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### NonExempt Marital Trust under the Melvin Last Revocable Trust v. Premier One Corp.

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[\*1]

<b>Non-Exempt Marital Trust under the Melvin Last Revocable Trust v Premier One Corp.</b>
2023 NY Slip Op 50658(U)
Decided on June 28, 2023
Civil Court Of The City Of New York, Queens County
Li, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 28, 2023

Civil Court of the City of New York, Queens County

**The Non-Exempt Marital Trust Under The Melvin Last Revocable Trust, Carol Last, Trustee and The Daniel Goldman Revocable Trust, DBA Woodrose Realty Co, Petitioner(s)-Landlord(s),**

**against**

**Premier One Corp., Respondent(s).**

Index No. LT-302133-21/QU

Petitioner's counsel:

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Wendy Changyong Li, J.

The following papers were read on Petitioner's motion to amend and Respondent's motion to dismiss:

## I. Papers Numbered

Petitioner's notice of motion ("Motion Seq. #2") e-filed with the court on March 10, 2022 [\*2] together with attorney affirmation and R. Last affidavit. 1

Respondent's memorandum of law in support of its cross-motion for summary judgment dismissing the Petition, together with exhibit(s), e-filed with the court on March 23, 2022 ("Motion Seq. #2A"). 2

Petitioner's affirmation in opposition to Respondent's cross-motion for summary judgment, together with exhibits, e-filed with the court on April 28, 2022. 3

Respondent's reply affirmation in further support of its cross-motion for summary judgment dismissing the Petition and in opposition to motion to amend, e-filed with the court on May 24, 2022. 4

## II. Procedural History

Petitioner commenced this instant non-payment proceeding against Respondent on April 30, 2021 by filing a Notice of Petition and Petition ("**Petition**") for judgment of possession and rent arrears and fees in the amount of \$319,040.94 pursuant to a lease term from February 5, 2016 to January 31, 2026 in connection with a commercial space located at [XXX] Steinway Street, Queens, NY 11103 ("**Premises**") (Petition at 1). On June 1, 2021, Respondent filed a COVID-19 Hardship Declaration. On December 17, 2021, an Order to Show Cause was filed by the Petitioner, seeking to restore the matter to calendar, which was later withdrawn. An answer ("**Answer**") was filed by Respondent on January 27, 2022 alleging five (5) affirmative defenses: (1) impossibility of performance; (2) Respondent's unabilities to secure legal counsel before January 14, 2022 during lease modification negotiation with Petitioner; (3) improper service; (4) disputed rent arrears; and (5) unrepaired leaks.

On March 10, 2022, Petitioner filed a motion ("**Motion**") to amend pleadings, together with attorney affirmation and Petitioner's managing agent R. Last's affidavit, but without any supporting exhibits, in which Petitioner sought to substitute 30-52 Steinway, LLC ("**Proposed New Petitioner**") as petitioner. On March 23, 2022, Respondent filed its Memorandum of Law in Support of Respondent's Cross-Motion for Summary Judgment Dismissing the Petition ("**Cross Motion and Opposition**") for lack of personal jurisdiction and to oppose the Motion, together with exhibit(s). On March 25, 2022, Judge Lanzetta

adjourned the matter to April 28, 2022. On April 28, 2022, Petitioner filed its opposition to Respondent's cross-motion and its reply to Respondent's opposition ("**Opp to Cross and Reply**"), together with attorney affirmation, R. Last's affidavit and exhibits. On May 24, 2022, Respondent filed its reply affirmation ("**Sur-Reply to Opp to Cross**") in further support of its cross motion for summary judgment dismissing the Petition and in opposition to the Motion. On May 31, 2022, Motion Seq. #2 and Motion Seq. #2A were submitted.

### **III. Discussion**

#### **A. Petitioner's Motion to Amend Pleading**

Petitioner's Motion seeks to amend the pleadings, court file, all papers and notices to substitute the Petitioner with the Proposed New Petitioner, as petitioner, *nonc pro tunc*. The current Petitioner reads "The Non-Exempt Marital Trust Under The Melvin Last Revocable Trust, Carol Last, Trustee and The Daniel Goldman Revocable Trust, DBA Woodrose Realty [\*3]Co" ("**Petitioner**"). Petitioner asserted that the name of the Petitioner "was correct at the time the instant proceeding was initiated[,] however, two members of the prior titleholder died before the instant proceeding was started" (See attorney G. R. Sarafan Affirmation at 1 for the Motion). Subsequently, "the formation of the current owner of the subject premises and the transfer of title of the subject premises occurred after the instant proceeding was initiated" (*id.*). Respondent opposed to the Motion, asserting that the Motion must be denied as factually defective. Respondent claimed that Petitioner failed to annex the proper documents to demonstrate the ownership of the Premises, or any landlord-tenant relationship. Respondent also asserted that the moving affidavit of R. Last made conclusory statements without proof, and referenced documents that were not included in the Motion. Moreover, Respondent emphasized the lack of empirical evidence for Petitioner's claims that two members passed away and that the ownership interest was then passed onto non-member family members. (See Cross-Mot and Opp at 8, 9.)

Part 52 of the New York City Civil Court handles summary proceedings based on commercial landlord-tenant relationship, either for tenant holdover or tenant non-payment. Part 52 only has jurisdiction when a tenant is in possession when the summary proceeding is initiated. In our instant matter, the court only has jurisdiction if the Petitioner is indeed the landlord and the Respondent is in possession of the Premises. It appears that the Respondent was in possession of the Premises when the proceeding was commenced and that the Respondent is still in possession of the Premises. The remaining issue here is whether the Petitioner is the landlord of the Premises ("**First Issue**"). In order to resolve the Part 52

jurisdiction concern, the First Issue must be answered, that is whether Petitioner is the title holder of the Premises and the landlord of the Premises; and whether the Proposed New Petitioner is the lawful successor of the Petitioner; and whether the Proposed New Petitioner is the lawful deed holder of the Premises and the landlord of the Premises established by evidence.

Petitioner moved to amend the pleadings by filing its Motion on March 10, 2022. Although Petitioner stated that supporting exhibits were included in the Motion, no single exhibit was filed in the Motion. In Petitioner's Opp to Cross and Reply, it eventually provided supporting exhibits on April 28, 2022. Evidence provided for the very first time by the moving party in its reply is improper ([\*Grocery Leasing Corp. v P & C Merrick Realty Co., LLC\*, 197 AD3d 625](#), 627 [2d Dept 2021]; [\*Deutsche Bank Natl. Trust Co. v March\*, 191 AD3d 762](#), 763 [2d Dept 2021]) and should be disregarded by the court ([\*Batista v. Santiago\*, 25 AD3d 326](#), 807 N.Y.S.2d 340; see also, [\*All County Paving Corp. v. Darren Constr., Inc.\*, 48 Misc 3d 1216\[A\]](#), 18 N.Y.S.3d 577; see also, [\*OneWest Bank, FSB v. Simpson\*, 148 AD3d 920](#)). Here, Petitioner failed, procedurally, to establish that the Proposed New Petitioner was the lawful deed holder of the Premises and thus was the landlord of the Premises. Petitioner failed on the First Issue procedurally.

Even if this Court were to allow the evidence improperly provided for the first time in Petitioner's reply, which this Court does not, Petitioner would have failed, in substance, to establish that the Proposed New Petitioner was the lawful deed holder and the landlord of the Premises as explained below.

It is well established that "summary proceeding is a special proceeding governed entirely by statute and that there must be strict compliance with the statutory requirements to give the court jurisdiction " (*MSG Pomp Corp. v. Doe*, 185 AD2d 798, 586 N.Y.S.2d 965 [1st Dept. 1992], citing *Berkeley Assocs. Co. v. Di Nolfi*, 122 AD2d 703, 705, quoting *Goldman Bros. v [\*4]Forester*, 62 Misc 2d 812, 814-815; see, *Matter of Blackgold Realty Corp. v. Milne*, 69 NY2d 719, 721; *Giannini v. Stuart*, 6 AD2d 418; also see *Clarke v. Wallace Oil Co., Inc.* 284 AD2d 492, 727 N.Y.S. 2d 139 [2nd Dept. 2001]).

New York Real Property Actions and Proceedings Law ("**RPAPL**") Section 741 requires a petition to "state the interest of the petitioner in the premises from which removal is sought" and to "state the respondent's interest in the premises and his relationship to petitioner with regard thereto" (RPAPL 741).

Here, Petitioner improperly provided evidence in its reply for the first time the

following supporting documents to prove Proposed New Petitioner's interest in the Premises: copies of two deeds and copy of one assignment of leases and rents, together with R. Last's affidavit of April 28, 2022. Pursuant to one copy of the deed, it appears that "The Estate of Melvin Last, by Carol Last, as Executrix, residing at 17034 Newport Club Drive, Boca Raton, Florida 33496" ("**Entity A-1**") transferred its title to the Premises (which was later described in the deed as 50% interest of the Premises) to the "Non-Exempt Marital Trust Under Article VI of Melvin Last Revocable Trust U/A/D July 2, 2007, Carol Last, Trustee, 17034 Newport Club Drive, Boca Raton, Florida 33496" ("**Entity A-2**") on May 18, 2012. Here, the 50% title interest in the "Last" family (hereinafter referred to as "**A Line**") was transferred to a trust, which was Entity A-2. Petitioner failed to provide any ownership document as to the other 50% deed interest of the Premises, therefore, the Motion supporting documents were silent on the lawful 100% deed owner of the Premises. The other copy of the deed indicated that on April 1, 2021, Entity A-2, as to an undivided fifty percent (50%) interest and Daniel Goldman 7730 south Oriole Blvd, Delray Beach, Florida 33466 ("**Individual B-1**"), as to an undivided fifty percent (50%) interest, transferred the 100% deed interest to the Proposed New Petitioner (this Court hereinafter refers the "Goldman" family line as "**B Line**"). Here, Petitioner failed to provide evidence to establish that Entity A-2 and Individual B-1, jointly, are the lawful 100% deed holder of the Premises. Even if they were, they would have not been the Petitioner, which reads "The Non-Exempt Marital Trust Under The Melvin Last Revocable Trust, Carol Last, Trustee and The Daniel Goldman Revocable Trust, DBA Woodrose Realty Co." Here, the chain of title between Individual B-1, who was Daniel Goldman, and his trust was broken. In addition, even if Petitioner had properly established the chain of title, which it did not, the transfer of title from the Petitioner to the Proposed New Petitioner was effectuated on April 1, 2021, which was about 29 days before Petitioner commenced the instant non-payment proceeding. As part of the Motion, Petitioner's alleged managing agent R. Last provided an affidavit on March 10, 2023 stating that the "instant proceeding was initiated after the members had passed away but before 30-52 Steinway, LLC formed" without providing any supporting evidence. Such sworn statement was in direct conflict with the supporting documents subsequently provided, which established that 30-50 Steinway, LLC, the Proposed New Petitioner, assumed the broken title about 29 days prior to the instant proceeding was commenced. The Court notes that pursuant to the articles of organization of the Proposed New Petitioner, which was improperly provided for the first time in Petitioner's reply, such articles of organization was indeed "subscribed to" on January 6, 2015, which was about six (6) years before the transfer of title to the Premises from the Petitioner to the Proposed New Petitioner. It was unclear when the Proposed New Petitioner was formed, but according to Last's affidavit, the instant proceeding

was commenced before the Proposed New Petitioner formed. Petitioner commenced the instant proceeding on April 30, 2021. Considering that the articles of organization of the Proposed New Petitioner was [\*5] subscribed to on January 6, 2015, this Court is not convinced that the alleged correct owner, the Proposed New Petitioner, was formed after April 30, 2021, more than six (6) years after its articles of organization was subscribed to. In any event, Petitioner failed to establish that the Petitioner was the lawful deed holder of the Premises; furthermore, Petitioner failed to establish that the Proposed New Petitioner was the lawful successor of the Petitioner and lawful deed holder of the Premises and that the Proposed New Petitioner had the legal grounds to substitute the Petitioner. It is noted that no lease was provided and there was no evidence to support the landlord-tenant relationship between the Petitioner and the Respondent; nor there was evidence to support the landlord-tenant relationship between the Proposed New Petitioner and the Respondent. Although Petitioner improperly provided a copy of the Assignment of Leases and Rents dated April 27, 2022 ("**Assignment of Lease**") for the first time in its reply, such Assignment of Lease was assigned from "Carol Last, Trustee, non-Exempt Marital Trust Under Article VI of Melvin Last Trust U/A/D July 2, 2007 and Frances Goldman, Trustee, Frances Goldman Revocable Trust" ("Carol Last, Trustee, non-Exempt Marital Trust Under Article VI of Melvin Last Trust U/A/D July 2, 2007" is hereinafter referred to "**Entity A-3**"; "Frances Goldman, Trustee" is hereinafter referred to "**Individual B-2**"; and "Frances Goldman Revocable Trust" is hereinafter referred to "**Entity B-3**") to the Proposed New Petitioner; not assigned from the deed holder the "Non-Exempt Marital Trust Under Article VI of Melvin Last Revocable Trust U/A/D July 2, 2007, Carol Last Trustee, 17034 Newport Club Drive, Boca Raton, FL 33496, as to an undivided fifty percent (50%) interest and Daniel Goldman 7730 south Oriole Blvd, Delray Beach, Florida 33466, as to an undivided fifty percent (50%) interest", which were Entity A-2 and Individual B-1, to the Proposed New Petitioner. In addition, such Assignment of Lease was only signed by Frances Goldman ("**Individual B-4**"). It is unclear if Frances Goldman, which was Individual B-4, signed the Assignment of Lease on behalf of both assignor (i.e., Entity A-3, Individual B-2 and Entity B-3) and assignee (i.e, Proposed New Petitioner) and under what capacity. Furthermore, the Motion was silent as to whether such Assignment of Lease was required to obtain the consent of the tenant. Here, Petitioner failed to establish neither the Petitioner nor the Proposed New Petitioner was the landlord of the Premises. It appeared based on submission that the chain of title in the B Line, the "Goldman" family line, was completely broken, in addition to the other defects in the A Line, the "Last" family line. Petitioner failed on the First Issue in substance.

CPLR 305 states that "at any time, in its discretion and upon such terms as it deems

just, the court may allow any summons or proof of service of a summons to be amended" so long as the opposing party is not prejudiced by the amendment (CPLR 305 [c]). Similarly, CPLR 3025 states that a party may amend its pleadings "at any time by leave of court" and that such leave "shall be freely given" as may be just (CPLR 3025 [b]).

Courts have often allowed parties to amend pleadings in the interest of justice. In *Magzamen v. Uws Ventures Iii Llc*, the court granted petitioner's motion to amend the named parties of the case (*Magzamen v. Uws Ventures Iii Llc*, 72 Misc 3d 677, 149 N.Y.S.3d 858, [2021]). There, the motion sought to change the petitioners after an election was held, which resulted in a new President, Vice President, and managing agent. The court emphasized that granting the motion would not significantly prejudice the respondents and that there was evidence submitted in support of the proposed amendments. (*id.*)

Here, Petitioner sought to amend petitioner's name. However, unlike the petitioner in *Magzamen*, Petitioner herein failed to provide documents in support of the proposed changes. [\*6] Petitioner in the instant proceeding failed to submit documents establishing the chain of title and the transfer of ownership between the Petitioner and the Proposed New Petitioner. In Respondent's Cross Motion and Opposition, Respondent contended that Respondent was not familiar with the purported entity which supposedly now owned the Premises; no attornment letter had been given to Respondent; and the trusts had no authority to demand rent as it was no longer the owner of the Premises or landlord to Respondent. The court in *60 W. 190th St. LLC v Rodriguez* granted a motion to amend the pleadings. There, the court explained that an amendment is favored "absent 'surprise or prejudice resulting directly from the delay'" (*60 W. 190th St. LLC v Rodriguez*, 67 Misc 3d 362, 123 N.Y.S.3d 413 [2020], citing *Lindo v. Brett*, 149 AD3d 459, 52 NYS3d 308 [2017]). However, in our instant matter, Petitioner moved to substitute Petitioner with the Proposed New Petitioner when it failed to establish that the Proposed New Petitioner was the lawful successor of the Petitioner. Here, Petitioner was not seeking to amend the pleading to correct a typo in the caption, rather, it sought to substitute the Petitioner, one entity, with the Proposed New Petitioner, another different entity, which was unknown to the Respondent. This Court finds that granting Petitioner's motion to amend the pleading is prejudicial to Respondent and denies this branch of the Motion. Petitioner's Motion to amend its pleadings is denied.

## **B. Petitioner's Motion to Amend Predicate Notice**

Even if this Court were to grant the branch of Petitioner's motion to amend its pleading, which this Court does not, the court would have to evaluate whether the predicate notices



must be amended in order to conform to any amendments made to the pleadings. RPAPL 711 requires that landlords make a written demand for rent, or delivery of possession, before initiating an eviction for nonpayment (RPAPL 711 [2]). Petitioner had submitted an Affidavit of Substitute Service & Mailing sworn to on April 12, 2021 showing that a rent demand and notice was served to Respondent on April 12, 2021. The Court notes that Respondent denied such service. The notice named "THE NON-EXEMPT MARITAL TRUST UNDER THE MELVIN LAST REVOCABLE TRUST, CAROL LAST, TRUSTEE AND THE DANIEL GOLDMAN REVOCABLE TRUST, D/B/A WOODROSE REALTY CO." as the Petitioner. Since Petitioner sought to amend the name of the Petitioner to the name of the Proposed New Petitioner, the issue is whether the predicate notice requirement would have been satisfied if the Court were to allow such change.

Predicate notices cannot be amended (Stockton v. McElderry, 2022 NY Misc. LEXIS731, \*5 [2022] citing Singh v. Ramirez, 20 Misc 3d 142[a], 872 N.Y.S.2d 497 [2008]). Therefore, Petitioner's request to amend all notices cannot be granted. However, a misspelling of a party's name is not a defect requiring dismissal (Stockton v. McElderry at \*5 citing Fa Wah Mgt., v. Alvarez, 18 Misc 3d 132(A), 856 N.Y.S.2d 497, [2008]) (referring to the party as the Administrator, as opposed to Limited Administrator, is of no consequence). On the other hand, a misstatement about the nature of a tenancy in the predicate notice will render the petition defective (Stockton v. McElderry at \*5). Here, Petitioner sought to substitute one entity with another entity. The amendment sought by Petitioner is more akin to a misstatement about the nature of a tenancy than a simple misspelling of a party's name.

Since a proper rent demand is a condition precedent to maintaining a non-payment proceeding, a lack of a proper predicate notice is fatal to the proceeding (Fitzpatrick Hous. Dev. Fund v. Gonzalez, 2018 NYLJ LEXIS 2983. \*4-\*5 [2018]). In assessing whether the predicate notice is proper enough to allow for the non-payment proceeding, the Court must analyze the [\*7] notice's reasonableness (*id.*). The court in Fitzpatrick Hous. Dev. Fund. explained that the purpose of the predicate notice is "not only to inform the tenant that an eviction proceeding will be commenced if payment is not made, but to allow the tenant an opportunity to make payment as required by the demand" (*id.*). Therefore, the predicate notice must contain the correct entity to which the tenant can make payments to in order to avoid an eviction proceeding (*id.*). In Fitzpatrick Hous. Dev. Fund., the plaintiff named an entity that did not own the subject property and did not have the authority to collect payment from the tenant (*id.*). Moreover, plaintiff there was not able to offer any excuses as to why an improper party was named; evidence revealed that the named party had not been the property owner for five years and so the mistakes were made simply because of "plain sloppy work"

(id.). Petitioner in our instant proceeding sought to substitute one entity with another entity, when neither of the entity had established its ownership to the Premises by submission. Such failure is fatal to the proceeding.

In the Cross Motion and Opposition, Respondent opposed to the Motion by pointing out that "no documentation to demonstrate the ownership of the Premises, or any landlord-tenant relationship with Respondent, [was] presented to support Petitioner's motion. To the extent the motion alleged a default in the rent, there [was] no ledger attached, nor [was] there any proof of the transfer of ownership interests by the supposedly deceased members. There [was] simply no documentary evidence submitted to support any of the motion's contentions"; and that "'Petitioner' [was] comprised of at least three separate parties, two of which [were] revocable trusts. Mr. Last [did] not purport to be a trustee of either, he simply state[d] he [was] the 'managing agent.' But, there [was] no connection made by him, or any relationship to the trusts or the individual, Carol Last, and Mr. Last [did] not say which Petitioner's records he reviewed or what those records [were]"; and, "[the affidavit [Robert Last's affidavit] reference[d] documents that [were] simply not attached." (Cross Mot and Opp at 8 & 9.) In the Sur-Reply to Opp to Cross, Respondent further argued that "[n]ot only [was] there again no proper jurat, but Mr. Last purport[ed] himself to be 'a managing agent of the Petitioner-Landlord,' and the 'Petitioner-Landlord' in this proceeding consist[ed] of two entities and one individual. Mr. Last [did] not state which entity he [was] the agent of; therefore he [did] not establish any cognizable basis for personal knowledge of the facts he assert[ed] (and fail[ed] to separately set forth any basis)"; and, "[t]o the extent the Robert Last affidavit attempt[ed] to introduce documents - which were completely missing from Petitioners' motion in chief - it [was] well-settled that deficiencies in motion papers cannot be cured on reply." (Sur-Reply to Opp to Cross at 3.)

The Court agrees with the Respondent.

Based on submission, it is unclear to the Court who were the petitioners and how many entities and/or individuals were included as Petitioner. Pursuant to one copy of the deed that was improperly provided for the first time in Petitioner's reply paper, it appears that "The Estate of Melvin Last, by Carol Last, as Executrix, residing at 17034 Newport Club Drive, Boca Raton, Florida 33496" (which was previously defined herein as Entity A-1) transferred its 50% title interest to the Premises to the "Non-Exempt Marital Trust Under Article VI of Melvin Last Revocable Trust U/A/D July 2, 2007, Carol Last, Trustee, 17034 Newport Club Drive, Boca Raton, Florida 33496" (which was previously defined herein as Entity A-2) on May 18, 2012. The other copy of the deed indicated that on April 1, 2021, Entity A-2 and

"Daniel Goldman 7730 south Oriole Blvd, Delray Beach, Florida 33466, as to an undivided fifty percent (50%) interest" (which was previously defined as Individual B-1), transferred the 100% deed interest to the Proposed New Petitioner. Petitioner's caption reads "The Non-Exempt Marital Trust Under [\*8]The Melvin Last Revocable Trust, Carol Last, Trustee and The Daniel Goldman Revocable Trust, DBA Woodrose Realty Co." It appears that petitioners in the instant proceedings were: "The Non-Exempt Marital Trust Under The Melvin Last Revocable Trust" (hereinafter referred to as "**Entity A-4**"), "Carol Last, Trustee" (hereinafter referred to as "**Individual A-5**"), "The Daniel Goldman Revocable Trust" (hereinafter referred to as "**Entity B-5**"), and a doing business entity called "Woodrose Realty Co" (hereinafter referred to as "**Entity Eleven**"). It is unclear if Entity B-5 did business as Entity Eleven, or Entity A-4, Individual A-5 and Entity B-5, collectively, did business as Entity Eleven. In any event, Entity A-4, Individual A-5 and Entity B-5, collectively as the Petitioner, were not the prior deed holder as supported by submission (assuming that the chain of title were to be established, but it was not), which were Entity A-2 and Individual B-1. As discussed above, Entity A-2 and Individual B-1 transferred the title to the Premises to the Proposed New Petitioner on April 1, 2021, but Entity A-2 and Individual B-1 were not named as the Petitioner when the proceeding was commenced 29 days after, on April 30, 2021. In addition, pursuant to the improperly executed Assignment of Lease, Entity A-3, Individual B-2 and Entity B-3 assigned the lease to the Proposed New Petitioner. Even if the Assignment of Lease were properly executed, which was not, it would have lacked legal ground to be effective, as the assignor were Entity A-3, Individual B-2 and Entity B-3, which were not the then title holder (assuming the chain of title were to be established, but it did not), i.e., Entity A-2 and Individual B-1. Furthermore, Petitioner's "Customer Open Balance" listed outstanding balance allegedly owed by the Respondent to "Woodrose Property Co" ("**Entity Twelve**"). Worth noting is that Entity Twelve was not Entity Eleven, which was "Woodrose Realty Co" as included in Petitioner's caption. Finally, pursuant to Petitioner's attorney Sarafan's March 10, 2022 affirmation, "the prior owner of the premises [was] Martini Realty LLC" ("**Entity Thirteen**") (Attorney Aff for Mot at 1). Here, the relationship among Entity Thirteen and the prior twelve entities/individuals was not explained.

As previously discussed, "summary proceeding is a special proceeding governed entirely by statute and that there must be strict compliance with the statutory requirements to give the court jurisdiction" (*MSG Pomp Corp. v. Doe*, 185 AD2d 798, 586 N.Y.S.2d 965 [1st Dept. 1992], citing *Berkeley Assocs. Co. v. Di Nolfi*, 122 AD2d 703, 705, quoting *Goldman Bros. v. Forester*, 62 Misc 2d 812, 814-815; see, *Matter of Blackgold Realty Corp. v. Milne*, 69 NY2d 719, 721; *Giannini v. Stuart*, 6 AD2d 418; also see *Clarke v. Wallace Oil Co., Inc.*,

284 AD2d 492, 727 N.Y.S. 2d 139 [2nd Dept. 2001]). Predicate notices cannot be amended (Stockton v. McElderry, 2022 NY Misc. LEXIS 731, \*5 [2022] citing Singh v. Ramirez, 20 Misc 3d 142[A], 872 N.Y.S.2d 497 [2008]). The branch of Petitioner's Motion to amend notices are denied.

### **C. Petitioner's Motion to Amend Court File and All Papers**

In its Motion, Petitioner moved to amend all pleadings, court files, all papers and notices. Respondent opposed. As discussed above, this Court denies the branch of the Motion to amend the pleadings and the predicate notices. Consequently, this Court denies the remaining branch of the Motion.

### **D. Respondent's Cross Motion to Dismiss**

Although Respondent's cross motion was not properly indexed in the court system, this Court is obligated to address Respondent's cross motion.

In its Cross Motion and Opposition, Respondent prayed an order granting "Respondent summary judgment pursuant to CPLR §3212 on its Third Affirmative Defense dismissing this [\*9]proceeding based on lack of personal jurisdiction due to the improper service of process of the written Rent Demand" (Cross Mot and Opp at 4), claiming that the "purported rent demand and notice of petition and petition was not served on an appropriate individual as defined by the CPLR and RPAPL" (*id.*, at 5). Here, Respondent moved to dismiss the Petition based on improper service.

Pursuant to CPLR 3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; [Rodriguez v. City of New York](#), 31 NY3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; [see Jacobsen v New York City Health and Hosps. Corp.](#), 22 NY3d 824 [2014]; [Brill v City of New York](#), 2 NY3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. ([Vega v. Restani Constr. Corp.](#), 18 NY3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the

non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

Here, Respondent denied proper service of the rent demand, the notice of petition and petition, arguing that Petitioner served the papers on Respondent through a "stranger". Pursuant to Petitioner's affidavit of service sworn to by P. Dankel on April 12, 2021, Petitioner "was unable to serve [Respondent] by personal delivery at [the Premises]" and that "on 4/12/2021 [Petitioner] served the rent demand and notice to tenant with declaration form and attorney list by gaining admittance to said premises and delivering to and leaving a true copy/copies with christina (refused name) general agent a person of suitable age and discretion " who was described as female, white skin, brown hair, age 36-50, height 5'4-5'8 and weight 131-160 lbs. (Dankel Aff, Petition at 10.) Petitioner also mailed a copy of the papers to Respondent on the same day (*id.*). Respondent argued that "there [was] no one named 'Christina' employed at the Premises and no one at the Premises fitting the description set forth in [Dankel Affidavit]" (Cross-Mot. and Opp. at 7) and provided an affidavit dated March 21, 2022 sworn to by S. Zarzoukis, the manager of the Respondent, to support its argument. Respondent also argued that "there [was] no proof of mailing attached to the affidavit of service, and Respondent did not receive the rent demand in the mail" (Zarzoukis Aff at 2). In its Opp to Cross and Reply, Petitioner argued that if the court finds that the service was not proper, a traverse hearing was warranted. Respondent counter argued in its Sur-Reply to Opp to Cross that "traverse hearing would be an exercise in futility" since Petitioner did not name the correct owner in its rent demand (Sur-Reply to Opp to Cross at 2).

It is well established that *prima facie* evidence of proper service is established by process server's affidavit (*Simonds v. Grobman*, 277 AD2d 369; *Wieck v. Halpern*, 255 AD2d 438; *Simmons First Natl. Bank v. Mandracchia*, 248 AD2d 375; *Remington Invs. v. Seiden*, 240 AD2d 647), however, plaintiff's *prima facie* case of service is "rebutted" when a defendant provides an affidavit denying service with detailed facts (*U.S. Bank, N.A. v. Peralta* 142A.D.3d 988; [U.S. Bank, N.A. v. Tauber](#), 140 AD3d 1154, [Matter of MBNA Am. Bank, N.A. v. Novins](#), 123 AD3d 832). As a result, plaintiff is required to establish its proper service and "personal jurisdiction by [\*10] a preponderance of the evidence at a hearing. (*id.*)

In our instant matter, Respondent is a corporation and Petitioner must serve Respondent pursuant to CPLR 311 (not pursuant to CPLR 308, Personal Service Upon a Natural Person, as contented by Petitioner) and RPAPL 735.

CPLR 311 states that "personal service upon a corporation shall be made by delivering the summons to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" (CPLR 311[a][1]). RPAPL 735 (1) (b) mandates a landlord serve a corporate tenant "at the property sought to be recovered, and if the principal office or principal place of business of such corporation is not located on the property sought to be recovered, and if the petitioner shall have written information of the principal office or principal place of business within the state, at the last place as to which petitioner has such information, or if the petitioner shall have no such information but shall have written information of any office or place of business within the state, to any such place as to which the petitioner has such information" (RPAPL 735 [1][b]). RPAPL 735 also states that "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 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. (RPAPL 735[1].) Predicate rent demand shall be served in the same manner as a notice of petition and petition ([Resnick Seaport, LLC v. 199 Roast LLC, 71 Misc 3d 1231\[A\]](#); [Tinker Ltd. Partnership v Berg, 26 Misc 3d 1214\[A\]](#); [CLK/HP One Old Country Rd. LLC v Settlement Sys., Inc., 39 Misc 3d 1230\[A\]](#)).

Based on submission, Petitioner claimed to have served Respondent, by substitute service, the rent demand by delivering the paper to "Christina", however, Respondent denied the existence of "Christina" within its organization, both supported by sworn statements. Petitioner also claimed that it mailed the rent demand to Respondent on the same day, however, Respondent denied receiving the mail, both of which were also supported by affidavits. Here, factual issues exist warranting a traverse hearing on the issue of service. Although "a defective rent demand cannot be amended (*Chinatown Apts. v. Chu Cho Lam*, 51 NY2d 786, 788, 412 N.E.2d 1312, 433 N.Y.S.2d 86, [1980]), here, Respondent moved to dismiss the Petition only based on improper service of rent demand, notice of petition and petition, Respondent's cross motion to dismiss the proceeding pursuant to CPLR 3212 based on improper service is denied to the extent that a traverse hearing is warranted.

## **E. Standing**

In its Cross Motion and Opposition, Respondent raised the issue for the first time that Petitioner was not the proper party to demand the rent when it opposed to Petitioner's motion to amend. It failed to raise such affirmative defense in its Answer. Although Respondent moved to dismiss the Petition in its Cross Motion and Opposition, however, it was only based on the ground of improper service of the rent demand pursuant to CPLR 3212. As such, this Court declines to address standing herein *Sua Sponte*.

## **IV. Decision and Order**

Accordingly, it is

**ORDERED** that Petitioner's motion to amend the pleadings, court file, all papers and notices to substitute 30-52 Steinway, LLC as Petitioner, *nonc pro tunc*, is denied in its entirety; *and it is further*

**ORDERED** that the clerk is directed to index Respondent's Cross Motion and Opposition as motion sequence 2A; *and it is further*

**ORDERED** that Respondent's cross motion for summary judgment seeking an order dismissing the Petition based on improper service of rent demand, notice of petition and petition pursuant to CPLR 3212 is denied; *and it is further*

**ORDERED** that the matter shall be restored to the calendar for a traverse hearing on the issue of proper/improper service of rent demand, notice of petition and petition.

This constitutes the **Decision and Order** of the Court.

Dated: June 28, 2023  
New York City Civil Court

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Honorable Li, J.C.C.

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