2021-02-26

# Bertoncelli v. 540 Jackson Realty Corp.

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| 2021 NY Slip Op 51307(U) |
| Decided on February 26, 2021 |
| Civil Court Of The City Of New York, Bronx County |
| Ibrahim, J. |
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| This opinion is uncorrected and will not be published in the printed Official Reports. |


Decided on February 26, 2021

Civil Court of the City of New York, Bronx County

**Cristina Bertoncelli, Petitioner,**

**against**

**540 Jackson Realty Corp., FRANK GONZALEZ, , Respondents, and DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, Co-Respondent.**

Index No. 309732/20

Mobilization for Justice, Inc. appeared for petitioner.

Shorab Ibrahim, J.

The instant matter was commenced by Christina Bertoncelli ("petitioner") against 540 Jackson Realty Corp. and Frank Gonzalez ("respondents") by order to show cause uploaded through NYSCEF on December 30, 2020. Petitioner sought, inter alia, an order to correct conditions in her apartment and a finding of harassment pursuant to NYC Admin Code § 27-2005(d) (a/k/a "the housing maintenance code" or "HMC").

The order to show cause submitted for signature states in relevant part, " ORDERED that service of copies of this Order shall be made on or before January 4, 2021, as follows,

and that service in the manner set forth herein shall be deemed good and sufficient:" It goes on to allow service upon the named respondents at the multiple dwelling registration ("MDR") address by overnight mail and upon their purported attorney via email.

As it turns out, respondents never appeared in this case, either on their own or through counsel. Naturally, petitioner asked this court to hold respondents in default and issue an order to correct for the outstanding conditions. Though the court expressed skepticism about the manner of service of the order to show cause commencing this case, it was swayed by the argument that petitioner had complied with the service ordered by another judge of this court.

By February 9, 2021, it was apparent the purported attorney for the respondents was not going to appear. This court issued a default order to correct directing the correction of all open violations. The matter was then adjourned to February 25, 2021 for an inquest on petitioner's harassment cause of action. After inquest, the court reserved decision.

Insofar as relevant here, section 27—2115 of the Housing Maintenance Code provides that:

> "(h)(1) the tenant ... may ... apply to the housing part for an order directing the owner and the department to appear before the court. Such order shall be issued at the discretion of the court for good cause shown, and shall be served as the court may direct," and
>
> "(j) If a tenant seeks an order directing the owner and the department to appear before the [*2]court pursuant to subdivision (h) ... of this section, the court may allow service of the order by the tenant by certified or registered mail, return receipt requested."

To the extent that these two provisions conflict, the Appellate Division clarified in *Ebanks v Skyline NYC, LLC*,

> "These two subsections must be read together. If, as the Civil Court held, that court may, under subdivision (h), order that service be effected in any manner that it directs, subdivision (j) would be superfluous since the court would already have possessed, even in the absence of subdivision (j), the authority expressly granted to it by subdivision (j) to direct that service be effected by a tenant through the use of registered or certified mail. Indeed, the enactment of subdivision (j), which postdated the enactment of subdivision (h), would have accomplished nothing. Contrary to the conclusion of the Civil Court, however, courts must give effect to the wording of a statute without rejecting any words as superfluous, and must harmonize related provisions in a way that renders them compatible Subdivision (j), therefore, must be read as effectively providing the Civil Court with the option

> of permitting service of a notice of petition or order to show cause in a manner not otherwise authorized by subdivision (h) or by other applicable statutes, but which would nevertheless ensure that an owner actually receives process, namely, by authorizing service by the tenant by certified or registered mail." (70 AD3d 943, 945, 896 NYS2d 369 [2nd Dept 2010] [internal citations omitted]).

Here, service by overnight mail is arguably better than the prescribed service. However, it is hornbook law that service requirements are to be strictly construed. Indeed, service received by means other those authorized by statue does not confer jurisdiction over the respondent. (*see Feinstein v Bergner*, 48 NY2d 234, 241, 422 NYS2d 356 [1979]). If a court does not obtain personal jurisdiction, all subsequent proceedings, including judgments entered on default, are rendered null and void. (*McMullen v Arnone*, 79 Ad2d 496, 499, 437 NYS2d 373 [2nd Dept 1981]; *Green 333 Corp. v RNL Life Science, Inc.*, 2021 NY Slip Op 00908 [1st Dept 2021]).

Thus, this court may only obtain jurisdiction over the respondent in this type of case, where service is by mail, if the mailing is "certified or registered mail, return receipt requested." As this was not done and the respondents have not appeared, there is no jurisdiction over the respondents.

The court recognizes, however, that petitioner served the order to show cause as directed by the court. Dismissal is still required. In *Ebanks*, it was not disputed that the petitioner had complied with the signing judge's service order. (*see also Glenn v Ken Maple LLC*, 70 AD3d 946, 896 NYS2d 368 [2nd Dept 2010]). Thus, compliance with the order to show cause's service requirement is of no concern where petitioner does not also comply with the minimum requirements of the statute.

Contempt motions are illustrative. § 761 of the Judiciary Law states,

> "An application to punish for contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge."

Under this section, ordinary mail service upon the accused is improper, *even when sanctioned by the court*. (*see Long Island Trust v Rosenberg*, 82 AD2d 591, 598-599, 442 NYS2d 563 [2nd Dept 1981]; *Hampton v Annal Management Co., Ltd.*, 168 Misc 2d 138, 139, 646 NYS2d 227 [App Term, 1st Dept 1996]); *2701 Grand Associates LLC v Encarnacion*, 64 Misc 3d 1229[A] at 2 [Civ Ct, Bronx County 2019] ["while upon signing the order to show cause [for contempt] *the [*3]court permitted service* to be made by first-class and certified mail, it is now apparent based upon the court's research on this motion that such service was

insufficient to obtain jurisdiction over Mr. Bautista.][emphasis added]).

Given that this court never obtained personal jurisdiction over the respondents, the default order to correct is null and void (*McMullen v Arnone*, 79 AD2d at 499). As the order is null and void, vacatur of same does not affect petitioner's substantive rights and the proceeding is dismissed pursuant to CPLR 409(b) [the court is required to "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised."]; *see, e.g.*, *1646 Union LLC v Simpson*, 62 Misc 3d 142[A], 2019 NY Slip Op 50089[U] [App Term, 2nd Dept 2019]; *Merrill Holdings, LLC v Toscano*, 59 Misc 3d 129[A] at 2, 2018 NY Slip Op 50410[U] [App Term, 2nd Dept 2018] [Default cannot be granted on facially insufficient papers]).

Here, the court erred in not making this summary determination sooner. Not dismissing the case at this juncture will only compound that error. As such, the order to correct is vacated and the proceeding is dismissed for improper service.

Dated: February 26, 2021
SO ORDERED,
Bronx, NY

/S/
SHORAB IBRAHIM, JHC