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WILMINGTON SAVINGS FUND SOCIETY, FSB v. GORDON

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

-----X L&T Index # 311409/2023

WILMINGTON SAVINGS FUND SOCIETY, FSB,
NOT INFIDIVIDALLY BUT SOLELY AS TRUSTEE OF
NATIONSTAR HECM ACQUISITION TRUST 2020-1,
Petitioner-Owner,

-against-

DECISION & ORDER

MARTINA I. GORDON, CARLOS GORDON,
ASHLEY GORDON; JOHN DOE, JANE DOE AND
ANY OTHER OCCUPANTS OF THE PREMISES and
unknown to the Plaintiff, the persons or parties intended
being the tenants, occupants, persons or parties, if any,
having or claiming an interest in or lien upon the
mortgaged premises described in the Complaint,

Respondent-Occupants.

Address: 678 E 158th Street, Bronx, New York 10456

-----X

Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR Rule 2219(a), of the papers considered in the review of
Respondent Martina I. Gordon’s motion to dismiss:

<u>Papers</u>	<u>NYSCEF Doc. #</u>
Notice of Motion	28
Affirmation and Affidavit in Support	29, 30
Exhibits A-B in Support	31-32
Affirmation in Opposition	33
Affirmation in Reply	34
Affidavits of Service filed April 7, 2023	13, 19
Affidavit of Service filed July 5, 2023	25

Upon the foregoing papers, the Decision and Order on Respondent Martina I. Gordon’s
motion to dismiss is as follows.

BACKGROUND & PROCEDURAL HISTORY

This is a licensee eviction proceeding against the former owner and occupants of 678 East
158th Street, Bronx, New York following a foreclosure sale. The petition references the following

annexed documents: Referee's deed and quitclaim deed (Exhibit A); 10-day notice to vacate with alternative 90-Day notice (Exhibit B); and affidavits of service of the deeds and predicate notice, six alleging affixation to the door of the premises on February 3, 2023 after four attempts at personal delivery on four different dates at various times and six alleging regular and certified mailings on February 3, 2023 (Exhibit C).

Upon the filing of the petition, the court issued a notice calendaring the proceeding to be heard in Intake Part 1 on April 21, 2023. On April 7, 2023 Petitioner filed twelve affidavits of service: six allege service on each Respondent of unspecified documents by affixation to the door of the premises on April 5, 2023 after two prior attempts at personal delivery on two different dates, and a third attempt at personal delivery one minute after the affixation; six allege regular and certified mailings to each Respondent of a certified referee's deed, holdover notice of petition and holdover petition on April 5, 2023. On July 5, 2023 Petitioner filed six amended affidavits of service alleging service of a certified referee's deed, holdover notice of petition and holdover petition in the same manner as was stated in the affidavits of service by affixation to the door of the premises filed on April 7, 2023.

After several adjournments, Respondent Martina Gordon retained counsel who filed first a notice of appearance on September 6, 2023 and then, on November 13, 2023, a motion to dismiss which has been fully briefed and submitted for decision.

MOTION TO DISMISS

Respondent's motion seeks dismissal on the following grounds:

- lack of personal jurisdiction pursuant to CPLR R 3211(a)(8) and RPAPL §§ 733 & 735(2)(b) due to improper service of the notice of petition and petition in that (a) service was not completed until a complete and correct affidavit of service was filed on July 5, 2023, in violation of (i) the statutory 3-day filing period required to complete service and (ii) the statutory 10-to-17-day notice requirement; and (b) as stated in Respondent Martina Gordon's affidavit and supported by annexed documents, she received no copies of the papers, was home and available to answer the door on the dates and at the times of the three alleged attempts at personal delivery and no one rang her doorbell at those times; and
- lack of personal jurisdiction and/or failure to state a cause of action pursuant to CPLR R 3211(a)(7) and RPAPL §§ 733 & 735(2)(b) due to improper service of the notice to quit in that, as stated in Respondent Martina Gordon's affidavit and supported by annexed documents, she received no copies of the papers, was home and available to answer the door on the dates and at the times of the four alleged attempts at personal delivery and no one rang her doorbell at those times.

Respondents cites to *Riverside Syndicate, Inc v Saltzman* (49 AD3d 402, 852 NYS2d 840 [1st Dep't 2008]) and other case law and argues that the proceeding should be dismissed based on Petitioner's failure to strictly comply with RPAPL §§ 733 and 735(2)(b).

In opposition, Petitioner points to the process servers' affidavits, asserts they prove proper service of all documents and argues that any ambiguity in the affidavits filed on April 7, 2023 was corrected by the amended affidavits of service filed on July 5, 2023. Petitioner further argues that Respondent's assertions as to her whereabouts at the times of the alleged attempts at personal delivery are insufficient to refute the process servers' affidavits.

On reply, Respondent argues that the process server's affidavit alleging service by affixation to the door of the premises filed on April 7, 2023 is irrelevant as it fails to identify what documents were allegedly served. Further, Respondent argues that her sworn affidavit and supporting documents sufficiently refute the process server's affidavits to warrant either dismissal of this proceeding on the papers or a traverse hearing.

DISCUSSION

Service of the Notice of Petition and Petition

Respondent challenges the adequacy of the service of the notice of petition and petition on both statutory and factual grounds. The statutory claims will be addressed first, as if they are upheld the case will be dismissed and there will be no need to address any other claims. 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).

Here, as per the affidavit of process server Steffe Jean Baptiste sworn to April 6, 2023 and filed April 7, 2023 [NYSCEF Doc #19], as amended by his affidavit sworn to June 29, 2023 and filed July 5, 2023 [NYSCEF Doc #25], there were a total of three attempts at personal delivery of the notice of petition and petition on three different dates, one of which was outside usual working hours as required by *Eight Associates v Hynes* (65 NY2d 739, 492 NYS2d 15, 481 NE2d 555 [1985]), and affixation of copies of the papers to the door of the premises on April 5, 2023. As per the affidavit of process server Thomas Broere, sworn to April 6, 2023 and filed April 7, 2023 [NYSCEF Doc #13], copies of the notice of petition and petition were sent to Respondent by first-class and certified mail on April 5, 2023. The April 7, 2023 filing date was within three days after the mailings, in compliance with RPAPL § 735(2)(b), and service was complete upon such filing. The April 7, 2023 filing date also met the RPAPL § 733(1) requirement of no less than 10 and no more than 17 days' advance notice of the April 21, 2023 court date.

True, there is a defect in process server Steffe Jean Baptiste's original affidavit of service by affixation to the door: that affidavit does not say what papers were served. However, this omission was corrected by the amended affidavit of service, which differs from the original only in that it includes the missing reference to the name of the papers served; the details of the service are otherwise identical in the original and amended affidavits. Defects in an affidavit of service are amendable, *Matter of Savitt* (171 AD3d 109, 115, 75 NYS3d 29, 43 [1st Dep't 2018]); *Bell v Bell, Kalnick, Klee & Green* (246 AD2d 442, 443, 668 NYS2d 177, 178 [1st Dep't 1998]), and do not undermine otherwise proper service that establishes the court's jurisdiction over Respondent. As the service of the notice of petition and petition complied with both RPAPL § 735(2)(b) and RPAPL § 733(1), dismissal under *Riverside Syndicate, Inc v Saltzman* (49 AD3d 402, 852 NYS2d 840 [1st Dep't 2008]) is unwarranted.


Nevertheless, while the process servers' affidavits of service constitute a *prima facie* showing of proper service under RPAPL § 735, in her affidavit Respondent has sufficiently rebutted the process servers' factual allegations to warrant a traverse hearing to determine whether the notice of petition and petition were properly served. *Poree v Bynum* (56 AD3d 261, 261, 866 NYS2d 663, 664 [1st Dep't 2008]). *Compare, e.g., Milonis v 3273-3285 Westchester Ave Realty Corp* (70 Misc3d 136[A], 138 NYS3d 787 [AT 1st Dep't 2021]); *US Equities Corp v Ruiz* (55 Misc3d 143[A], 58 NYS3d 876 [AT 1st Dep't 2017]).

Service of the Notice to Quit

Respondent's challenge to the service of the 10-day notice to quit, "represents merely the failure to comply with a condition precedent to suit and cannot properly be said to affect the court's jurisdiction." *170 W 85th St Tenants Ass'n v Cruz* (173 AD2d 338, 339, 569 NYS2d 705, 707 [1st Dep't 1991]). *See also, e.g., 322 W 47th St HDFC v Loo* (2016 NY Slip Op 51188[U], 52 Misc3d 1217[A][Sup Ct NY Co 2016]). Accordingly, if Respondent's personal jurisdiction challenge is overruled after the traverse hearing, Respondent may raise her claim of defective service of the predicate notice as a defense in her Answer, to be heard at trial.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that Respondent's motion to dismiss is denied except as to her claim of lack of personal jurisdiction due to failure to properly serve the notice of petition and petition. A traverse hearing will be held in Resolution Part K-SPP on **Friday, January 5, 2024 at 2:15 p.m.** This constitutes the Decision and Order of the Court, copies of which are being uploaded on NYSCEF.



Diane E. Lutwak, HCJ

Dated: Bronx, New York
November 20, 2023