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Bronx 2120 Crotona Ave. L.P. v. Gonzalez

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[*1]

Bronx 2120 Crotona Ave. L.P. v Gonzalez
2022 NY Slip Op 22148
Decided on May 17, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on May 17, 2022

Civil Court of the City of New York, Bronx County

<p>Bronx 2120 Crotona Avenue L.P., Petitioner,</p> <p>against</p> <p>Revel Gonzalez, Respondent-Occupant, and John Doe & Jane Doe, Respondents-Undertenants.</p>
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L & T Index No. 310955-2021

For Respondent: Bronx Legal Services, By Kayla Middleton, Law Graduate & Fernando Mancias-Steinmann, Esq.

For Petitioner: Todd Rothenberg, Esq., by Boris Lepikh, Esq.

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY RESPONDENT TO DISMISS THE PROCEEDING BASED ON LATE FILING OF THE AFFIDAVIT OF SERVICE OF THE NOTICE OF PETITION AND PETITION AND PETITIONER'S CROSS-MOTION TO DEEM THAT SAME AFFIDAVIT TIMELY FILED: NYSCEF DOC NO. 10-20

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

RELEVANT FACTS & PROCEDURAL POSTURE

In this summary holdover proceeding, petitioner obtained October 13, 2021 as the return date on the petition. It is undisputed that the affidavit of service for the notice of petition, which has been served by conspicuous place service on September 30, 2021, was filed on October 18, 2021.

Respondent now moves for dismissal for petitioner's late completion of service of process. Petitioner cross-moves for an order deeming the affidavit timely filed.

THE LAW AND ITS APPLICATION

Under RPAPL § 733, in a holdover proceeding, the notice of petition and petition must be served at least ten (10) days and not more than seventeen (17) days *before* the return date [*2][emphasis added]. And, pursuant to RPAPL § 735(2), service of the notice of petition and petition, when effected by conspicuous place service, is not *complete* until proof of service is filed with the court [emphasis added]. (see *Siedlecki v Doscher*, 33 Misc. 18, 20, 931 NYS2s 203 [App Term, 2nd Dept 2011]; [170 East 77th 1 LLC v Berenson](#), 12 Misc 3d 1017, 1022, 820 NYS2d 693 [Civ Ct, New York County 2006]).

Here, service was completed, with filing of the affidavit of service, some five (5) days *after* the return date.

Respondent moves for dismissal based on this non-compliance, citing to [Riverside Syndicate, Inc. v Saltzman](#), (49 AD3d 402, 2008 NY Slip Op 02482 [1st Dept 2008]). In *Saltzman*, there was a one-day delay in filing proof of service of the petition. After dismissal in the Housing Court, the Appellate Term reversed noting the "absence of any discernible prejudice." (see 15 Misc 3d 138(A), 1, 2007 NY Slip Op 50925(U) [App Term, 1st Dept 2007]). Nevertheless, the Appellate Division, adhering to the "strict compliance" line of cases, (see *Berkeley Assoc. Co. v Di Nolfi*, 122 AD2d 703, 705, 505 NYS2d 630 [1st Dept 1986]; *MSG Pomp Corp. v Doe*, 185 AD2d 798, 586 NYS2d 965 [1st Dept 1992]), reversed the Appellate Term.

In response, petitioner urges this court to adopt what some term the more "modern

view" and not exalt form over substance. Petitioner further argues that the affidavit of service was properly filed pursuant to the New York City Civil Court Act (CCA).

Petitioner's argument has merit. Respondent does not allege that he has been prejudiced by the late filing. Furthermore, it has become common place that non-prejudicial defects in summary proceedings, whether procedural or substantive, are either overlooked or amendment allowed. (see CPLR § 305(c) (affidavit of service can be amended); *see also Hablin Realty Corp. v McCain*, 123 Misc 2d 777, 778 [App Term, 1st Dept 1984] (verification error correctable at any stage of the proceeding); [Sassouni v Mary's Dairy First Ave., Inc.](#), 11 Misc 3d 1073(A) [Civ Ct, New York County, 2006] (petitioner's name is amendable), *citing Jackson v New York City Hous. Auth.*, 88 Misc 2d 121, 122 [App Term, 1st Dept 1976] ("A petition in a summary proceeding is no different than a pleading in any other type of civil case. A petition which may fail to state facts sufficient to constitute a cause of action or contains other pleading infirmities is capable of correction by amendment."); [601 W. Realty, LLC v Mao Chu Zheng](#), 54 Misc 3d 145(A) [App Term, 1st Dept 2017] (certain misstatements of address amendable); [OLR ECW, L.P. v Myers](#), 59 Misc 3d 650 [Civ Ct, Bronx County 2018] (regulatory status may be amendable)).

On this exact issue [late filing of the affidavit of service], the Appellate Term, Second Department has long held it is a non-prejudicial error. ([see Friedlander v Ramos](#), 3 Misc 3d 33, 34-35, 779 NYS2d 237 [App Term, 2nd Dept 2004]).

Of course, the Appellate Division in *Saltzman* was aware of *Friedlander* (as the Appellate Term had cited to it) when it reversed and granted dismissal. It was also aware of the NYCAA provisions cited in *Friedlander* and cited by petitioner here.

While the Appellate Term, Second Department may now take a different view on this exact issue, this court sits in the First Department and must follow binding authority. *Saltzman* is such binding authority. Indeed, it appears to still be binding authority statewide. ([see Abakporo v Gardner](#), 22 Misc 3d 1101(A), 2, 2008 NY Slip Op 52574(U) [Civ Ct, Kings County 2008] ("this court is bound by the precedent set forth by the First Department in *Riverside Syndicate* which is the only decision on this issue which was made by any court of statewide [*3]jurisdiction."), *citing Mountain View Coach Lines v Storms*, 102 AD2d 663, 664, 476 NYS2d 918 [2nd Dept 1984] ("The doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department" until the Court of Appeals or the same Division announces a contrary rule.); *see also*. [D'Alessandro v Carro](#), 123 AD3d 1, 6, 992 NYS2d 520 [1st Dept 2014]). [\[FN1\]](#)

As such, petitioner's cross-motion is denied, and respondent's motion seeking dismissal is granted. Judgment shall enter in the respondent's favor.

This constitutes the Decision and Order of the court. It will be posted to NYSCEF and emailed to the parties.

SO ORDERED,

Dated: May 17, 2022
Bronx, NY
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: Numerous lower court decision in the First Department have continued to recognize *Saltzman* as binding. (*see 1215 Realty LLC v Khan*, 2016 NYLJ LEXIS 4950 [Civ Ct, Bronx County 2016]; *New York City Hous. Auth. v Goldman*, 2016 NYLJ LEXIS 4560 [Civ Ct, Bronx County 2016]; *Valane v Cruz*, 2018 NYLJ LEXIS 2629 [Civ Ct, Bronx County 2018]; *2198 Cruger Assoc. v Xhurreta*, 2019 NYLJ LEXIS 4387 [Civ Ct, Bronx County 2019]).

[Return to Decision List](#)