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

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BEL AIR LEASING LP,

Index No. 302355/21

Petitioner,

DECISION/ORDER

-against-

Mot. seq. no. 1

JENNIFER JOHNSTON,

Respondents.

-----X

WEISBERG, J.:

The following e-filed document listed by NYSCEF document numbers (motion no. 1) 6-10; 13-15 were read on this motion seeking entry of a judgment on default in a summary nonpayment eviction proceeding.

The COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L 2020, ch 381) changed the service requirements for the notice of petition and petition in summary eviction proceedings.¹ Pre-CEEFFPA, service of process by “affix and mail” was permitted after attempts at personal service satisfying a “reasonable application” standard (RPAPL 735). CEEFFPA imposed a “due diligence” standard before permitting service of process to be made other than by personal service (L 2020, ch 381, part A, § 5[2] [“service of the notice of petition...shall be made by personal delivery to the respondent, unless such service cannot be made with due diligence, in which case service may be made under section 735 of the real property actions and proceedings law”). The question before the court is whether Petitioner’s process server’s three attempts at personal service, each made on a weekday at various times of the day, meets the “due diligence” requirement of CEEFFPA. The court holds that it does not.

“Due diligence” is derived from CPLR § 308, which governs service of process upon a natural person in a civil action. That statute permits “affix and mail” service where service by delivery to the person to be served, or service upon a person of suitable age or discretion, cannot be made with “due diligence” (CPLR § 308[4]). The “due diligence” standard contrasts with the

¹ This proceeding was commenced in April 2021. Although CEEFFPA has expired, recently enacted legislation (L 2021, ch 417) mimics the service requirements of CEEFFPA for cases commenced on or after September 2, 2021.

“reasonable application” standard contained in RPAPL 735; “reasonable application” requires less effort by the process server than “due diligence” (*Brooklyn Heights Realty Co. v Gliwa*, 92 AD2d 602 [2d Dept 1983]). Whichever standard is applied, service by “affix and mail” is the least desirable method service, when compared with in-hand or substitute service (*see Eight Assoc. v Hynes*, 102 AD2d 746 [2d Dept 1984]; *see also e.g. Gurevitch v Goodman*, 269 AD2d 355 [2d Dept 2000] [noting reduced likelihood that process served by “affix and mail” will be received]).

As with the “reasonable application” standard typically applied in summary eviction proceedings, “due diligence” is not defined in any statute but is instead interpreted and applied on a case-by-case basis (*Wilmington Trust Co. v Gewirtz*, 193 AD3d 1110 [2d Dept 2021]). “The due diligence requirement refers to the quality of the efforts made to effect personal service, and certainly not to their quantity or frequency” (*Estate of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007] [internal citations omitted]). Because there is no “magic number” of attempts, “‘due diligence’ may be satisfied with a few visits on different occasions and at different times to the defendant’s residence or place of business when the defendant could reasonably be expected to be found at such location at those times” (*id.*).

However, because the quality of the attempts, and not their quantity, is implicated by “due diligence,” the Second Department has imposed a requirement that that process server make “genuine inquiries about the defendant’s whereabouts and place of employment” (*id.*). This requirement has been iterated by the court repeatedly (*see Faruk v Dawn*, 162 AD3d 744, 745-746 [2d Dept 2018] [“it must be shown that the process server made genuine inquiries about the defendant’s whereabouts and place of employment”]; *Cadlerock Joint Venture, LP v Kierstedt*, 119 AD3d 627, 629 [2d Dept 2014] [same]; *Serraro v Staropoli*, 94 AD3d 1083 [2d Dept 2012] [same]); *but see Wilmington Trust Co.*, 193 AD3d at 1110 [“four attempts to serve the defendants at their residence at times when they could reasonably have been expected to be found there, including attempts on a late weekday evening, an early weekday morning, a weekend evening, and a weekday afternoon” satisfied “due diligence;” no mention of “genuine inquiries about whereabouts or place of employment”).

The Appellate Term, Second Department, has followed suit. “The process server has an affirmative duty to make genuine inquiries to ascertain a defendant’s whereabouts” (*Univ. of Bridgeport v Emengo*, 34 Misc 3d 145[A], 2012 NY Slip Op 50153[U] [App Term, 2d Dept, 2d,

11th, and 13th Jud Dists 2012]). In *1653 Realty, LLC v Hernandez*, an action for nonpayment of rent (not an eviction proceeding), the court affirmed vacatur of a default judgment entered nine years earlier where the affidavit of service contained no allegation of efforts to serve process at the defendant's place of business (64 Misc 3d 146[A], 2019 NY Slip Op 51321[U] [App Term, 2d Dept, 2d, 11th, and 13th Jud Dists 2019]). In doing so, the court held that satisfaction of "due diligence" required genuine inquiries into the defendant's whereabouts and place of employment (*id.*). The court noted that the plaintiff, the defendant's former landlord, "would be in a position to have knowledge of defendant's employer or be in possession of information which may help identify defendant's place of employment" (*id.*).

Here, there is no allegation that the process server made any inquiries into Respondent's whereabouts or place of employment before resorting to "affix and mail" service. Additionally, unlike in *Wilmington Trust*, all of the process server's attempts at service were made on weekdays. Therefore, the "due diligence" requirement of CEEFPA was not satisfied.

"A default final judgment may not be granted on facially insufficient papers" (*Martine Assoc. LLC v Minck*, 5 Misc 3d 61, 62 [App Term, 2d Dept 2004]). A landlord is not entitled to a default final judgment where the affidavit of service of process fails to satisfy the requisite standard of service (*id.* [affidavit of service alleged only a single attempt at personal service before "affix and mail" service, thus not satisfying "reasonable application" standard of RPAPL 735]). Accordingly, because Petitioner's papers do not demonstrate "due diligence" before service by "affix and mail," it is ORDERED that Petitioner's motion is DENIED.

This is the court's decision and order.

Dated: November 8, 2021

Michael L. Weisberg, JHC