

**Muccioli v Gobrial**

2020 NY Slip Op 34451(U)

September 25, 2020

Civil Court of the City of New York, Queens County

Docket Number: L&T 50403/20

Judge: Clinton J. Guthrie

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART E

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LAURA MUCCIOLI,

Index No. L&T 50403/20

Petitioner-Landlord,

-against-

**DECISION/ORDER**

RAPHAEL GOBRIAL,

Respondent-Tenant,

-and-

“JOHN DOE” and “JANE DOE,”

Respondents-Undertenants.

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Present:

Hon. CLINTON J. GUTHRIE  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent’s motion to dismiss pursuant to CPLR §§ 3211(a)(1), 3211(a)(2), 3211(a)(7), and 3211(a)(8), RPAPL § 735, and Rent Stabilization Code § 2524.2(c)(3):

<b>Papers</b>	<b>Numbered</b>
Notice of Motion & Affirmation/Affidavit/Exhibit Annexed.....	<u>1</u>
Affirmation in Opposition & Affidavit/Exhibits Annexed.....	<u>2</u>
Affirmation in Reply.....	<u>3</u>

Upon the foregoing cited papers, the decision and order on Respondent’s motion to dismiss is as follows.

PROCEDURAL HISTORY

This holdover proceeding was commenced in January 2020. The predicate “Notice of Tenant of Non-Renewal of Lease, Termination of Tenancy and Landlord’s Intention to Recover

Possession” (hereinafter “Notice of Non-Renewal”) alleges that Respondent Raphael Gobrial, the rent-stabilized tenant, has failed to occupy the subject premises as his primary residence. After Respondent retained counsel, he moved to dismiss on the basis that the Notice of Non-Renewal was not served within the time period permitted under the Rent Stabilization Code (hereinafter “R.S.C.”). After the motion was made, the return date was adjourned to March 23, 2020 for opposition and reply. Following the shutdown of normal court operations due to the COVID-19 public health emergency, opposition and reply papers were filed electronically and the court heard argument via Skype on September 16, 2020. Following argument, the motion was held in abeyance for one week, pending settlement discussions. On September 23, 2020, the court was advised that the parties had not settled the proceeding and decision on the motion to dismiss was reserved.

#### ANALYSIS

Respondent’s motion to dismiss invokes several subsections of CPLR § 3211(a), but the central argument is that Petitioner failed to timely serve its Notice of Non-Renewal upon Respondent. The court first addresses Respondent’s assertion that the court lacks personal jurisdiction over him (citing CPLR § 3211(a)(8) and RPAPL § 735). In a summary proceeding, obtaining personal jurisdiction requires service of a notice of petition and petition in accordance with RPAPL § 735. *See e.g. 342 E. 67 Realty LLC v. Jacobs*, 106 AD3d 610 [1st Dept 2013]. In order to challenge personal jurisdiction, a party must set forth a “sworn, nonconclusory denial of service” of the notice of petition and petition. *Tzifil Realty Corp. v. Temammee*, 46 Misc 3d 144[A], 2015 NY Slip Op 50196[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]; *see also Rox Riv 83 Partners v. Ettinger*, 276 AD2d 782, 783 [2d Dept 2000]. Here, Respondent’s motion does not include any sworn statement challenging service of the Notice of Petition and

Petition. Therefore, there is no merit to Respondent's contention that the court lacks personal jurisdiction over him.

Respondent also argues that the court lacks subject matter jurisdiction (citing CPLR § 3211(a)(2)). It is well established, however, that the failure to comply with statutory or contractual requirements regarding service of a predicate notice "may implicate a condition precedent to a summary proceeding but does not affect a court's subject matter jurisdiction." *716 Realty, LLC v. Zadik*, 38 Misc 3d 139[A], 2013 NY Slip Op 50194[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]; *see also 433 West Associates v. Murdock*, 276 AD2d 360, 360-361 [2d Dept 2000]; *Hernco, LLC v. Hernandez*, 46 Misc 3d 137[A], 2015 NY Slip Op 50062[U] [App Term, 2d Dept, 2d 11th & 13th Jud Dists 2015]. Accordingly, Respondent's assertion that the Notice of Non-Renewal was not timely served in accordance with the R.S.C. does not implicate the court's subject matter jurisdiction.

To the extent that Respondent claims that documentary evidence, namely his lease, demonstrates that service of the Notice of Non-Renewal was improper, the court must assess the proffered evidence according to the standard governing CPLR § 3211(a)(1) motions. The Court of Appeals has held that a CPLR § 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes [petitioner's] factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]. Moreover, documentary evidence must be "unambiguous and of undisputed authenticity." *Fontanetta v. John Doe I*, 73 AD3d 78, 86 [2d Dept 2010]. Respondent annexes a copy of what he alleges is his lease to his motion. The annexed copy of the lease is unsigned, and includes a rider signed only on the "landlord" line. Respondent, in his affidavit, states that the lease was "backdated" to January 1, 2019 and that he and Petitioner

“entered into” the lease in March 2019 (Gobrial Affidavit, ¶ 2). Respondent argues that since the lease was entered into in March 2019, the Notice of Non-Renewal was premature since it presumed that the lease term expired on December 31, 2019, rather than sometime in March 2020 (when the purported one-year term would end). Petitioner annexes a different version of the lease to its opposition papers, which includes signatures of both “landlord” and “tenant” at the end of the lease and the rider, along with the date of “1/3/19” on both the lease and rider. Petitioner disputes that the lease was backdated, and states that the agreed-upon term was January 1, 2019 through December 31, 2019 in her affidavit. Since the copy of the lease that Respondent relies upon is not signed or authenticated and is countered with a different version of the lease, Respondent has not proffered “documentary evidence” that would entitle him to judgment as a matter of law. *See e.g. Bou v. Llamaza*, 173 AD3d 575, 576 [1st Dept 2019] [Unauthenticated lease insufficient to conclusively establish defense under CPLR § 3211(a)(1)]; *Fontanetta*, 73 AD3d at 86.

Finally, Respondent argues that Petitioner has failed to state a cause of action (citing CPLR § 3211(a)(7)), insofar as she has not satisfied the condition precedent of timely serving the Notice of Non-Renewal pursuant to R.S.C. § 2524.2(c)(3) (9 NYCRR § 2524.2(c)(3)). On a motion made pursuant to CPLR § 3211(a)(7), the petition “is to be afforded a liberal construction, the facts alleged are presumed to be true, the [petitioner] is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory.” *Watts v. City of New York*, 2020 NY Slip Op 05084 [2d Dept 2020]. Here, the Petition alleges that the term of Respondent’s tenancy expired on December 31, 2019. *See* Petition, ¶ 6. The Notice of Non-Renewal annexed to the Petition

states the same and is accompanied by an affidavit of service stating that service of the notice was completed with certified and regular first-class mailings on September 27, 2019.

Pursuant to R.S.C. § 2524.2(c)(3), a notice of non-renewal based on a tenant's failure to occupy the premises as his or her primary residence (the ground set out in R.S.C. § 2524.4(c)) must be served "at least 90 and not more than 150 days prior to the expiration of the lease term." With an alleged lease expiration date of December 31, 2019, the completion of service of the Notice of Non-Renewal on September 27, 2019 occurred ninety-five (95) days prior thereto.<sup>1</sup> Consequently, in assessing only the Petition, service was within the required "window period" set out in R.S.C. § 2524.2(c)(3).

Respondent argues that notwithstanding the allegations in the Petition, his lease term actually commenced in March 2019 and expired in March 2020. In support, as detailed above, Respondent annexes a lease. However, the lease that is attached is unsigned and unauthenticated (and by its very terms, expires on December 31, 2019). Consequently, it fails to demonstrate that Petitioner lacks a cause of action. *See Sokol v. Leader*, 74 AD3d 1180 [2d Dept 2010] [In assessing evidentiary material on a motion to dismiss made pursuant to CPLR § 3211(a)(7), the criterion is merely whether the proponent of the pleading at issue has a cause of action]. Although Respondent also annexes an affidavit that asserts that his lease was "entered into" in March 2019, this is not accompanied by an authenticated lease; moreover, Petitioner counters the allegation in her affidavit, which states that the agreed-upon term was January 1, 2019 to December 31, 2019. Petitioner also states that Respondent effectively succeeded to the apartment from his parents after they vacated the apartment in November 2018, and that it was

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<sup>1</sup> Although not at issue here, an additional 5 days for mailing is not added for calculating the service period for a Notice of Non-Renewal. *See e.g. 85th Columbus Corp. v. Cooperman*, 45 A.D.3d 358 [1st Dept 2007].

Respondent's request that he receive a lease commencing on January 1, 2019. Accordingly, as Petitioner is afforded every favorable inference on a motion made pursuant to CPLR § 3211(a)(7), the factual disputes about the commencement date of the lease cannot be resolved in Respondent's favor under the governing standard. *See Watts*, 2020 NY Slip Op 05084, \*1. The ultimate determination on the merits shall be made at trial.

For the foregoing reasons, Respondent's motion to dismiss is denied in its entirety.

#### CONCLUSION

Respondent's motion to dismiss is denied. Pursuant to CPLR § 3211(f), Respondent shall be permitted to serve an answer within 10 days of service of this Decision/Order with notice of entry. This proceeding will be restored to the Part E calendar for a virtual conference via Microsoft Teams on October 26, 2020 at 10:30 AM, per Administrative Order 160A/20. An invitation will be sent to the parties' attorneys in advance of the conference.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York  
September 25, 2020

  
HON. CLINTON J. GUTHRIE  
J.H.C.

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**SO ORDERED - HON. CLINTON J. GUTHRIE**