Affidavit of Service

Late Filing: Basis for Dismissal or Correctable?

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Pursuant to Real Property Actions and Proceedings Law ("RPAPL") §733(1), in a summary proceeding other than a non-payment proceeding, "the notice of petition and petition shall be served at least five and not more than twelve days before the time at which the petition is noticed to be heard."[1] RPAPL §735(2)(b) provides that when service is made by any method other than personal delivery to the respondent, proof of service of the notice of petition and petition shall be filed with the court within three days after mailing to respondent, and service shall be complete upon the filing of proof of service.

A recent decision by Judge Sabrina B. Kraus of the Civil Court, Kings County in *Zot Inc. v. Watson*[2] addressed the following issue, as stated by the court: "Does the late filing of the affidavit of service deprive the Court of personal jurisdiction over Respondent or subject matter jurisdiction over the proceeding, or is it a de minimus error subject to correction?"

The case was a holdover proceeding to recover possession of a residential apartment based on allegations that the respondent had created or allowed a nuisance in the subject premises. Petitioner served the petition by substituted service on the respondent's daughter on Thursday, Dec. 27, 2007. A mailing was also done on that day. However, the proof of service was not filed until Wednesday, Jan. 2, 2008. The petition was noticed to be heard on Jan. 3, 2008.

As the court noted, "[p]roof of service should have been filed no later than December 31, 2007." That was the next business day following the third day (a Sunday) after mailing, and thus would have complied with the RPAPL §735(2) time frame. It also would have satisfied the RPAPL §733(1) requirement that service be complete five days before the return date, as the fifth day prior to the return date was Dec. 29, 2007, a Saturday, and the next business day on which proof of service could have been filed was Dec. 31, 2007. As the court stated, the "filing on January 2, 2008 was [thus] two days late, and one business day after December 31, 2007."

The petitioner moved to deem the affidavit of service timely filed nunc pro tunc, arguing that the late filing was de minimus and subject to correction by such a motion. The respondent cross-moved for dismissal, pursuant to RPAPL §733(1) and §735(2)(b). The court granted petitioner's motion and denied respondent's cross-motion. It found that the "late filing of the affidavit of service neither deprives the court of personal jurisdiction over respondent nor subject matter jurisdiction over this proceeding."

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In so ruling, the court considered itself to be following a consistent line of Second Department cases. The court concluded, however, that there was "a division between the First Department and Second Department on the issue of whether late filing of the affidavit of service is a 'jurisdictional' defect requiring dismissal of the proceeding or a de minimus error subject to correction by court order in the absence of prejudice." We discuss here the court's reasoning and some of the statutory and case law it cited.

The court discussed amendments to the New York City Civil Court Act ("NYCCCA") in 2005 and their impact on these motions. Respondent emphasized that prior to Sept. 8, 2005, §411 of NYCCCA provided that

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where a petition or notice of petition had not been timely filed, the court could order the filing thereof nunc pro tunc, but that the current §411 has eliminated that language. Respondent argued that this change in law purportedly made no longer valid cases such as *Friedlander v. Ramos*,[3] which granted motions to deem a late filed affidavit of service timely nunc pro tunc, since those cases relied in part on pre-amendment §411.

The court rejected that argument. It noted that the new §411 "eliminated the provision for nunc pro tunc relief, because the relief was no longer necessary based on other amendments made to the NYCCCA at the same time," which eliminated any time deadline for the filing of proof of service. For example, §409 of NYCCCA was amended from requiring that proof of service be filed within a specific time frame to simply requiring that proof of service be filed, and that statutory section, the court noted, explicitly applies to petitions and notices of petition in special proceedings. The court commented:

> To the extent that there is a conflict between the time requirements of NYCCCA and RPAPL, the provisions of the NYCCCA, which are intended specifically for proceedings in New York City Civil Court, as opposed to statewide provisions of the RPAPL, prevail.[4]

In 'Zot Inc.,' a Brooklyn Civil Court judge addressed the following: "Does the late filing of the affidavit of service deprive the Court of personal jurisdiction over Respondent or subject matter jurisdiction over the proceeding, or is it a de minimus error subject to correction?"

The court also pointed out that the NYCCCA does not require that proof of service be filed in order for Civil Court to have jurisdiction over a party to a special proceeding. It cited NYCCCA §400(2) which provides that jurisdiction is acquired over a party to a special proceeding by service upon such party of the notice of petition and petition.

Judge Kraus drew a distinction between, on the one hand, "a true violation of RPAPL §733(1), where acts other than filing proof of service necessary to acquire jurisdiction over the respondent are not complete five days before the petition is noticed to be heard," and, on the other hand, cases "where all acts for service were timely made in accordance with RPAPL §733(1), but the affidavit of service was filed late." The court viewed the case before it as falling in the latter category, stating:

> In the case at bar, there is no violation of RPAPL §733(1). Respondent was served with the papers, and all steps required to effect that service, other than the filing of the affidavit of service, were properly effectuated [more than five] days prior to the return date. Therefore, the objective of RPAPL §733(1) has been met. There is only a violation of RPAPL §735(2), which...is not a fatal defect and is subject to cure by order of the Court.[5]

In support of the conclusion that where the only alleged defect in service is the late filing of proof of service, the error is de minimus and may be excused, the court cited the following cases involving summary proceedings: *Revelstoke Properties Inc. v. Beaumont Neckwear Inc.*,[6] *Fame Company v. Sandberg*,[7] *Eiler v. North*,[8] and *Jamal Estates v. Crockwell*.[9] It also cited two cases, *Paracha v. County of Nassau*[10] and *Toulouse v. Chandler*,[11] which were a personal injury action and a breach of contract action, respectively, involving the CPLR rather than the RPAPL. The court implicitly justified its reliance on such case authority beyond the context of summary proceedings by citing the following passage from the Appellate Division, Second Department in *Lanz. v. Lifrieri*:[12]

> Although earlier nisi prius cases indicated that petitions in summary proceedings should be strictly construed, we adopt the reasoning of a recent trend of cases which treats summary proceedings the same as any other type of civil case and which refuse to consider de minimus variations from strict compliance as jurisdictional defects.[13]

The court acknowledged that a recent Appellate Division, First Department, decision in *Riverside Syndicate Inc. v. Saltzman*[14] supported respondent's position that a late filing requires dismissal. In *Saltzman*, the Civil Court had dismissed the petitions based on the fact that the affidavit of

service was filed four days prior to the initial return date in the proceeding, instead of five days. Apparently, all other service requirements had been timely met. Citing *Jamal Estates v. Crockwell* and *Friedlander v. Ramos*, the Appellate Term reversed the Civil Court and held that "[i]n 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."[15]

The Appellate Division, however, unanimously reversed the Appellate Term on the law and granted the motion to dismiss the petitions. Quoting from *Berkeley Associates v. DiNolfi*,[16] the Appellate Division stated:

> 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.'[17]

In support of the above-quoted holding, the Appellate Division in *Saltzman* also cited *MSG Pomp Corp. v. Doe*.[18] The court in *Zot* noted, however, that, as the Appellate Term, Second Department, had stated in *Paikoff v. Harris*,[19] whatever its validity in the First Department, *MSG Pomp* is not controlling in the Second Department.

The court in *Zot* viewed the distinction between the First Department and the Second Department on the issue of how to treat a late filing of an affidavit of service as most significantly being whether to treat prejudice as relevant or irrelevant. The court stated:

> *Saltzman* provides that the late filing of the affidavit deprives the court of jurisdiction, and that the issue of prejudice is irrelevant, because absent strict compliance with the statute, the proceeding must be dismissed. Whereas the Second Department has consistently indicated that where there is a technical defect, that does not prejudice any party, summary proceedings, just as any other type [of] civil litigation, should not exalt technicalities over substance.
>
> The Second Department cases continue to focus on the issue of demonstrable prejudice to the respondent.[20]

As examples of Second Department cases where the court focused on whether there was prejudice, the *Zot* court cited *Friedlander v. Ramos*, *Paikoff v. Harris*, and *17th Holding LLC v. Rivera*.[21] In all of those cases, the court found there was no demonstrable prejudice and thus refused to dismiss the petition. In *Paikoff* and *17th Holding*, the lack of compliance did not relate to filing of an affidavit of service, but to the accuracy of allegations in the petition as to rent-regulatory status and the status of the tenants. The *Zot* court commented, however, that the principle enunciated in those cases that non-prejudicial error is not jurisdictional, and is subject to correction, is applicable to the facts of the case before it involving late filing.

Indeed, on the issue of prejudice, the *Zot* court stated that there was less prejudice to the respondent than in most of the other cases cited in the court's decision because:

> Most cases cited herein involve fact patterns where service was made by conspicuous place service, but in the case at bar, the papers were [served] by delivery to a person of suitable age and discretion, respondent's daughter, who is also a named party to this proceeding. Thus there is less concern about insufficient notice than in cases where no one was available to receive the papers from the process server.[22]

The court pointed out that the respondent had not even claimed that the late filing had caused her any prejudice.

In further support of granting the motion to deem the affidavit of service filed timely nunc pro tunc, the *Zot* court cited CPLR §2001 and §2004. CPLR §2001 provides that the court may permit a mistake, omission, defect or irregularity to be corrected upon such terms as may be just or, if a substantial right of a party is not prejudiced, to be disregarded, provided that any applicable fee shall be paid. The court pointed out that this provision was amended effective August 2007 to specifically include as irregularities to which the section is applicable "the failure to purchase or acquire an index number or other mistake in the filing process," in other words, irregularities in the filing of the papers necessary to commence cases. Judge Kraus quoted the commentary of Vincent C. Alexander that the intent of the amendment is to "overrule the judicial decisions...that have treated numerous types of non-prejudicial filing errors as jurisdictional."

CPLR §2004 provides in relevant part that "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown." The *Zot* court cited *Weininger v. Sassower*[23] as an example of a case where CPLR §2004 was cited in excusing the late filing of proof of service.

The following are additional points to consider in reviewing the reasoning of the court in *Zot*:

Various cases, e.g., *445 East 85th Street, LLC v. Phillips*,[24] have emphasized the distinction between short filing, in violation of RPAPL §733(1), and late filing, in lack of compliance with §735(2)(b). In *445 East 85th Street*, the court stated (and this was quoted in *Zot*) that "[t]he jurisprudence is unanimous" that "late filing is a non-jurisdictional defect that a nunc pro tunc order can remedy." It concluded, however, that short filing was quite another matter; it was a jurisdictional defect.

In *Zot*, the court consistently referred to late filing, not short filing. Presumably, that is because, as discussed above, Justice Kraus' view was that since all steps required to effect service other than the filing of the affidavit of service were effected within the time frame of RPAPL §733(1), there was no violation of that statutory section.

However, if the harm of short filing is that it deprives a respondent of adequate time to prepare for court, that harm might result from not filing the affidavit of service within the time frame of RPAPL §733(1). To the extent that giving notice is a basic element of personal jurisdiction, then it might be said that the filing of the affidavit of service does have a notice function and thus might be considered an element of personal jurisdiction.

The filing of the affidavit of service gives the respondent an opportunity, by obtaining a copy of the affidavit of service from the court, to be notified of how the petitioner claims service was made and what steps petitioner took to effect service. Thus, it allows the respondent to make a determination whether there is a basis for asserting that service was not properly made in compliance with statute. If the affidavit of service is "short filed," i.e., filed less than five days prior to the date the petition is noticed to be heard, the respondent is deprived of the full statutory time intended to evaluate and prepare its defenses, specifically any defense of improper service. It thus might be argued that the objective of RPAPL §733(1) is not met unless the affidavit of service is filed within the time frame set forth in that statutory section. In short, one person's technicality might be another's demonstrable prejudice.

1. In a non-payment proceeding, the litigant does not select the return date of the petition. The return date is set by the court.
2. NYLJ, July 30, 2008, p. 29, col. 1 (Civ. Ct. Kings Co.).
3. 3 Misc.3d 33, 779 N.Y.S.2d 327 (A.T. 2d and 11th Jud. Dist. 2004).
4. NYLJ, July 30, 2008, p. 29 at col. 1.
5. NYLJ, July 30, 2008, p. 29 at col. 2.
6. 114 Misc.2d 545, 451 N.Y.S.2d 996 (Civ. Ct. N.Y. Co. 1982).
7. 9 Misc.3d 1115(A), 808 N.Y.S.2d 917 (Civ. Ct. N.Y.Co. 2005).
8. 121 Misc.2d 539, 467 N.Y.S.2d 960 (County Ct. Delaware Co. 1983).
9. 113 Misc.3d 548, 453 N.Y.S.2d 134 (A.T. 1st Dept. 1982). At a subsequent point in its decision, the *Zot* court stated that the Appellate Division, First Department decision in *Riverside Syndicate Inc. v. Saltzman*, 49 AD3d 402, 852 N.Y.S.2d 840 (1st Dept. 2008) "implicitly overruled the decision in *Jamal*."
10. 228 AD2d 422, 643 N.Y.S.2d 637 (2nd Dept. 1996).
11. 5 Misc.3d 2005(A), 798 N.Y.S.2d 714 (Sup. Ct. Westchester Co. 2004).
12. 104 AD2d 400, 478 N.Y.S.2d 722 (2nd Dept. 1984).
13. 104 AD2d at 401, 478 N.Y.S.2d at 723.
14. 49 AD3d 402, 852 N.Y.S.2d 840 (1st Dep't 2008). Rosenberg & Estis represented Riverside Syndicate Inc. in the case.
15. 15 Misc.3d 138 (A), 841 N.Y.S.2d 221 (A.T. 1st Dep't 2007).
16. 122 AD2d 703, 505 N.Y.S.2d 630 (1st Dept. 1986).
17. 49 AD3d at 402, 852 N.Y.S.2d at 840.
18. 185 AD2d 798, 586 N.Y.S.2d 965 (1st Dept. 1992).
19. 185 Misc.2d 372, 713 N.Y.S.2d 109 (A.T. 2nd Dep't 1999).
20. NYLJ, July 30, 2008, at p. 29, cols. 3-4.
21. 195 Misc.2d 531, 758 N.Y.S.2d 758 (A.T. 2nd Dep't 2002).
22. NYLJ, July 30, 2008, at p. 29, col. 4.
23. 204 AD2d 715, 612 N.Y.S.2d 249 (2nd Dept. 1994).
24. 2003 WL 22170112 (Civ. Ct. N.Y. Co. 2003).