

1422 Nelson LLC v Paredes

2022 NY Slip Op 33834(U)

November 7, 2022

Civil Court of the City of New York, Bronx County

Docket Number: L&T Index No. 306915/2020

Judge: Diane E. Lutwak

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X

L&T Index # 306915/2020

1422 NELSON LLC,

Petitioner,

-against-

DECISION & ORDER

CONSUELO PAREDES, JOHN DOE, JANE DOE,

Respondents.

-----X

Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR R 2219(A), of the papers considered in the review of Respondent’s Motion to Dismiss (motion seq #3):

<u>Papers</u>	<u>NYSCEF Doc #</u>
Notice of Motion	20
Memorandum of Law in Support	21
Affirmation in Support	22
Affidavit in Support	23
Exhibits A-I	24-32
Affidavit of Personal Service of Notice of Petition and Petition	33

After oral argument, upon the foregoing papers and for the reasons stated below, Respondent’s motion is granted and this proceeding is dismissed, without prejudice.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

This is a nonpayment eviction proceeding brought against a Rent Stabilized tenant who initially appeared and answered *pro se* and is now represented by counsel. The petition, dated and efiled via “NYSCEF” (New York State Courts Electronic Filing system) on November 27, 2020, seeks rent arrears of \$9974.30 for the period of March through November 2020 and is predicated on a written 14-day rent demand seeking arrears of \$9280.17 for the period of March through October 2020. On December 7, 2020 Respondent *pro se* answered the petition and, pursuant to COVID-19 pandemic procedures in effect at that time, the court placed the case on the “Non Payment Admin Calendar”.

Thereafter the court calendared the case for an initial virtual appearance in Intake Part 2 on December 7, 2021 at which time it was adjourned to the “ERAP Admin Calendar” based upon Petitioner’s filing the day before of notice of pendency of an ERAP (Emergency Rent Assistance Program) application. Respondent retained counsel, who filed a Notice of

Appearance on April 1, 2022. After Respondent's ERAP application was granted and Petitioner received ERAP funds, Petitioner moved to lift the ERAP stay and Respondent moved to amend her answer. By Decision and Order dated September 22, 2022 the court granted both motions, restored the case to the calendar for a pre-trial conference on October 31, 2022 and deemed Respondent's proposed amended answer duly served and filed.

RESPONDENT'S MOTION TO DISMISS

Now pending before the court is Respondent's motion to dismiss for lack of personal jurisdiction and failure to state a cause of action pursuant to CPLR Rules 3211(a)(7) and (8) on four alternative grounds: (1) lack of personal jurisdiction pursuant to RPAPL § 735 due to defective service of the Notice of Petition and Petition and failure to file proof of service; (2) failure to serve a 30 Day Notice to Surrender as required by the Coronavirus Aid, Relief and Economic Security Act (CARES Act), which Respondent asserts applies to this proceeding because, upon information and belief, "Petitioner was approved for a federal tax credit in order to facilitate investments in low income housing on September 1, 1996," Attorney's Affirmation at ¶ 22; (3) failure to plead that the subject premises are subject to the CARES Act; or (4) the petition is based on a rent demand that is defective as it improperly calculates the amount demanded, alleging arrears of \$9280.17 but listing unpaid amounts that add up to \$8908.77.

Petitioner filed no opposition papers but on the October 31, 2022 return date of Respondent's motion argued that Respondent in fact had been personally served, and the absence of proof of service from the court's file is not Petitioner's fault but rather due to a filing error by the Court Clerk's Office. Petitioner's counsel then did file the process server's affidavit of service of the Notice of Petition and Petition on November 1, 2022, which reflects personal service on Respondent Consuelo Paredes on December 7, 2020 at 7:36 a.m.

DISCUSSION

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).

In the First Department, the leading Appellate Division case analyzing RPAPL § 735(2) is *Riverside Syndicate, Inc v Saltzman* (49 AD3d 402, 852 NYS2d 840 [1st Dep't 2008]). The Appellate Term had reinstated holdover petitions dismissed by the trial court, finding that "In the absence of any discernible prejudice to tenants ..., landlord's one-day delay in filing proof of

service of the petitions did not require dismissal of these otherwise properly commenced holdover proceedings.” *Riverside Syndicate, Inc v Saltzman* (15 Misc3d 138[A], 841 NYS2d 221 [AT 1st Dep’t 2007]). The Appellate Division reversed the Appellate Term and reinstated Housing Court Judge Schreiber’s dismissal order as the landlord had “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]).” In doing so, the Appellate Division stated, “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.”

Here, it is evident from the case file on NYSCEF that Petitioner failed to efile proof of service of the Notice of Petition and Petition until the day after oral argument on Respondent’s motion to dismiss, almost two years after the alleged service, and Petitioner proffers no viable explanation for this omission. That the process server’s affidavit of service alleges personal service on Respondent on December 7, 2020 – and Respondent in fact filed an answer that same day – is of no moment in this analysis, as “consideration of prejudice has effectively been abandoned in the First Department”. *208 W 20th St LLC v Blanchard* (76 Misc3d 505, 509, 173 NYS3d 439, 442 [Civ Ct NY Co 2022]). Given this conclusive and unamendable defect, there is no need for the court to reach any other of Respondent’s arguments.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that Respondent’s motion is granted and this proceeding is dismissed without prejudice. This constitutes the Decision and Order of this Court, which is being uploaded on NYSCEF.


Diane E. Lutwak, HCJ

Dated: Bronx, New York
November 7, 2022



Attorneys for Petitioner:

Ita Flug, Esq.
672 Dogwood Avenue Suite #311
Franklin Square, New York 11010-3247 (516) 612-7034 ita@ItaFlugLaw.com

Attorneys for Respondent:

Jaynor Diaz, Esq., Mobilization for Justice, Inc.
424 East 147th Street, 3rd Floor
Bronx, New York 10455 (212) 417-3905 JDiaz@mfjlegal.org