2022-10-27

McManus v. Condren

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McManus v Condren
2022 NY Slip Op 51057(U)
Decided on October 27, 2022
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on October 27, 2022

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

John McManus, Petitioner,

against

Madeline Condren, John Doe, Jane Doe, Respondents.

Index No. 305855/21

Mizrahi Law Offices, LLC (Robert Mizrahi, Esq.), for the petitioner

New York Legal Assistance Group (Benjamin Loomis Neuhaus, 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: 1-19.

PROCEDURAL HISTORY AND BACKGROUND

This is a holdover summary proceeding brought against Madeline Condren ("respondent") by petitioner based on the termination of her oral month-to-month tenancy. Respondent applied for assistance from the Emergency Rental Arrears Program ("ERAP")

and the proceeding was stayed as a result.[FN1] Before the court is petitioner's motion to vacate the ERAP stay, NYSCEF Doc No. 8, notice of motion (sequence 1), and respondent's motion to dismiss based on failure to comply with service requirements, NYSCEF Doc No.11, notice of motion (sequence 3).

The notice of petition and petition herein were filed on August 19, 2021. (NYSCEF Doc Nos. 1 and 2.) The court did not assign a court date due administrative determinations and directives during the COVID-19 pandemic; rather the court marked the notice of petition "Date to be determined. The court will notify all parties of the court date." (NYSCEF Doc No. 3 ¶ 3.) A separate notice from the court to the parties further explicated: "Due to the ongoing COVID-19 public health crisis, your upcoming court appearance at: New York County Housing Court has been postponed until further notice from the court. Once the matter has been scheduled by the court, you will be notified of your court date and you will be required to follow the Court's instructions." (NYSCEF Doc No. 4, court notice.) Petitioner then served the notice of petition and petition by conspicuous place service pursuant to RPAPL 735 (1). Thereafter, as required, petitioner mailed the notice of petition and petition to respondents on September 3, 2021, which was within one day of the of the last attempt to find a person of suitable age and discretion. (*Id.*; NYSCEF Doc No. 5, affidavit of service.) Thirty-two days later, on October 5, 2021, petitioner filed the affidavit of service on NYSCEF. (*Id.*) On March 15, 2022, the court generated postcards which were sent to all parties notifying them that 23 days later, the proceeding would [*2]appear on the court's calendar for the first time.

Respondent does not oppose petitioner's motion to vacate the ERAP stay and instead has filed a motion to dismiss. Respondent argues that the failure to complete service by filing the affidavit of service with the court within three days is a jurisdictional defect that requires dismissal of this proceeding. Petitioner argues in opposition that the petition was not noticed by the court to be heard until many months later on April 7, 2022. Petitioner posits that "since the matter was noticed to be heard more than six months after the affidavits of service were filed . . . there was no prejudice whatsoever to the Respondents in the delayed filing of the affidavits of service." (NYSCEF Doc No. 17, petitioner's attorney's affirmation in opposition ¶ 7.) Petitioner also distinguishes the leading appellate cases in the First Department, cited by respondent, which analyze prejudice in light of the failure to comply with filing requirements, and urges the court to adopt the reasoning of the Appellate Term in *Riverside Syndicate, Inc.* v *Saltzman*, 15 Misc 3d 138 (A), 2997 NY Slip Op 50925 (U), which was reversed by the Appellate Division in *Riverside Syndicate, Inc.* v *Saltzman*, 49 AD3d 402 (1st Dept 2008). (*Id.*, petitioner's attorney's affirmation in opposition ¶ 6.)

DISCUSSION

RPAPL 735 (1) states:

> "Service of the notice of petition and petition shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; or if admittance cannot be obtained and such person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises; and in addition, within one day after such delivering to such suitable person or such affixing or placement, by mailing to the respondent both by registered or certified mail and by regular first class mail[.]"

When service is effected by any of the alternatives to personal in-hand delivery as provided above, RPAPL 735 (2) (b) (2) states that "the notice of petition . . . and petition together with proof of service thereof shall be filed with the court or clerk thereof within three days after . . . mailing to respondent . . . and such service shall be complete upon the filing of proof of service.

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."

Landlords in petitioner's position were on the horns of a dilemma during COVID-19 pandemic when the court was delaying the scheduling of appearances as a matter of public [*3]safety.[FN2] A petitioner who was aware of the RPAPL 733 (1) requirements would understandably be confused as to how to proceed if they sought to secure a place in line for a hearing date on a holdover proceeding. For example, petitioner could serve a notice of termination and then forestall serving the notice of petition and petition and filing the affidavit of service until it was notified of the new court date, at which time petitioner could comply with both RPAPL 735 (2) (b) (2) and RPAPL 733 (1); however, choosing this course would create other temporal quandaries with regard to predicate notices. Alternatively, the

petitioner could serve the petition and file the affidavit of service. However, by the time the case was scheduled by the court, petitioner would be in violation of RPAPL 733 (1). Given the immense scale of unpredictability occasioned by the COVID-19 pandemic, the only requirement that a petitioner could rely on with certainty was the filing requirement under RPAPL 735 (2) (b) (2).[FN3]

Administrative Order 231/20 which was issued on October 9, 2020 provided some guidance: "All residential eviction matters, both nonpayment and holdover, may proceed in the *normal course*, *subject to . . . individual court scheduling requirements* occasioned by health and safety concerns arising from the coronavirus health emergency." Thus, while it could not be surmised when the court would schedule a proceeding, practitioners were advised that, as of October 9, 2020, they should "proceed in the normal course." This would necessarily include the statutory requirement that service must be completed by filing the affidavit of service within three days of mailing. (RPAPL 735 [2] [b] [2].)[FN4]

Here, petitioner did not comply with either RPAPL 735 (2) (b) (2) *or* RPAPL 733 (1). [FN5] Petitioner filed the affidavit of service almost one month late. Petitioner had several poor choices, but it made the choice to serve a petition, and, rather than timely filing the affidavit of service, filed it 32 days later. At the time the petition was filed, all Executive Orders which tolled filing deadlines applicable to litigation in the New York courts were no longer in effect. (Executive Order 202.72, effective November 4, 2020.) Petitioner proffers no excuse for the late [*4]filing, except that respondent has not been prejudiced. Petitioner's argument is unpersuasive. In the First Department, prejudice is not part of the calculus when deciding a motion to dismiss based on a failure to strictly adhere to service requirements.

Petitioner attempts to distinguish two cases cited by respondent: *Berkeley v DiNolfi,* 122 AD2d 703 (1st Dept 1986), and *Riverside Syndicate, Inc.* v *Saltzman*, 49 AD3d 402 (1st Dept 2008).

Berkeley is not apropos, and in any case is no longer followed in the First Department. *Berkeley* 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). The *Berkeley* court deemed service timely; however, the *Berkeley* court did not grant the landlord's motion to deem filing timely pursuant to RPAPL 733 (1). 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 been abandoned in the

First Department. Twenty-two years after *Berkeley* was decided, the Appellate Division in *Saltzman* eschewed the concept of prejudice in a case where the proceeding 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 filing deficiencies can be excused where there is no prejudice to the respondent.

The First Department follows *Saltzman*; and, arguably, the Second Department should, too. (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 (2d Dept 1984.) In *125 E. 50th St. v Credo Intl. Inc.* (75 Misc 3d 134 (A), 2022 NY Slip 50504 (U) (App Term, 1st Dept 2022), *lv denied* 2022 NY Slip Op 73253 (U) (2022), the Appellate Term, citing to *Salzman*, affirmed the lower court which had held that "pursuant to the holding of the Appellate Division, First Department failure to timely file proof of service is a jurisdictional defect." (2021 NY Slip Op 33639 [U] [Civ Ct, New York County 2021].)

Recently, in *Bronx 2120 Crotona Ave. L.P. v Gonzalez*, 168 NYS3d 674, the court decided a motion like respondent's herein. In that case, there was no RPAPL 733 (1) issue as the first hearing date of the holdover proceeding was 10 days after the affidavit of service was filed. However, the mailing occurred on October 1, 2021 and service was completed on October 10, 2021, nine days later. 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.)

Other courts have reached the same result.

In *Sonder USA Inc. v Johnson et al*, Civ Ct, New York County, September 9, 2022, Chinea, J., Index No. 305532/21, the notice of petition and petition were mailed on August 20, [*5]2021, but the affidavit of service was not filed until August 26, 2021. (Index No. 305532/21, NYSCEF Doc No. 7, affidavit of service.) *Johnson* was a holdover proceeding wherein the notice of petition, as in the instant proceeding, stated "Date to be determined. The court will notify all parties of the court date." As in *Gonzalez*, the determination of the

Johnson court found the filing requirements of RPAPL 735 (2) (b) (2), in and of itself, to be dispositive of respondent's motion to dismiss.

In *2198 Cruger Associates LLC v Xhurreta et al*, Civ Ct, Bronx County, November 15, 2019, Lach, J., index no. 005187/19, the petitioner was unable to produce an affidavit of service bearing the date-stamp from the clerk of the court. The court held:

> "While Petitioner's motion may have merit in the Appellate Division, Second Department . . . this Court is bound by the holdings of this Department which require strict compliance with the statutory requirements so as to give the court jurisdiction. . . . Contrary to the positions set forth in Petitioner's cross-motion, there is no indication that the Petitioner timely complied with the filing requirements of the RPAPL as they pertain to the Notice of Petition and affidavits of service."

To the extent that this judge has made a decision that could be read as contrary to the holding herein, the court agrees with respondent that the First Department adheres to a strict compliance standard.[FN6]

CONCLUSION

Accordingly, it is

ORDERED that petitioner's motion to restore the proceeding to the court's calendar is granted as unopposed; and it is further

ORDERED the respondent's motion to dismiss the proceeding is GRANTED.

This constitutes the decision and order of this court.

October 27, 2022
New York, NY
HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1:L 2021, c 56, part BB, subpart A, § 8, as amended by L 2021, c 417, part A, § 4; Admin Order of Chief Admin Judge of Cts AO/34/22.

Footnote 2:*See* Admin Order of Chief Admin Judge of Cts AO/231/20, issued October 9,

2020 (Note: accompanying memorandum of Hon. Lawrence K. Marks ¶ 1 [b]): "The safety of judges, non-judicial personnel, and court visitors remains the paramount concern in all court operations. Given the ongoing need to restrict foot traffic in courthouses for reasons of health and safety, we anticipate that the scheduling, hearing and issuance of decisions in eviction matters will often require far lengthier time periods than anticipated in statutes and prevalent under pre-COVID conditions."

Footnote 3:A third option for petitioners, even more unfavorable than the others, would have been to forego exercising their right to file a valid claim in court altogether.

Footnote 4: Unfortunately, and understandably, because of the absolute necessity of the procedures implemented by the court, and the speed with which the court was required to move to protect the public, the RPAPL 733 (1) issues were not anticipated and remained a procedural ticking time-bomb waiting to explode.

Footnote 5: Note that respondent did not raise RPAPL 733 (1) in its notice of motion or the body of the motion, except by reference to decisional law that analyzes it. Thus, the court does not reach that issue as part of this decision and order. *See Rosenblatt v. St. George Health and Racquetball Associates, LLC*, 119 AD3d 45 (1st Dept 2014) (the court cannot address a dispositive issue not raised by the parties).

Footnote 6: In *208 W 20th St. LLC v Blanchard*, 76 Misc 3d 505, 508, 173 NYS3d 439, 441 (NY Civ. Ct. 2022), this court dismissed a holdover petition on the grounds that the landlord had filed proof of service one day late under RPAPL 735 (2) (b) (2), and one day short under RPAPL 733 (1). Quoting from *445 East 85th Street LLC v Phillips*, 2003 WL 22170112, 2003 NY Slip Op. 51270 (U) (Civ Ct, New York County 2003) to illustrate a point, the court excerpted a portion of that decision that stated that late filing can be remedied *nunc pro tunc*, but that short filing is a separate matter and cannot be so amended. *Id*. at 508. The *Phillips* case came out of the First Department in 2003. Since that time, the law has changed, and this is no longer the case. *See Credo*, 2021 NY Slip Op 33639 (U) (Civ Ct, New York County 2021) ("Petitioner relies on a former version of New York City Court Act Section 411, which used to explicitly allow for said relief. That statutory provision is no longer in effect, and pursuant to the holding of the Appellate Division, First Department failure to timely file proof of service is a jurisdictional defect").

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