2023-06-01

Services for the Underserved v. Mohammed

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Services for the Underserved, Inc. v Mohammed
2023 NY Slip Op 50536(U) [79 Misc 3d 1205(A)]
Decided on June 1, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on June 1, 2023

Civil Court of the City of New York, Bronx County

Services for the Underserved, Inc., a/k/a S:US, Petitioner,

against

"John" Mohammed, Respondents.

L&T Index No.: 300364-2020

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Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE RESPONDENT TO DISMISS THE

PROCEEDING: NYSCEF Documents 12 (Notice of Motion), 13 (Attorney Affirmation in Support), 14 through 25 (Respondent's Exhibits), 26 (Affidavit in Support), 27 (Memorandum of Law in Support) and 30 (Affidavit in Opposition), 31 (Attorney Affirmation in Opposition), 32 through 46 (Petitioner's Exhibits), and 47 (Attorney Affirmation in Reply).

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

BACKGROUND AND PROCEDURAL POSTURE

Services for the Underserved, Inc, a/k/a S:US, the petitioner in this proceeding (petitioner), alleges that "John Mohammed," the respondent in this proceeding (respondent), is either a licensee of the deceased tenant of record or a squatter. (*see* Notice to Vacate at NYSCEF Doc. 17). Although commenced by petition filed September 16, 2020, (see NYSCEF Doc. 1), the matter was delayed by pandemic-era stays. Once the court began resuming normal operation, the matter was set for a virtual "intake" appearance in November 2021, when it appears the respondent informed the court there was a pending ERAP application. Consequently, the matter was placed on the court's ERAP administrative calendar, which is nothing more than a holding [*2]pen for cases until there is a determination on the ERAP application.[FN1] Respondent's counsel filed a notice of appearance on April 18, 2022.

In December 2022, petitioner moved to restore the matter to the calendar. The affidavit in support of that motion notes both that respondent is not entitled to ERAP benefits as a squatter or licensee and that the ERAP application was never actually submitted. (see NYSCEF Doc. 8 at par. 5, 8). That motion was granted by order dated January 17, 2023. (*see* NYSCEF Doc. 11). Respondent filed an answer on the same day which asserts, *inter alia*, that the petition incorrectly states that the premises are exempt from rent stabilization and that service of the petition and notice of petition was complete 411 days prior to the initial return date, running afoul of RPAPL § 733(1), requiring service be complete between 10 and 17 days prior to return date. (*see* answer at NYSCEF Doc. 10).

Respondent now moves for dismissal pursuant CPLR § 3211(a)(7) based on the alleged noncompliance with RPAPL § 741(4) [requiring that a petition state the premise's regulatory status] and pursuant to CPLR § 3211(a)(8) [lack of personal jurisdiction] based on alleged noncompliance with RPAPL § 733(1). Respondent also alleges that petitioner knew his name prior to commencing this case and impermissibly used a pseudonym to identify him in

contravention of CPLR § 1024.

In its opposition, petitioner first argues that the petition and service of it, including filing, complies with the relevant directives in effect at the time it commenced this proceeding. Those directives, according to petitioner, allowed for service of notice of petitions with return dates "To Be Determined" by the court. Petitioner also argues that this type of jurisdictional objection is waived if not timely raised and points out that the answer raising the defense was filed nine months after respondent appeared in this case by his attorney filing a notice of appearance. The delay, petitioner argues, is unacceptable considering that the ERAP application by respondent was never filed.

Petitioner further alleges that the petition correctly states that the premises are not subject to rent-stabilization because as stated in the petition, "the housing accommodation is owned, operated, leased or rented pursuant to governmental funding by an institution operated exclusively for charitable or educational purpose(s) on a non-profit basis" and "because there is no Landlord/Tenant relationship between the Landlord and the Occupant."

Finally, petitioner disputes that it had any prior knowledge of movant's true name and points out that respondent has not produced any independent proof of such prior knowledge.

In reply, respondent argues that petitioner concedes the subject premises are subject to rent stabilization, and dismissal is required, especially where petitioner has not moved to amend the petition. Furthermore, respondent argues that the jurisdictional defense was not waived because the answer was filed the same day the ERAP stay was vacated. Respondent also argues that the CPLR § 3211(e) waiver provision has a summary eviction proceeding exception.

DISCUSSION

Pursuant to RPAPL § 733(1), in a holdover proceeding, the notice of petition and petition must be served at least 10 days and not more than 17 days before the time at which the petition is noticed to be heard. And, pursuant to RPAPL § 735(2), service of the notice of petition and petition, when effected by conspicuous place service, is not complete until proof of service is [*3]filed with the court. (*see 37 West 72nd Street, Inc. v. Frankel*, 78 Misc 3d 637, 639, 183 N.Y.S.3d 275 [Civ. Ct., Bronx County 2023]; *Bronx 2120 Crotona Ave. L.P. v. Gonzalez*, 75 Misc 3d 753, 754, 168 N.Y.S.3d 674 [Civ. Ct., Bronx County 2022]).

If non-compliance with § 733(1) is timely raised, courts in the First Department dismiss

proceedings, citing to *Riverside Syndicate, Inc. v. Saltzman*, (49 AD3d 402, 852 N.Y.S.2d 840 [1st Dept. 2008]). (*see e.g. Bronx 2120 Crotona Ave. L.P. v. Gonzalez*, *supra*; *Matticore Holdings, LLC v. Hawkins*, 76 Misc 3d 511, 172 N.Y.S.3d 585 [Civ. Ct., Bronx County 2022]; *208 W 20th Street LLC v. Blanchard*, 76 Misc 3d 505, 173 N.Y.S.3d 439 [Civ. Ct., New York County, 2022]).

Here, there is no dispute that after substitute service of the petition and notice of petition, the affidavit of service was filed more than 400 days prior to the initial November 2021 return date. Petitioner alleges it was simply following pandemic-era court directives and should not be penalized for doing so. The court need not reach this argument because, for the reasons stated below, the court holds that respondent waived any objection to personal jurisdiction.[FN2]

Notice of Appearance and Waiver of Personal Jurisdiction Defense(s)

When a party appears by a notice of appearance and does not object to the court's jurisdiction over them in an answer or motion, any such defense is waived. (s*ee Urena v. NYNEX, Inc.*, 223 AD2d 442, 443, 637 N.Y.S.2d 49 [1st Dept. 1996] ("An appearance by a defendant is equivalent to personal service of the summons upon it, unless objection to jurisdiction is asserted either in a pre-answer CPLR 3211 motion or in the answer (CPLR 3211 [e])"); *Resolution Trust Corp. v. Beck*, 243 AD2d 307, 307, 1997 NY Slip Op. 08355 [1st Dept. 1997] (service of a notice of appearance was equivalent to personal service of a summons); *U.S. Bank N.A. v. Black*, 209 AD3d 790, 791, 2022 NY Slip Op. 05732 [2d Dept. 2022] ("The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction"); *Bank of America, N.A. v. City of New York Department of Hous. Pres. & Dev.*, 211 AD3d 661, 663, 181 N.Y.S.3d 110 [2d Dept. 2022]]; *U.S. Bank National Association as Trustee for Holders of Specialty Underwriting and Residential Finance Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-BC4 v. Rodriguez*, 201 AD3d 493, 493, 156 N.Y.S.3d 837 [1st Dept. 2022]; *155 Realty LLC v. Mottola*, 48 Misc 3d 133(A), 1, 2015 NY Slip Op. 51069(U) [App. Term, 2d, 11th, & 13th Jud. Dists. 2015] (personal jurisdiction waived in holdover by, among other things, tenant's attorney filing of a notice of appearance)).

In other words, service or filing of a notice of appearance is the equivalent of consenting

to the court's jurisdiction over the respondent.

Respondent, however, argues that the CPLR § 3211(e) waiver provision does not apply to summary proceedings. CPLR § 3211(e) applies to all cases except "any proceeding to collect a debt arising out of a consumer credit transaction where a consumer is a defendant *or under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law*." (emphasis added). This section of the CPLR requires that a motion to dismiss on personal jurisdiction grounds be made within sixty days of an answer.

Although summary proceedings under RPAPL § 711(2) (nonpayment proceedings) and § 711(1) (holdovers after expiration of term) are exempted, § 3211(e) applies to all *other* summary proceedings. (*see Eaton v. New York City Conciliation & Appeals Bd.*, 56 NY2d 340, 345, 437 N.E.2d 1115 [1982] (where "statute describes the particular situations to which it is to apply an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded") [internal citations omitted]; *People v. Heil*, 28 Misc 3d 215, 221, 900 N.Y.S.2d 624 [City Ct., Rye 2010] ("Where the Legislature has listed specific items in a statute, the general rule is that the express mention of one thing implies the exclusion of other similar things."); *Morales v. County of Nassau*, 94 NY2d 218, 224, 724 N.E.2d 756 [1999]).

This proceeding was commenced under RPAPL § 713 and *would be* clearly subject to the "60-day rule." (*see Riverton Associates v. Harvey*, 1 Misc 3d 822, 823, 772 N.Y.S2d 199 [Civ. Ct., New York County., 2003]; *see also see also Stein v. Jeff's Express, Inc.*, 37 Misc 3d 94, 955 N.Y.S.2d 713 [App Term, 2d Dept. 2012] (acknowledging that § 3211(e) applies to summary proceedings under RPAPL § 713 (3) and (7)).

That being said, respondent did not fun afoul of the 60-day rule because the clock only starts running upon filing of an answer, (*see e.g. Brafman & Assoc., P.C. v. Balkany*, 190 AD3d 453, 453, 139 N.Y.S.3d 199 [1st Dept. 2021] ("60-day clock for a motion to dismiss on grounds of improper service began to run from the date of his amended answer."), and here the motion was made well within 60 days of the answer. (*see also 650 Victory Boulevard LLD v. Monteleone*, 78 Misc 3d 1217(A), 2, 2023 NY Slip Op. 50251(U) [Civ. Ct., Richmond County 2023]).

Furthermore, since respondent's jurisdictional objection is not based on improper service, but on a technical filing requirement, the 60-day rule does not apply. (s*ee Goldenberg v Westchester County Healthcare Corp.*, 16 NY3d 323, 327, 946 N.E.2d 717 [2011]).

Still, as stated above, personal jurisdiction is waived if it is not asserted when the notice of appearance is filed. It is fair to ask, of course, if the mere act of filing a notice of appearance waives personal jurisdiction in every instance where a motion or answer raising the defense is not concurrently filed. The court believes it does not. It is common practice in Housing Court for an attorney to file a notice of appearance [sometimes at the behest of the court] when appearing for the first time and the case gets adjourned, usually because the attorney has recently been retained. Under those circumstances, filing a notice of appearance, alone, may not act to waive personal jurisdiction. Here, however, the delay between the notice of appearance (April 18, 2022) and the answer (January 17, 2023) was nine months and, as such, personal jurisdiction objections and any defense based on noncompliance with RPAPL § 733(1) were waived.

There Was No ERAP Stay in Effect

Respondent argues that there was no delay after the notice of appearance because an answer was filed the same day the ERAP stay was vacated.

While respondent may have benefited from this case being off calendar, upon closer [*4]inspection, it is clear there was no stay in effect at any time. First, the mere act of filing an ERAP application does not stay a case if the applicant is not a tenant or an occupant obligated to pay rent. (*see Bank of NY Trust Co. v. Courtney*, — N.Y.S.3d —, 2023 NY Slip Op. 23075, 1 [App. Term, 1st Dept. 2023]). Despite the courts' prior general practice of placing cases on an administrative calendar pending ERAP determination at the mention of an application,[FN3] the *Courtney* court unequivocally states, "[h]ad the Legislature intended to extend the ERAP stay to any individual who files an application, regardless of status, it could have chosen to do so through appropriately worded legislation." (*id.* at 2).[FN4]

There is no allegation that respondent is a tenant, or an occupant obligated to pay rent. (*see* answer at NYSCEF Doc. 10). Second, even if respondent was a qualifying individual, he never completed the ERAP application, and it was noted as "Application Not Submitted." (*see* NYSCEF Doc. 9). It strains credulity to hold that merely *attempting* to file an application would trigger a stay since there is nothing awaiting determination.[FN5]

Furthermore, the ERAP statute has no bar on a respondent filing an answer during the stay. The stay on "proceedings" pending an eligibility determination was enacted to restrict evictions. (*see* Part BB, Subpart A, § 8 of Chapter 56 of the Laws of 2021 (the "E.R.A.P.

Statute") as amended by Part A, § 4 of Chapter 417 of the Laws of 2021 (the "Act")). Section 8's subheading is "restrictions on eviction" and the overall goal of ERAP was to stem evictions and the resulting damage caused to "the state's economic recovery, and the deleterious social and public health effects of homelessness and housing stability." (*43-25 Hunter Affordable Lessee, L.L.C. v. Johnson*, 78 Misc 3d 1219(A), 2, 2023 NY Slip Op. 50264(U) [Civ. Ct., Queens County 2023] *quoting* L. 2021, c. 417, § 2); *see also Elliot Place Properties v. Jaquez*, 77 Misc 3d 1230(A), 4, 2023 NY Slip Op. 50067(U) [Civ. Ct., Bronx County 2023] (legislative intent of ERAP statute is to "aid applicants negatively impacted by COVID-19 by providing a temporary stay on evictions")). An answer does nothing to advance a case toward an eviction and at least one court allowed an answer to be filed during the stay. (*see Papandrea-Zavaglia v. Arroyave*, 75 Misc 3d 541, 542, 168 N.Y.S.3d 789 [Civ. Ct., Kings County 2022]). This court observes that well-crafted answers have, on occasion, encouraged a petitioner or two to withdraw their case.

There being no stay, respondent was obligated to raise his personal jurisdiction objection when the notice of appearance was filed [in an answer or a motion]. Where a defendant makes an appearance without having been served and without raising the objection, "he becomes a volunteer" and is subject to *in personam* jurisdiction. (*Colbert v. International Sec. Bureau*, 79 AD2d 448, 463, 437 N.Y.S.2d 360, [2nd Dept. 1981], *lv. denied* 53 NY2d 608, 425 N.E.2d 899); *see also Unifund CCR Partners v. Aviles*, 58 Misc 3d 126(A), 1 [App. Term, 1st Dept. 2017]).

Although the time to answer holdover petitions is generally extended to subsequent appearances, (*see City of New York v. Candelario*, 156 Misc 2d 330 [App. Term, 2nd & 11th Jud. Dists. 1993] [an adjournment for the tenant to obtain counsel in effect extends the tenant's time to answer], *affd in part and revd in part on other grounds* 223 AD2d 617 [1996]),**[FN6]** this does not mean that certain defenses are not waived by delay. (*see* CPLR 3211(e)).

To this point, courts routinely find that when a party waits to raise a personal jurisdiction defense, after having filed a notice of appearance, such defense is waived. (*see JP Morgan Chase Bank v. Jacobowitz*, 176 AD3d 1191, 1192, 111 N.Y.S.3d 391 [2nd Dept. 2019] (personal jurisdiction waived when defendant waited 10 months after the notice of appearance to make motion to dismiss); *Capital One Bank, N.A. v. Faracco*, 149 AD3d 590, 2017 NY Slip Op. 03062 [1st Dept. 2017] (jurisdiction defense waived where motion made 4 months after notice of appearance); *U.S. Rof III Legal Title Trust 2015-1 v. John*, 189 AD3d 1645, 1649, 140 N.Y.S.3d 59 [2nd Dept. 2020] (8 month delay between notice of appearance

and motion to dismiss for lack of personal jurisdiction waived the defense)).

The court notes that respondent asserts that the failure to comply with RPAPL § 733(1) deprives the court of personal jurisdiction. As such, respondent's argument and petitioner's waiver arguments are assessed under that lens. (*see generally, Rosenblatt v St. George Health and Racquetball Associates, LLC*, 119 AD3d 45, 54, 984 N.Y.S.2d 401 [2nd Dept. 2014] *quoting Misicki v Caradonna*, 12 NY3d 511, 519, 909 N.E.2d 1213 [2009] ("[w]e are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made").

However, the court reiterates that the failure to comply with RPAPL § 733(1) does not deprive this court of subject matter jurisdiction, notwithstanding *Riverside Syndicate, Inc. v. Saltzman's* having held to the contrary. (*see* 49 AD3d 402, 402, *citing Berkely Assoc. Co v Di Nolfi*, 122 AD2d 703, 705-706, 505 N.Y.S.2d 630 [1st Dept. 1986] ("Because Di Nolfi has a meritorious procedural defense to the eviction, the motion to vacate the default judgment is granted and the petition dismissed for lack of personal and *subject matter jurisdiction* due to noncompliance with RPAPL 733.") [emphasis added]).[FN7]

"Subject matter jurisdiction is conferred by statute and is not impacted by defects in a predicate notice itself or in the service thereof." (*541 Court Street, LLC v. Zheng*, 72 Misc 3d 128(A), 1 [App. Term, 2nd Dept. 2nd, 11th & 13th Jud. Dists. 2021], *citing Rivercross Tenants' Corp. v. Tsao*, 2 Misc 3d 137(A) [App. Term, 1st Dept. 2004] & *170 W. 85th St. Tenant's Assn. v. Cruz*, 173 AD2d 338 [1st Dept. 1991]). The Court of Appeals has repeatedly cautioned the lower courts to avoid implicating subject matter jurisdiction when there are technical *filing* defects. (*see Ballard v HSBC Bank USA*, 6 NY3d 658, 663, 848 N.E.2d 1292 [2006] ("We have routinely held that technical defects in filings do not fall under the umbrella of subject matter jurisdiction when they do not undermine the constitutional or statutory basis to hear a case.") *citing Fry v. Village of Tarrytown*, 89 NY2d 714, 718—719, 680 N.E.2d 578 [1997]).

The lower courts have similarly rejected the idea that filing defects implicate subject matter jurisdiction. (*see Dixon v. County of Albany*, 192 AD3d 1428, n.4, 145 N.Y.S.3d 639 [3rd Dept. 2021] (failure to timely file an affidavit of service relative to the eviction notice and petition itself is not a jurisdictional defect)).[FN8]

Since subject matter jurisdiction is not implicated, filing defects like the one allegedly made by the petitioner only impact the court's jurisdiction over the respondent and are

waivable. (*see Harris v. Niagara Falls Bd. of Educ.*, 6 NY3d 155, 159, 144 N.E.2d 753 [2006] ("A court should dismiss an action or proceeding only where the plaintiff or petitioner does not fulfill all the filing requirements and the defendant or respondent timely objects."); *Goldenberger v Westchester County Healthcare Corp.*, 16 NY3d at 327).

This court recognizes the perceived harshness in finding waiver where the delay in answering may have resulted from the [mistaken] belief there was a stay in effect. However, as the Court of Appeals cautions in *Ballard v HSBC Bank USA*, "respondents are warned that if they want to capitalize on technicalities they must mind their own procedures." (6 NY3d at 159, *quoting* Siegel, NY Prac. § 63, at 94 [4th ed.]).

Failure to State Regulatory Status

As to the alleged noncompliance with RPAPL § 741(4) [requiring that a petition state the [*5]premises regulatory status], this type of error, under the circumstances, does not require dismissal. Failure to accurately state the regulatory status in a petition is a defect that "may be *overlooked* where no prejudice results to the tenant." (*Fortune Society v. Brown*, 68 Misc 3d 956, 959, 128 N.Y.S.3d 788 [Civ. Ct., Bronx County 2020], *quoting PCMH Crotona, L.P. v. Taylor*, 57 Misc 3d 1212[A], 2017 NY Slip Op. 51401[U] [Civ. Ct., Bronx County 2017]).

Here, respondent is represented by counsel and is aware of his rights and defenses. He has neither alleged nor established that the alleged misstatement in the petition prejudices him.[FN9] Consequently, such misstatements "provide no basis for dismissal," (*Paikoff v. Harris*, 185 Misc 2d 372, 376, 713 N.Y.S.2d 109 [App. Term, 2nd Dept. 1999]), and the court may even properly "deem the petition amended to state that the premises is subject to rent stabilization." (*17th Holding LLC v. Rivera*, 195 Misc 2d 531, 532, 758 N.Y.S.2d 758 [App. Term, 2nd Dept. 2002]; *see also 37-20 104th Street v. Sanchez*, 76 Misc 3d 23, 25-26, 173 N.Y.S.3d 826 [App. Term, 2nd, 11th, & 13th Jud. Dists. 2022] (no prejudice where tenant prepared to litigate issues and, as such, dismissal not warranted for omission); *Shahid v. Ansari*, 2 Misc 3d 1, 3, 770 N.Y.S2d 566 [App. Term, 2nd & 11th Jud. Dists. 2003], *citing* CPLR §3026 ("Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."); *Kennedy v. New York State Office for People With Developmental Disabilities*, 154 AD3d 1346, 1347, 62 N.Y.S.3d 253 [4th Dept 2017] ("the purpose behind amending CPLR 2001 was "to allow courts to correct *or disregard* technical defects, occurring at the commencement of an action [or proceeding], that do not prejudice the opposing party and to fully foreclose dismissal of actions for technical, non-prejudicial

defects" [citations omitted]; *see also Ruffin v. Lion Corp.*, 15 NY3d 578, 915 N.Y.S.2d 204 [2010]).[FN10]

Consequently, if the petition contains a misstatement as to the rent regulatory status of the subject apartment, the court chooses to disregard it since there is no prejudice to the respondent.

Failure to Properly Name Respondent

As to the CPLR § 1024 basis for dismissal, the law is clear that an unknown party may be named as John Doe or Jane Doe. (*see* CPLR § 1024 ["A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known."]; *Mia Terra Realty Corp. v Sloan*, 57 Misc 3d 141[A], *3, 68 N.Y.S.3d 379, [App Term, 1st Dept. 2017] ["landlord was unaware of the identity of undertenant when it commenced the proceeding and obtained jurisdiction over him by naming him as 'John Doe'."] [internal citations omitted]). Dismissal is not appropriate here as respondent's reply affirmation concedes [*6]that, at best, "whether petitioner had notice of respondent's full first name and last name appears to be an issue of fact for trial." (*see* NYSCEF Doc. 47 at par. 23). However, the description of "John" Mohammed sufficiently apprised respondent that he was the intended respondent. (*see Thas v. Dayrich Trading, Inc.*, 78 AD3d 1163, 1165, 913 N.Y.S.2d 269 [2nd Dept. 2010]). Furthermore, respondent does not allege any prejudice from the designation. In fact, he concedes that he knew the designation referred to him. (*see* NYSCEF Doc. 26 at par. 20). Under these circumstances, the court may properly deem the pleadings amended to reflect the respondent's true name. (*see* CPLR § 1024 ["If the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed accordingly."].

Summary Judgment in Petitioner's Favor

Finally, the court cannot grant summary judgment to petitioner. Although there is no basis for dismissal, petitioner has not established its entitlement to a judgment of possession.

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to

establish the existence of material issues of fact which require a trial of the action. (*see Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503, 942 N.Y.S.2d 13 [2012]). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party. (*see Sosa v. 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 N.Y.S.2d 589 [1st Dept 2012]).

Critically, any proof submitted in support of summary judgment must be in evidentiary form. (*see Zuckerman v City of New York*, 49 NY2d 557, 562, 404 N.E.2d 718 [1980]). Respondent correctly points out that the alleged lease between the building's owner and petitioner and the license agreement between petitioner and the deceased tenant of record are not properly authenticated. (*see generally Tuscan Realty Corp. v. O'Neill*, 189 Misc 2d 349, 350, 731 N.Y.S.2d 830 [App. Term, 2nd Dept. 2001] (signature on lease authenticated by testimony that witness is familiar with it); *Sussmann v. MacKewan*, 148 N.Y.S. 152, 153 [App. Term, 1st Dept. 1914]; *Jamaica Seven LLC v. Douglas*, 73 Misc 3d 659, 661, 155 N.Y.S.3d 528 [Civ. Ct., Queens County 2021]). Petitioner also does not lay a foundation that any of its offered documents are its business records. (*see Marina Towers Associates, L.P. v. Yu*, 177 AD3d 469, 469, 112, N.Y.S.3d 721 [1st Dept. 2019] (affidavit explaining that documents were kept in the ordinary course of business and necessary for the business sufficient to establish them as business records); *see also Tuscan Realty Corp. v. O'Neill*, 189 Misc 2d at 350).

Furthermore, respondent argues he should be given an opportunity to file an amended answer as succession might be possible under the House Rules Rider (par. I) executed by the deceased tenant of record. (*see* NYSCEF Doc. 34). Respondent alleges he only learned of this document, and therefore the possibility of "contractual succession," when petitioner included it in its filings. Given that it is petitioner that raises the possibility of succession, respondent ought to be allowed to seek leave to file an amended answer to add the defense.

CONCLUSION

Based on the foregoing, respondent's motion to dismiss this proceeding is denied in all respects. Summary judgment in petitioner's favor is denied.

It is ordered that all pleadings are deemed amended pursuant to CPLR § 1024 to reflect respondent's true name, Mohammad Osman.

The parties are directed to appear for a conference on July 14, 2023 at 9:30. Any motion

is to be filed no later than June 22, 2023. Opposition to be filed no later than July 6, 2023. Reply is to be filed no later than July 13, 2023.

This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: June 1, 2023
Bronx, New York
HON. SHORAB IBRAHIM
JUDGE, HOUSING PART J

Footnotes

Footnote 1: In practice, some cases were placed on the "administrative calendar" where there was no ERAP application pending either because a determination had already been made or the application was not submitted.

Footnote 2: Were the court to consider the defense on its merits, it would be guided by the cogent analysis of Judge Shahid in *Hamilton v Carter*, where he finds that "dismissals of proceedings where the notice of petition was assigned by the clerk's office as 'to be determined' would" be "unjust." (77 Misc 3d 525, 531, 178 N.Y.S.3d 894 [Civ. Ct., Bronx County 2022]). While the *Hamilton* decision does not address the RPAPL § 733(1) issue, its analysis of pandemic-era guidance given to petitioners and whether defects ought to be forgiven by CPLR § 2001 is compelling. (*but see 37 West 72nd Street, Inc. v. Frankel*, 78 Misc 3d at 645 ("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.")).

Footnote 3:(*see EQR-Hudson Crossing, LLC v. Magana*, 75 Misc 3d 979, 982, 170 N.Y.S.3d 837 [Civ. Ct., New York County 2022] ("As an application for ERAP funds has the effect of staying 'all proceedings pending a determination of eligibility,' this proceeding was administratively stayed by the court upon receiving notice of the application."), *citing* Admin Order of Chief Admin Judge of Cts AO/34/22.).

Footnote 4: In *37 West 72nd Street, Inc. v. Frankel*, *supra*, the court found that this type of defense (failure to comply with RPAPL 733(1)) could be waived but had not because the respondent "immediately raised this jurisdictional issue when the proceeding was no longer subject to a statutory stay."

Footnote 5: Respondent's counsel does not make this argument, although she repeatedly refers to there being a stay in effect.

Footnote 6: The tenant in *Candelario* first appeared pro-se and sought time to obtain counsel. That kind of appearance, the court held, should not serve to waive a personal jurisdiction defense. (*see also In-Towne Shopping Ctrs Co. v. Demottie*, 17 Misc 3d 134(A), 2007 NY Slip Op. 52200(U) [App. Term, 9th & 10th Jud. Dists. 2007]). Similarly, provided a respondent has not already waived personal jurisdiction, an attorney's appearance solely to obtain an adjournment because they were recently retained should not waive any personal jurisdiction.

Footnote 7:*Saltzman* also cites to *MSG Pomp Corp. v. Doe*, (185 AD2d 798, 586 N.Y.S.2d 965 [1st Dept. 1992]). *MSG Pomp.*, also citing to *DiNolfi*, held that summary proceedings are governed entirely by statute and there must be strict compliance with the statutory requirements to give the court jurisdiction. This concept of "strict compliance" survives in *Saltzman* [even if the understanding of what gives a court "jurisdiction" has evolved], but has otherwise been watered down, even in the First Department, with multiple holdings that it is "deliberate" misrepresentations that should lead to dismissal, as a matter of equity. (*see 546 West 156th Street HDFC v. Smalls*, 43 AD3d 7, 11 [1st Dept. 2007]; *631 Edgecombe LP v. Fajardo*, 39 Misc 3d 143(A), 1 [App. Term, 1st Dept. 2013]; *Hughes v Lenox Hill Hosp.*, 226 AD2d 4 [1st Dept. 1996] (citing to *MSG Pomp* for the proposition that strict construction is a matter of equity); *190 Riverside Drive L.L.C. v. Nosei*, 185 Misc 2d 696, 697 [App. Term, 1st Dept. 2000] (only in circumstances where such a notice contains substantial and prejudicial misstatements will it be subject to "strict construction as a matter of equity")). *Nosei* cites to *Hughes*, which cites to *MSG Pomp*. (*see also Coalition Houses L.P. v. Bonano*, 12 Misc 3d 146(A) [App. Term, 1st Dept. 2006] *citing Hughes* (Tenant stated no basis why the petition should be subject to strict construction as a matter of equity)). Of course, numerous courts in this Department have also employed a less than "strict" analysis for many defects, omissions, and misstatements in predicate notices and petitions. However, the Appellate Term, First Department's only months ago reiterated that *Saltzman* remains in good standing. (*see 125 East 50th Street Co., Lessee, LLC v. Credo International Inc.*, 75 Misc 3d 134(A) [App Term, 1st Dept. 2022] *lv denied* 2022 NY Slip Op. 73253(U) [1st Dept. 2022]). MSG Pomp. also continues to be cited to regularly. (*see e.g. Carnegie Management, Inc. v. Johnson*, 2022 WL 17716511, 3 [Civ. Ct., Kings County 2022]).

Footnote 8: In the other judicial departments, this type of filing defect is amendable or even disregarded. (*see Siedlecki v. Doscher*, 33 Misc 3d 18, 20, 931 N.Y.S.2d 203 [App. Term, 2nd, 11th, & 13th Jud. Dists. 2011]). *Siedlecki* notes that the Appellate Division, Second Department "has rejected the 'strict compliance' approach to jurisdiction in summary proceedings, and has stated that summary proceedings are to be treated like other civil actions." citing *Lanz v. Lifrieri*, 104 AD2d 400, 478 N.Y.S.2d 722 [1984] and *Birchwood Towers # 2 Assoc. v. Schwartz*, 98 AD2d 699, 469 N.Y.S.2d 94 [1983].

Footnote 9: Respondent's affidavit in support of the motion does not address this issue. (*see* NYSCEF Doc. 26). Respondent cites to *MSG Pomp.* in the Memorandum of Law in support of dismissal because of the alleged regulatory misstatement. The court believes that *MSG Pomp.* is limited to its facts. (*see* footnote 7, above; *but see 2515 LLC v Bencosme*, 77 Misc 3d 1229(A), 3, 2023 NY Slip Op. 50063(U) [Civ. Ct., New York County 2023] ("In cases that have survived motions to dismiss for failure to state a cause of action, the petitioners

either moved or cross-moved to amend the petitions to address a potential defect in the manner in which the rent regulatory status was pleaded.")).

Footnote 10:CPLR § 2001 is applicable to special proceedings. (*see* CPLR § 103); *Great Jones St. Realty Corp. v. Chimsanthia*, 67 Misc 3d 136(A), 1 [App. Term, 1st Dept. 2020]; *Bleinheim LLC v. Il Posto LLC*, 14 Misc 3d 735, 738, 827 N.Y.S.2d 620 [Civ. Ct., New York County 2006]).

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