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At an IAS Term, Part 42 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 15th day of August, 2002

P R E S E N T:

HON. IRA B. HARKAVY,
Justice.

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PETRA MEJIA,
Plaintiff,

- against -

Index No. 2911/01

JANET NESBOT,
Defendant.

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The following papers numbered 1 to 8 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1 - 5 |
| Opposing Affidavits (Affirmations) | **6 - 8** |
| Reply Affidavits (Affirmations) | |
| _____ Affidavit (Affirmation) | |
| Other Papers | |
| | |

Upon the foregoing papers in this action by plaintiff Petra Mejia ("plaintiff') against defendant Janet Nesbot ("defendant") alleging fraud and seeking a declaration that a deed to the subject property given by her to defendant is void, defendant moves for an order

dismissing plaintiffs complaint as against her, or, in the alternative, granting her leave to interpose a late answer.

Plaintiff was the owner of certain real property located at **106** Emerson Place, in Brooklyn, New York. On September 16, **1997,** plaintiff executed a deed transferring the subject property to herself and defendant, who is her daughter, as joint tenants with rights of survivorship. The deed was executed at the office of an attorney, Laurence P. Greenberg, Esq., who (like plaintiff) was Spanish-speaking. Thereafter, defendant moved from her own residence into the subject property, and defendant claims that she then made numerous repairs to such property.

On October 5, 1999, plaintiff and defendant executed a mortgage on the property, in the amount of $82,000, obtained from Home American Credit, Inc. d/b/a Upland Mortgage ("the Upland Mortgage"). According to the Settlement Statement for the Upland Mortgage, the proceeds of such mortgage were used to pay off an existing mortgage on the property in the amount of $26,088.74, and, inter alia, to make payments on automobiles and a credit card bill. This Settlement Statement, along with the Truth-in-Lending Disclosure, Notice of Right to Cancel, Owner's Affidavit, and 1-4 Family Rider Assignment of Rents were executed by plaintiff. Subsequently, a dispute arose between plaintiff and defendant, and defendant left the property.

By a bare summons filed on January 24, 2001, plaintiff attempted to commence this action. The summons was filed without the complaint and without notice of the nature of the

action, the relief sought, or the sum of money for which judgment would be taken in case of a default. Defendant's attorney served a notice of appearance dated March 14,2001 upon plaintiffs attorney.

On March 30,2001, a complaint was filed by plaintiff. The complaint alleges that the September 16, 1997 deed was a fraud, that defendant persuaded plaintiff to sign the deed to help her obtain a loan, that plaintiff had no intention of giving defendant a deed, that plaintiff does not speak English, and that defendant represented that she was applying for a loan. Plaintiff claims that she was unaware that the deed would affect the inheritance of the real property. She also alleges that she was deceived into executing the Upland mortgage, and that the proceeds of the mortgage were spent solely for the use of defendant, for defendant's purchase of an automobile and for payment of defendant's personal debts. The complaint seeks a judgment declaring void and vacating the September 16,1997 deed, determining that defendant has no claim to the subject property, and awarding plaintiff compensatoiy and punitive damages.

On April 9, 2001, defendant's attorney wrote to plaintiffs attorney with regard to settling this action. Plaintiffs attorney then extended defendant's time to answer the complaint to April 20, 2001. This time was further extended and, on June 1, 2001, the attorneys met to discuss settlement, and purportedly reached an agreement. On August 24, 2001, plaintiffs attorney forwarded certain documents relating to such agreement, but did not annex any stipulation of settlement. By letter dated December 10, 2001, defendant's

attorney, who had been awaiting the stipulation, requested such stipulation of settlement from plaintiffs attorney. Plaintiffs attorney further communicated with defendant in January 2002. By letter dated February 8, 2002, defendant's attorney advised plaintiff's attorney that his response was not satisfactory and no written stipulation in satisfactory form to terminate the matter had been received by him.

Following an attempt by plaintiff to move for a default judgement, defendant brought the instant motion to dismiss plaintiffs complaint, or, alternatively, for leave to interpose a late answer. As an excuse for defendant's delay in serving an answer, defendant's attorney asserts that defendant's time to answer had been extended by the settlement discussions and the belief that a settlement had been reached. Defendant also has submitted her sworn affidavit, along with her proposed answer and other evidence, demonstrating a meritorious defense to plaintiffs claims *(see Bruenn v Pawlowski,* 292 AD2d 856, 857; *Goldman v City of New York,* 287 AD2d 482, 483; *Capone v Board of Educ.,* 266 AD2d 879, 880; *Peter Gisondi & Co. v Evans Dev. Corp.,* 131 AD2d 651, 651). Additionally, defendant, in her instant motion to dismiss and in her proposed answer, asserts the affirmative defense of lack of personal jurisdiction based upon plaintiffs improper service of the summons unaccompanied by the complaint and without the notice required by CPLR 305 (b).

In addressing defendant's motion, the court notes that "[w]hen a summons is served without a complaint pursuant to CPLR 305 (b), it is imperative that "'at least basic information concerning the nature of plaintiffs claim and the relief sought'" be provided"

*(Scaringi v Elizabeth Broome Realty* ***Corp.,*** 191 AD2d 223,223, quoting *Matter of Hurt Is. Comm. v Koch,* 150 AD2d 269, 271). Here, as noted above, plaintiff failed to comply with CPLR 305 (b) since the bare summons does not state or give any notice whatsoever of the nature of the underlying action, the relief sought, the damages requested, or the sum of money involved. Therefore, defendant could not reasonably have been expected to ascertain the nature of the action *(see Scaringi,* 191 AD2d at 223; *Drummer* v ***Valeron Corp.,*** 154 AD2d 897, 897-898).

The failure by a plaintiff to comply with the notice requirements contained in CPLR 305 (b) has consistently been held to constitute "a jurisdictional defect which renders the summons insufficient not only for the purposes of taking a default judgment, but also to obtain jurisdiction over the defendant and commence the action'' *(Frerk v Mercy Hosp.,* 99 AD2d 504, 504-505, *affd* 63 NY2d 635; *see also Parker v Mack,* 61 NY2d 114, 117-118; *Sibley v Lake Anne Realty* ***Corp.,*** 136 AD2d 619,619; *Bryne v Fordham Univ.,* 118 AD2d 525,526; *Ciaschi v* ***Town*** *of Enfield,* 86 AD2d 903,904). Thus, "[n]o action is commenced by the service of a summons alone which neither contains nor has attached to it a notice of the nature of the action and of the relief sought'' *(Parker,* 61 NY2d at 115).

In opposition to defendant's motion, plaintiffs attorney argues that defendant received a complaint. This complaint, however, was not filed or served with the summons but, in fact (as stated above), was not filed until March 30, 2001. Consequently, this subsequent filing of the complaint does not remedy the jurisdictional defect. "[T]he

Legislature . . . has determined and fixed a defendant's entitlement, at the time and as part of service of process, to knowledge concerning the claim being asserted against him [or her]" ***(Parker,*** 61NY2d at 117-118). "A jurisdictionally defective summons, of course, cannot be corrected or amended under CPLR 305 ***(c)"*** (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:3, at 423).

Plaintiffs attorney further asserts that defendant's attorney requested additional time to answer the complaint, and argues that defendant did not timely make a motion to dismiss or answer the complaint. He contends that defendant, therefore, waived her jurisdictional objection. Such contention is without merit. Requests by a defendant for additional time to answer a complaint do not effect a relinquishment of such defendant's jurisdictional defense ***(see Parrotta*** v *Wolgin,* 245 AD2d 872, 873), and defendant's motion was brought following extensions of defendant's time to answer, given by plaintiffs attorney, as evidenced by various letters submitted by defendant. Indeed, even plaintiffs attorney's affirmation dated June 24, 2002 states that defendant's "request to be permitted to interpose a late answer [had been] consented to at [a] previous conference." Thus, inasmuch as defendant's instant motion and proposed answer raise and interpose the defense of lack of personal jurisdiction, there was no waiver of defendant's jurisdictional defense based upon a failure to assert it therein ***(see Sibley,*** 136 AD2d at 619; ***compare Bryne,*** 118 AD2d at 526; ***Le Conte*** v ***City of New York,*** 129 Misc 2d 719, 721).

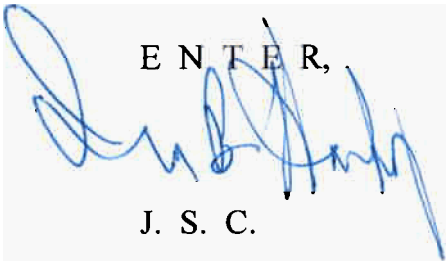
Defendant also did not waive her defense of lack of personal jurisdiction by her attorney's service of the notice of appearance dated March 14, 2001. It has been expressly held that where a defendant submits a notice of appearance, the jurisdictional defect under CPLR 305 (b) is not waived (***Sibley,*** 136 AD2d at 619; ***Le Conte,*** 129 Misc 2d at 721; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:3, at 424). Consequently, the service of the summons, unaccompanied by the complaint and without the notice required by CPLR 305 (b) did not confer jurisdiction over defendant, and dismissal of plaintiffs complaint for lack of personal jurisdiction is required ***(see*** CPLR 3211 [a] [8]; ***Parker,*** 61 NY2d at 117; ***Scaringi,*** 191 AD2d at 223; ***Drummer,*** 154 AD2d at 897-898).

Additionally, it is noted that plaintiffs complaint fails to state a claim of fraud and that the allegations contained in such complaint are belied by the documentary evidence submitted by defendant ***(see*** CPLR 3211 [a] [13, [7]). The complaint fails to adequately plead that defendant made material representations that were false, upon which plaintiff justifiably relied and was injured (*see Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278; 60 NY Jur 2d, Fraud and Deceit § 223). Plaintiff also has not supported her claim of fraud by factual allegations containing the details constituting the wrong ***(see*** CPLR 3016 [b]). Rather, the complaint, along with plaintiffs affidavit, asserts that defendant defrauded plaintiff by "persuad[ing]" her to sign the deed. While the complaint alleges that plaintiff does not speak English, the attorney who prepared the deed has submitted his affirmation,

stating that he communicated with plaintiff in Spanish, and that she understood the purpose of the deed. Furthermore, as discussed above, the Settlement Statement executed by plaintiff discloses the distribution of certain of the proceeds of the subsequently executed mortgage to pay for defendant's automobile loans and credit card bill.

Accordingly, defendant's motion to dismiss plaintiffs complaint as against her is granted.

This constitutes the decision, order, and judgment of the court.




IRA E?. HARKAVY
*Justice of* the Supreme Court