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O'reilly v. Sigarreta

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

ANNE O'REILLY and VINCENT O'REILLY
Petitioners-Landlords

-against-

LESLY SIGARRETA
53-08 72nd Place, 2nd Floor
Maspeth, New York 11378
Respondent-Tenant

JUAN ARDILA, "JOHN DOE" and "JANE DOE"
Respondents-Undertenants

L&T Index No.: 308070/22

DECISION/ORDER

Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	

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

Background

The petitioner commenced this holdover proceeding by notice of petition and petition to recover possession of the second-floor apartment located at 53-08 72nd Place, Maspeth. The matter was filed on NYSCEF. The affidavit of service for the petition and notice of petition indicates that copies were affixed to the subject premises on June 9, 2022 and mailed to respondents the following day. The affidavit was filed with the court on June 12, 2022. Respondent Juan Ardila moves to dismiss the proceeding for lack of personal jurisdiction and/or for failure to state a cause of action. In the alternative, respondent seeks leave to interpose an answer raising the lack of jurisdiction defense.

Discussion

Respondent argues that the case should be dismissed because the petition and notice of petition were served more than seventeen days before the case was scheduled to be heard. Respondent, in opposition, argues that it followed the Chief Clerk's memorandum instructions in serving the pleadings as it did.

RPAPL § 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." Where service is effectuated by means other than personal delivery, it is deemed complete upon the filing of proof of service with the court. Holdover petitions are generally submitted with a return date selected by the petitioner. However, due to the COVID-19 pandemic, the Chief Clerk issued a memorandum on July 30, 2020 ("CCM 211") informing petitioners that the court was unable to schedule cases and was uncertain when future court dates would become available. The memorandum noted that while "[h]oldover cases are generally submitted with a return date selected by establishing the procedure for scheduling holdover proceedings filed in person, by mail or e-filed during the pandemic":

This procedure is to be employed for scheduling Holdover proceedings filed in NYSCEF:

- Schedule case to the appropriate administrative part. At a future date these cases will be rescheduled for an actual appearance and parties will be notified.
- 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"
- Notice of Petition – Assigned should be filed in NYSCEF Application.

Petitioners complied with the memorandum and were thus aware that no return date was assigned when the pleadings were served on respondents. However, "a clerk's memorandum does not supersede a statutory enactment." *Hill v. Cubilete*, 2022 NYLJ LEXIS 1192 [Civ Ct Kings]. Therefore, the memorandum did nothing to alter the requirements of RPAPL § 733(1). "If the court were to conclude otherwise, the statutory requirement of timely service would be meaningless; any service attempts that otherwise were sufficient would confer jurisdiction without regard to when they were made". *Hill v. Cubilete, supra*. Petitioners could have complied with both the statute and memorandum by serving the papers timely after the case was assigned a return date. Their failure to do so deprives the court of jurisdiction over respondents.

Conclusion

Based on the foregoing, the motion is granted and the case dismissed without prejudice.

This constitutes the decision and order of the Court.

SO ORDERED
HON. CLIFTON A. NEMBHARD

Date: April 14, 2022
Queens, New York

Hon. Clifton. A. Nembhard, JHC