2021-07-07

Dep't of Hous. Pres. & Dev. v. 654 Putnam Owner LLC

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART B

---------- X

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

Index No. HP 302972/21

-against-

DECISION/ORDER

654 PUTMAN OWNER LLC
ALEXANDER HORN
SAM KOORIS,

Respondents.

---------- X

Present: Hon. Julie Poley
Judge, Housing Court

The Department of Housing Preservation and Development of the City of New York ("HPD") commenced this proceeding pursuant to Section 110(a)(9) of the New York City Civil Court Act directing Respondents to correct all violations of the Multiple Dwelling Law and the Housing Maintenance Code at the subject premises located at 654 Putnam Avenue, Brooklyn, New York 11221 ("premises"). HPD seeks an order to correct, civil penalties for violations and tenant harassment, an order enjoining Respondents from engaging in tenant harassment, access to inspect and effectuate repairs, and the production of documents. All parties are represented by counsel and appeared via Microsoft Teams.

Before the Court is Respondents' motion seeking to dismiss the proceeding pursuant to CPLR § 3211(a)(8) alleging that HPD failed to obtain personal jurisdiction over Respondents or in the alternative setting the matter down for a pre-answer transverse hearing; and to dismiss pursuant to CPLR § 3211 (a)(2) and 22 NYCRR § 208.43(d)(4), (5), (6), (7) and (8) alleging that

the proceeding was improperly commenced, untimely noticed to be heard and jurisdictionally defective.

The Court first turns to the prong of Respondents' motion concerning the provisions contained in 22 NYCRR § 208.43 (Rules of the housing part). Respondents' argument is three-fold. First, Respondents allege that the proceeding should be dismissed because HPD's Petition was short served and because HPD impermissibly demanded an answer seven (7) days in advance of the return date (subsections (d)(3) and (d)(4)); second, that affidavits of service were not filed on time with the clerk of the housing part (subsections (d)(5), (d)(6) and (d)(7)); and third, that a penalty action for an immediately hazardous violation needed to be commenced by an order to show cause (subsection (d)(8)).

As a preliminary matter, even if Respondents' allegations are all correct concerning 22 NYCRR § 208.43 (Rules of the housing part), the issue becomes whether those rules are controlling. As noted in subdivision (b), "All rules of the Civil Court shall apply to the housing part whenever practicable, *except when otherwise provided by statute* or as otherwise provided in this section (emphasis added)." (*See*, 22 NYCRR § 208.43(b)). This subdivision observes a fundamental maxim of statutory construction that if a regulation runs counter to the clear wording of a statutory provision it should not be accorded any weight. (*See*, *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 [2009]; *quoting*, *Kurcsics v. Merchants Mut. Ins. Co.*, 42 N.Y.2d 451, 459 [1980]). Therefore, the Court is mindful of the principle that a statute, such as the New York City Civil Court Act, takes precedence over a rule or regulation, such as 22 NYCRR § 208.43 (Rules of the housing part).[1]

[1] The Uniform Rules for the New York City Civil Court provides that, "The provisions of this Part shall be construed as consistent with the New York City Civil Court Act (NYCCCA), and matters not covered by these provisions shall be governed by the NYCCCA." (*See*, 22 NYCRR § 208.1(d)).

Respondents' arguments concerning subdivisions (d)(5), (d)(6) and (d)(7) all are premised upon time requirements for filing affidavits of service with the clerk of the housing part, however, the New York City Civil Court Act § 409 does not include a deadline for filing proof of service. (*See*, N.Y.C. Civ Ct Act § 409(a) ["Proof of service of the summons and complaint, notice of petition and petition or order to show cause and petition shall be filed with the clerk of the court in the county in which the action is brought."]). A deadline for filing the affidavit of service is clearly absent from the controlling statute. Indeed, concerning the New York City Civil Court Act § 409, the Appellate Division, Second Department has found that "there is no deadline to file proof of service in an action commenced in the Civil Court." (*See*, *Rodriguez v. Rodriguez*, 103 A.D.3d 117, 123 [2nd Dep't 2012]). Therefore, as the New York Civil Court Act takes precedence over the rules that Respondents rely on, the Court will not dismiss the proceeding based upon HPD's alleged untimely filing of affidavits of service. Furthermore, in the absence of prejudice to a party, *de minimis* defects are not jurisdictional in the Appellate Division, Second Department. (*See*, *Paikoff v. Harris*, 185 Misc.2d 372 [2nd Dep't 1999]; *citing*, *Villas of Forest Hills Co. v. Lumberger*, 128 A.D.2d 701 [2nd Dep't 1987]; *Birchwood Towers #2 Assoc. v. Schwartz*, 98 A.D.2d 699 [2nd Dep't 1983]).

The New York City Civil Court Act is also controlling concerning Respondents' 22 NYCRR § 208.43(d)(8) argument that a penalty action for immediately hazardous violations needed to be commenced by order to show cause. As opposed to mandating commencement by order to show cause, the New York Civil Court Act uses permissive language and provides that HPD "may" commence any action or proceeding by an order to show cause returnable within five days, or within any other time period in the discretion of the court. (*See*, N.Y.C. Civ Ct Act § 110(a)(9)). Rather than provide a limitation on a city department that is charged with

enforcing proper housing standards, the statute affords HPD the option of commencing a proceeding by an expedited order to show cause. A rule to the contrary that mandates commencement by order to show cause is not controlling and does not warrant dismissal. (*See*, *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 [2009]; *quoting*, *Kurcsics v. Merchants Mut. Ins. Co.*, 42 N.Y.2d 451, 459 [1980]).

Turning to the last prong of Respondents' argument concerning 22 NYCRR § 208.43 (Rules of the housing part), the Court is not persuaded by Respondents' interpretation of subsections (d)(3) and (d)(4). Respondents' allege that the proceeding should be dismissed because HPD's Petition was short served and because HPD impermissibly demanded an answer seven (7) days in advance of the return date. Respondents' allege that the Notice of Petition, made returnable May 20, 2021, was short served as service was not completed until at least May 3, 2021 when the mailings allegedly occurred. Respondents also allege that the Petition "incurably misleads Respondents" by shortening their time to answer the proceeding because it demands an answer at least seven (7) days before the petition is noticed to be heard if the Notice of Petition is served at least twelve (12) days beforehand.

The proceeding was noticed to be heard on May 20, 2021. Respondents' argue that mailings did not occur until May 3, 2021, which deprives Respondents of the 20 days they are afforded to appear and answer pursuant to 22 NYCRR § 208.43(d)(4). Irrespective of whether the rule is actually controlling in this instance, using the May 3, 2021 mailings as the tolling date, HPD did not short serve the Petition according to the plain language of the rule, which states, "Where a summons for a hazardous or nonhazardous violation is delivered by mail or by any other method provided in NYCCA 110(m), the defendant shall appear and answer *within* 20 days after the proof of service thereof is filed with the clerk of the housing part (emphasis added)."

(*See*, 22 NYCRR § 208.43(d)(4)). Under the New York City Civil Court Act, service is complete immediately upon personal delivery or upon filing of proof of service if served by any means other than personal delivery. (*See*, N.Y.C Civ Ct Act § 410). Therefore, using the May 3, 2021 date of mailing, or May 10, 2021, when the affidavits of service were filed on NYSCEF, the May 20, 2021 Court date was *within* the 20 day time period contemplated by 22 NYCRR § 208.43(d)(4) that Respondents' rely on.[2] (*See also*, *Department of Hous. Preserv. & Dev. v. Ju Jin Li*, 24 Misc. 3d 803 [Hous Part, Kings County 2009]).

Furthermore, if personal service was completed on April 30, 2021, the earliest alleged date, the May 20, 2021 Court date was still *within* the 20 day time period proscribed by New York City Civil Court Act § 402(a) ["If the summons is personally delivered to the defendant within the city of New York, it shall require him to appear and answer within twenty days after its service."].[3] As previously discussed, the New York City Civil Court Act, as a statute, takes precedence over rules to the contrary contained in 22 NYCRR § 208.43(d)(3) [which provide ten [10] days to appear and answer]). (*See*, *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 [2009]; *quoting*, *Kurcsics v. Merchants Mut. Ins. Co.*, 42 N.Y.2d 451, 459 [1980]). The Court has considered the remaining arguments and denies this prong of Respondents' motion in its

---

[2] The New York City Civil Court Act § 402(b) provides thirty (30) days, therefore the May 20, 2021 return date was also permissible according to the governing statute. (*See*, N.Y.C. Civ Ct Act § 402(b) ["If the summons is served by any means other than personal delivery to the defendant within the city of New York it shall provide that the defendant must appear and answer within thirty days after proof of service is filed with the clerk."]).

[3] In computing time for an act to be performed, the rule is to exclude the first day and include the last day. (*See*, NY General Construction Law § 20; *see also*, *Sugerman v. Jacobs*, 160 A.D. 411, 413 [2nd Dep't. 1914] ["the ordinary rule for determining the time within which an act required to be done in an action or special proceeding shall be performed, is to exclude the first day and to include the last."]; *Seminole Hous. Corp. v. M & M Garages*, 78 Misc.2d 755 [Civ Ct, Queens County 1974] [the first day is excluded and the last day is included to determine the time required to perform an act]).

entirety. In addition, the argument that Respondents have been prejudiced in some way by HPD seeking an answer before the first Court appearance is unavailing and does not warrant dismissal.

Lastly, the Court turns to Respondents' traverse claims. Respondent Sam Kooris submits an Affidavit in Support, dated May 19, 2021, which states that the affidavits of service are incorrect and that he was not personally served on April 30, 2021. Mr. Kooris states that he was not in his office on April 30, 2021, that he was touring other buildings that day, and that if he was in the office that day, he would not have answered the door to receive service because his personal office is not located near the front door. Mr. Kooris further alleges that the affidavit of service is improper because it states that the person served was 45 years old and that everyone in his office is younger than that, and that he is not 5'9".[4] (*See*, Aff. of S. Kooris, dated May 19, 2021). The motion is opposed by attorney affidavit only.

"Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and therefore, gives rise to a presumption of proper service." *(Wells Fargo Bank N.A. v. Chaplin*, 65 A.D.3d 588, 589 [2nd Dep't 2009]; *see also*, *Bankers Trust Co. of Cal. v. Tsoukasa*, 303 A.D.2d 343, 344 [2nd Dep't 2003]). "However, when a [party] submits a sworn denial of receipt containing specific facts to refute the statements in the affidavit of the process server, the prima facie showing is rebutted and the plaintiff must establish personal jurisdiction by a preponderance of evidence at a hearing." (*U.S. Bank, N.A. v. Peralta*, 142 A.D.3d 988, 989 [2nd Dep't. 2016]; *see also*, *Citibank N.A. v. Balsamo*, 144 A.D.3d 964 [2nd Dep't. 2016]; *see also*, *Empire Nat'l Bank v. Judal Constr. Of New York, Inc.*, 61 A.D.2d 789 [2nd Dep't 1978]). After careful consideration of the papers and affidavit submitted, this Court finds that Respondents have sufficiently refuted the veracity of the affidavit of service requiring a traverse

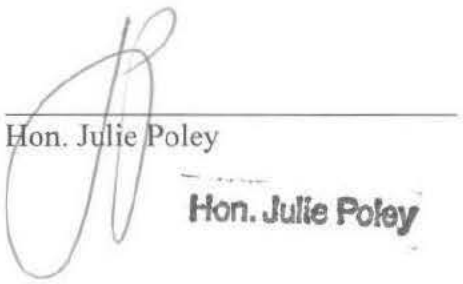
[4] The description in the affidavit of service contains a range in height from 5ft 9in – 6ft 0in.

hearing as to personal service of the Notice of Petition and Petition. The Court has considered the remaining arguments presented in Respondents' motion and find that they do not warrant dismissal.

Therefore, for the reasons stated, Respondents' motion is granted in part and denied in part. This proceeding is hereby transferred to Part X for traverse and trial. Respondents' are directed to file an Answer on or before July 23, 2021.

This constitutes the Decision/Order of the Court, which is uploaded to NYSCEF.

Dated: July 7, 2021
Brooklyn, New York



Hon. Julie Poley

Hon. Julie Poley