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Liguoro v. Malone

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Liguoro v Malone
2022 NY Slip Op 50506(U)
Decided on June 13, 2022
Civil Court Of The City Of New York, Richmond County
Ofshtein, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 13, 2022

Civil Court of the City of New York, Richmond County

Vincent Liguoro, Petitioner,

against

**Megan Malone, RICHARD IRIZARRY A/K/A RICHARD
URCIUOLI, JOHN DOE & JANE DOE, Respondents**

L & T Index No. 300646-21

Petitioner's Attorney: Law Offices of Nichole E. Lee: nellie0903@gmail.com

Respondent's Attorney: Legal Aid Society: ALipari@legal-aid.org

Eleanora Ofshtein, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the motion:

NYSCEF documents: Motion: #46-52, Opposition: #53-54, Reply: #55-56.

Upon the foregoing cited papers and argument, the decision and order on this motion is as follows:

Vincent Liguoro ("Petitioner") commenced this summary holdover proceeding against Megan Malone ("Malone"), Richard Irizarry A/K/A Richard Urciuoli ("Urciuoli"), John Doe, and Jane Doe (collectively "Respondents") in August 2021 to recover possession of the premises located at 39 Narrows Road North, 1st floor, Staten Island, New York ("Premises").

Petitioner brought its first motion (seq. 1) in November 2021 seeking a default judgment when Respondents failed to appear, and its second motion (seq. 2) in December 2021 seeking to vacate the Hardship Declaration filed by Respondents. The first motion is moot as against the two appearing Respondents and the second motion is moot since that portion of the CEEFPA statute that allowed for a stay due to the filing of the Hardship Declaration expired in January 2022. Respondent Malone, by his attorney, the Legal Aid Society, filed this pre-answer motion to dismiss the proceeding pursuant to CPLR §3211(a)(7). Respondent Urciuoli appears by CAMBA and has not filed an Answer.

In its motion, Respondent's attorney argues that the ninety-day termination notice was not [*2]properly served upon Respondent because no attempts were made outside of 'business hours' before resorting to conspicuous-place service and mailings. A review of the process server's affidavit of service indicates that four attempts at personal or substitute service were made, on different days and at different times each day, prior to resorting to conspicuous-place service and mailings. The process server's affidavit indicates that the personal service attempts were made as follows:

April 5, 2021 at 1:17PM;

April 5, 2021 at 5:58PM;

April 6, 2021 at 9:59AM; and

April 7, 2021 at 10:32AM.

The Court takes Judicial Notice of the 2021 calendar which indicates that these attempts were made on a Monday, Tuesday, and Wednesday, respectively.

"Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service". [Deutsche Bank Natl Trust Co v Yurowitz, 181 AD3d 646](#) (2d Dept 2020). However, the presumption of proper service can be rebutted " with a sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit". [Deutsche Bank Natl Trust Co v Yurowitz, 181 AD3d 646](#), *id*, citing to [US Bank NA v Cherubin, 141 AD3d 514](#) (2d Dept

2016).

In the case at bar, Respondent has not provided an affidavit to rebut the process server's affidavit, and there is no denial of service of process. Instead, Respondent argues that the case is fatally defective because Petitioner failed to serve the predicate notice 'as required by law', and that the process server's attempts at personal service did not meet the 'reasonable application' standard of RPAPL §735(1).

RPAPL §735 Manner of service; filing; when service complete

1. 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 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,

(See also RPL §232-a for notices to terminate tenancies in the City of New York).

Petitioner's counsel opposes the motion to dismiss, arguing that since Petitioner's wife and agent, Mrs. Serano, gave her attorney "specific information about the respondents", including the best time to expect them to be home for purposes of service, and since Petitioner's attorney explained those instructions to the process server, the reasonable application standard of RPAPL §735(1) has been met. The affidavits of Petitioner's agent and the process server, as well as the affirmation of Petitioner's attorney, corroborate the information given to the process server about Respondents' usual whereabouts and the reason for Petitioner's belief that they are home during the day (see affirmation of Petitioner's attorney, affidavit of the process server, and affidavit of Petitioner's agent, NYSCEF document #53).

Mrs. Serano's affidavit indicates that she is familiar with Respondents, has known Ms. [*3]Malone for five years, knows that she has not been employed during that time, and avers that "(w)henever my husband and I go to the apartment, we go during daytime, i.e. during business hours. Each time we go there, Megan is home, usually asleep. I informed my attorney when we retained her that the best time to catch respondents for purposes of service of process, is during the day because neither she nor her boyfriend, Mr. Urciuoli, have ever

been employed in the entire time they've resided in our property and they're always at home, hanging out or sleeping." Therefore, Mrs. Serano's conclusion, that the best expectation of finding them at home for purposes of effectuating personal service was to attempt service during business hours, was based on her prior interactions with the Respondents.

The "reasonable application" standard requires that there is "at least a reasonable expectation of success in finding a person on the premises to whom delivery may be made." [809-811 Kings Highway, LLC v Pulse Laser Skin Care, 25 Misc 3d 130](#)(A) (App Term, 2d Dept, 2nd, 11th & 13th Jud Dists 2009). Furthermore, "(a)s a rule, at least two attempts at personal service, one during *normal working hours* and one attempt *when a person working normal hours could reasonably be expected to be home*, are required to satisfy the 'reasonable application' standard (RPAPL 735[1]; see *Eight Assoc v Hynes*, 102 AD2d 746, 748 [1984], *affd* 65 NY2d 739, 740 [1985]; *Hynes v Buchbinder*, 147 AD2d 371 [1989])." [Martine Assoc LLC v Minck, 5 Misc 3d 61](#), 62 (App Term, 2d Dept 2004) (emphasis added by the Court).

In some cases, Courts have analyzed the 'reasonable application' standard to mean one attempt during business hours, generally understood to be 9AM to 5PM, extended to an hour before and an hour after those times, or 8AM to 6PM. The statute, however, is not so stringent and exacting, and Appellate analysis consistently leaves room for different interpretations of reasonableness since people do not all have standard 'working' and 'resting' hours. This statutory flexibility has been especially underscored by the current pandemic, now entering its third year, where the rules of working hours, resting hours, and commuting hours have been upended and redrawn, if not completely thrown out.

In *Eight Assoc v Hynes*, 102 AD2d 746 (1st Dept 1984), *affd*, 65 NY2d 739 (1985), the Appellate Court ruled that "(u)nder the facts present herein, one attempt to serve process during 'normal working hours' did not satisfy the 'reasonable application' standard set forth in RPAPL §735." However, the Court also stated that "(i)n so doing we do not rule that such service during 'normal working hours' would be insufficient under all circumstances." (See also, [156 Nassau Ave HDFC v Tchernitsky, 62 Misc 3d 140](#)[A] [App Term 2d Dept, 2nd, 11th & 13th Jud Dist 2019]).

The Court agrees with Respondent's counsel, that much of Mrs. Serano's affidavit includes self-serving allegations about the Respondents. However, Mrs. Serano's reason for believing that attempts at service during business hours would be the best time to find Respondents at home, was not unreasonable, to wit: that she had previously found

Respondents at home during business hours and knew that they were unemployed. The Court notes that Respondents have not submitted affidavits to refute Mrs. Serano's affidavit, have not denied service, and have produced no information to refute the allegation that they are home during business hours, that they are unemployed, or to indicate their whereabouts during the process server's four attempts at personal service. Additionally, the Court notes that the process server did not merely resort to conspicuous-place service and mailings after one or two attempts. Instead, the affidavit of the process server avers that he attempted service four times, with one of [*4]those times a mere *two minutes* prior to what is accepted as 'after business hours', or 6PM. (See affidavit listing one of the four attempts on April 5, 2021, at 5:58PM).

Under these circumstances, the Court finds that the process server's attempts at personal or substitute service, prior to resorting to conspicuous-place service and mailing, met the reasonable application standard pursuant to RPAPL §735(1).

Accordingly, the motion to dismiss is denied. Respondents may file their answer by June 24, 2022, and the case is adjourned for an in-person, pre-trial conference on July 6, 2022 at 2:30PM.

This constitutes the decision/order of this Court.

Dated: June 13, 2022
Richmond, New York

HON. ELEANORA OFSHEIN
J.H.C.

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