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Delta Realty Holding v Vega

2023 NY Slip Op 32101(U)

June 20, 2023

Civil Court of the City of New York, Bronx County

Docket Number: L&T Index No. 335881-22/BX

Judge: Diane E. Lutwak

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CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART K-SPP

-----X

L&T Index # 335881-22/BX

DELTA REALTY HOLDING, 662 LLC
Petitioner (Landlord,

-against-

DECISION & ORDER

IRIS VEGA, and all other occupants,
Respondent (Tenant).

-----X

Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR R 2219(A), of the papers considered in the review of Respondent's motion to dismiss (motion seq #1):

<u>Papers</u>	<u>NYSCEF Doc #</u>
Notice of Motion	12
Attorney's Affirmation in Support	13
Exhibits A-E in Support	14-18
Affidavit in Support	19
Memorandum of Law	20
Attorney's Affirmation in Opposition	23
Exhibits A-F in Opposition	24-29
Attorney's Reply Affirmation	31

Upon the foregoing papers and for the reasons stated below, respondent's motion to dismiss is granted and this proceeding is dismissed, without prejudice.

PROCEDURAL HISTORY

In this RPAPL § 711(1) holdover eviction proceeding the petition, notice of petition and predicate 90-day termination notice (with proof of its service) were all e-filed via "NYSCEF" (New York State Courts Electronic Filing system) on December 1, 2022. The court assigned the case to Intake Part 2, calendared it for January 3, 2023 and generated a notice with this information to be served with the notice of petition and petition. On December 27, 2022 petitioner filed an affidavit of service of the notice of petition and petition alleging "substitute" service on "Jane Doe" on December 22, 2022 followed by mailings that same day by first-class and certified mail. The case was heard on January 3 and then transferred to Resolution Part K and adjourned to January 18, 2023. Respondent thereafter retained counsel who filed an answer to the petition on April 25, 2023 and then, on April 27, 2023, the motion to dismiss that is now before the court.

Respondent seeks dismissal on various grounds including dismissal under CPLR RR 3211(a)(1), (7) and (8) based on defective service of process under RPAPL §§ 733 and 735 due to

failure to file proof of service within three days of the mailing and failure to complete service between ten and seventeen days in advance of the date the petition was noticed to be heard.

DISCUSSION

Under RPAPL § 733(1), a holdover notice of petition and petition must be served at least 10 and not more than 17 days prior to when the petition is noticed to be heard. Under RPAPL § 735, there is a 3-day period for filing proof of service with the Court, which time frame runs either from the date of personal delivery when service has been made by that means, RPAPL § 735(2)(a), or from the date of mailing when service is made by an alternative (“conspicuous” or “substituted”) method, RPAPL § 735(2)(b). This statute also establishes when service is deemed complete: for personal delivery, “immediately”, RPAPL § 735(2)(a); when service is effectuated by an alternative method, “upon the filing of proof service”, RPAPL § 735(2)(b).

In the First Department, the leading Appellate Division case analyzing the interplay between RPAPL §§ 733(1) and 735(2) is *Riverside Syndicate, Inc v Saltzman* (49 AD3d 402, 852 NYS2d 840 [1st Dep’t 2008]). The Appellate Term had reinstated holdover petitions dismissed by the trial court, finding that “In the absence of any discernible prejudice to tenants ..., landlord’s one-day delay in filing proof of service of the petitions did not require dismissal of these otherwise properly commenced holdover proceedings.” *Riverside Syndicate, Inc v Saltzman* (15 Misc3d 138[A], 841 NYS2d 221 [AT 1st Dep’t 2007]). The Appellate Division reversed the Appellate Term and reinstated the lower court’s dismissal order as the landlord had “failed to ‘complete’ service of the notice of petitions and petitions by filing proof of service (RPAPL § 735 [2] [b]) at least five days¹ prior to the date the petitions were noticed to be heard (see RPAPL § 733 [1]).” In doing so, the Appellate Division stated, “A summary proceeding is a special proceeding ‘governed entirely by statute ... and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction.” *See also, e.g., 208 W 20th St LLC v Blanchard* (76 Misc3d 505, 173 NYS3d 439 [Civ Ct NY Co 2022])(dismissing non-primary residence holdover where proof of service of the notice of petition and petition was filed 9 days prior to the initial court date, noting lack of prejudice is not a factor); *Bronx 2120 Crotona Ave LP v Gonzalez* (75 Misc3d 753, 168 NYS3d 674 [Civ Ct Bx Co 2022])(dismissing holdover proceeding where proof of service was filed 5 days after the return date, noting that lack of prejudice is not a factor).


Here, it is evident from the case file on NYSCEF that petitioner completed service by e-filing proof of service of the notice of petition and petition on December 27, 2022, which was five days after the “substituted” service on “Jane Doe” and mailings to respondent on December 22, 2022 and seven days before the initial court appearance on January 3, 2023. The

¹ RPAPL § 733(1) was amended by the Housing Stability and Tenant Protection Act of 2019 to extend the window period for service from a minimum of 5 days before the time at which the petition is noticed to be heard to 10 days; maximum notice was extended from 12 to 17 days.

filing on December 27, 2022 was timely under RPAPL § 735(2)(b), given that the third day after December 22 – December 25 - was both a Sunday and a holiday (Christmas Day) and December 26 was also a public holiday (also for Christmas). *See NY Gen Constr Law § 25-a(1)*. However, that filing on December 27 was “short” under RPAPL § 733(1) as it did not provide a minimum of ten days’ notice in advance of the initial court date on January 3, 2023. Given this unamendable defect, the proceeding must be dismissed, *Riverside Syndicate v Saltzman, supra*, and there is no need to reach any of the other arguments made by respondent.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that respondent’s motion is granted and this proceeding is dismissed without prejudice. This constitutes the Decision and Order of this Court, which is being uploaded on NYSCEF.



Diane E. Lutwak, HCJ

Dated: Bronx, New York
June 20, 2023