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### Collins v. Walker

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"Collins v. Walker" (2022). *All Decisions*. 745.

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

-----X

RUTH COLLINS,

L&T Index No. 308238/22

Petitioner,

-against-

**DECISION/ORDER**

JUDY WALKER,  
"JOHN" "DOE,"  
"JANE" "DOE,"

Respondents.

-----X

Present: Hon. OMER SHAHID  
Judge, Housing Court

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of Respondent’s Summary Judgment Motion (Motion #1 on N.Y.S.C.E.F.):

<b>Papers</b>	<b>Numbered</b>
Notice of Motion (Motion #1 on N.Y.S.C.E.F.).....	<u>1</u>
Affirmation in Opposition (Entry 10 on N.Y.S.C.E.F.).....	<u>2</u>
Affirmation in Reply (Entry 11 on N.Y.S.C.E.F.)....	<u>3</u>

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Petitioner commenced this holdover proceeding seeking possession of 2930 Morgan Avenue, BSMT, Bronx, N.Y. 10469 (the “subject premises”) from Respondents on the ground that Respondent Judy Walker is residing at the subject premises as a month-to-month tenant. Petitioner served a 90-day Notice of Termination, dated December 15, 2021, which states that Petitioner will commence a summary holdover proceeding in the event Respondents do not vacate by March 31, 2022. The subject premises is not subject to the Rent Stabilization Law because it is situated in a dwelling with less than 3 units. The Notice of Petition and Petition were filed on N.Y.S.C.E.F. on April 4, 2022. Respondent Judy Walker obtained the Legal Aid Society as counsel and a verified answer was filed on N.Y.S.C.E.F. on May 31, 2022. Respondent filed the instant motion on N.Y.S.C.E.F. on July 5, 2022. On the July 7, 2022 appearance, the court adjourned the proceeding to August 16, 2022 for a motion schedule. The fully briefed motion was marked submitted for decision after conference on the August 16, 2022 appearance.

Respondent moves for the following relief: (a) granting summary judgment in Respondent’s favor pursuant to C.P.L.R. § 3212 and dismissing this proceeding because this court lacks jurisdiction due to Petitioner’s violation of R.P.A.P.L. §§ 735(2)(b) and 733; (b) granting summary judgment in Respondent’s favor pursuant to C.P.L.R. § 3212 and dismissing

this proceeding because Petitioner has failed to state a cause of action pursuant to R.P.A.P.L. § 741(2) since Respondent is not a tenant; (c) granting summary judgment in Respondent's favor pursuant to C.P.L.R. § 3212 and dismissing this proceeding based upon Petitioner's defective predicate notice; (d) granting Respondent a judgment for reasonable attorney fees, costs, and disbursements; and; (e) granting Respondent such other relief that this court may deem just and proper. Petitioner opposes the motion.

Respondent seeks an award of summary judgment in her favor and a dismissal of this proceeding on two grounds. First, Respondent argues that Petitioner resorted to conspicuous service of the Notice of Petition and Petition and mailed copies of the papers by first class mail and certified mail on April 14, 2022 but did not file the affidavit of service until April 19, 2022, more than three days after the mailing which violates R.P.A.P.L. § 735(2)(b). Furthermore, since service was completed on April 19, 2022, nine days before the Petition was noticed to be heard on August 28, 2022, this violates R.P.A.P.L. § 733. The second ground upon which Respondent seeks summary judgment in her favor and a dismissal of this proceeding is that Respondent is neither a tenant nor a licensee but instead is a family member of Petitioner. Respondent argues that she is the mother of Petitioner's grandchild. The co-owner of the subject premises is the father of the child. Respondent also argues that she has never had a lease and never had an obligation to pay rent. Based upon these grounds, Respondent seeks summary judgment in her favor and a dismissal of this proceeding.

Petitioner's opposition paper consists solely of the affirmation of Petitioner's attorney. Petitioner argues through counsel that the late filing should be considered de minimis and it was due to an oversight that the affidavit of service was filed late because the process server was unable to file the affidavit of service electronically due to lack of authorization. Petitioner does not oppose Respondent's allegation that she is a family member and instead states that Respondent is preventing Petitioner from obtaining access to correct violations and that Respondent verbally harasses Petitioner on a regular basis. Lastly, Petitioner argues this proceeding should not be dismissed because the predicate notice provides adequate notice for Respondent to vacate if she is indeed not a tenant and just a licensee.

C.P.L.R. § 3212 governs summary judgment. Summary judgment is a drastic remedy. The moving party must establish a prima facie showing of entitlement to a judgment as a matter of law and demonstrate that there is no doubt as to the existence of any material, triable issue of fact. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986). Once the moving party makes such a showing, the burden shifts to the opposing party to establish with evidentiary proof that there is a material triable issue of fact. See id. The opposing party must avoid making mere conclusory allegations and shall lay forth proof of the existence of a genuine issue of fact, the failure of which shall lead the court to infer that there are no material triable issues of fact. See Banasik v. Reed Prentice Div. of Package Mach. Co., 34 A.D.2d 746 (1st Dep't 1970), aff'd 28 N.Y.2d 770 (1971). If the court finds on the motion that there are any material issues of fact that require a trial, the motion must be denied. See C.P.L.R. § 3212(b). "The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Id.

The court finds that the filing of the affidavit of service violates both R.P.A.P.L. §§ 735(2)(b) and 733. R.P.A.P.L. § 735(2)(b) provides that the service of Notice of Petition and Petition pursuant to conspicuous service is complete upon the filing of proof of service which shall be filed with the court within three days of the service. See R.P.A.P.L. § 735(2)(b). Here, the papers were mailed by first class mail and certified mail on April 14, 2022. The affidavit of

service was not filed until April 19, 2022, five days after the mailing. Furthermore, the filing of the affidavit of service on April 19, 2022 was within nine days of April 28, 2022 when the Petition was noticed to be heard. R.P.A.P.L. § 733(1) provides that “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.” R.P.A.P.L. § 733(1). Hence, the filing of the affidavit of service clearly violates R.P.A.P.L. § 733.

Petitioner’s argument that the late filing should be considered de minimis is without merit. Petitioner’s failure to timely comply with the filing requirements subjects this proceeding to a dismissal. See Riverside Syndicate, Inc. v. Saltzman, 49 A.D.3d 402 (1st Dep’t 2008). Petitioner’s failure to strictly comply with statutory requirements deprives this court of jurisdiction. See Berkeley Assoc. Co. v. Di Nolfi, 122 A.D.2d 703 (1st Dep’t 1986), lv. denied 69 N.Y.2d 804 (1987). Hence, this proceeding shall be dismissed accordingly. Even if this court was to entertain Petitioner’s argument that the process server was prevented from electronically filing the affidavit of service due to lack of authorization, this court cannot consider such. Petitioner’s opposition paper, as noted above, consists of only the affirmation of Petitioner’s attorney and does not annex an affidavit from the process server, or any evidentiary proof, attesting to the assertion that the process server was barred from timely filing the affidavit of service due to the lack of authorization.

Based upon the foregoing, Respondent’s summary judgment motion is granted to the following extent. The court awards summary judgment in Respondent’s favor and dismisses the proceeding without prejudice due to Petitioner’s violation of R.P.A.P.L. §§ 735(2)(b) and 733(1). The court need not address Respondent’s remaining arguments for dismissal. Respondent’s request for attorneys’ fees is denied because the court dismisses this proceeding without prejudice and does not reach the ultimate outcome of the controversy. See Horatio Arms, Inc. v. Celbert, 41 Misc. 3d 11 (App. Term, 1st Dep’t 2013).

The foregoing constitutes the decision and order of the court.

Dated: September 15, 2022  
Bronx, N.Y.

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Omer Shahid, J.H.C.