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[*1]

Li-Seabrooks v Pimento
2022 NY Slip Op 22131
Decided on April 28, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on April 28, 2022

Civil Court of the City of New York, Bronx County

Michael Li-Seabrooks, Petitioner,

against

Sean Pimento, "JOHN DOE," & "JANE DOE", Respondents.

Index No. L & T 310750-2021

To: Nora Kenty, Esq., Mobilization for Justice, Inc., Attorneys for Respondent-Pimento
&
Craig K. Tyson, Esq., Law Office of Craig K. Tyson, Attorney for Petitioner

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY RESPONDENT TO DISMISS THE PROCEEDING: NYSCEF Documents No. 9 through 21.

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

FACTS

For the purposes of deciding the within motion, the salient facts are these: respondent lives at 2736 Fenton Avenue, Second Floor, Room 2, Bronx, NY (the unit); the notice of termination was allegedly affixed to the door and subsequently mailed to the unit, with no floor indicated; after attempts on September 21, 2021 at 1:18 PM and September 22, 2021 at 6:07 PM, the notice of petition and petition were allegedly affixed to and subsequently mailed to 2736 Fenton Avenue, *First Floor*, Room 2.

ARGUMENTS

Respondent argues that service of the termination notice was not upon the property sought to be recovered since, according to the affidavit of service, no floor is indicated. The notice of petition and petition were similarly improperly served as the affidavit of service indicates service upon the wrong floor. Additionally, respondent argues that petitioner did not exercise "due diligence" before resorting to "nail and mail" service.

Petitioner counters that there is only one "room 2" in the subject two floor building and *implies* that the defects in the affidavits of service are mere drafting errors. Furthermore, petitioner argues that service of the notice of petition and petition were in accordance with instructions appearing on the court's website.

LEGAL ANALYSIS

"Reasonable Application" and "Due Diligence"

As of September 2, 2022, Chapter 417 of the Laws of 2021 (the Act), required service of the notice of petition "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 [*2]real property actions and proceedings law."[FN1] (*see Bel Air Leasing LP v Johnston*, 73 Misc 3d 809, 810, 157 NYS3d 346 [Civ Ct, Kings County 2021]).

Thus, before resorting to the "nail and mail" service performed, petitioner was required to exercise due diligence.

Due diligence requires more effort than the "reasonable application" standard found in RPAPL § 735. (*see Bel Air Leasing LP v Johnston*, 73 Misc 3d at 810, *citing Brooklyn Hgts. Realty Co. v Gliwa*, 92 AD2d 602, 459 NYS2d 793 [2nd Dept 1983]). While one attempt

inside of normal working hours and one attempt outside those hours may satisfy reasonable application, (*see 1199 Housing Corp v Griffin*, 136 Misc 2d 689, 691, 520 NYS2d 93 [Civ Ct, New York County 1987], *citing Eight Associates v Hynes*, 102 AD2d 746, 476 NYS2d 881 [1st Dept 1985]), due diligence is not so easily met or defined. (*see Barnes v City of New York*, 51 NY2d 906, 907, 415 NE2d 979 [1980] ("Indeed, in determining the question of whether due diligence has been exercised, no rigid rule could properly be prescribed."); *Greene Major Holdings, LLC v Trailside at Hunter, LLC*, 148 AD3d 1317, 1320, 49 NYS3d 769 [3rd Dept 2017] (While the precise manner to accomplish due diligence is not rigidly prescribed, the requirement that due diligence be exercised must be strictly observed.)).

Here, service was designed to comply with the reasonable application standard rather than the due diligence standard. Petitioner concedes this in pointing to the court webpage, which specifically refers to that provision of the RPAPL. (*see* NYSCEF Doc. 17 and NYC Housing Court (nycourts.gov) [last accessed on April 15, 2022]).

It is, of course, possible for a petitioner to meet the due diligence standard when reasonable application would suffice. (*see, e.g., Avgush v Berrahu*, 17 Misc 3d 85, 86, 847 NYS2d 343 [App Term, 9th & 10th Jud. Dists. 2007]).

However, the two attempts here, on consecutive weekdays, with no further information provided, does not satisfy due diligence. (*see Bel Air Leasing LP v Johnston*, 73 Misc 3d at 811-812 (Conspicuous place service under RPAPL § 735, without showing of genuine inquiries made, does not suffice as due diligence service); *see also Suero v Rivera*, 74 Misc 3d 723, 725, 162 NYS3d 684 [Civ Ct, Queens County 2022]; *Dolan v Linnen*, 195 Misc 2d 298, 324, 753 NYS2d 682 [Civ Ct, Richmond County 2003] ("Two responsible attempts at in-hand or substituted service before resorting to conspicuous service satisfy reasonable application but not due diligence."); *Borg v Feeley*, 56 Misc 3d 128(A), *1, 2017 NY Slip Op 50834(U), [App Term, 1st Dept 2017] ("Significantly, the affidavit of service does not describe any efforts to ascertain the tenant's whereabouts, work schedule or business address.")).

Reliance on the Court's Website

To be fair, petitioner does not argue that he has met the due diligence standard. Rather, he argues that reasonable application sufficed because, as stated above, the court's website referred to the RPAPL service standard. (*see* Opposition Affirmation at par. 11 & par. 18).

A review of the relevant webpage reveals it was last updated on February 18, 2020, which was prior to the true onset of the Covid-19 pandemic. The pandemic affected summary eviction proceedings in many ways with the issuance of Executive and Administrative Orders and the passage of new law. (*see Cabrera v Humphrey*, 192 AD2d 227, 230-231, 140 NYS3d 609 [3rd [*3]Dept 2021]; *Morrison Management LLC v Moreno*, 71 Misc 3d 1230(A), *1-2, 2021 NY Slip Op 50528(U) [Civ Ct, Bronx County 2021]). It was and is incumbent upon practitioners to know of and to adapt to these changes. (*see Fielding v Kupferman*, 65 AD3d 437, 440, 885 NYS2d 24 [1st Dept 2009] ("[A]n attorney is obligated to know the law relating to the matter for which he/she is representing a client and it is the attorney's duty, 'if he has not knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner.' ") [citations omitted]).

As service requirements are strictly construed, (*see Macchia v Russo*, 67 NY2d 592, 595, 505 NYS2d 591 [1986]), any reliance upon a webpage's recitation of service of process requirements cannot render proper otherwise improper service.

The Property Sought to be Recovered

No matter the "proper" standard of service, petitioner fails to establish that service was properly effectuated at the premises sought to be recovered. (*see* RPAPL § 735(1); *Filancia v Clarke*, 62 Misc 3d 1212(A), *1, 2019 NY Slip Op 50122(U) [City Ct, Mount Vernon 2019]).

Normally, a proper affidavit of service creates a presumption of proper service upon a respondent. (*see Eros International PLC v Mangrove Partners*, 191 AD3d 464, 142 NYS3d 21 [1st Dept 2021]; *Reliable Abstract Co., LLC v 45 John Lofts, LLC*, 152 AD3d 429, 58 NYS3d 365 [1st Dept 2017]).

Here, the petition, according to the affidavit of service, was served at the first floor. The parties acknowledge that respondent resides on the second floor. Thus, the affidavit of service is facially defective and insufficient to establish jurisdiction over the respondent. (*see Velocity Investments, Inc. v McCaffrey*, 31 Misc 3d 308, 314, 921 NYS2d 799 [Dist. Ct., Nassau County 2011]; *Mercogliano v Munroe*, 22 Misc 3d 127(A), *1, 2009 NY Slip Op 50032(U) [App Term, 9th & 10th Jud. Dists. 2009] (petition must be dismissed where affidavit of service is facially defective)).[FN2]

Based on the above, judgment shall enter in respondent's favor dismissing this

proceeding.[FN3]

This constitutes the Decision and Order of the court. It will be posted to NYSCEF and copies sent to the parties.

Dated: April 28, 2022
SO ORDERED,
Bronx, NY
/S/
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: The Act was the successor to the COVID Emergency Eviction and Foreclosure Prevention Act (CEEFPA). (*see* L 2020, ch 381, § 3, part A, § 5 [2]).

Footnote 2: Though petitioner should have been aware of the defects in the affidavits of service, he did not make any motions to try to address them.

Footnote 3: The other grounds for dismissal are denied as moot.

Return to Decision List