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AZ Dyre Ave Realty Corp. v. Wright

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**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART F**

-----X

AZ DYRE AVE REALTY CORP.,

Index No: LT 320271/23

Petitioner,

DECISION AND ORDER

-against-

**CHARMAINE WRIGHT
DEISHADEL BELL,**

Respondents.

-----X

Miriam Breier, J.

Recitation, as required by CPLR §2219 of the papers considered in the review of respondent’s motion to dismiss for lack of jurisdiction pursuant to CPLR §3211(a)(8) and for petitioner’s failure to comply with RPAPL §733(1), petitioner’s opposition thereto and petitioner’s cross-motion for *nunc pro tunc* relief from its failure to upload the affidavit of service as required and for use and occupancy and respondent’s reply and opposition thereto.

Papers NYSCEF Doc. No.

Notice of Motion, Affirmation/Affidavit.....	7, 8, 10, 11
Exhibits	9
Memorandum of Law	12
Affidavit/Affirmation in Opposition	14
Exhibit	15
Notice of Cross-Motion	17
Reply Affirmation.....	18
Exhibits	19 - 24

Upon the foregoing cited papers, the Decision/Order in this matter is as follows:

DISCUSSION

Respondent moves to dismiss this summary holdover proceeding for lack of personal jurisdiction pursuant to CPLR §3211(a)(8) as a result of petitioner’s failure to file the petition and notice of petition with affidavit of service on NYSCEF within 3 days of service pursuant to RPAPL §725(2)(b), and that service through the building’s mail slot was improper. Additionally, respondent seeks to dismiss the proceeding pursuant to RPAPL § 733(1) as the petition was not returnable between 10 and 17 days from completion of service.

Petitioner cross-moves for use and occupancy and for the Court to “[allow] for a *nunc pro tunc* submission of the Affidavit of Service of the Petition to reflect what was filed timely on the EDDS filing...” In other words, petitioner admits that the affidavit of service was not filed on NYSCEF, and despite that knowledge, asks the Court to ignore this fatal defect because petitioner improvidently and without any authority, filed the affidavit of service through EDDS.

Respondent opposes petitioner’s frivolous cross-motion for *nunc pro tunc* relief, on the grounds that petitioner did not file the affidavit of service on NYSCEF as required by 22 NYCRR §208.4-a(b) and §208.4(c) (2), until July 25, 2023, after the proceeding had already appeared in the Intake Part calendar. Respondent properly points out that filing an affidavit of service on EDDS as petitioner inexplicably did in this proceeding, is improper in that EDDS is not the authorized method for filing an affidavit of service in any instance and certainly not when the proceeding was commenced on NYSCEF and petitioner is required to file the affidavit of service in a holdover proceeding on NYSCEF.

With respect to the request for use and occupancy, respondent opposes that claim for use and occupancy on various grounds, among them that the motion is premature pursuant to RPAPL §745 which governs the procedure for the granting of use and occupancy. Respondent further points out that the motion is not supported by an affidavit, a rent ledger, or any documentation whatsoever. As this is a pre-answer motion to dismiss, and the proceeding had not appeared on the resolution part calendar on two separate dates, much less adjourned at the respondent’s request two times, respondent submits that the cross-motion for use and occupancy is premature, unsupported and must be denied.

DECISION

Respondent's motion to dismiss this proceeding is granted, and petitioner's cross-motion is denied in its entirety. Petitioner failed to upload the affidavit of service of the notice of petition and petition onto NYSCEF within 3 days as required. Indeed, petitioner did not upload the affidavit of service to NYSCEF at all until July 25, 2023 as proof of EDDS filing (Doc. 13), and as part of Exhibit A to its opposition to respondent's motion on August 14, 2023 (Doc. 15). Before attaching it as part of the exhibit, the petitioner wrongly filed the affidavit of service on EDDS. Thus, the affidavit of service has not been uploaded to NYSCEF as a separate document at any time to date.

Petitioner claims in its opposition to respondent's motion, that NYSCEF was down on June 29, 2023, a claim that respondent disputes by attaching proof of several successful filings uploaded to NYSCEF on that date. Indeed, 22 NYCRR §202.5-b(d)(1)(iii), provides for an "emergency exception" to the requirement by §202.5-bb that all documents be electronically filed on NYSCEF. The emergency exceptions permit a hard copy to be filed with the court. Had NYSCEF really been down for an extended period of time, petitioner could have travelled to the Bronx courthouse and requested an emergency exception to file the affidavit of service at the clerk's window in the lobby. Instead, petitioner improperly resorted to EDDS for filing the affidavit of service.

In the seminal case of *Riverside Syndicate v Saltzman*, 49 AD3d 402 (2008), the Appellate Division reversed the lower court's failure to dismiss a holdover proceeding where proof of service was not filed in accordance with RPAPL §735(2)(b), within the then 5 days required after personal service or mailings of the pleadings. The Court held that,

Landlord failed to "complete" service of the notice of Petitions and petitions by filing proof of service (RPAPL 735(2)(b) at least five days prior to the date the petitions were noticed to be heard (see RPAPL 733(1)). A summary proceeding is a special proceeding "governed entirely by statute...and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction" (citations omitted). Thus the court should have granted respondents' motions to dismiss the petitions.

Currently, under RPAPL §735(2)(b), petitioner is required to file the affidavit of service of the petition and notice of petition within 3 days of completion of service, which in this case was June 29, 2023. Petitioner has never uploaded the affidavit of service to NYSCEF as required, merely attaching it as part of its EDDS filing July 25, 2023 (Doc. 13) and an exhibit on August 14, 2023 (Doc. 15). These filings were well beyond the 3 days from June 29, 2023

required by statute. Petitioner’s frivolous contention that NYSCEF was down on June 29, 2023 also begs the question of why no attempt was made to upload the affidavit on July 1 through 3, before the July 4th holiday.

For the reasons set forth herein, respondent’s motion to dismiss the proceeding is granted, and the proceeding is dismissed without prejudice. Petitioner’s cross-motion is denied in all respects as moot.

This constitutes the Decision and Order of the Court which is being uploaded to NYSCEF.

Dated: January 9, 2024
Bronx, New York

So Ordered:

Miriam Breier

Hon. Miriam Breier, JHC