inc. v Citicorp Leasing, Inc.*, 45 AD3d 716, 716 [2d Dept 2007]).

Here, the delay in filing a formal motion to dismiss was short, approximately one month. There is little or no prejudice to the plaintiff as defendant’s attorney informed plaintiff’s counsel of the defect in service on the same day that the plaintiff attempted service (see Mendez Aff. ¶ 9, NYSCEF Doc. No. 18; Exh. 3, NYSCEF Doc. No. 21), and the plaintiff was put on notice via the letter application that the defendant was contesting jurisdiction. Defendant has reasonable excuses for the delay in filing the motion to dismiss – both lack of service, and short notice of the return date. As set forth below, the defendant was not properly served and the court lacks jurisdiction – therefore, the defendant has a meritorious defense. Furthermore, the defendant has consistently and repeatedly asserted the defense of lack of jurisdiction. Accordingly, an extension of time for making the formal motion to dismiss is warranted, and the court deems such motion timely made.

### **Lack of Personal Jurisdiction**

#### **The affidavit of service is insufficient on its face**

Defendant moves pursuant to CPLR § 3211(a)(8) to dismiss for lack of personal jurisdiction.

As set forth in the Affidavit of Service (NYSCEF Doc. Nos. 13, 22), the defendant was purportedly personally served on May 31, 2023 by delivering the summons and notice of motion at “c/o Javier Mendez, Esq., 677 Broadway 8th Floor, Albany, NY 12207” and indicates that it was served on “Attorney for Defendant therein named.” The affidavit of service is deficient on its face as it states that it was served on the attorney for the defendant, not the defendant himself (see *Chow v Kenteh Enterprises Corp.*, 169 AD2d 572 [1st Dept 1991]). Additionally, the affidavit of service is self-contradictory in

that it indicates the defendant was served at his attorney's office and then checks the box indicating this was the defendant's dwelling house. Accordingly, the affidavit of service itself indicates that the defendant was not served. Therefore, the court lacks jurisdiction.

The deficiency of the affidavit of service is further demonstrated by the affirmation of Javier Mendez, the defendant's attorney, which admits that he was personally served with the pleadings on May 31, 2023 (Mendez Affirmation, ¶ 7, NYSCEF Doc. No. 18). However, that same day, Mr. Mendez emailed plaintiff's counsel informing them that he was not authorized to accept service on behalf of the defendant (*Id.* at ¶ 9; Email, Def. Exh. 3, NYSCEF Doc. No. 21). Additionally, Defendant Sean Robinson swears that he resides in Kings County, does not work at his attorney's office, did not authorize his attorney to accept service on his behalf, was never personally served with the pleadings, no one at his residence was served with the pleadings, and that he did not receive a copy of the pleadings in the mail (see Robinson Aff., NYSCEF Doc. No. 23).

In opposition to the defendant's motion to dismiss, plaintiff spuriously contends that the defendant consented to the jurisdiction of the court by filing a notice of appearance (NYSCEF Doc. No. 14) and a demand to change venue (NYSCEF Doc. No. 16) without contesting jurisdiction. Plaintiff conveniently ignores the letter application to the court (NYSCEF Doc. No. 15), which was filed simultaneously with the notice of appearance and demand for change of venue.

### **Lack of Personal Jurisdiction**

For the reasons set forth hereinabove, it is hereby

ORDERED that the defendant's request for additional time to file a formal motion to dismiss is granted; and it is further


ORDERED that the defendant's motion to dismiss (Motion Sequence 002) is granted; and it is further

ORDERED that the motion for summary judgment in lieu of complaint (Motion Sequence 001) is denied; and it is further


ORDERED that the Summons is dismissed without prejudice to commence a new action, under a new index number, via summons and complaint.

This constitutes the decision and order of the court.

**Motion Sequence 001**

<u>9/24/2024</u> DATE		 NICHOLAS W. MOYNE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

**Motion Sequence 002**

<u>9/24/2024</u> DATE		 NICHOLAS W. MOYNE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE