

At an IAS Term, Part 17 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of July, 2004

P R E S E N T:

HON. DIANA JOHNSON,

Justice.

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IN THE MATTER OF THE APPLICATION OF
MOSHE HELLMAN, ET ANO.,

Index No. 42816/03

Plaintiffs,

- against -

BAIS YAAKOV OF BROOKLYN, ET ANO.,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1,2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, petitioners Moshe Hellman (Hellman) and Ohel Children's Home and Family Services, Inc. (hereinafter, "Ohel"), move, by order to show cause, for an order and judgment, pursuant to CPLR 7510, confirming an arbitration award of the Rabbinical Court of Yeshiva Beth Joseph dated June 4, 2003. Respondents, in opposition, claim the instant proceeding is a nullity.

Ohel is the owner of the premises located at 4510 16th Avenue in Brooklyn, New York, and the respondents, Bais Yaakov of Brooklyn (hereinafter, Yaakov) and Yehoshua Moshe Halevi Balkany (Balkany), allegedly rented a portion of the premises for a monthly rental fee. For the past several years, it is claimed respondents have failed to pay their monthly rent to petitioners. In addition, it is alleged that Balkany borrowed monies personally from petitioner Hellman. These controversies were submitted to the aforementioned Rabbinical Court for resolution. The Rabbinical Court directed Yaakov to pay Ohel, *inter alia*, \$101,000.00 if payment were made before April 4, 2001 by monthly payments, and directed Balkany to pay \$59,500.00 to Hellman. Petitioners now seek confirmation of their award.

In support, petitioners' attorney alleges that on or about October 29, 2003, the original notice of petition and verified petition were filed and petitioners "thereafter could not serve Defendants [sic] in a timely manner so as to file the Affidavit(s) of Service and get the motion on the Court's calender [sic] for the date noticed," which was December 9, 2003. Thereafter, petitioners, on March 8, 2004, served a new petition using the same index number, incorporating the original notice of petition and verified petition as exhibits. The new return date was March 29, 2004.

Submitting an objection in point of law, respondents' counsel argues that the original notice of petition and petition were not timely served, and that March 2, 2004, the date the new petition was served, is more than 120 days after October 29, 2003, the date that the special proceeding was filed. Counsel argues that CPLR 306-b does not permit service of

a notice of petition and petition more than 120 days after a special proceeding is filed unless leave by motion for such late service is first obtained. Respondents maintain that no motion was made, nor does the instant notice of petition request leave to make late service. Thus, they assert, in the absence of judicially permitted late service, the instant proceeding is a legal nullity.

In reply, petitioners argue that respondents' reliance on CPLR 306-b is misplaced. Petitioners maintain that the original notice of petition and petition were allegedly timely served on Yaakov and Balkany on November 25, 2003, and the two affidavits of service with the second copy of the original notice of petition and petition were filed with the County Clerk on December 4, 2003 instead of the Motion Support Office. Accordingly, the special proceeding was never placed on the motion calendar of December 9, 2003. Petitioners aver that there is, and can be, no question that jurisdiction was properly obtained over Yaakov and Balkany and that the "opposition" is nothing more than an attempt to raise a specious procedural "defect" to circumvent confirmation of a properly obtained arbitration award.

CPLR 304 provides, in pertinent part, that "[a] special proceeding is commenced by filing a notice of petition ... and a petition with the clerk of the court" in the action where the proceeding is brought, or with any person designated by the clerk to accept delivery (*see* CPLR 304).

The record in this case shows that the action was commenced on October 29, 2003 with the purchase of an index number, and the filing of a copy of the petition, notice of petition and request for judicial intervention with the County Clerk. After the alleged

service upon the respondents, the second copy of the notice of petition and petition with the affidavits of service were brought to the County Clerk's office and filed on December 4, 2003. Petitioners have complied with CPLR 304.

Respondent argues that the instant proceeding is a nullity because service was made more than 120 days after filing the petition on October 29, 2003 and leave of court was not obtained for such late service.

CPLR 306-b provides that "...if service is *not* made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (emphasis added).

Respondents' reliance on CPLR 306-b is misplaced. The record demonstrates that service was first made on respondents on November 25, 2003 and filed on December 4, 2003. As viable process was on file, the commencement prerequisite was, therefore, met at the time of service of the second set of papers. Thus, CPLR 306-b was not implicated by failure to effectuate service upon the respondents within the statutory period.

Accordingly, the motion for judgment and to confirm the award is denied without prejudice. The respondents shall serve an answer within 20 days of the date of service of a copy of this order with notice of entry.

This constitutes the decision and order of this court.

ENTER
Stephan A. Johnson
J. S. C.