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208 W 20th St. LLC v Blanchard
2022 NY Slip Op 22226
Decided on July 22, 2022
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on July 22, 2022

Civil Court of the City of New York, New York County

<p>208 W 20th Street LLC, Petitioner,</p> <p>against</p> <p>Trent Blanchard, Respondent, "JANE DOE" "JOHN DOE" Respondent-Undertenants.</p>

Index No. 304876/22

Golino Law Group (Santo Golino, Esq.), for the petitioner

Coran Ober PC (Steven Beard, Esq.), for the respondent

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 5-24.

PROCEDURAL HISTORY AND BACKGROUND

This is a nonprimary residence holdover proceeding brought against Trent Blanchard ("respondent") by 208 W 20th Street LLC ("petitioner"). Petitioner served the petition and notice of petition by conspicuous place service and mailed copies of the court papers on Thursday, April 21, 2022 in compliance with RPAPL 735. Petitioner filed proof of service on Monday, April 25, 2022, more than three days after the mailing occurred, and nine (9) days before the initial court date on May 4, 2022. Respondent has filed a motion to dismiss on several grounds: 1) The proceeding should be dismissed because petitioner is in violation of RPAPL 733 (1) which requires petitioner to file proof of service at least ten (10) and no more than 17 days prior to the first court appearance; 2) petitioner failed to properly publish the LLC's formation as required by NY Limited Liability Company Law § 206 and is therefore precluded from maintaining this summary proceeding as petitioner lacks standing; 3) the notice of non-renewal is defective because the lease expired on March 31, 2022 and the notice is dated December 17, 2022; and 4) the notice of non renewal was not served with a hardship declaration as required by the L 2021, c 417, part C, subpart A. As an alternative to dismissal, respondent seeks leave to submit an answer.

Petitioner opposes the motion on the grounds that pursuant to statute it had three days, until April 24, 2022, to file proof of service. However, because April 24, 2022 was a Sunday, filing on April 25 was timely, and was not in violation of RPAPL 735 because General Construction Law § 25 a, allows for an act to be completed on the next business day when the act must be completed on a weekend day or a public holiday. However, petitioner argues that RPAPL 733 (1) must also be harmonized with General Construction Law § 25-a such that it should not be penalized for short-filing under RPAPL 733 (1) as respondent has claimed no prejudice from same. Petitioner states that none of the controlling case law deals with the tension between RPAPL 733 (1) and General Construction Law § 25 a. Petitioner argues that it [*2] does have standing to commence this proceeding despite the fact that it did not follow the publication requirements of Limited Liability Company Law § 206; that a scrivener's error in the notice of non-renewal is not prejudicial or confusing to respondent; and that respondent did, in fact, receive a hardship declaration with the notice of nonrenewal but, regardless, he has shown no prejudice by failing to receive a hardship declaration required by a statute that expired on January 15, 2022.

For the following reasons the court dismisses the petition on the basis that petitioner did not strictly comply with the requirements of the RPAPL 733 (1).

DISCUSSION

RPAPL 733 (1) requires that "[e]xcept as provided in section seven hundred thirty-two of this article, relating to a proceeding for non-payment of rent, the 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." RPAPL 735 (2) (b) provides that "when service is made by the alternatives above provided [conspicuous place service] . . . such service shall be complete upon the filing of proof of service."

Late-filing of the affidavit of service is not the issue in this case. Petitioner timely filed the affidavit of conspicuous place service when General Construction Law § 25-a is applied to the filing requirement. However, petitioner argues that the *short-filing* under RPAPL 733 (1), which states that the affidavit of service must be filed at such a time that provides a respondent notice no more than 17 days and no less than 10 days prior to the initial appearance in court, should be forgiven by harmonizing General Construction Law § 25-a with RPAPL 733 (1).

Petitioner argues that in the absence of demonstrable prejudice, the *short-filing* of the affidavit of service should be considered *de minimis* in the same way that *late-filing* can be remedied *nunc pro tunc* in the absence of prejudice. Petitioner states: "The analysis must be one of prejudice. Where there is no prejudice to the tenant, the landlord should get the benefit of GCL §25-a; where there is prejudice to the tenant, such as resulted in *Berkeley Assocs. Co. v Di Nolfi* . . . then the landlord should not get the benefit of GCL §25-a." (NYSCEF Doc No. 18, petitioner's attorney's affirmation in opposition ¶ 17.)

Petitioner cites to [ZOT, Inc. v Watson, 20 Misc 3d 1113](#) (A) (Civ Ct, Kings County 2008), to support its position that short-filing can be remedied *nunc pro tunc* when there is no prejudice. Notwithstanding that *Zot* is a Second Department, Kings County trial court case, the *Zot* court itself recognizes that petitioner's analysis is flawed insofar as the venue for the proceeding at bar is in the First Department. In *Zot*, the court concluded that there was a division between the First and Second Departments regarding the effect of prejudice in the context of a summary holdover proceeding:

[[Riverside Syndicate, Inc. v Saltzman, 49 AD3d 402](#) (1st Dept 2008)] provides that the late filing of the affidavit deprives the court of jurisdiction, and that *the issue of*

prejudice is irrelevant, because absent strict compliance with the statute, the proceeding must be dismissed (emphasis added). . . . The Second Department cases continue to focus on the issue of demonstrable prejudice to the Respondent.

As stated in *445 East 85th Street LLC v Phillips*, 2003 WL 22170112, 2003 NY Slip Op. 51270 (U) (Civ Ct, New York County 2003)

The jurisprudence is unanimous that . . . failing to file proof of service timely is a [*3] technical defect, a mere irregularity that causes no prejudice. . . . *But short filing is another matter* (emphasis added). . . . *Berkeley* squarely addressed short filing, the issue in this case . . . *Berkeley* did not analogize to cases involving late filing. The First Department in *Berkeley*, moreover, never raised the possibility that *nunc pro tunc* relief can remedy a short filing (under RPAPL 731 [1].) (*Id.* *4.) [EN1]

Berkeley v DiNolfi, 122 AD2d 703 [1st Dept 1986], involved a case where an affidavit of service was properly filed one day late pursuant to General Construction Law § 25-a (the last day to file was a Saturday, and proof of service was filed on the following Monday). Two things are important here: 1) Service was deemed timely; *however* 2) the *Berkeley* court did not grant the landlord's motion to deem filing timely pursuant to RPAPL 733. While the *Berkeley* court found that the tenant had been prejudiced in light of his default by the one-day delay in filing because it foreshortened the time required by RPAPL 733 (1), such consideration of prejudice has effectively been abandoned in the First Department. Twenty-two years after *Berkeley* was decided, the Appellate Division in *Riverside Syndicate, Inc. v Saltzman*, 49 AD3d 402 eschewed the concept of prejudice in a case where the proceeding, as here, was noticed just one day short of the requirements in RPAPL 733 (1). The Appellate Division in *Saltzman* reversed the Appellate Term which had cited to *Berkeley* to support its determination that short-filing can be excused where there is no prejudice to the respondent.

Recently, in *Bronx 2120 Crotona Ave. L.P. v Gonzalez*, 168 NYS3d 674, the court decided a motion similar to respondent's herein. As in this case, that proceeding was initially heard less than 10 days after filing proof of service. The *Gonzalez* court cogently explicated the issue of prejudice which petitioner herein argues is a necessary element in the controlling case law:

"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." (*Id.* at 675.)

Finally, the court notes that this proceeding is a New York State Courts Electronic Filing System ("NYSCEF") case. The petition was mailed on Thursday, April 21, 2022 after affixing it [*4] to the door of the premises. However, proof of service was not filed electronically until Monday, April 25, 2022. Aside from the General Construction Law § 25 a argument, petitioner proffers no reason as to why proof of service could not have been timely filed in compliance with RPAPL 733 (1) on Friday, April 22, 2022, or the immediately following Saturday or Sunday for that matter. Such electronic filing can be effected from anywhere a participating attorney has access to a computer and wifi. The Uniform Rules for the New York State Trial Courts 22 NYCRR 208 4 a (c) (2), provides that "[w]here an action is commenced by electronic filing pursuant to this section, the original proof of service shall be filed with the Clerk of the Court in the county in which the action was commenced by filing with the NYSCEF site. Service is deemed complete . . . upon receipt of the electronic proof of service by the NYSCEF site." (*Id.*) Moreover, ". . . documents [can be] filed **at any time on any day**, even when the courts are closed (emphasis in original) " (NYSCEF FAQ's New York State Unified Court System website, iappscontent.courts.state.ny.us/NYSCEF/live/faq.htm [last accessed July 19, 2022].)

CONCLUSION

Accordingly, it is

ORDERED that the petition is dismissed

As such, respondent's other arguments are moot

This constitutes the decision and order of this court

July 22, 2022
New York, NY
HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: Most recently, in *125 East 50th Street, Co., Lessee, LLC v Credo International Inc.*, 75 Misc 3d 134 (A), 2022 NY Slip Op 50504 (U) (App Term, 1st Dept 2022), on June 17, 2022 the Appellate Term First Department denied the landlord's motion to deem service timely filed *nunc pro tunc* and for a default judgment. Respondent argues that this case supports its position. However, *Credo International* is distinguishable in that it is a commercial nonpayment proceeding (LT-302862-21/NY) which in no way implicates *short-filing* under RPAPL 733 (1) in a residential holdover proceeding.

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