

PP Commercial LLC v 1450 Metropolitan Ave. Corp.
2024 NY Slip Op 35525(U)
April 19, 2024
Civil Court of the City of New York, Bronx County
Docket Number: Index No. LT-307694-24/BX
Judge: Betty Lugo
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 52

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PPC COMMERCIAL LLC

Index No. LT-307694-24/BX

Petitioner(s),

DECISION AND ORDER

-against-

1450 METROPOLITAN AVE. CORP.,
D/B/A KIDS PLACE,
“ABC CORP.”

Respondent(s).

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Attorneys and Law Firms

Law Offices of Cutler Minikes & Adelman LLP, by Jonathan Z. Minikes, Esq., for Petitioner

Law Offices of Moshe Assis, by Moshe Assis, Esq., for Respondent

Recitation of the papers considered in reviewing the underlying motion as required by CPLR § 2219(a)

Papers Numbered

Respondent’s Notice of Motion, Affirmation, Affidavits, and Exhibits in Support	<u>1</u>
Petitioner’s Affirmation in Opposition, and Exhibits in Support	<u>2</u>
Respondent’s Reply	<u>3</u>

Judge Betty Lugo, J.C.C.

This is a commercial landlord tenant summary proceeding for non-payment of rental arrears. Respondent 1450 Metropolitan Ave, Corp., d/b/a Kids Place (1450 Metropolitan) motion was orally argued on April 9, 2024, on the Courts FTR recording in Room 529A, both Petitioner and Respondent appeared by counsel.

Respondent moves for an Order pursuant to 22 NYCRR § 208.42 and CPLR § 3211(a)(8) dismissing this proceeding for lack of personal jurisdiction for reasons which include (i) the defective nature of the Notice of Petition used to initiate this proceeding which fails to comport with the form Notice of Petition which the law requires that landlord’s use

in Non-Payment proceedings, and (ii) because the Notice of Petition and Petition were not served upon the Respondent in accordance with the requirements of the lease between the parties. In opposition Petitioner PPC Commercial LLC (PPC Commercial) contends that the Notice of petition form is not improper and that the use of this form does not implicate the personal jurisdiction of this Court since respondent argues the form is improper based upon its content, not service of process. Further Petitioner argues that 22 NYCRR § 208.42 applies only to residential housing court proceedings.

Petitioner commenced this non-payment summary proceeding on February 27, 2024, with the filing of the Notice of Petition, seeking rental arrears. Respondent did not file an answer and instead filed the instant motion.

Respondent moves for dismissal of the Petition and argues that Petitioner failed to use the form Notice of Petition required by 22 NYCRR § 208.42 and RPAPL §732. The statute, 22 NYCRR § 208.42, reads in relevant part as follows,

- (a) Such proceedings involving residential property shall be commenced in the housing part.
- (b) The chief administrator of the courts shall promulgate, and post on the Unified Court System website, a form notice of petition for mandatory use in eviction proceedings involving residential property under Article 7 of the Real Property Actions and Proceedings Law (other than in proceedings brought on the ground that the respondent has defaulted in the payment of rent).
- (c) Real Property Action and Proceedings Law section 732 shall be applicable in this court in a proceeding brought on the ground that the respondent has defaulted in the payment of rent. The chief administrator of the courts shall promulgate, and post on the Unified Court System website, a form notice of petition for mandatory use in such proceedings.

However, the referenced statute is applicable in residential summary proceedings. Specifically, 22 NYCRR § 208.42(b) states that in pertinent part that “a form notice of petition for mandatory use in eviction proceedings involving residential property....other

than in proceedings brought on the ground that the respondent has defaulted in the payment of rent.” This case involves a Commercial Non-Payment proceeding.

Respondent references several cases in his motion that relate to failure to use the Notice of Petition form mandated under 22 NYCRR § 208.42 in residential summary proceedings. *See M & S Queens Realty LLC v Kim London*, 79 Misc 3d 788 (Civ Ct, NY Cty 2023) (respondent tenant was assisted by NYLAG and the cases cited within this matter reference residential proceedings); *Mautner-Glick Corp., et al. v Haley Glazer*, 148 AD3d 515 (1st Dept 2017) (the matter concerns a residential holdover proceeding). Respondent relies heavily on a lower court case, *30 Broad Street Venture LLC v Broad Street Suites LLC*, LT-314363-23NY (Civ Ct, NY Cty 2024) in support of his argument. However, this case is not binding authority on this Court. While the matter in *30 Broad Street Venture*, *supra* involves a commercial landlord tenant summary proceeding the court there held that the Notice of Petition contained substantive defects and thus failed to give proper notice. (Court held the notice of petition failed to notify the respondent of the time within which they must answer or appear). Here, the Petition does not contain the substantive defects as in *30 Broad Street* and provides proper notice as required by RPAPL § 732.

RPAPL § 732 contains special provisions applicable in non-payment proceeding if the rules so provide and reads as follows,

If the appropriate appellate division shall so provide in the rules of a particular court, this section shall be applicable in such court in a proceeding brought on the ground that the respondent has defaulted in the payment of rent; in such event, all other provisions of this article shall remain applicable in such proceeding, except to the extent inconsistent with the provisions of this section.

1. The notice of petition shall be returnable before the clerk and shall be made returnable within ten days after its service.

2. If the respondent answers, the clerk shall fix a date for trial or hearing not less than three nor more than eight days after joinder of issue, and shall immediately notify by mail the parties or their attorneys of such date. If the determination be for the petitioner, the issuance of a warrant shall not be stayed for more than five days from such determination, except as provided in section seven hundred fifty-three of this article.
3. If the respondent fails to answer within ten days from the date of service, as shown by the affidavit or certificate of service of the notice of petition and petition, the judge shall render judgment in favor of the petitioner and may stay the issuance of the warrant for a period of not to exceed ten days from the date of service, except as provided in section seven hundred fifty-three of this article.
4. The notice of petition shall advise the respondent of the requirements of subdivisions 1, 2 and 3, above.

In this case, Respondent claims that the Notice of Petition fails to conform to RPAPL § 732 because, “(a) It does not state that the landlord is asking the Court for permission to evict the Respondent if Respondent does not pay the money judgment obtained by the landlord, (b) It does not say that the Respondent has a ‘right to trial,’ (c) It does not state that Respondent has ‘a right to postpone that date (the court date) for 14 days but you have to come to the courthouse to ask for a postponement,’ and (d) It does not state that ‘If you pay all rent due before your court date, the case will be dismissed.’” (Assis affirmation, ¶¶8(a)-(d)).

However, contrary to respondent’s argument, the Notice of Petition conforms with the requirements of RPAPL § 732, it conforms with the first requirement stating “TAKE NOTICE also that WITHIN TEN (10) DAYS after service of this Notice of Petition upon you, you must answer either orally or before the Clerk of this Court at 851 Grand Concourse, Bronx, New York, County of Bronx and State of New York, it also satisfies the second requirement “On receipt of your answer, the Clerk will fix and give notice of the date for trial or hearing which will be held not less than three (3) nor more

than eight (8) days thereafter, at which you must appear. If after trial or hearing, judgment is rendered against you, the issuance of a warrant dispossessing you may, in the discretion of the Court, be stayed for five (5) days from the date of such judgment,” and satisfies the third requirement “In the event you fail to answer and appear, final judgment by default will be entered against you but a warrant dispossessing you will not be issued until the tenth (10) day following the date of service of this Notice of Petition upon you.” (Assis affirmation, exhibit A).

Respondent further affirms that the Notice of Petition and Petition were not mailed in accordance with the lease. Respondent claims that pursuant to Lease Article 22 the Notice of Petition and Petition had to be sent via overnight mail. (Assis affirmation, ¶¶ 13-15). The Lease provision Article 22 states, “Notices. Any notice or communication required by this Lease must be in writing. Notices and other communications shall be given by overnight courier or by United States Mail, postage prepaid, certified mail, return receipt requested. Notice shall be given at the addresses herein set forth or such other address as Landlord or Tenant may specify in writing. All notices to Tenant may be given at the Premises. Notices shall be effective upon receipt or refusal of receipt.” In opposition, Petitioner claims that Article 22 of the Lease does not apply to the Notice of Petition and Petition as they are pleadings not “notices” required by the Lease. (Minikes affirmation, ¶18). Petitioner further states the process server’s affidavit alleges that the Notice of Petition and Petition were both personally served upon a “John Smith” on March 12, 2024, at 10:57 a.m., at 1450 Metropolitan Avenue, Suite F-1, Bronx NY 10462, and mailed via certified mail and prepaid regular first-class mail 1450 Metropolitan Avenue, Suite F-1, Bronx NY 10462. (Minikes affirmation, exhibit E).

Requirements for service of the Notice of Petition and Petition are found in RPAPL

§ 735, which provides in relevant part,

(1) Service of the notice of petition and petition shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; or if admittance cannot be obtained and such person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises; and in addition, within one day after such delivering to such suitable person or such affixing or placement, by mailing to the respondent both by registered or certified mail and by regular first class mail.

“It is well settled that summary proceedings are solely statutory creations and thus in order for courts to assert jurisdiction there must be strict compliance with the statute.” *NY Housing Auth. v Fountain*, 172 Misc 2d 784 (Civ Ct, Bronx Cty 1997) [citing *Grayson v 240 Central Park South*, 36 NYS2d 293 (1st Dept 1942)]. Therefore, the requirements of service found under RPAPL § 735 govern this proceeding not the service provided for in the Lease. According to petitioner’s affidavit of service, process server, Albert Sanchez, states the Notice of Petition and Petition were both personally served upon a “John Smith” on March 12, 2024, at 10:57 a.m., at 1450 Metropolitan Avenue, Suite F-1, Bronx NY 10462,

Based on the foregoing, service of the Notice of Petition and Petition were completed in compliance with RPAPL § 735. While respondent’s contests personal jurisdiction, the affidavit in opposition does not contain specific objections as to service. A process server’s affidavit of service constitutes prima facie evidence that service was proper. *CPLR § 308 (2)*; *Matter of Nazarian v Monaco Imps., Ltd.*, 255 AD2d 265 (1st Dept 1998). However, that presumption is rebuttable, *63rd Street Realty, LLC v Yanush*, 2018 NY Slip Op 50428 (App Term, 2d Dept 2018) but must consist of more than

unsubstantiated denials of receipt of the summons and complaint. *Matter of de Sanchez*, 57 AD3d 452 (1st Dept 2008); *NYCTL 1998-1 Trust and The Bank of New York v Rabinowitz*, 7 AD3d 459 (1st Dept 2004). Here, Respondent does not deny that service was effectuated pursuant to RPAPL §735, instead contends that service should have been performed pursuant to the lease provision, Article 22. Furthermore, Respondent claims that the Notice of Petition failed to conform with the requirements of RPAPL § 732, however, the Court does not find that the Notice of Petition failed to adhere to RPAPL §732 requirements.

Accordingly it is hereby,

ORDERED, that the Respondent's motion to dismiss the Petition is DENIED; and it is further

ORDERED, the Clerk shall schedule this matter for a pretrial conference on May 21, 2024 and notify the parties; and it is further

ORDERED, Respondent shall serve a copy of this Order with notice of its entry on all parties within thirty (30) days and file proof of service with the Court.

This constitutes the order of the Court.

Dated: April 19, 2024
Bronx, New York


Judge Betty Lugo
Judge of the Civil Court

ENTERED

APR 25 2024

CIVIL COURT
BRONX COUNTY