

Marks v 170 W. 85th St. Hous. Dev. & Fund Corp.

2022 NY Slip Op 34063(U)

November 30, 2022

Supreme Court, New York County

Docket Number: Index No. 653121/2020

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

JEANETTE MARKS,

Plaintiff,

- v -

170 WEST 85TH ST. HOUSING DEVELOPMENT AND
FUND CORPORATION,

Defendant.

-----X

INDEX NO. 653121/2020

MOTION DATE 10/30/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12,
13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant to dismiss the
complaint for lack of personal jurisdiction pursuant to CPLR
3211(a)(8) is DENIED; and it is further

ORDERED that the plaintiff's cross motion for leave to amend
her pleadings, in particular, the amended summons and amended
complaint herein to correct a misnomer by changing the name of
defendant in the first amended summons and in the first amended
complaint from 170 West 85th St Housing Development and Fund
Corporation to 170 West 85 St Housing Development Fund Corporation
is granted, and the second amended summons and second amended
complaint in the proposed form annexed to the moving papers (NYSCEF

Document Number 22) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that cross movant shall, within ten (10) days from entry of this order, file such second amended summons and second amended complaint with a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the defendant shall serve an answer to the second amended complaint within twenty (20) days from the date of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference order(s) at least two days before January 12, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

As stated in Ober v Rye Town Hilton, 155 AD2d 16, 19 (2d Dept 1990),

CPLR 305 (c) authorizes the court, in its discretion, to "allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced". This provision, and its predecessors, has been consistently interpreted as allowing a misnomer in the description of a party defendant to be cured by amendment, even after the Statute of Limitations has run. Generally, such an amendment should be granted where (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought.

In Ober, the appellate court, in upholding personal jurisdiction, further reasoned:

Even assuming that the delivery of the original summons and complaint at the hotel, which occurred on May 2, 1986, did not constitute valid service upon Hilton Hotels Corporation, this defect was remedied by service of the summons and complaint on the Secretary of State in July 1988. Furthermore, there is no proof that granting the plaintiffs' application for leave to amend would result in any actual prejudice to any party.

The facts of Ober are practically on all fours with those of the herein matter. For the reasons stated by the Appellate Division, Second Department, in Ober, this court shall deny

defendant's motion to dismiss this action for lack of personal jurisdiction and grant plaintiff's cross motion to amend her summons and complaint.

Debra A. James

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11/30/2022

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE