

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

SOUFER FAMILY LLC

Index No. 64229/18

Petitioner,

DECISION/ORDER

-against-

Motion Sequence No. 3

BARBARA SPRAGUE ET AL

Respondent.

HON KAREN MAY BACDAYAN, JHC

Buttnick and Levenson, for the petitioner

Himmelstein McConnel Gribben & Joseph LLP, for the respondent

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 8-14, 19-25.

PROCEDURAL HISTORY AND BACKGROUND

On May 5, 2019, the Hon. Clifton Nembhard issued a decision and order “striking respondent’s first through tenth objection in point of law and affirmative defenses. (NYSCEF Doc No. 10, petitioner’s attorney’s affirmation in support, exhibit 1.) Counsel for petitioner served respondents with a notice of entry on May 13, 2019. The notice advised respondent’s counsel that “the within is a true copy of the DECISION/ORDER in this matter dated May 5, 2019, duly entered in the office of the Clerk of the within named Court.” (*Id.*) The UCMS “case summary” indicates “05/17/2019 - Seq 1, Date(s): Court 10/26/2018, Filed By: (P) Family Soufer LLC.”) (NYSCEF Doc No. 11, petitioner’s exhibit B.) Respondent’s then attorney rejected the notice of entry as the attached decisions did not bear the stamp of the clerk of the court. (NYSCEF Doc No. 22, respondent’s attorney’s affirmation in opposition, exhibit C.) The letter of rejection stated:

“[T]here is no indication from your transmission that what was sent was an ‘entered’ Decision/Order or the date such Decision/Order may have been entered; 2. although your ‘Notice of Entry’ cover sheet claims that the ‘within’ was ‘filed’ with the Office of the Clerk of the Civil Court, the document annexed bears no indication of any such ‘filing’ (sic). In other words, there is no

indication from the papers sent that any document was ever actually ‘entered’ in the Office of the Clerk of the Civil Court, New York County.” (*Id.*)

On March 9, 2022, respondent served petitioner with a notice of appeal (NYSCEF Doc No. 5.)¹ Petitioner has moved to “strike” that notice as untimely. (NYSCEF Doc No. 8, notice of motion sequence 3.) Respondent opposes and argues that the notice of entry was rejected by respondent’s former counsel, as the annexed decision and order did not bear any indication that it was “entered” with the clerk. Respondents argue that even *if* the clerk’s notation that it received a notice of entry on May 17, 2019 could constitute the entering of a decision, the copy that was served was surely not entered as it was served on May 13, 2019. Thus, respondent argues, the notice of appeal was timely filed. (NYSCF Doc No. 19, respondent’s attorney’s affirmation in opposition ¶¶ 4-13.)

DISCUSSION

CPLR 5513 states in relevant part that “[a]n appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry.” CPLR 5016 states that “[a] judgment is *entered* when, after it has been signed by the clerk, it is filed by him (emphasis added).”

Prior to the New York City Housing Court adopting the New York State Electronic Filing System (NYSCEF), housing court decisions were delivered by the issuing judge or their court attorney for placement in the hard file by the part clerk, or even placed in the file by the judge or their court attorney themselves. The clerk in housing court almost uniformly did not stamp judges’ decisions and orders before or after filing on NYSCEF. For whatever reasons, unlike other courts, this was simply not done with regularity in the housing court. Rather, the judge signed the decision with the date and county of determination, and that was the decision attached to the notice of entry. As the proceeding at bar was filed before NYSCEF, the decision did not bear the stamp or signature of the clerk when notice of entry was served.

The electronic filing rules specifically caution that filing on NYCEF by a clerk “does not constitute service of notice of entry by any party” (22 NYCRR 202.5-b [h] [2].) However, it is certainly much simpler now to file and serve a proper notice of entry upon a party who is participating in a NYSCEF-filed proceeding as the filing of the decision on NYSCEF constitutes

¹ The copy of the May 5, 2019 decision and order has yet to indicate a stamp or signature of a clerk.

“entry” and filing of the notice of entry with a copy of the entered decision on NYSCEF constitutes service of the notice of entry.

Nevertheless, while petitioner’s notice of entry herein (NYSCEF Doc No. 10) ostensibly conforms to the requirements of the CPLR in that it parrots the language of the statute, it is well settled that the requirements of CPLR 5513 (a) are to be strictly followed. In *Reynolds v Dustman*, 1 NY3d 559 (2013), the court found that a decision that was attached to the notice of entry “was neither stamped with a date and place of entry, nor signed by the clerk and therefore did not provide the *essential element* of a notice of entry (*see* CPLR 5016 [a]). Thus, petitioner’s time to appeal never commenced running and his appeal was timely taken (emphasis added).” (*Id.* at 561; *see also Gramercy Park Residence Corp. v Ellman*, 96 AD3d 423, 424 [1st Dept 2012]; *Retta v 160 Water St. Assocs., LP*, 94 AD3d 623 [1st Dept 2012] [“The time period for filing a notice of appeal is nonwaivable and jurisdictional”].)

A decade and a half ago, in an attempt to conform housing court practice to the requirements of law, the Chief Clerk of the New York City Civil Court issued a memorandum (CCM-171) regarding the entry of orders which directs as follows:

“To capture accurately the entered date of an order/decision we have developed the following procedure: Part clerks shall assure that all orders/decisions written in the part are entered. Using the county specific ‘Entered New York City Civil Court’ stamps the clerk shall endorse the date of entry on every order and decision prior to filing it away in the record room.”

(<https://www.nycourts.gov/COURTS/nyc/SSI/directives/CCM/ccm171> (last accessed July 29, 2022.)) This memorandum, like CPLR 5016 and CPLR 5513, has neither been repealed nor amended.

The Legal and Statutory Memorandum (LSM-126), issued by the Hon. Jaqueline Silberman, then Citywide Administrative Judge of the NYC Housing Courts, which is cited by petitioner in support of its position that the housing court is not bound by the strictures of the CPLR and controlling case law, is not apropos. (NYSCEF Doc No. 25, respondent’s reply affirmation, exhibit A.) Issued in 1995, like CCM-171, LSM-126 also attempted to address the lack of uniformity of practice in housing court and clarified the procedure for when a judge issued a judgment, and the judge additionally required “notice of entry” in their judgment in order to ensure that the respondent had notice of the default judgment. The LSM states that “[g]iven the many practitioners out in the field and the lack of any definite requirements for a

“Notice of Entry,” each practitioner has devised a different format.” LSM-126 required an affidavit from the petitioner prior to the warrant being issued. The LSM delineated what the affidavit must contain, and states “that the above will be sufficient, and may be presented in any format, provided that it is comprehensible.” (*Id.*) LSM-126 has essentially been abrogated by subsequent events.

In August 2020, several committees of the New York City Bar Association issued a report entitled “Serving and Filing Notices of Entry on the New York State Courts Electronic Filing System.” (NYC Bar Association website, [2020736-NYSCEFNoticeOfEntry.pdf](#) (last accessed August 1, 2022.)) As background, the 2020 report referenced the state-wide inconsistency that existed prior to 1997 when CPLR 5513 was amended to make it clear that *any* party could serve the notice of entry. (“To stem the confusion and to further a statewide uniformity of practice, the Office of Court Administration urged the state legislature in 1996 to clarify CPLR 5513. The Legislature obliged (internal footnotes and citations omitted).” Rather than calling upon the legislature, the City Bar is now urging the Office of Court Administration to add a technological improvement to NYSCEF which would allow a party to generate a notice of entry and serve it with just a few clicks. This would not run afoul of any service requirements and would still give parties control over when to serve the notice of entry. The 2020 report comprises recommendations to streamline the process of filing notices of entry, avoid confusion, and create uniformity through the New York court system, which in turn would be “harmonious” and further the goals of the “Chief Judge’s Excellence Initiative.” Even if these recommendations are not acted upon, as housing court is now an electronic filing court, practitioners can look forward to more uniformity, at least when it comes to entering decisions and filing notices of entry.

Regarding the immediate motion before the court, while the court knows very well that petitioner’s oral argument that “this is the ways it’s always been done” is accurate with limited exceptions, the customs and practices in Housing Court, as baked into the culture as they are, do not alter or modify the mandates of law.

Accordingly, it is

ORDERED that petitioner’s motion is DENIED, and the court finds that the notice of entry served by petitioner does not comply with CPLR 5016 and 5513, and further finds that respondent’s time to file an appeal has not yet run.

This constitutes the decision and order of this court.

Dated: August 1, 2022
New York, NY

So Ordered:



~~HON. KAREN MAY BACDAYAN~~
Hon. Karen May Bacdayan
Judge, Housing Part