

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

[All Decisions](#)

[Housing Court Decisions Project](#)

2021-03-31

PIMOR ASSOCIATES v. DELVALLE

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"PIMOR ASSOCIATES v. DELVALLE" (2021). *All Decisions*. 1123.
https://ir.lawnet.fordham.edu/housing_court_all/1123

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

PIMOR ASSOCIATES,
Petitioner-Landlord,

Motion Cal. # ____ Motion Seq. # ____

DECISION/ORDER

-against-

Recitation, as required by CPLR §2219(a), of the
Papers considered in the review, Motion:

CASSIE DELVALLE,
Respondent-Tenant,
-and-

Papers Numbered

Notice of Motion..... 1 -2 & exhibits
Cross-motion and Affirm...3-5 & exhibits A-D
Replying Affidavits.....

"JOHN DOE" AND "JANE DOE"
Respondent-Undertenants,

-----X

HON. MARIA RESSOS, J.H.C.

Petitioner moves herein to amend the notice of petition pursuant to CPLR §§ 3025(b) & 2004. Respondent opposes the motion and cross-moves to dismiss the proceeding for lack of personal jurisdiction pursuant to CPLR §3211(8) and for leave to interpose the proposed answer annexed to the cross-motion.

Petitioner attempted to initiate this nuisance holdover proceeding on or about August 12, 2020 by sending documents to the court via FEDEX. Petitioner's attorney alleges that enclosed in the FEDEX envelope was the notice of petition, petition with a COVID-19 affirmation, affirmation of service for the termination notice, complaint by neighboring tenants, filing fee, post card with stamp and self-addressed stamped envelope for the return of the notice of petition which he expected to be returned to him signed with an assigned court date, time and place with housing part. (See letter from Philip Orner, Esq. dated August 12, 2020) However, Petitioner claims that the notice of petition was never sent back by the court and therefore, Petitioner did not have a copy of the notice of petition to serve on Respondent. The notice of petition is missing from the court file but the petition is contained therein and it is stamped with the index number.

On December 28, 2020, Governor Cuomo signed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 herein after ("CEEFPA"). This provision stayed all pending RPAPL article 7 eviction proceedings filed through January 28, 2021, for sixty days and provided for a further stay until at least May 1, 2021 in any case where a respondent is adversely impacted by COVID-19, as established through submission of a Hardship Declaration. However, CEEFPA carved out an exception for cases where the tenant is "persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others." As the termination notice in this case alleged that the respondent was creating a nuisance in the premises, the court scheduled a conference for February 25, 2021. During the conference, Petitioner emailed a copy of the missing notice of petition to the court and requested that the Hon. Clinton Guthrie sign it and place it in the file. Judge Guthrie denied this request and wrote on the papers, "No indication in court file that original notice of petition was filed. Also notice contains misstatements of laws under amendment to RPAPL in 2019 (HSTPA) Must seek any relief with regard to notice of motion by motion (sic)." (Notice of Petition-declined). The case was then adjourned to March 15, 2021 for motion practice. At the time of the original conference, February 25, 2021, a notice of

petition had not been accepted by the court and neither the notice of petition or petition had been served on the respondent.

On February 27, 2021 before seeking leave of court to amend the notice of petition and/or recreate the file as instructed, Petitioner's attorney unilaterally filled in the blank spaces on the notice of petition that Judge Guthrie declined to sign on February 25, 2021. Either Petitioner or its attorney made a change to line four, paragraph one on page two of the notice of petition by crossing out the word "five" and replacing it with "14". Additionally, petitioner's attorney seems to have either signed or doodled on the signature line of the copy of the notice of petition, which is reserved for a date stamp and signature of the clerk of the Civil Court of the City of New York. Petitioner claims it then proceeded to personally serve that rejected notice of petition on the respondent on February 27, 2021. On March 1, 2021, Petitioner filed the instant notice of motion seeking to amend the notice of petition pursuant to CPLR §3025(b).

CPLR§ 3025 (b) provides in pertinent that a party "may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties...". McKinneys CPLR § 3025 (B). It is well settled that leave to amend shall be freely granted in the absence of unfair surprise or significant prejudice to the opposing party. *Edenwald Contracting Co. v. New York*, 60 NY2d 957 (1983). However, leave to amend should not be granted where the movant has failed to comply with the service requirements of the RPAPL. 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." McKinneys N.Y. Real Prop. Acts Law § 733. In order for the court to obtain personal jurisdiction over the respondent proper service of process must be effectuated on the respondent. Pursuant to RPAPL§ 713, a holdover proceeding is commenced by service of the petition and notice of petition. In this case those papers were served after the case was noticed to be heard. The fact that a respondent has actual notice of the proceeding does not confer jurisdiction upon the court. *City of New York v. Coelho*, 6/30/93 N.Y. L.J. 23, col. 4 (Civ. Ct. Bronx Co.) The court cannot obtain personal jurisdiction over the respondent if the respondent is not served properly. Failure to serve the respondent in accordance with RPAPL §733(1) is a fatal defect which cannot be cured by simply amending the pleadings. See *Berkeley Associates Co. v. Di Nolfi*, 505 N.Y.S. 2d 630 (1st. Dep't 1986)

Petitioner essentially admitted to failing to satisfy the service requirement of RPAPL §733(1) as is outlined in paragraphs 8-9 of its affirmation in support of the motion. The case was noticed to be heard on February 25, 2021, the same day Judge Guthrie declined to sign it, by statute it had to be served between ten and seventeen days prior to February 25, 2021 but it was not. In fact, it was rejected. Although Petitioner first filed the proceeding August 12, 2020 it was allegedly served on the respondent on February 27, 2021, two days after it was first noticed to be heard. (Respondent claims she never got the papers served by the petitioner). Nevertheless, it appears she came to court and was offered representation by Queens Legal Services. However, this does not obviate the need for proper service, without which this Court does not have jurisdiction over Respondent unless she waives it.

We are in the midst of a pandemic and court procedure is changing frequently to meet the demands of the current climate. It is possible that Petitioner never put the notice of petition in the envelop it sent to the court, it is also possible that it was lost in the court. Regardless, rather than withdrawing and recommencing the case, Petitioner took the unorthodox step of waiting until the day the proceeding is first noticed to be heard to try to amend a notice that had never been served upon the respondent and was not part of the court file. In any event, the termination notice which forms the basis of this proceeding appears to be defective (the notice fails to cite the specific section of the rent stabilization code that the respondent allegedly violated and fails to

list the specific dates and times the alleged conduct occurred) so even if Petitioner had been allowed to amend the notice of petition and proceed, the case would have ultimately been dismissed based on the defective termination notice which is not subject to amendment. See *Chinatown Apts v. Chu Cho Lam*, 51 NY 2d 786 (1980)

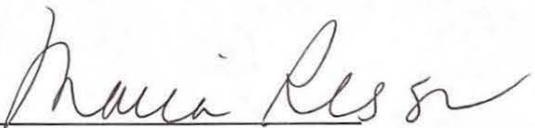
Respondent cross-moves to dismiss the proceeding for lack of personal jurisdiction. For the reasons already discussed above, this court lacks personal jurisdiction over the respondent based upon Petitioner's failure to comply with RPAPL§ 733(1).

Accordingly, Petitioner's motion to amend the notice of petition is denied and Respondent's cross-motion to dismiss the proceeding is granted but the branch of the motion seeking leave to interpose an answer is denied as moot. The proceeding is dismissed without prejudice.

This Constitutes the decision and order of the Court. Respondent shall serve a copy of this order with notice of entry on Petitioner within ten (10) days.

The Court is emailing a copy of this decision/order to the parties' attorneys.

Dated: Queens, NY
March 31, 2021



Maria Ressos, JHC

Petitioner's Attorney
Felipe ("Philip") Orner, Esq.
72-29 137th Street
Flushing, NY 11367
Felilaw@aol.com

Respondent's Attorney
Mathew Reichert, Esq.
Queens Legal Services
89-00 Sutphin Blvd.
Jamaica, NY 11435
mxreichert@lsnyc.org