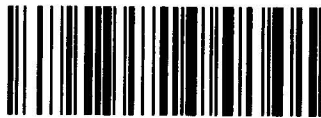


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| <b>Metcalf v Wilco 06, LLC</b>                                                                                                                                                                                                 |
| 2026 NY Slip Op 32104(U)                                                                                                                                                                                                       |
| February 5, 2026                                                                                                                                                                                                               |
| County Court, Allegany County                                                                                                                                                                                                  |
| Docket Number: Index No. 50363                                                                                                                                                                                                 |
| Judge: Terrence M. Parker                                                                                                                                                                                                      |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.                                                                                                                                                         |



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Robert L. Christman, Allegany County Clerk

Clerk: LK

**At a Term of the County Court  
of the County of Allegany,  
Belmont, New York, on  
February 5\_\_, 2026**

**PRESENT: HON. TERRENCE M. PARKER  
COUNTY COURT JUDGE**

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**DAVID METCALF & KANDI OTERO**

(Respondents)

**vs.**

**WILCO 06, LLC**

(Petitioner)

**DECISION AND ORDER**

**Index. 50363**

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**APPEARANCES**

Legal Assistance of Western New York, Inc., David Kagle, Esq., on behalf of David Metcalf and Kandi Otero

Morgan and Associates, PLLC, Michael A. Morgan, Esq., on behalf of WILCO 06, LLC

**BACKGROUND**

Respondents come before this Court on an appeal of a Wellsville Village Court decision dated December 10, 2023. This decision denied respondents' motion to dismiss a pending eviction proceeding. The lower Court's denial of the motion eventually led to the issuance of a warrant of eviction against the respondents<sup>1</sup>. In their appeal,

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<sup>1</sup>Respondent's request for a stay pending appeal was denied by County Court and they were consequently evicted from the residence when the warrant was executed.

respondents argue five separate points as a basis to overturn the lower court's holding and vacate the warrant. There is no appellate response filed by the petitioner.

## DECISION

First, the Court will address the question of mootness, which the respondents prophylactically raised in the first point of their appeal. Though possession of the property has already been returned to the landlord, the respondents argue that the record of an executed eviction warrant still poses harm to them. Specifically, they raise the fact that their credit is reduced by the eviction on their record, and their ability to enter into leases in the future is diminished. These are cognizable consequences of an eviction warrant which remain with respondents long after the warrant's execution. Furthermore, for the sake of clarity, it is important to emphasize that this case is an appeal of a trial court's decision on a motion to dismiss, it is not a post-eviction motion to vacate a warrant on good cause shown. *See, Brusco v Braun*, 84 NY2d 674 (1994). Therefore, this case is not subject to a pre or post-execution distinction. *See, Matter of LaFayette Boynton Hsg. Corp. v. Pickett*, 135 AD3d 518 (1<sup>st</sup> Dept., 2016). The difference is paramount; an appeal survives the execution of the warrant. Therefore, this Court does not deny the appeal on the issue of mootness.

In their motion to dismiss and again in their subsequent appeal, respondents raise the issue of personal jurisdiction. Personal service, and hence jurisdiction to hear the matter, is foundational to the Court's determination. With no jurisdiction over the person of the respondent, the respondent has a statutory basis for a motion to dismiss. CPLR 3211(8). The format for service in this matter is set forth in RPAPL 735(1), which must be interpreted strictly. *See, Wilmington Trust, National Ass'n as Trustee for MFRA Trust 2014-2 v. Walcott*, 79 Misc.3d 1025, 1030 (Civ. Ct., Queens, 2023). RPAPL §735 reads follows:

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” RPAPL 735(1).

Respondents were not personally served in this proceeding and they allege that service upon them was defective. Respondents argue that the person who was served, “Ms. Elliot”, did not live or work at the premises, and therefore service upon her did not conform to the statute. RPAPL 735 clearly requires that in the absence of personal service, respondents must be served via service upon a person of suitable age and discretion who either lives or works at the property in question. The statute is unambiguous and leaves no room for discretion<sup>2</sup>. See, *Wilmington Trust, National Ass’n as Trustee for MFRA Trust 2014-2 v. Walcott*, 79 Misc.3d 1025, 1030 (Civ. Ct., Queens, 2023), where an eviction was overturned for failure to serve per the terms of the statute.

Once jurisdiction is raised, it is incumbent upon the petitioner to establish a cure to the jurisdictional defect, specifically in this case to establish that the party served did in fact live or work at the premises: “Compliance with a statutory notice requirement represents a condition precedent to maintenance of a summary eviction proceeding, and the burden remains with the landlord to prove that element of its case”. *Mautner-Glick Corp. v Glazer*, 148 A.D.3d 515, 515-516 (1<sup>st</sup> Dept., 2017). See also, *Hughes v Malek*, 87 Misc.3d 1260(A)(Kings Co: August 2025). Petitioner was unable to establish proper

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<sup>2</sup>Because adherence to the terms of the statute is not within the discretion of the court, departure therefrom is not entitled to deference upon appeal. *Matter of Barton v Truesdell*, 183 AD3d 979 (3<sup>rd</sup> Dept., 2020).

service due to the determination by the lower court that no testimony would be received. *See, Wilmington Trust, supra.*

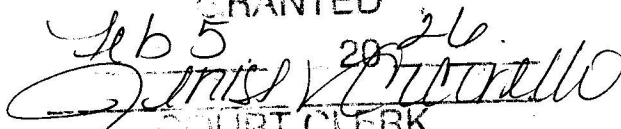
The lower court summarily dismissed respondent's motion in a written decision dated December 10, 2024. Because the respondents raised the issue of jurisdiction in a timely manner, because the issue of jurisdiction was not factually established, and because the lower court lacked discretion to proceed without a factual determination on the issue of jurisdiction, the lower court's decision to dismiss respondents' motion was in error.

Based upon the determination above, the Court does not reach appellants' additional points of law. Respondents' appeal is granted and the warrant of eviction is vacated accordingly.

So Ordered.

February 5, 2026

  
\_\_\_\_\_  
Hon. Terrence M. Parker  
County Court Judge

GRANTED  
Feb 5 2026  
  
COURT CLERK

ALLEGANY COUNTY CLERK  
FILED & ENTERED

FEB - 5 2026