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TWIN PARKS, L.P. v. LIVINGTON

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART J

-----X

TWIN PARKS, L.P.,
Petitioner,

Index No. L&T 307665/22

-against-

DECISION/ORDER

VENICE LIVINGTON,
Respondent.

Motion seq nos. 1, 2

-----X

HON. KISHA L. MILLER:
Richard Layliev, Esq., for Petitioner.
The Legal Aid Society, for Respondent.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of the motions

Papers **Numbered**
Notice of Motion and Cross-Motion and Affidavits Annexed..... NYSCEF Doc. Nos. 7, 9

Upon the foregoing cited papers, the decision and order on this motion is as follows:

In this nonpayment summary eviction proceeding, Respondent moves to dismiss the proceeding pursuant to CPLR 3211(a)(8) based upon Petitioner’s failure to timely file proof of service of the notice of petition and petition. Petitioner cross-moves pursuant to CPLR 2001 requesting leave to file the affidavit of service nunc pro tunc.

RPAPL §735(2)(b) provides that the notice of petition and petition together with proof of service shall be filed with the court within three days after mailing. Failure to timely file proof of service deprives the court of jurisdiction as a summary proceeding is a special proceeding “governed entirely by statute...and it is well established that there must be strict compliance with statutory requirements” (*Riverside Syndicate, Inc. v Saltzman*, 49 AD3d 402 [1st Dept 2008]; *Berkeley Assoc. Co. v Di Nolfi*, 122 AD2d 703 [1st Dept 1986]).

Here, the affidavit of service of the notice of petition and petition indicates that service was effectuated upon “John Doe,” who refused his name, on April 6, 2022. The process server then mailed the notice of petition and petition by certified mail and by first class mail on April 7,

2022. In accordance with RPAPL §735, the affidavit of service should have been filed no later than April 11, 2022. Petitioner filed the affidavit of service on November 1, 2022 (NYSCEF Doc. No. 8), nearly 7 months after mailing the notice of petition and petition. Petitioner failed to “complete” service by timely filing the affidavit of service which deprives this court of jurisdiction (*Saltzman*, supra).

Other courts have ruled that late filing is not a jurisdictional defect (see *Siedlecki v Doscher*, 33 Misc 3d 18, 2011 NY Slip Op 21268 [App Term, 2d Dept 2011] [“as no prejudice was shown to have resulted from the belated filing of proof of service, the error should have been disregarded”]); however, this court sits in the First Department and must follow *Saltzman* as binding authority (*Bronx 2120 Crotona Avenue L.P. v Gonzalez*, 75 Misc 3d 753, 2022 NY Slip Op 22148 [Civ Ct, Bronx County 2022]). Contrary to Petitioner’s claim, such defect cannot be corrected by a motion deeming the affidavit of service timely filed nunc pro tunc (*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] [the court properly denied landlord’s motion for an order deeming the affidavit of service timely filed nunc pro tunc]).

The court is not persuaded by Petitioner’s claim that Respondent did not allege any jurisdictional defenses in her answer. Respondent, who was unrepresented when she filed the answer, possesses no intimate knowledge of landlord-tenant litigation and could not have known to assert such defense, especially since she utilized the court’s pre-printed pro se answer form.

Accordingly, it is

ORDERED that Respondent’s motion to dismiss this proceeding is granted. Petitioner’s cross-motion is denied. The proceeding is hereby dismissed.

This constitutes the decision and order of the court.

Dated: November 15, 2022



KISHA L. MILLER, J.H.C.