Rosenzweig v Gubner
2018 NY Slip Op 32393(U)
September 26, 2018
Supreme Court, Kings County
Docket Number: 522766/16
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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JOEL ROSENZWEIG and FAIGIE ROSENZWEIG,

Plaintiffs,

-against-

SIMON GUBNER a/k/a MOSHE GUBNER, 1225 50th STREET RESIDENCE TRUST and 1225 50th STREET LLC,

Defendants.

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DECISION / ORDER

Index No. 522766/16
Motion Seq. No. 2, 3
Date Submitted: 7/26/18
Cal No. 47, 48

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiffs' motion for a default judgment and defendants' cross motion to dismiss.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	40-42
Notice of Cross Motion, Affirmation and Exhibits.....	59-74
Affirmation in Opposition and Reply.....	76-79

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a suit for wages by plaintiffs, who claim they were home health aides for Jacob (also know as Eugene) Gubner, their grandfather/grandfather-in-law for three years commencing on or about April 1, 2010, without pay. The wage claims comprise the first four causes of action in the complaint. Plaintiffs also have claims in the complaint for imposition of a constructive trust (Fifth Cause of Action), unjust enrichment (Sixth), and for breach of contract (Seventh). The premises at issue is a three-family house which was allegedly owned by defendant 1225 50th Street Residence Trust in 2013 but was transferred to defendant 1225 50th Street LLC in 2015

by Simon Gubner, who is alleged to have been the trustee of the trust.[1]

Plaintiffs now seek a default judgment on the issue of liability, and an inquest on damages (although this is not mentioned in the motion, which asks for the entry of a judgment), based upon defendants' failure to answer the complaint. Defendants (all represented by one law firm) oppose the motion, and cross-move for dismissal of the complaint or an extension of time to answer. Defendants claim the action was started in a failed attempt to stop a summary holdover (eviction) proceeding in Housing Court, but the motion for a stay was denied, and all stays were lifted. A further attempt by plaintiffs to obtain a second Order Show Cause with a stay was declined by the court, and the action has been dormant since February 2017. It appears that plaintiffs were evicted from the premises in the Housing Court proceeding.

Defendants contend in the motion that they reasonably believed the action had been abandoned. Now, served with a motion for a default judgment, defendants seek to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a)(1), (5), (7) and (8).

Defendants claim, with regard to CPLR 3211(a)(1), that documentary evidence establishes their right to have the complaint dismissed. With regard to CPLR 3211 (a)(5), defendants claim that plaintiffs' claims are barred by res judicata, collateral estoppel and by arbitration and award, to the extent the issues between Gubner, the Trust and plaintiffs were resolved before a rabbinical court, that the plaintiffs' claims herein could have been raised and adjudicated in that arbitration proceeding, and that the LLC is now the only owner of the premises and it did not enter into any agreement

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[1]A copy of the deed is annexed as Exhibit L. It reflects that no consideration was paid for this transfer of title in 2015. Prior to this transfer, the trust was the titled owner since the year 2000 when Eugene Gubner as president of a corporation that had owned it transferred it to the trust.

with plaintiffs and thus is an improper party. With regard to 3211 (a)(8), defendants claim the court lacks personal jurisdiction over defendant Gubner and that service was not properly effectuated on the other defendants (the Trust and the LLC). Plaintiffs reply that the cross motion was filed late with respect to plaintiffs' motion, that the motion to dismiss is untimely, that service on all defendants was properly effectuated and that defendants have failed to furnish a reasonable excuse for their default or a meritorious defense to their action.

Discussion

This action was commenced on December 22, 2016, by the purchase of an index number and e-filing a summons and verified complaint. Service of the summons and complaint had not been effectuated before plaintiffs' obtained an order to show cause on the same day, signed December 22, 2016, which required service of the order to show cause and the papers on which it was based upon defendants' (nonexistent) attorney.[2] That motion (for a stay of the eviction proceeding) was opposed by defendants' counsel (then only representing defendant LLC, the entity that was the petitioner in the eviction proceeding) and was denied on January 5, 2017.

Service of the summons and complaint was then effectuated on defendant Gubner and defendant Trust on January 31, 2017 by personal service on Gubner in Israel pursuant to CPLR §313, and the affidavit of service was e-filed on February 23,

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[2]Until jurisdiction is obtained over a defendant by service of process of a summons with notice or a summons and complaint, the party does not have an attorney, and technically, a defendant's attorney cannot make an appearance for the defendant in the action. Thus, the order to show cause, signed by another judge of this court, should have required that service include service of the summons and complaint and be made upon the defendants by personal service, as the order to show cause was apparently intended to commence this action.

2017 as Doc. No. 34, Exhibit C to plaintiffs' second order to show cause, which the court declined to sign. While the affidavit of service should have been filed within 20 days of service as a separate item, not as an exhibit to a motion, the court has the discretion to consider it properly filed *nunc pro tunc* and elects to do so. Further, defendants haven't alleged any violation of the rules for service in Israel or as provided for in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163). NY law (CPLR 2001) permits the court to disregard a "technical infirmity" (See *Ruffin v Lion Corp.*, 15 NY3d 578 [2010]). The filing of a document as an exhibit to a motion in the efile system instead of as a separate document titled "affidavit of service" is a technical infirmity, as is filing it three days late.

Service of the summons and complaint in this action was effectuated on defendant 1225 50th Street LLC on February 6, 2017 by service on the Secretary of State pursuant to Limited Liability Company Law §303, and the affidavit of service was e-filed on February 23, 2017 as Doc. No. 34, Exhibit C to plaintiffs' second order to show cause, which the court declined to sign. While the affidavit of service should have been filed within 20 days of service and as a separate item, not as an exhibit to a motion, the court has the discretion to consider it properly filed *nunc pro tunc* and elects to do so. Thus, to the extent plaintiffs' motion must establish service on the defendants as a condition precedent to an order granting them a default as to liability as against defendants for failing to answer the complaint, the court finds that the defendants were served and affidavits of service were filed.

Addressing the defendants' claim pursuant to CPLR 3211(a)(8) first, the court does not find that service was improper as movants allege. The affidavit of Norman

Eisen dated April 24, 2018 submitted in opposition to the motion, which avers that he is the sole managing member of the LLC and he knows the LLC was not served because he did not receive it is insufficient. A process server's affidavit of service on the New York Secretary of State for a New York Limited Liability Company pursuant to limited Liability Company Law §303 is a rebuttable presumption of proper service. To raise an issue of fact and obtain a traverse hearing with regard to the service of process, Mr. Eisen would have had to have sworn to specific facts in his affidavit to rebut the statements in the process server's affidavit *(see Bennett v Patel Catskills, LLC*, 120 AD3d 458 [2d Dept 2014]), which he does not do.

Next, with regard to service on Mr. Gubner and the Trust, notwithstanding the fact that Simon/Moshe Gubner claims through his attorney that he resides out of the United States, there is nothing in the motion papers that supports this claim. Mr. Eisen's statement in his affidavit that he knows Mr. Gubner lives in Israel, is of no help in the matter. A person may have more than one residence. While the contract with plaintiffs [Exhibit G] which, as to its substance, is not in admissible form, as discussed below, has an address for Gubner in Israel, it also describes him as the "Landlord" of the subject premises in Brooklyn, and the "landlord is the trustee and manager of the entity and every decision with respect to the entity's assets is in control of the landlord alone." The deed annexed as Exhibit L states that Gubner lived at the subject premises in 2015 when he signed it as the Trustee. In any event, the court clearly has long arm jurisdiction over him based upon his transaction of business in the State of New York with plaintiffs, which is the subject of the action (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Lebel v Tello*, 272 AD2d 103, 103-04 [1st Dept 2000] ["CPLR 302 (a) (1) provides that a court may exercise personal jurisdiction over a

non-domiciliary who, in person or through an agent, transacts any business within the State, provided that the cause of action arises out of the transaction of business"]).

Lastly, defendants' claim that service was improper as only one copy of the summons and complaint were served on Mr. Gubner, when he was served both as an individual and as the trustee of the Trust, is unavailing. (see *Raschel v Rish*, 69 NY2d 694, 696-97 [1986] (holding that "the guiding principle must be one of notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 70 S. Ct. 652, 94 L. Ed. 865 [1950]).

The court finds that service of process was proper, and defendants should have answered the complaint. A motion for a default judgment must be made within a year of the expiration of defendants' time to answer the complaint. CPLR 3215(c). Here, plaintiffs' motion for a default judgment was filed on March 8, 2018 and thus was filed exactly a year after defendant LLC's time to answer had elapsed.

Despite the fact that the cross motion may have been served late, causing plaintiffs to request an adjournment of their motion in order to oppose it, plaintiffs had ample time to oppose it and were not prejudiced (*see Bakare v Kakouras*, 110 AD3d 838, 839 [2d Dept 2013] ["Contrary to the defendants' contention, the Supreme Court providently exercised its discretion in accepting the plaintiffs' untimely opposition papers, since the defendants were not prejudiced thereby"]; *Mughal v Rajput*, 106 AD3d 886, 887 [2d Dept 2013] ["Although the affidavit was not timely submitted, the plaintiffs had an opportunity to respond to it, and were not prejudiced thereby"]).

However, the defendants' cross motion to dismiss, which seeks relief pursuant to CPLR 3211, which is a pre-answer motion, is untimely because it was not brought

within the time in which a responsive pleading was due (see CPLR 3211[e]; *see Portilla v Law Offices of Arcia & Flanagan*, 125 AD3d 956, 956–57 [2d Dept 2015] ["Supreme Court properly denied, as untimely, that branch of the appellants' motion which was to dismiss the complaint pursuant to CPLR 3211(a)(1) insofar as asserted against them, as it was not made within the time period in which the appellants were required to serve an answer (see CPLR 3211 [e]), and no extension of time to make the motion was requested by the appellants or granted by the court"]).

At the same time, given the strong public policy of disposing of cases on the merits, defendants have shown an excusable law office failure in not timely interposing an answer, based upon their belief that once defendant LLC had evicted the plaintiffs from the house, since they heard nothing further from the plaintiffs, that this action had been abandoned by the plaintiffs. Further, defendants have made a sufficient showing of a meritorious defense by providing an affidavit of a member of the defendant LLC, as well as the written contract between plaintiffs and Gubner and the arbitration award from the rabbinical court, which, while not in admissible form, are sufficient to raise a meritorious defense to the plaintiffs' action and support the granting of the branch of the motion which asks for permission to answer the complaint. Indeed, the appellate courts routinely hold that a court's failure to consider a late motion to vacate a default on its merits is an abuse of judicial discretion, if a reasonable excuse for the default is provided along with "a showing of a potentially meritorious defense" (*see Felix v Thomas R. Stachecki Gen. Contracting, LLC*, 107 AD3d 664, 666 [2d Dept 2013]); CPLR 2005. Accordingly, the court has determined that the defendants' motion should be considered on the merits in spite of it being untimely. CPLR 2004.

With regard to defendants' claim that the complaint should be dismissed

pursuant to 3211 (a)(1), based on documentary evidence, there is no documentary evidence annexed to the motion. It is black letter law that documentary evidence must both qualify as documentary evidence and be submitted in admissible form. A motion to dismiss a complaint pursuant to CPLR 3211 (a)(1) will be granted if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [2002] [internal quotation marks omitted]; *see also Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2010]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Documents where the contents are "essentially undeniable" include judicial records, mortgages, deeds, contracts and other written agreements (*Fontanetta*, 73 AD3d at 84-85). Lastly, a complaint containing factual claims flatly contradicted by documentary evidence should be dismissed (*Well v Yeshiva Rambam*, 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [1997], *cert. denied* 522 US 967 [1997]).

With regard to defendants' claim that the complaint should be dismissed pursuant to 3211(a)(5), arbitration and award, collateral estoppel and res judicata (the categories in this statute which are claimed in the motion), there is no evidence in admissible form annexed to the motion which makes a prima facie case for dismissal. The foreign language documents upon which defendants rely are not translated in accordance with CPLR 2101(b), insofar as the translator's affidavit is attached separately from the translations and does not identify what document was translated nor does it set forth the translator's qualifications (*see Rosenberg v Piller*, 116 AD3d 1023, 1025–26 [2d Dept 2014]). Thus, defendants have failed to present admissible evidence in support of their claim under CPLR 3211(a)(5).

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. *See also Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2d Dept 2000].

The standard of review on a motion pursuant to CPLR 3211(a)(7) is not whether the party has artfully drafted the pleading, "but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez, 84* NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

Herein, plaintiffs assert seven causes of action in the complaint, and the court will address them individually with regard to whether each states a cause of action. It is noted that while Mr. Eisen as managing member of the defendant LLC contends it never entered into any agreements with plaintiffs, for the purposes of a 3211(a)(7) motion, the pleadings, which allege plaintiffs were employed by the defendants (collectively), are deemed true (see *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013] ["we must accept facts alleged as true and interpret them in the light most favorable to plaintiff"]).

The first four causes of action are plaintiffs' wage claims. The first is titled "minimum wage," the second "overtime," the third "spread of hours under the NY Labor Law" and the fourth "failure to provide payroll notices under the NY Labor Law." Counsel's affirmation does not address these claims, nor does Mr. Eisen's affidavit. Therefore, these four causes of action may not be dismissed as defendants do not make a prima facie case in their motion papers.

The fifth cause of action is for the imposition of a constructive trust. "The equitable remedy of a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. The elements of a cause of action to impose a constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." (*See Dee v Rakower*, 112 AD3d 204, 206 [2d Dept 2013].) This cause of action must be dismissed as the complaint fails to allege these elements.

Plaintiffs claim in their complaint that they were of the belief that if they lived with and cared for their grandfather for the rest of his life, they would be entitled to "receive

title to the apartment." However, their 2010 written agreement [Exhibit G] with Mr. Gubner specifically states that title to the property is held by a trust set up by Eugene/Jacob Gubner, and that they will be tenants and employees and will have no claim to ownership of this three-family house. Further, there is no such thing as title to an apartment in a property that is not a condominium. Finally, while the papers to not specify what the trust provided with regard to who was entitled to the property when Jacob/Eugene Gubner died, any oral representation to plaintiffs could not have modified the trust agreement or the contract.

The Sixth Cause of Action is for unjust enrichment. The motion is devoid of any mention of this claim. The Seventh Cause of Action is for breach of contract. Defendants claim, in their attorneys' affirmation, that these issues were all resolved by the rabbinical court and the plaintiffs' time to move to vacate that decision has passed. This is addressed above in the discussion concerning the branch of the motion under CPLR 3211 (a)(5). However, counsel does not address the breach of contract claim except to claim it was decided by the rabbinical court. Thus, viewing the cause of action in the light most favorable to plaintiffs, it may not be dismissed.

The branch of the cross motion which seeks permission to serve and file an answer to the complaint is granted. This is an action seeking monetary damages only, as the court has herein dismissed the plaintiffs' equitable claim for the imposition of a constructive trust, and the delay caused by defendants in failing to answer the complaint has not been shown to have caused plaintiffs any prejudice (*see Felix v Thomas R. Stachecki Gen. Contracting, LLC*, 107 AD3d 664, 666 [2d Dept 2013]); *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 60 [2d Dept 2013]; *Smith v Waldbaum's Supermarket, Inc.*, 99 AD2d 530 [2d Dept 1984]; *see also Ippolito v TJC Dev., LLC*, 83

AD3d 57, 71-72 [2d Dept 2011]).

Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment is denied, and it is further

ORDERED that the defendants' cross motion is granted to the extent that the plaintiffs' Fifth Cause of Action is dismissed and defendants' time to interpose an answer is extended to the date which is 30 days after service of a copy of this order with notice of entry, and it is further

ORDERED that the parties herein shall appear in the Intake Part for a Preliminary Conference on November 14, 2018 at 9:30 a.m. However, no conference shall be held if defendants have not served and filed an answer to the complaint.

This shall constitute the decision and order of the court.

Dated: September 26, 2018

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court