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400 Fort Washington LLC v. Baeza

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Petitioner opposes and cross-moves for an order striking respondent's first and second affirmative defenses and directing respondent to pay use and occupancy *pendente lite*. Petitioner argues that the personal jurisdictional defense was not properly interposed because the answer is not verified and thus the defense is waived.

RPAPL § 733(1) titled "Time of Service" provides in relevant part 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." The First Department appellate authority mandates strict compliance with statutory requirements in commencing a summary proceeding to confer jurisdiction to the court. *Riverside Syndicate, Inc. v. Saltzman*, 49 A.D.3d 402 (1st Dept. 2008).

An answer may be verified by an attorney. *See generally* CPLR § 3020(d)(3). However, if an answer is not properly verified by an attorney, the defectively verified pleading may be treated as a nullity provided notice objecting to the insufficient verification is made with due diligence to the adverse party. CPLR § 3022. Due diligence has been defined as within 15 days and immediately or within 24 hours. *See Rozz v. Law Offs. of Saul Kobrick, P.C.*, 134 A.D.3d 920, 921-922 (2d Dept. 2015); *Knoll Manor Associates of NY v. Goldstein*, 73 Misc.3d 138(A) (AT 2 2021). If an objection is not made with due diligence, it is deemed waived. *Rosenshein v. Ernstoff*, 177 A.D.2d 686 (1st Dept. 1991).

Here, the affidavit of service of the notice of petition and petition was filed on April 2, 2021. The parties' first court appearance was on June 15, 2022. The notice of petition and petition was not served within the requisite notice period in violation of RPAPL § 733(1). In respondent's attorney-verified answer dated October 5, 2022, the second defense raises lack of personal jurisdiction defense due to this defect. Petitioner first raised the issue of an improperly verified answer in its opposition papers on April 13, 2023. Petitioner's objection to an insufficient verification six months later was not made with due diligence and is thus waived. Therefore, respondent's defense that petitioner failed to comply with RPAPL § 733(1) stands and mandates dismissal of the petition.

Accordingly, respondent's motion to dismiss is granted and petitioner's cross motion is denied as moot. The petition is dismissed pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction.

This constitutes the decision and order of the court.

Dated: August 9, 2023
New York, New York



HON. VANESSA FANG, J.H.C.