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Matticore Holdings, LLC v. Hawkins

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Matticore Holdings, LLC v Hawkins
2022 NY Slip Op 22228
Decided on July 25, 2022
Civil Court Of The City Of New York, Bronx County
Lutwak, J.
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Decided on July 25, 2022

Civil Court of the City of New York, Bronx County

<p>Matticore Holdings, LLC, Petitioner,</p> <p>against</p> <p>Andrew Hawkins & Madeline Cepero AKA Marilyn Cepero, Respondents.</p>

L & T Index No. 308973/22

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Diane E. Lutwak, J.

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review

of Petitioner's Motion to Vacate "ERAP" Stay and Respondent Cepero's Cross-Motion to Dismiss and/or Other Relief:

Papers NYSCEF Doc No.

Petition/Notice of Petition (filed 4/7/22) 1, 2

Notice of Petition — Assigned/Court Notice (filed 4/13/22) 3, 4

Affidavits of Service (filed 5/3/22) 5

Petitioner's Notice of Motion 6

Petitioner's Attorney's Affirmation in Support 7

Petitioner's Exhibit A 8

Respondent's Notice of Cross-Motion 13

Respondent's Attorney's Affirmation in Support 14

Respondent Cepero's Affidavit in Support 15

Respondent's Exhibits A-K 16

Petitioner's Attorney's Reply Affirmation 17

Petitioner's Exhibits A-L 19-30

Upon the foregoing papers, and for the reasons stated below, Petitioner's Motion to Vacate ERAP Stay and Respondent Cepero's [\[EN1\]](#) Cross-Motion to Dismiss, consolidated herein for disposition, are decided as follows.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

This holdover eviction proceeding was commenced by Notice of Petition and Petition dated April 6, 2022, predicated upon a "Ninety Day Notice to Quit" dated October 22, 2021 advising Respondents that Petitioner would commence a summary eviction proceeding if they did not move out by January 31, 2022. The Petition alleges, *inter alia*, that the building is not a multiple dwelling, the apartment is not subject to rent regulation and Respondents filed an "ERAP" (Emergency Rent Assistance Program) application (Petition at ¶¶ 6, 7, 10).

The Petition was filed with the Court on April 7, 2022 and, by "Court Notice" dated April 13, 2022 (NYSCEF Doc # 4), calendared for an initial virtual conference in Intake Part 1 on May 4, 2022. The Court Notice further states: "Please attach this to the petition and notice of petition." The process server's affidavit of service of the Petition, Notice of Petition and Court Notice, sworn to and filed on May 3, 2022 (NYSCEF Doc #5), asserts service on Respondent Cepero as follows: "Attempted to serve Madeline Cepero a/k/a Marilyn Cepero on April 13, 2022, but she refused and told me to do what I had to do, while pointing to the door. I affixed two copies to the front door. Ms. Cepero waited for until I reached my vehicle when I saw Ms. Cepero open the front door and remove both copies that were affixed to the door and rip them up, throwing them in the garbage." Further, the May 3, 2022 affidavit of

service asserts that a copy of the papers was mailed by "registered certified mail" to Respondent on April 14, 2022. A Supplemental Affidavit of Service, sworn to by the process server on July 11, 2022 and filed on July 12, 2022 (Exhibit C to Reply Affirmation, NYSCEF Doc # 21), is identical to his original affidavit with the additional statement that a copy of the papers was sent to Respondent by "regular mail", also on April 14, 2022.

Both Petitioner by counsel and Respondent *pro se* appeared for the May 4, 2022 initial conference. The case was transferred to Part C and adjourned to June 7, 2022. On May 10, 2022 Petitioner's counsel filed a motion to vacate the ERAP stay pursuant to L. 2021, c. 56, Part BB, Subpart A, §8 as amended by L. 2021, c. 417, Part A, § 4 ("the ERAP Law") and place the case on the trial calendar. In support of that motion Petitioner makes two arguments: first, that the stay imposed by the ERAP Law is an unconstitutional violation of Petitioner's due process rights; second, on the facts and circumstances presented the stay should be lifted because this is a holdover proceeding against occupants of an apartment in a building with less than four units, there is no current lease, Petitioner has advised Respondents that any prior lease will not be renewed and Petitioner does not seek use and occupancy. Petitioner cites to, *inter alia*, this Court's decision in [2986 Briggs LLC v Evans](#) ([74 Misc 3d 1224](#)[A], 163 NYS3d 794 [Civ Ct Bx Co 2022]).

Respondent retained counsel who filed opposition to Petitioner's motion and a cross-[*2]motion to dismiss for lack of personal jurisdiction. In opposition to Petitioner's motion Respondent argues that (1) the constitutional argument cannot be considered because Petitioner did not serve the New York State Attorney General; (2) even if the constitutional argument is considered, it should be denied because the ERAP stay is not unconstitutional; and (3) Respondent is entitled to the benefit of the statutory stay under the ERAP Law.

Respondent's cross-motion, supported by her own affidavit and her attorney's affirmation, seeks dismissal under CPLR R 3211(a)(8) for lack of personal jurisdiction due to three defects in the service of the Notice of Petition and Petition: (1) under New York State Real Property Actions and Proceedings Law (RPAPL) § 735(1)(a), because the original affidavit of service did not assert that a copy was sent by regular mail after a copy was left on the door; (2) under RPAPL § 735(2)(a), because the affidavit of service was not filed with the court until May 3, 2022, "significantly more than three days after mailing the court papers on April 14, 2022"; and (3) under RPAPL § 733(1), which requires that a holdover notice of petition and petition, "shall be served at least ten and not more than seventeen days before the time at which the petition is noticed to be heard," as the papers were served more than seventeen days before the May 4, 2022 return date. Respondent cites, *inter alia*, [Riverside](#)

[Syndicate, Inc v Saltzman \(49 AD3d 402](#), 852 NYS2d 840 [1st Dep't 2008]), and *Berkeley Assocs Co v Di Nolfi* (122 AD2d 703, 505 NYS2d 630 [1st Dep't 1986]).

In the alternative, Respondent seeks leave to interpose an Answer, and an order deeming her proposed Answer duly served and filed.

In opposition to the cross-motion Petitioner argues that (1) as per the process server's Supplemental Affidavit, he did send copies by both registered certified mail and regular mail on April 14, 2022; (2) the mailings were in addition to personal delivery to Respondent, as described in the process server's affidavit; (3) failure to file an affidavit of service within three days of completion of service pursuant to RPAPL § 735(2) is not a jurisdictional defect but merely a procedural irregularity which can be corrected *nunc pro tunc*; and (4) service was not defective under RPAPL § 733(1) because service on "April 13-14, 2022" was "at least ten days before the return date and a mere thirteen business days before the return date."

DISCUSSION

Respondent's cross-motion to dismiss due to defective service will be addressed first, as if it is granted, there will be no need to address Petitioner's motion to vacate the ERAP stay. The starting point in the analysis is the "black-letter law" principle that "where the defendant resists service, it suffices to leave the summons in his general vicinity". *McDonald v Ames Supply Co* (22 NY2d 111, 115, 291 NYS2d 328, 331, 238 NE2d 726, 728 [1968]). *See also, e.g., Bossuk v Steinberg* (58 NY2d 916, 460 NYS2d 509, 447 NE2d 56 [1983]); [Hall v Wong \(119 AD3d 897](#), 990 NYS2d 579 [2nd Dep't 2014]); *Austrian Lance & Stewart, PC v Rockefeller Ctr, Inc* (163 AD2d 125, 558 NYS2d 521 [1st Dep't 1990]). Here, the process server, in his detailed affidavit, describes Respondent resisting service when he tried to deliver the papers to her in hand on April 13, 2022. Respondent did not dispute these allegations in her affidavit, and merely denied receipt of a copy of the papers by regular mail [\[FN2\]](#). A process server's affidavit is *prima facie* [*3] evidence of proper service sufficient to withstand a naked denial of receipt of service. *Nazarian v Monaco Imps, Ltd* (255 AD2d 265, 266, 680 NYS2d 252, 252 [1st Dep't 1998]). It was reasonable and appropriate for the process server to affix the papers to the door when Respondent, "told me to do what I had to do, while pointing to the door". That the process server affixed the papers to the door under these circumstances did not convert the method of service under RPAPL § 735(1) from "personal delivery" to "conspicuous", rendering the subsequent mailings to Respondent superfluous and of no legal significance to this case. Accordingly, when he left the papers in Respondent's general vicinity the process server effectuated service by personal delivery, and

such service was complete "immediately upon such personal delivery". RPAPL § 735(1).

However, the RPAPL imposes other unique service requirements, two of which are relevant to this proceeding. First, the notice of petition and petition must be served within a specified time frame: "at least ten and not more than seventeen days before the time at which the petition is noticed to be heard." RPAPL § 733(1).^[FN3] Second, there is a 3-day period for filing proof of service with the Court, which time frame runs either from the date of personal delivery when service has been made by that means, RPAPL § 735(2)(a), or from the date of mailing when service is made by an alternative ("conspicuous" or "substituted") method, RPAPL § 735(2)(b). This statute also establishes when service is deemed complete: for personal delivery, "immediately", RPAPL § 735(2)(a); when service is effectuated by an alternative method, "upon the filing of proof service", RPAPL § 735(2)(b).

Here, documents filed on "NYSCEF", the Court's e-filing system, reflect the following

- 4/7/22 — Notice of Petition/Petition filed, Court assigns index number
- 4/13/22 — Court assigns return date of 5/4/22 at 11:45 a.m. (virtual appearance)
- 4/13/22 — Court generates "Court Notice", with instructions for Petitioner to attach it to the Notice of Petition and Petition
- 4/13/22 — Process server effectuates service by personal delivery to Respondent of the Notice of Petition, Petition and "Court Notice" by leaving the papers in her "general vicinity" when she refused to accept service
- 5/3/22 — Proof of service (process server's affidavit) filed with the Court
- 5/4/22 — Return date

Applying the rules described above to this timeline, it is evident that when the papers were personally delivered to Respondent on April 13, 2022 such service exceeded the maximum 17-day advance notice requirement of RPAPL § 733(1) by four days. Further, having completed service by personal delivery to Respondent on Wednesday, April 13, 2022, Petitioner was required to file proof of service under RPAPL § 735(2)(a) no later than Monday, April 18, 2022, *see General Construction Law § 25-a(1)*, which allows an act to be completed on the next business day when it otherwise would have to be completed on a weekend day or holiday. However, such proof of service was not filed until May 3, 2021.

In the First Department, the leading Appellate Division case analyzing RPAPL §§ 733 and 735(2) is [*Riverside Syndicate, Inc v Saltzman* \(49 AD3d 402, 852 NYS2d 840 \[1st Dep't](#)

[*4]2008]). The Appellate Term had reinstated holdover petitions dismissed by the trial court, finding that "In the absence of any discernible prejudice to tenants , landlord's one-day delay in filing proof of service of the petitions did not require dismissal of these otherwise properly commenced holdover proceedings." [*Riverside Syndicate, Inc v Saltzman* \(15 Misc 3d 138\[A\], 841 NYS2d 221 \[AT 1st Dep't 2007\]\)](#). The Appellate Division reversed the Appellate Term and reinstated Housing Court Judge Schreiber's dismissal order as the landlord had "failed to 'complete' service of the notice of petitions and petitions by filing proof of service (RPAPL § 735 [2] [b]) at least five days prior to the date the petitions were noticed to be heard (see RPAPL § 733 [1])." In doing so, the Appellate Division stated, "A summary proceeding is a special proceeding 'governed entirely by statute and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction." The Appellate Division cited and quoted *Berkeley Assocs Co v Di Nolfi* (122 AD2d 703, 505 NYS2d 630 [1st Dep't 1986]), in which that court vacated a judgment and warrant issued six years earlier and dismissed a holdover petition for lack of both subject matter and personal jurisdiction for noncompliance with the RPAPL § 733 filing window period.

Housing Court Judge Ibrahim, recently faced with a similar RPAPL § 733 issue in a case where proof of service was not filed until five days after the petition's return date, granted the respondent's motion to dismiss and explained:

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\[A\], 875 NYS2d 818 \[Civ Ct Kings Co 2008\]\)](#) ("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 jurisdiction"), *citing Mountain View Coach Lines v Storms* (102 AD2d 663, 664, 476 NYS2d 918 [2nd Dep't 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, 992 NYS2d 520 \[1st Dep't 2014\]\)](#).

Bronx 2120 Crotona Ave LP v Gonzalez (2022 NY Slip Op 22148, ¶¶ 2-3, 168 NYS3d 674 [Civ Ct Bx Co 2022]); *see also 208 W 20th St LLC v Blanchard* (2022 NY Slip Op 22226 [Civ Ct NY Co 2022])(dismissing holdover proceeding under RPAPL § 733(1) as amended by HSTPA where "conspicuous" service was completed nine days in advance of return date); *Valane v Cruz* (2018 NYLJ LEXIS 2629 [Civ Ct Bx Co 2018 (dismissing holdover proceeding under pre-HSTPA version of RPAPL § 733(1) where "substituted" service was

completed thirteen days in advance of return date).

This Court acknowledges the difference between the service in this case effectuated by personal delivery under RPAPL § 735(2)(a) and the "conspicuous" or "substituted" service in *Riverside Syndicate, Berkeley Associates* and the other cases cited above, which are subject to the § 735(2)(b) mandate that service is not complete until proof of service is filed. While the 3-day filing rule applies to all three scenarios, it only implicates personal jurisdiction in the latter two and not, as here, where the papers were personally delivered and service was deemed complete under subsection (2)(a) upon such personal delivery.

However, as explained by the Court of Appeals in *Brusco v Braun* (84 NY2d 674, 682, 621 NYS2d 291, 294, 645 NE2d 724, 727 [1984]), "Article 7 [of the RPAPL] represents the [*5]Legislature's attempt to balance the rights of landlord and tenants to provide for expeditious and fair procedures for the determination of disputes involving the possession of real property [citation omitted]." Following in these footsteps, *Riverside Syndicate* stands not just for the proposition that the 3-day filing rule as applied under RPAPL § 735(2)(b) implicates personal jurisdiction; rather, it reaffirms the broader principle that a summary eviction proceeding "is a special proceeding governed entirely by statute [citations omitted] and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction [citations omitted]." *Berkeley Assocs Co v Di Nolfi, supra* (122 AD2d at 705, 505 NYS2d at 632). The Appellate Division in *Riverside Syndicate* rejected the Appellate Term's focus on "discernible prejudice", instead requiring "strict compliance."

Further, under Section 208.42(i)(1) of the Uniform Rules for the Civil Court of the City of New York, at the time proof of service is filed a petitioner must also provide the Clerk of the Court with stamped postcards addressed to each respondent to notify them that a proceeding has been filed against them. The Court Clerk is then required to mail the postcards to respondents and "[n]o default judgement for failure to answer shall be entered unless there has been compliance with this rule." Title 22 NYCRR § 208.42(i)(2). The Court of Appeals in *Brusco v Braun* highlighted the fact that these postcards constitute one of three key opportunities for tenants to receive notice that an eviction proceeding is pending against them. Here, Petitioner's failure to file proof of service until one day before the proceeding was noticed to be heard necessarily deprived Respondent of one of those three types of required notices.

Even if the Court were to find a violation of the 3-day filing rule to be excusable here where the notice of petition and petition were served by personal delivery, as opposed to

"substitute" or "conspicuous" service, Petitioner also failed to meet the requirement under RPAPL § 733(1) that the papers be served no less than 10 and no more than 17 days in advance of the return date: they were personally delivered to Respondent on April 13, which is more than 17 days before the May 4 return date. It bears noting that the New York State Legislature examined and amended RPAPL § 733(1) as recently as 2019, when HSTPA changed the window period from a minimum of five days' advance notice to ten. However, not only was the outer edge of that service window not eliminated or expanded, but HSTPA's amendment of RPAPL § 733(1) maintains the very same seven-day period for completing service that has been in place since the 1960's by increasing the maximum advance notice from 12 to 17 days.

Petitioner's argument that the papers were served "a mere thirteen business days before the return date" is unavailing. RPAPL § 733(1) does not use the term "business days", that is, excluding weekends and holidays, and April 13 is 21, not 13, calendar days prior to May 4. Under New York's General Construction Law § 20, a specified number of days "means such number of calendar days exclusive of the calendar day from which the reckoning is made"; intervening weekends and public holidays are excluded only when calculating a 2-day deadline, Gen Constr Law § 20, or where the deadline for filing legal papers or other documents falls on a weekend or holiday when courts or government offices are closed for business, *People v Assi* (14 NY3d 335, 343, 902 NYS2d 6, 10-11, 928 NE2d 388, 392-93 [2010]). Also unavailing is Petitioner's argument that the fact that the Court Clerk provided the return date somehow affects the calculation of the window-period for effectuating service. The "Court Notice" dated April 13, 2022 calendaring the case for May 4, 2022 (NYSCEF Doc #4) required on its face that Petitioner attach it to the Notice of Petition and Petition; Petitioner in fact did this and served the "Court Notice" on Respondent with the Notice of Petition and Petition. *See Affidavits of Service*, [*6]NYSCEF Doc ## 5 & 21.

Accordingly, as Petitioner failed to strictly comply with the statutory filing and service requirements under RPAPL §§ 735(2) and 733(1), Respondent is entitled to dismissal of the Petition, without prejudice. Given this ground for dismissal, there is no need to reach either party's other arguments.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that Petitioner's motion is denied, Respondent's cross-motion is granted, and the Petition is dismissed without prejudice. This constitutes the Decision and Order of the Court, which the Court is uploading on NYSCEF.

Dated: July 25, 2022
Bronx, New York
Diane E. Lutwak, H.C.J.

Footnotes

Footnote 1: Respondent Hawkins has not appeared; accordingly, references hereinafter to "Respondent" are to Marilyn (aka Madeline) Cepero unless otherwise stated.

Footnote 2: Respondent's only statement regarding service was, "Upon information and belief, I did not receive a copy of the Notice of Petition or Petition in this case by regular mail." Cepero Affidavit at ¶ 13.

Footnote 3: Effective June 14, 2019, under the Housing Stability and Tenant Protection Act of 2019, L. 2019, c. 36, § 15 (Part M) ("HSTPA"), what used to be "at least five and not more than twelve days" under RPAPL § 733(1) was changed to "at least ten and not more than seventeen days."

[Return to Decision List](#)