

Gilbert v Von Der Burg
2026 NY Slip Op 31855(U)
April 29, 2026
Supreme Court, New York County
Docket Number: Index No. 100869/2025
Judge: Phaedra F. Perry-Bond
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHAEDRA F. PERRY-BOND PART 35

Justice

-----X

ANDREA GILBERT, and EDWARD DEE,

Plaintiffs,

- v -

PATRICIA VON DER BURG,

Defendant.

INDEX NO. 100869/2025

MOTION DATE 03/13/2026

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 011) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for DISMISSAL

Upon the foregoing documents, Defendant's motion to dismiss pursuant to CPLR 3211(a)(2) and (a)(8) is granted in part and otherwise denied as moot.

This case, which involves the theft of a cat named Lucy, has a lengthy procedural history, which is pertinent to Defendant's pending motion. On August 1, 2025, Plaintiffs, who have been proceeding pro se, filed a "Verified Petition for Replevin and Emergency Relief." The pleading and its accompanying exhibits allege that Plaintiffs own a cat named Lucy and that on July 22, 2025, Defendant, who is their neighbor, broke into Plaintiffs' apartment and stole Lucy.

Defendant, who for most of this case's history was also proceeding pro se objected to personal service. On August 26, 2025, Defendant wrote to the Court claiming she was never served, that she just learned about Plaintiffs' claims, and requesting an adjournment of proceedings. That same day, the Court responded and asked Plaintiffs to provide proof of personal and e-mail service. On August 27, 2025, Defendant responded and again stated she was out of the country, was not served, and asked for an adjournment. She also asked via e-mail to 'please dismiss both claims.' In response, Plaintiffs responded, and instead of showing proof of service, wrote

“please proffer the evidence of your flight and current location and let us know the location of the cat.” Plaintiffs never produced an affidavit of service.

Defendant then submitted an “affirmation in support of application to adjourn and, in the alternative, to dismiss” on August 27, 2025. Defendant affirmed that she has been in Sweden due to a family emergency, was physically unable to appear in Court, and again stated that she was never served and that the Court lacks personal jurisdiction over her. Her affirmation was supported by an airline ticket which showed she traveled to Sweden on August 20, 2025. On August 27, 2025, this Court granted Plaintiffs’ request for substitute service via e-mail, but it appears the only document served was Plaintiffs’ order to show cause on motion sequence 001, which sought an order granting them judgment on their cause of action for replevin.

On September 3, 2025, this Court denied motion sequence 002, which was Plaintiffs’ order to show cause with a temporary restraining order seeking contempt, based on the determination that the order to show cause was not properly served. On September 24, 2025, this Court issued an interim order on motion sequence 001, which was an order to show cause for replevin directing Defendant to return Lucy the cat to New York (Lucy was taken to Sweden by Defendant) on or before October 16, 2025, and directing the parties to appear for oral argument on November 6, 2025.

On October 10, 2025, Defendant filed an order to show cause seeking a stay of proceedings, which this Court declined to sign (*see* motion sequence 003). On October 22, 2025, Plaintiffs filed an order to show cause to hold Defendant in contempt, which this Court declined to sign (*see* motion sequence 004). On October 27, 2025, Defendant moved to reargue this Court’s decision to decline to sign Defendant’s order to show cause seeking a stay of proceedings (*see* motion sequence 006). That motion was denied.

On November 6, 2025, the Court held a hearing on Plaintiffs' order to show cause seeking replevin (*see* motion sequence 001). The motion was granted on default as Defendant did not appear in person. On November 20, 2025, Defendant moved to vacate her default by order to show cause, which this Court declined to sign (*see* motion sequence 008). On January 7, 2026, Defendant again moved to vacate her default by order to show cause, which this Court declined to sign (*see* motion sequence 009).

Defendant then retained counsel, but Plaintiffs claim they consulted with Defendant's counsel about this case when Plaintiffs were originally looking to retain a lawyer. Plaintiffs did not end up retaining counsel but given Plaintiffs' representation that they divulged confidential information and legal strategy to Defendant's counsel, the Court stayed proceedings while Plaintiffs moved to disqualify Defendant's attorney. On January 26, 2026, the Court denied Plaintiffs' motion to disqualify, finding the consultation was brief, limited, and Plaintiffs only disclosed information and documents which were publicly filed (*see* motion sequence 010).

The Court then scheduled a contempt hearing to determine why Lucy had not been returned to Plaintiffs. On February 19, 2026, at the contempt hearing, Defendant's lawyer objected to this Court having personal jurisdiction over her on the basis that she was never served with a summons and complaint. Defendant also stated on the record that Plaintiffs' cause of action for replevin was jurisdictionally defective because they brought the case via petition rather than summons and complaint. The Court admonished Defendant's counsel for seeking this relief spontaneously at the hearing without bringing a notice of motion, and set a briefing schedule for a motion to dismiss jurisdictional issues, leading to the instant motion.¹ The contempt hearing was then adjourned so jurisdictional issues could be resolved.

¹ Although the Court and Defendant asked for proof of service of the operative pleading, Plaintiffs were unable to show proof of service.

Defendant argues Plaintiffs improperly commenced a replevin proceeding via Petition and never obtained a summons, which is a non-curable jurisdictional defect. Defendant further argues that dismissal is appropriate under CPLR 3211(a)(8) because Plaintiffs failed to serve Defendant with the pleadings in a manner proscribed by the CPLR. In opposition, Plaintiffs argue that Defendant waived personal jurisdiction based on her own conduct and that any defect in the form of the pleading should be cured pursuant to CPLR 103(c). In reply, Defendant reiterates that she was not served and reproduced her written communications from August 26-27, 2026, objecting to personal jurisdiction, and her August 27, 2025 affirmation requesting dismissal based on lack of service. Defendant argues that she was not living at her apartment at the time and was renting an Airbnb in Brooklyn because Plaintiffs had allegedly engaged in self-help and physical force towards her.² She claims when she eventually left for Sweden on August 20, 2026, she hired security to escort her to the airport.

The Court finds Defendant did not waive her objection to lack of service. When she was proceeding *pro se*, she promptly wrote to the Court objecting to service and even filed an affirmation requesting dismissal based on lack of service.³ She then repeatedly tried to move to vacate her default under motion sequence 001, where this Court held a hearing and determined, on default, that Plaintiffs are the owners of Lucy the cat.

“In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and void” (*see Brownstone Capital NY, LLC v Lindsay*, 183 AD3d 687, 688 [2d Dept 2020]). Once Defendant challenged service, Plaintiffs “had the burden of demonstrating satisfaction of statutory and due process prerequisites” (*see Carney v*

² It is undisputed that in July of 2025, prior to the commencement of this lawsuit, that Plaintiffs followed Defendant to Newark International Airport and tried to physically stop her from boarding a plane to Sweden.

³ The relief requested in the affirmation was not made via notice of motion.

Metropolitan Transp. Auth., 221 AD3d 447, 448-449 [1st Dept 2023] citing *Stewart v Volkswagen of Am.*, 81 NY2d 203, 206-207 [1993]). “Notice received by means other than those authorized by statute cannot serve to bring [defendant] within the jurisdiction of the court” (*Carney, supra*, quoting *Landsdowne Fin. Servs. v Binladen Telecommunications Co.*, 95 AD2d 711, 712 [1st Dept 1983]). Status as a pro se litigant does not excuse defective service (*Jiggetts v MTA Metro-N. R.R.*, 121 AD3d 414, 415 [1st Dept 2014]).

Despite Defendant’s repeated challenge to service, Plaintiffs have never produced an affidavit of service showing that the Petition/Complaint was ever served on Defendant. While Defendant confirmed receipt of an order to show cause via e-mail, the order to show cause was not the commencing document – the operative pleading was required to be served. In opposition, Plaintiffs do not argue that personal jurisdiction was properly obtained, they simply argue that Defendant waived personal jurisdiction.⁴ But personal jurisdiction was not waived because Defendant did object to it in writing, and Defendant never served her answer or filed a motion to dismiss. The time for Defendant to serve her answer or file a motion to dismiss never started running because Plaintiffs never served Defendants with their pleading (*Carney v Metropolitan Transp. Auth.*, 221 AD3d 447, 449 [1st Dept 2023]).

Therefore, the motion to dismiss based on lack of service is granted. Since personal jurisdiction was not properly obtained, the prior proceedings, including this Court’s decision and order on motion sequence 001, are null and void, and are hereby vacated. Because dismissal is not on the merits, the dismissal is without prejudice. Plaintiffs may refile within six months pursuant to CPLR 205(a). The Court is sympathetic to Plaintiffs who have been persistent in their attempts to seek recourse and have expended much time and effort trying to obtain justice. The Court further

⁴ Plaintiffs rely on *McGowan v. Hoffmeister*, 15 A.D.3d 297 (1st Dept. 2005). But that case is inapposite because there the Defendant filed an answer without objection to jurisdiction, while here Defendant never filed an answer.

understands that dismissal of this case, without prejudice and based on a jurisdictional defect, is frustrating given Lucy's poor prognosis.⁵ However, the Court is bound by the CPLR and precedent, and the rules regarding jurisdiction apply universally to all parties. To reiterate, the Court does not rule on the merits, nor does it foreclose the possibility that Plaintiffs may prevail in any refiled litigation.

Accordingly, it is hereby,

ORDERED that Defendant's motion to dismiss based on lack of personal jurisdiction is granted, and this proceeding is hereby dismissed, without prejudice, and the Court's prior determination on motion sequence 001 is hereby recalled and vacated as rendered without jurisdiction; and it is further

ORDERED that within ten days of entry, counsel for Defendant shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

4/29/26
DATE


HON. PHAEDRA F. PERRY-BOND, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

⁵ Prior to this lawsuit, Lucy was diagnosed with cancer and was undergoing chemotherapy.