| **Furuya v Parry** |
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| 2019 NY Slip Op 31354(U) |
| May 13, 2019 |
| Supreme Court, New York County |
| Docket Number: 158800/2018 |
| Judge: Andrew Borrok |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ANDREW BORROK **PART** IAS MOTION 53EFM

*Justice*

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AKIYO FURUYA,

Plaintiff,

- v -

MICHAEL PARRY, FRANK BARNETT

Defendant.

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**INDEX NO.** 158800/2018

**MOTION DATE** 05/06/2019

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion to/for DISMISSAL.

This is an action for breach of contract brought by Akiyo Furuya against Michael Parry and Frank Barnett. Mr. Parry moves to dismiss the complaint pursuant to CPLR 306-b and 3211 [a] [8] for improper service and lack of personal jurisdiction, and pursuant to CPLR 3211 [a] [1] based on documentary evidence. Ms. Furuya cross moves to deem the proof of service of Mr. Parry, which was filed on November 30, 2018, as timely filed pursuant to CPLR 2001 and 2004. For the reasons set forth below, Mr. Parry's motion to dismiss is denied, and Ms. Furuya's cross motion is granted.

## BACKGROUND

Reference is made to (x) a Contract of Sale – Condominium Unit (the **Contract**), dated November 2016, between Ms. Furuya and Mr. Parry, pursuant to which Ms. Furuya agreed to sell to Mr. Parry Unit 22F (the **Unit**) in the building known as the Revere Condominium located at 400 East 54th Street, New York, New York for the purchase price of $1,400,000 (NYSCEF Doc. No. 14 ¶ 1), and (y) a Holdover Agreement, dated December 2016, between Ms. Furuya

and Mr. Parry, pursuant to which Mr. Parry agreed that Ms. Furuya could remain as a tenant of the Unit for a term of two years (the **Lease Term**) expiring on December 31, 2018, in exchange for a reduction in the purchase price of $96,000 (*i.e.*, such that the purchase price would be $1,304,000) (NYSCEF Doc. No. 15 ¶¶ 1-8). The Holdover Agreement required, among other things, for Ms. Furuya to maintain the appliances, plumbing, heating, air conditioning systems, and electrical systems in the same condition as on closing inspection, subject to reasonable wear and tear (*id.* ¶ 5). Pursuant to the Contract, Mr. Parry remitted a down payment of $130,400 to Ms. Furuya's counsel as escrow agent, where it was to be held pending closing of title (NYSCEF Doc. No. 14 ¶ 3; Pressau aff ¶ 2). Mr. Barnett, Mr. Parry's attorney, retained $10,000 from the proceeds of the sale at closing and held it in escrow to secure Ms. Furuya's obligation to vacate the Unit at the end of the Lease Term (Pressau aff ¶ 2).

Pursuant to the Holdover Agreement, Ms. Furuya could terminate her tenancy prior to the end of the Lease Term on 30-days' written notice to Mr. Parry. In the event of any such earlier termination of the Lease Term, and subject to the conditions set forth in the Holdover Agreement, Ms. Furuya would receive a credit of $4,000 for each full month remaining in the Lease Term (NYSCEF Doc. No. 15 ¶ 1 [a]). On March 26, 2018, Ms. Furuya served notice of her intention to terminate the tenancy and vacate the Unit on April 30, 2018 (Pressau aff ¶ 4). Ms. Furuya claims that inasmuch as there were eight months remaining in the Lease Term, she is entitled to a credit of $32,000 and the $10,000 deposit retained to ensure that she timely vacated the apartment, neither of which amounts she has received. Mr. Parry alleges that when he inspected the property on April 30, 2018, he discovered that the Unit was not in the condition that it was at closing, that it will cost approximately $24,750 to repair the Unit, and that Ms.

Furuya is accordingly not entitled to either the deposit or the credit. To wit, the air conditioning systems, heating units, appliances, and light fixtures in the kitchen were not in working order, and the parquet floor was damaged and taped down to keep the tiles in place (Parry aff ¶¶ 11, 14).

Ms. Furuya commenced this action by filing a summons and verified complaint on September 21, 2018, and an amended verified complaint on October 18, 2018. Mr. Barnett filed an answer to the amended verified complaint on October 24, 2018. After four attempts to serve Mr. Parry by personal service, Ms. Furuya served the summons and verified complaint on Mr. Parry by affixing a true copy of the papers to the door of Mr. Parry's residence and mailing a copy to the same address. Mr. Parry now moves to dismiss this action pursuant to CPLR 306-b and CPLR 3211 [a] [1] and [a] [8] for improper service and lack of personal jurisdiction. Ms. Furuya opposes the motion, and cross moves for an order pursuant to CPLR 2001 and 2004 deeming the proof of service on Mr. Parry to be timely filed.

**DISCUSSION**

On a motion to dismiss pursuant to CPLR 3211 [a] [1], the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Dismissal under CPLR 3211 [a] [1] is warranted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Mr. Parry argues that the Holdover Agreement expressly required Ms. Furuya to maintain the Unit in the same condition as on closing inspection, subject to reasonable wear and tear, and that the Unit was in worse condition when she moved out (Acaru aff ¶¶ 9, 13). Mr. Parry further argues that Ms. Furuya has failed to submit any proof regarding the condition of the Unit as of the date of closing (*id.* ¶ 13). These arguments are unavailing. The amended complaint alleges that, "[o]n or before April 30, 2018, [Ms. Furuya] inspected the [Unit] with Christine Filotti, upon information and belief, [Mr. Parry's] wife. Filotti did not offer any indication that she objected to the condition of the [Unit] in any manner at that time" (Amended Complaint, ¶ 12). The amended complaint further alleges that "[t]he condition of the [Unit] as of April 30, 2018, was the same as the condition of the [Unit] on the date of Closing, March 6, 2017" (*id.* ¶ 13). Nor do the photographs submitted by Mr. Parry conclusively establish a defense as a matter of law. While Mr. Parry has submitted photographs purporting to show the condition of the Unit when Ms. Furuya moved out, Mr. Parry has not submitted any documentary evidence demonstrating the condition of the Unit as of the date of closing, and therefore fails to conclusively establish that Ms. Furuya failed to maintain the premises as required under the Holdover Agreement. Accordingly, Mr. Parry's motion to dismiss pursuant to CPLR 3211 [a] [1] is denied.

Mr. Parry also asserts that he was never served in this action and that the court therefore lacks personal jurisdiction over him. CPLR 306-b provides that a plaintiff must serve the summons and complaint within 120 days after commencement of an action. An action is commenced when the pleadings are filed with the court (CPLR 304). The court may dismiss an action without prejudice for lack of personal jurisdiction if the plaintiff fails to serve the pleadings

within 120 days (CPLR 3211 [a] [8]). The court may also extend the plaintiff's time for service of the pleadings for good cause shown or in the interest of justice (CPLR 306-b).

Mr. Parry alleges that he "was never served with the Summons and Complaint with respect to this action" (Parry aff ¶ 3). However, Ms. Furuya submits an affidavit of service indicating that a true copy of the summons and complaint was affixed to Mr. Parry's dwelling or usual place abode on December 20, 2018 at 2:10 PM, and an affidavit of mailing indicating that the same was mailed to Mr. Parry at his dwelling or usual place of abode by First Class Mail on October 10, 2018 (NYSCEF Doc. No. 39). An affidavit of service in accordance with CPLR 302 is *prima facie* evidence that process was properly served (*In re de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). A conclusory assertion that a defendant was never properly served is insufficient to rebut the presumption of proper service (*JP Morgan Chase Bank v Dennis*, 166 AD3d 530, 530 [1st Dept 2018]). Here, Mr. Parry's bare denial of service is insufficient to rebut the presumption of proper service to which the proof of service is entitled.

Mr. Parry also challenges the proof of service filed by Ms. Furuya on the ground that it was not timely filed. Mr. Parry argues that the proof of service was filed more than 50 days after the alleged service was completed and was therefore untimely under CPLR 308 [2], which requires proof of service to be filed within 20 days after the mailing of the summons and complaint (Acaru Aff ¶ 6). A plaintiff's delay in filing proof of service pursuant to CPLR 308 is not a jurisdictional defect but a procedural irregularity that may be corrected by the court *nunc pro tunc* (*Lancaster v Kindor*, 98 AD2d 300, 306 [1st Dept 1984]). CPLR 2001 allows a court to permit a mistake, omission, defect, or irregularity in the filing process to be corrected at any

stage of an action, so long as it does not prejudice a substantial right of a party. CPLR 2004 permits the court to extend the time for any act by a party in an action for good cause shown.

Here, Mr. Parry was properly served by "nail and mail" service pursuant to CPLR 308 [4] and 313. The proof of service was filed on November 30, 2018, 50 days after service was completed and 31 days after the time to file proof of service had expired under CPLR 308 [4]. The delay in filing proof of service was inadvertent and was promptly corrected (Presseau aff ¶ 8). This delay constitutes a procedural irregularity and is not a jurisdictional defect that would support dismissal under CPLR 3211 [a] [8]. Deeming the proof of service to be timely filed would serve the interests of justice and judicial economy and would not prejudice a substantial right of any party. If the filing of the proof of service is deemed timely, Mr. Parry will be in the same position as he would have been had the proof of service been filed within 20 days. Accordingly, Mr. Parry's motion to dismiss pursuant to CPLR 306-b and 3211 [a] [8] is denied, Ms. Furuya's cross motion is granted, and the court deems the filing of the proof of service to be timely, *nun pro tunc*. Mr. Parry shall have 20 days from the date of entry of this Decision and Order to file an answer.

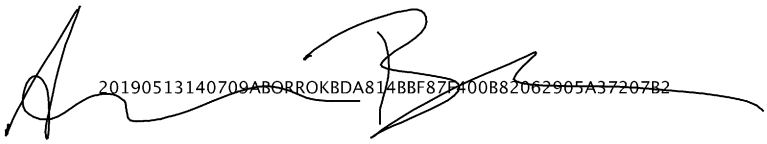
It is hereby

ORDERED that Michael Parry's motion to dismiss is denied; and it is further

ORDERED that Akiyo Furuya's cross motion is granted; and it is further

ORDERED that Michael Parry is directed to serve an answer to the verified amended complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 238, 60 Centre Street, New York, New York forthwith.




5/13/2019
DATE

ANDREW BORROK, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |