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Kenmore Assoc., L.P. v Burke
2020 NY Slip Op 20059
Decided on February 20, 2020
Civil Court Of The City Of New York, New York County
Ortiz, J.
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Decided on February 20, 2020

Civil Court of the City of New York, New York County

<p>Kenmore Associates, L.P., Petitioner(s),</p> <p>against</p> <p>Brian Burke; "John" "Doe"; "Jane" "Doe," Respondent(s).</p>
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LT-063064-18/NY

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Frances A Ortiz, J

This is a holdover proceeding based on respondent's failure to re certify with Section 8 and renew his lease with petitioner in a rent stabilized unit This Court held a traverse hearing on September 20, 2019 and December 13, 2019 solely on the issue of the service of the notice of termination

Here, according to the affidavit of service for the notice of termination, licensed process server, Thomas Dundas, served the instant notice Specifically, the affidavit indicates that Mr Dundas made a first attempt to personally serve the notice on respondents, Brian Burke, John and Jane Doe on March 27, 2018 at 8 39 p m at the subject premises located at 145 East 23rd Street, apt 4R, New York, NY 10010 Mr Dundas was unable to complete service at that time Then, the affidavit reflects Mr Dundas' second attempt to personally serve respondents on March 28, 2018 at 3 32 p m at the subject premises Mr Dundas was once again unable to serve respondents personally Therefore, his affidavit indicates that at 3 32 p m on March 28,

2018, he affixed a copy of the notice of termination for each respondent upon a conspicuous part of the [*2]apartment door.

Respondent, Brian Burke, does not dispute that he was served with the notice of termination on March 28, 2018 at 3:32 p.m. However, he contests the purported first attempt at personal service on March 27, 2018 at 8:39 p.m. The scope of the traverse hearing held before the court was limited to this purported first attempt at service of the notice of termination.

THE HEARING

After careful consideration of the testimony and evidence presented, the court denies traverse for the reasons discussed below.

EVIDENCE

Thomas Dundas, the process server, for the notice of termination testified for petitioner at the hearing and introduced several documents into evidence. First, petitioner introduced Mr. Dundas' license with the New York City, Department of Consumer Affairs ("DCA") showing a February 28, 2020 expiration. (*Petitioner's Exhibit 1*). Second, petitioner introduced into evidence the process server's logbook containing entries that were consistent with his affidavit of service for the notice of termination. Specifically, the log book entries indicate the title and caption of the case, with a first attempt to personally serve the notice on respondents, Brian Burke, John and Jane Doe on March 27, 2018 at 8:39 p.m. at the subject premises located at 145 East 23rd Street, apt. 4R, New York, NY 10010. Then, the logbook entry shows conspicuous place service on respondents on March 28, 2018 at 3:32 p.m. by affixing a copy of the notice of termination for each respondent onto the apartment door. (*Petitioner's Exhibit 2*). Third, petitioner introduced into evidence a photograph taken by Mr. Dundas of the front door of the subject premises on March 28, 2018 at approximately 3:31 p.m. with his cell phone. (*Petitioner's Exhibit 3*). The photograph shows three sets of papers taped to apartment 4R. Fourth, petitioner introduced into evidence the original United States Post Office ("USPS") certified mailings dated March 29, 2018 and addressed to respondents at the subject premises and the USPS tracking for the mailings. (*Petitioner's Exhibit 4a-4d &*

Exhibits 5a-d). Fifth, petitioner introduced into evidence Mr. Dundas' Global Positioning System ("GPS") tracking device records for March 27 and 28, 2018. (*Petitioner's Exhibit 6*). Lastly, petitioner introduced into evidence Mr. Dundas' logbook pages 15 and 16. Those pages contained details of the services Mr. Dundas made on March 27, and 28, 2018. The details include title of case, whether delivery was made, nature of papers served, index number, type of service (personal, conspicuous or substituted), address of place served, name of the person served, date and time of service and the latitude and longitude coordinates of the location. (*Petitioner's Exhibits 7 & 8*).

TESTIMONY

On direct examination Mr. Dundas credibly testified that he has been a licensed process server for thirty years (30), that on March 27, 2018 he visited the subject building at approximately 8:39 p.m. to serve Brian Burke with the notice of termination, that he located apartment 4R, that he rang the bell, knocked on the door, waited a minute, rang again, knocked again, waited a minute and repeated the pattern one more time. Then, he returned to the subject premises, the next day on March 28, 2018 at approximately 3:32 p.m. to serve Brian Burke with the notice of termination. He rang the bell, knocked on the door, waited a minute, rang again, knocked again, waited a minute and repeated the pattern one more time. Then, he affixed three copies of the notice of termination to apartment 4R and took a photograph of it. Lastly, he testified that the next day he mailed three copies of the notice to the respondents by certified and regular mail dated March 29, 2018. (*Petitioner's Exhibit 4a-4d*).

On cross examination Mr. Dundas testified that on March 27, 2018, he used his automobile for traveling to the different locations he served process on that day. He usually parks his vehicle at meters, garages or free street parking places. Mr. Burke drew attention to *Petitioner's Exhibits 2, 7 and 8*, the logbook entries. According to *Petitioner's Exhibit 8*, Mr. Dundas attempted to serve Olga Zhdanova at 520 East 83rd Street, apt. B1, New York, NY on March 27, 2018 at 7:20 p.m. Then, he attempted to serve Joan Lyons at 449 East 84th Street, apt. 1A, New York, NY at 7:26 p.m. Thereafter, according to *Petitioner's Exhibit 7*, Mr. Dundas attempted to serve John and Jane Doe at 163 East 36th Street, apt. 4A, New York, NY on March 27, 2018 at 8:12 p.m. Then, he attempted to service Margaret Man at 145 East 23rd Street, apt. 18G, New York, NY which is the subject building at 8:36 p.m. Lastly, according

to *Petitioner's Exhibit 2*, Mr. Dundas attempted to serve respondents, Brian Burke, John and Jane Doe at 145 East 23rd Street, apt. 4R, New York, NY on March 27, 2018 at 8:39 p.m.

However, as the cross examination of Mr. Dundas continued, Mr. Burke questioned him on inconsistencies between *Petitioner's Exhibit 6*, the GPS records and *Petitioner's Exhibits 2, 7 and 8*, the logbook entries. Specifically, Mr. Burke questioned Mr. Dundas on GPS records [\[EN1\]](#) for March 27, 2018 which indicate that he was at 520 East 83rd Street, apt. B1, New York, NY at 20:02 military time (**aka 8:02 p.m**) serving Olga Zhdanova, then the records indicate he was at 449 East 84th Street, apt. 1A, New York, NY at 20:16 military time (**aka 8:16 p.m**) serving Joan Lyons, then the records indicate he was at 163 East 36th Street, apt. 4A, New York, NY at 20:12 military time (**aka 8:12 p.m.**) serving John and Jane Doe.

Lastly, respondent, Brian Burke testified on direct examination that he was home on the evening of March 27, 2018. The Court took judicial notice of the calendar and noted that March 27, 2018 was a Tuesday. Though he was unable to testify to his exact activities on March 27, 2018, Mr. Burke testified that on Tuesday evenings around 8:30 p.m. he is usually in his apartment watching television or doing online legal research. He testified that he usually only leaves his apartment on Mondays for medical appointments. He testified that he keeps a calendar for any appointments he might have, but respondent did not introduce that calendar into evidence.

DISCUSSION

Generally, service of a notice of a termination is made in accordance with RPAPL § 735.

If a lease is silent on service of a notice of termination, then it must be made in accordance with RPAPL § 735. Also, where the lease provision is *more* stringent than the statute, the lease provision governs. *Bogatz v. Extra Touch Int'l, Inc.*, 179 Misc 2d 1029, 1034 (Kings Cty, Civ. Ct. 1999).

According to RPAPL § 735,

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 [*3] 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.*

However, before conspicuous place service may be employed, there must be a showing that "upon reasonable application" admittance to the premises cannot be obtained and/or a proper person cannot be found to whom the process may be delivered. *Eight Assocs. v. Hynes*, 102 AD2d 746, 748 (1st Dep't 1984), *aff'd*, 65 NY2d 739, (1985). Specifically, when effectuating conspicuous place service pursuant to RPAPL § 735, there must be a showing that the process server attempted to personally serve the tenant at the subject premises sought to be recovered at least twice, before resorting to conspicuous place service. One attempt must be during reasonable business hours and the other during nonbusiness hours, usually on two separate days and at least one attempt during a time when a working person would reasonably be expected to be at home. [322 West 47th Street HDFC v. Loo](#), [153 AD3d 1143](#) (1st Dep't 2017), leave to appeal dismissed, 30 NY3d 1084 (2018). Therefore, though the parties agree that the process server placed the documents on the respondent's door on March 28, 2018, that conspicuous service would not fulfill the mandate of RPAPL § 735 unless petitioner can prove by a preponderance of the evidence that the process server attempted personal service on March 27, 2018. [Woods v. M.B.D. Community Housing Corp.](#), [90 AD3d 430](#) (1st Dep't 2011); [Chaudry Const. Corp. v. James G. Kalpakis & Assocs.](#), [60 AD3d 544](#) (1st Dep't 2009). Petitioner's failure to establish that burden mandates dismissal of the proceeding.

Courts give great weight to the credibility of a process server at traverse hearings. [SBS Owners Inc. v. Kelly](#), [19 Misc 3d 141\(A\)](#) (AT 1st Dep't 2008); [Fifty-Seven Assocs., LP v. Feinman](#), [28 Misc 3d 131\(A\)](#) (AT 1st Dep't 2010). If a licensed process server in New York City testifies as to service of legal papers in a traverse hearing, he/she must bring to court all records relating to the matter including his/her license. 22 NYCRR § 208.29. The failure to do so may result in the traverse being sustained and the petition dismissed. Also, DCA regulations require that process servers maintain GPS records. 6 R.C.NY § 2-233b(a). Process servers must always carry a device to establish electronically the details of their service and attempted service. The purpose of these regulations is to deter process servers from filing affidavits which assert false claims and to make it easier for those reviewing such affidavits to

detect such falsehoods. *Parkash v. Almonte*, 41 Misc 3d 267, 275 (Civ. Ct. Bronx Cty 2013). The regulations also require that the GPS records must be maintained by an independent third party, and not by the process server. 6 R.C.NY § 2-233b (a) (3).

Here, petitioner was able to prove by a preponderance of the evidence that there was an attempt at personal service of the termination notice on March 27, 2018. The process server's affidavit, logbook, and GPS records all show that the process server was at the subject premises on March 27, 2018 at 8:39 p.m. Both the logbook and the GPS records also show that the process server was in the same building serving a tenant in Apartment 18G with papers four minutes before Mr. Burke was served and that the process server attempted service of other tenants on East 36th Street twenty-four minutes before that. The process server gave credible, detailed testimony as to how he gained access to the building, how he attempted service on the tenant in apartment 18G prior to attempting service on Mr. Burke, and how such service was attempted. Mr. Burke, on the other hand, states that he was in his apartment when service was [*4] attempted but does not provide the same level of detail as the process server. Mr. Burke instead relies on generalities about his daily routines and habits. He asserts that he did not have any appointments that day but does not enter any evidence substantiating that claim. The evidence presented by the process server has more credibility.

The court concedes that there are inconsistencies between entries in the logbook and in the GPS records. The court does not find these inconsistencies merit dismissal of the proceedings for two reasons. First, these inconsistencies do not concern the service at issue. Both the logbook and the GPS records show that the process server attempted service on Mr. Burke on March 27, 2018 at 8:39 p.m. The two previous attempts at service that evening are consistent in both the logbook and the GPS records as well. The court realizes that the logbook and the GPS records place the process server in the subject building for at least four minutes prior to attempting service on Mr. Burke. It strains credulity to believe that the process server remained in the building for those minimum four to three minutes to make a convincing record that he attempted service without doing so. Indeed, it would appear easier to attempt service than to go to the building, wait for four to three minutes, and not attempt service.

Second, as discussed above, the purpose of the GPS records that process servers keep is "to deter process servers from filing affidavits which assert false claims and to make it easier for those reviewing such affidavits to detect such falsehoods." *Parkash v. Almonte*, *supra*. In

other words, the courts are to use GPS records to determine the credibility of process servers' affidavits. The GPS entries that are inconsistent with the logbook, however, are themselves incredible. According to the GPS records, the process server attempted service on Olga Zhadnova at East 83rd Street at 8:02 p.m., then attempted service on John and Jane Doe at East 36th Street at 8:12 p.m. and then returned to East 84th Street to attempt service on Joan Lyons at 8:16 p.m. Simply put, a four minute car travel from East 36th Street to East 84th Street is physically impossible even in the lightest Manhattan traffic. The court cannot give these inconsistent records any credibility, let alone use them to disprove the logbook entries that are more internally consistent.

Accordingly, the court overrules/denies traverse. This matter is adjourned to March 9, 2020 to Part R, Room 851 for trial.

This is the decision and order of the Court, copies of which are being mailed to those indicated below.

Dated: February 20, 2020

New York, New York

Frances A. Ortiz, JHC

Footnotes

Footnote 1: Some of the GPS records are inconsistent with Mr. Dundas' logbook entries for March 27, 2018. Additionally, the GPS records do reflect the logbook entry of March 27, 2018 showing service on Margaret Mann at 8:36 p.m. at the subject premises.

[Return to Decision List](#)