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37 W. 72nd St., Inc. v Frankel
2023 NY Slip Op 23018
Decided on January 20, 2023
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on January 20, 2023

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

37 West 72nd Street, Inc., Petitioner,

against

Rebecca Frankel, John Doe, Jane Doe, Respondents.

Index No. 300420-20

Borah Goldstein Altschuler Nahins & Goidel (Carla Seals, Esq.), for the petitioner

The Legal Aid Society (Kenson Ng, Esq.), for the respondent-Rebecca Frankel

No appearance — John Doe, Jane Doe

Karen May Bacdayan, J.

PROCEDURAL HISTORY AND BACKGROUND

This is a holdover summary proceeding brought against respondent on the basis of chronic rent delinquency. Petitioner filed the notice of petition and petition on August 6, 2020, at the height of the COVID-19 pandemic in New York City. (NYSCEF Doc No. 1-2.) Rather than assigning a return date, the internal procedure for scheduling holdover proceedings governed by the Chief Clerk's Memorandum 210 ("CCM 210") dated July 30,

2020 and available at https://nycourts.gov/COURTS/nyc/SSUdirectives/CCIWCCM210.pdf, was as follows:

> "Landlord & Tenant Holdover cases are generally submitted with a return date selected by the filer/petitioner. Due to the current crisis related to the COVID-19 Pandemic, we are unable to schedule these cases and are uncertain when future court dates will become available. . . . A notation should be made on the Notice of Petition — Assigned stating 'DATE TO BE DETERMINED. THE COURT WILL NOTIFY ALL PARTIES OF THE COURT DATE.'"

The CCM 210 notation was made on the notice of petition herein. (NYSCEF Doc No. 2, notice of petition filed; NYSCEF Doc No. 5, notice of petition — assigned.) Petitioner served the notice of petition and petition by personal service upon respondent pursuant to RPAPL 735, mailed copies of the notice of petition and petition on August 20, 2020, and filed the affidavit of service on August 26, 2020. (NYSCEF Doc No. 7, affidavit of service.) Subsequently, as with all suspended holdover proceedings regardless of whether an affidavit of service had been filed or not, a notice from the court that the proceeding had been scheduled for June 15, 2021 was sent to the parties. According to the Universal Case Management System, available only to court [*2]employees and of which the court takes judicial notice,[FN1] this notice was generated on May 28, 2021, 18 days prior to the scheduled June 15, 2021 appearance (CPLR 4511; NYSCEF Doc No. 16, court notice). On June 15, 2021, the court stayed the proceeding as respondent had filed a hardship declaration and an Emergency Rental Assistance Program ("ERAP") application, both of which occasioned an automatic stay.[FN2] (NYSCEF Doc No. 17, COVID-19 hardship declaration; NYSCEF Doc No. 23, respondent's attorney's affirmation.) Eventually, both stays were vacated and the proceeding was restored to the calendar by motion in October 2022. Respondent filed an answer raising a first objection in point of law that "[t]he petition must be dismissed because Petitioner failed to comply with RPAPL § 733 (1). RPAPL § 733 (1) mandates that a holdover petition must be made returnable no less than ten [and not] more than seventeen days after service is completed." (NYSCEF Doc No. 29, verified answer ¶¶ 4-8.)

Now before the court is respondent's motion to dismiss the proceeding based on early-filing of the notice of petition and petition in that the notice of petition and petition were served in August 2020 and the proceeding was first noticed to be heard by the court on June 15, 2021. Respondent's position is that this is a summary proceeding requiring strict compliance with statute and, therefore, prejudice need not be demonstrated. Respondent cites to two leading Appellate Division, First Department cases as support for her arguments that

no prejudice needs to be demonstrated, and that strict compliance with statutory prerequisites is required to maintain a summary proceeding. (*Berkeley v DiNolfi,* 122 AD2d 703 [1st Dept 1986]; *Riverside Syndicate, Inc.* v *Saltzman*, 49 AD3d 402 [1st Dept 2008].)

Petitioner opposes and cross-moves for an order to pay use and occupancy and to dismiss respondent's first objection in point of law, on the basis that RPAPL 733 (1) should not be strictly followed given the unprecedented disruption of justice caused by the COVID-19 pandemic, and the various administrative orders that modified ordinary court procedures. Petitioner argues that "[d]ismissal of [this] proceeding because the petitioner followed the rules imposed by the Court is absurd, unfair and serves no legitimate end of justice." (NYSCEF Doc No. 40, petitioner's attorney's affirmation in opposition ¶ 4.) Petitioner urges that *Berkeley* and *Riverside Syndicate* "should not be followed as they clearly do not address the circumstances the courts and the parties faced in 2020 and 2021." (*Id.* ¶ 30.)

<u>DISCUSSION</u>

<u>Modified Court Procedures</u>

On October 9, 2020, the Chief Administrative Judge issued Administrative Order 231/20, which provided that "[a]ll 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." [*3](Admin Order of Chief Admin Judge of Cts AO/231/20 ["AO/231/20"], ¶ 1 [b] (emphasis added.) In the accompanying memorandum, the Hon. Lawrence K. Marks explained that "[t]he 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." Mem of Chief Admin Judge of Cts, *available at* https://www.nycourts.gov/whatsnew/pdf/EvictionsMemo-10-09-20.pdf.

Concededly, AO/231/20 was issued after petitioner served the notice of petition and petition. However, the preceding administrative orders did not advise landlords either to serve or not to serve a notice of petition and petition comprising the CCM 210 language. Indeed, Administrative Order 127/20, issued on June 18, 2020 provided that ". . . eviction proceedings filed after March 16, 2020 shall, upon the filing of a petition (if no answer is

filed thereafter) or the filing of an answer, be suspended until further order." Administrative Order 161/20 further provided that "[e]viction proceedings commenced after March 16, 2020 shall, upon the filing of a petition (if no answer is filed thereafter) or the filing of an answer, be *suspended* until further order (emphasis added)." [FN3] Because petitioner filed their petition on August 6, 2020, and was on notice that the proceeding would be "suspended" until further notice. (*Id.*; NYSCEF Doc No. 1, petition; NYSCEF Doc No. 2, notice of petition filed.) Moreover, nothing requires a petitioner to serve a notice of petition and petition within a specific time-frame after filing same with the court.

The modified court procedures set forth in various administrative orders were well within the Chief Administrative Judge's power to control the daily operations of the court and did not intrude upon the legislature's authority to regulate proceedings in law. However, like CCM 210, none of the relevant administrative orders altered nor excused statutory requirements. Unlike the legislature and the governor, the Chief Clerk and the Chief Administrative Law Judge do not have the power to enact, suspend, or modify statutes during a state of disaster in order to manage the emergency. [FN4]

Statutory Requirements for Commencing a Holdover Proceeding

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 [*4]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[.]"

In holdover proceedings, RPAPL 733 (1) requires 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." When service is made by personal in-hand delivery, service is completed immediately upon personal delivery. RPAPL 735 (2) (a).

The Parties' Arguments

In support of her argument that the petition must be dismissed for failure to comply with RPAPL 733 (1), respondent cites to *208 W 20th Street LLC v Blanchard*, 76 Misc 3d 505 [Civ Ct, New York County 2022] and *Matticore Holdings, LLC v Hawkins*, 76 Misc 3d 511 [Civ Ct, Bronx County 2002]. (NYSCEF Doc No. 34, respondent's attorney's affirmation ¶¶ 10-11.) In *Blanchard*, petitioner completed service of the notice of petition and petition by filing the affidavit of service on NYSCEF more than three days after mailing, and fewer than 10 days before the first court appearance assigned by the court. Citing to *Berkeley* and *Riverside Syndicate, Inc.*, this court held that while respondent was not prejudiced by the short-filing of the affidavit of service, prejudice is not part of the calculus in the First Department when deciding a motion to dismiss based on a failure to strictly adhere to service requirements. (*Blanchard*, 76 Misc 3d at 441-442.)

Though 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 was subsequently abandoned in the First Department. The Appellate Division in *Riverside Syndicate, Inc.* 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 *Riverside Syndicate, Inc 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. (*Riverside Syndicate*, 49 AD3d at 402.)

In *Matticore*, the court dismissed the holdover petition where petitioner filed the affidavit of service of the notice of petition and petition 21 days prior to the return date of the petition. Citing to *Riverside Syndicate*, the court rejected petitioner's argument that the petition should not be dismissed because respondent was not prejudiced by receiving more time to defend the proceeding. Respondent also cites to a recent Housing Court decision in Kings County, *Lamont Hill v Carmen Cubilete et al*, Civ Ct, Kings County, July 22, 2022, Harris, J., index no 300344/20, for the proposition that a clerk's memorandum does not supersede a statute, and thus the petition must be dismissed.

In opposition, petitioner cites to *Ballard v HSBC Bank USA*, 6 NY3d 658 (2006), which, as in the instant proceeding, involved a special proceeding governed by Article 4 of the CPLR. In *Ballard*, the petitioner failed to include a return date in her notice of petition as required by CPLR 403 when seeking review of a determination by the New York State Division of Human Rights. The court found that this omission did not affect the court's

"subject matter jurisdiction" which would require dismissal, but rather "a claim of improper commencement or personal [*5]jurisdiction, at best." (6 NY3d at 664.) As such, the court found that respondent had "waived [any] right to challenge the defect by actively participating in the proceeding without timely objecting to the defect on personal jurisdiction grounds." (*Id.*)

The instant proceeding is distinguishable from *Ballard* in two important ways: First, respondent immediately raised this jurisdictional issue when the proceeding was no longer subject to a statutory stay and so did not waive her right to raise same. The answer, which articulated this objection in point of law, was filed on October 3, 2022, just 12 days after petitioner moved to vacate the ERAP stay and restore the proceeding to the calendar. (NYSCEF Doc No. 29, answer ¶¶ 4-8.) Second, respondent is not seeking dismissal based on a failure to include a date or time of the hearing in the notice of petition.

Petitioner also cites to *Nat'l Gypsum Co. Inc. v Assessor of Town of Tonawanda*, 4 NY3d 680 (2005), a Real Property Tax Law proceeding, where the Court found that the petition therein was "jurisdictionally sound" because the petitioner had initially complied with CPLR 403 by including a date and time in the notice of petition which the court later changed,[FN5] thus, "[a]ny other interpretation of the statute would be patently unfair to a party attempting to commence such a proceeding (internal quotation marks omitted) [.]" (*Id.* at 684.) Here, however, petitioner did not include a proposed date and time of the hearing for the court to change, thus, following the reasoning in *Nat'l Gypsum*, the petition herein was never "jurisdictionally sound." (*Id.*; NYSCEF Doc No. 2, filed notice of petition.) [FN6] , [FN7] The *Nat'l Gypsum* court noted that "Professor David D. Siegel, in his treatise, New York Practice, acknowledged the difficulties a petitioner's lawyer may face in setting a return date but concluded that 'the best bet is to set a return day satisfactory to statutory notice requirements, even if it appears inevitable that the date selected will be postponed . . . .' (internal citations omitted)." (*Id.* n 5.)

Respondent argues that petitioner should have waited to receive the court notice scheduling the hearing date and time before serving the notice of petition and petition and filing the affidavit of service, in order to comply with RPAPL 733 (1). As set forth above, the court sent a letter to the parties on May 28, 2021, alerting them that the first court appearance would [*6]be on June 15, 2021. This provided petitioner with sufficient time to serve the notice of petition and petition within the statutory time frame under RPAPL 733 (1) prior to the scheduled appearance. While initially and viscerally persuaded by petitioner's argument that they should not be penalized for failing to comply with RPAPL 733 (1) "because the

petitioner followed the rules imposed by the Court," and such a result would be "absurd, unfair and serves no legitimate end of justice," upon further analysis, the court does not find this argument to be legally sound.

Unfortunately, CCM 210 and AO 231/20 did not provide clear guidance on a "new-normal" course regarding serving and filing of the notice of petition and petition; but neither did they, nor could they have, altered statutory requirements. It is true, as respondent argues, that the "normal course" would have been for petitioner to wait for the court to provide a hearing date when the proceeding was no longer suspended, as the court did, and *then* serve the notice of petition and petition in compliance with RPAPL 733 (1). Petitioner's statement that it was simply "follow[ing] the rules imposed by the Court" proves too much as it was still possible to follow the extant statutory prerequisites for commencing a summary holdover proceeding in the normal course.

Petitioner's reaction of unfairness has not fallen on deaf ears; but what is fair or unfair is typically not a legal question because fairness, in the colloquial sense, is too subjective. As here, what is fair and what the law requires are often at odds.

CONCLUSION

Accordingly, for the foregoing reasons, it is

ORDERED that respondent's motion to dismiss is GRANTED and the petition is dismissed without prejudice. As such, petitioner's cross-motion is moot.

This constitutes the decision and order of this court.

January 20, 2023
New York, NY
Hon. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: Government records available electronically are admissible as electronic documents under the common law public records exception, CPLR 4518 (a) (electronic business records), and State Technology Law § 306. See e.g. *Kearney v Capelli Enters., Inc.,* 2012 NY Slip Op 30439 (U) (Sup Ct, New York County 2012) (taking judicial notice of public records available on the New York State Department of State website).

Footnote 2:See generally L 2021, c 417, part C, subpart A, and L 2021 (providing for a stay of proceedings upon the filing of a COVID-19 "hardship declaration", and L 2021, c 56, part BB, subpart A, § 8, as amended by L 2021, c 417, part A (providing for a stay of proceedings upon submission of an application for ERAP.

Footnote 3:See also Executive Order [A. Cuomo] No. 202.8 issued on March 20, 2020, which "tempora[rily] suspend[ed] any specific time limit for the commencement, filing, or service of any legal action, notice, motion or other process or proceeding. . . ." Executive Order 202.8 was extended until November 4, 2020 when Executive Order [A. Cuomo] No. 202.72 lifted the toll.

Footnote 4:See Executive Law § 29-a (2) (d) ("the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions").

Footnote 5:CPLR 403 (a) provides that "[a] notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition.

Footnote 6:Petitioner also cites to several cases to support its argument that holding it to the strictures of RPAPL 733 (1) would lead to unreasonable consequences which could not have been the intention of the legislature, and that RPAPL 733 (1) should not be interpreted so broadly as to include the instant proceeding. However, those cases vary wildly from this case in both subject matter (e.g. eligibility for membership in the New York City Employees' Retirement System, libel, parks and parkways, unjust conviction), and statutory scheme. (NYSCEF Doc No. 40, petitioner's attorney's affirmation ¶¶ 26-27.)

Footnote 7:This court makes no finding as to whether this defect may be corrected by the court pursuant to CPLR 2001 in the procedural posture of this proceeding. See e.g. *Hamilton v Carter*, — NYS3d —, 2022 NY Slip Op 22345 (Civ Ct, Bronx County 2022) (overlooking the failure of the court to assign a return date and time when the *first appearance* on the calendar was the return date of a landlord's motion to restore to the calendar after the expiration of the hardship declaration stay).