2022-08-08

A&J Estates Inc. v. Grindley

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART A
A & J ESTATES INC.,

Petitioner-Landlord Index No. L&T 308649/21

DECISION/ORDER

-against-

GARTH GRINDELY,
Respondent-Tenants,
JOHN DOE & JANE DOE,
Respondent-Undertenant(s).

Hon. Jeannine Baer Kuzniewski

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Notice of Motion:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	
ORDER TO SHOW CAUSE AND AFFIRMATION ANNEXED	1
ANSWER AFFIRMATION	
REPLYING AFFIRMATION	
EXHIBITS	
STIPULATIONS	
OTHER Transfer Order NYSCEF document 8	2

Upon the foregoing cited papers, the Decision/Order on the respondent's motion in this holdover proceeding which seeks leave to reargue CPLR §2221(d) is as follows:

The petitioner commenced this holdover proceeding seeking possession of the premises at 157-12 110th Avenue, Apt # 2, Jamaica, NY 11433. The petitioner alleged to have terminated the tenancy by serving a Ninety Day Notice of Termination. The Affidavit of Service states that service was effectuated:

> "by affixing a true copy of each to the door of said premises. which is RECIPIENTS residence within the state. Deponent was unable, with due diligence to find recipient or a person of suitable age and discretion thereat, having called there
>
> Attempts were made on; AUGUST 26. 202.1 at 7:16 PM
> AUGUST 27. 2021 at 9:04 AM
> AUGUST 27, 2021 at 12:37 PM - AFFIXED
>
> TO DOOR

MAILING TO RESIDENCE Within 1 day of such delivery or affixing, deponent enclosed a copy of the same in a postpaid envelope properly addressed to recipient at recipient's last known residence, at 157-12 I 10™ AVENUE. APT #2. JAMAICA. NY 11433 and deposited said envelope in an official depository under the exclusive care and custody of the U.S. Postal Service within New York."1

Similarly, the Petition and Notice of Petition were served by "nail and mail".

"The respondent(s) were served by affixing separate true copies for each respondent, to the door of the premises sought to be recovered. At the time of said service, deponent rang the bell and/or knocked on the door but received no reply. After reasonable application, deponent was unable to find the aforementioned respondent(s) or a person of suitable age and discretion who was willing to accept service at the above address, having previously attempted service at: 157-12 110™ AVE, APT. 2, JAMAICA, NY 11433

First Attempt Date: 12/28/21 First Attempt Time: 8:35 PM
Second Attempt Date: 12/29/21 Second Attempt Time: 2:00 PM
Third Attempt Date: 12/30/21 Third Attempt Time: 11:15 AM

That on 12/31/21, deponent mailed true copies … ." 2

The respondent, represented by counsel, moved for dismissal for lack of personal jurisdiction arguing that the petitioner's process servers failed to exercise due diligence in the service of both the Notice of Termination and the Petition and Notice of Petition as statutorily required pursuant to the amended CEEFPA Part C, Subpart A, §3(2) of Chapter 417 of the Laws of 2021 (the "Act"). On March 24, 2022 this Court transferred the proceeding to Part X for assignment to a trial part for a traverse hearing. The respondent now moves to reargue that act by the Court. The movant argues that the Court misapplied and misapprehended the law by transferring the proceeding for a traverse hearing rather than addressing the motion to dismiss, as it is asserted that the affidavits are defective on their face, for failing to comply with the due diligence standard.

Upon a review of the papers before the Court, reargument is granted.

The NYS legislature amended the COVID 19 Emergency Eviction and Foreclosure Prevention Act which was thereafter amended on September 1, 2021. One of the provisions provided:

"Service of the notice of petition with the attached copies of the hardship declaration and affidavits shall be made by personal delivery to the respondent, unless such service cannot be made with due diligence, in which

1 NYSCEF document #1.
2 NYSCEF document 4.

case service may be made under section 735 of the real property actions and proceedings law."

The question before the Court is whether the Affidavits of Service are defective on their face by simply resorting to three attempts at personal service before resorting to nail and mail? Primarily it is argued that the affidavits are defective as they fail to allege that the process server made any attempts to ascertain the respondents whereabouts or place of employment. It is further argued that the process server made all attempts during the week rather than making at least one attempt on a weekend.

"The landlord bears the burden of establishing that personal jurisdiction over the tenant was acquired and must show that the process server made genuine inquiries about the tenant's whereabouts and place of employment (*see Greene Major Holdings, LLC*, 148 AD3d at 1320-1321). Here, the record reflects that landlord's process server attempted to serve tenant only at the subject premises on three occasions and made no attempt to serve her at her place of employment or new residence. Under the circumstances, the due diligence requirements of CPLR 308 (4) were not met."3

The caselaw dictates:

"This Court has repeatedly emphasized that "the due diligence requirement of CPLR 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*Gurevitch v Goodman*, 269 AD2d 355, 355, 702 NYS2d 634 [2000]; *see County of Nassau v Letosky*, 34 AD3d 414, 415, 824 NYS2d 153 [2006]; *O'Connell v Post*, 27 AD3d 630, 631, 811 NYS2d 441 [2006]; *Lemberger v Khan*, 18 AD3d 447, 794 NYS2d 416 [2005]; *see generally Estate of Waterman v Jones*, 46 AD3d 63, 843 NYS2d 462 [2007]). What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality (*see Estate of Waterman v Jones*, 46 AD3d at 66)."4

This Court agrees with my colleague who determined that:

"The fact that the Legislature does not explicitly refer to C.P.L.R. §308(4) does not mean that the Legislature did not intend for the standard derived from that provision of the law to attach. Requiring a process server to exercise due diligence as derived from C.P.L.R. §308(4) would be more harmonious to the legislative intent as opposed to the interpretation proposed by Petitioner. 'In the construction

3 Merrbill Holdings, LLC v Toscano, 59 Misc 3d 129[A], 2018 NY Slip Op 50410[U], *2 [App Term 2018]

4 *Id.*

> of statutory provisions, the legislative intent is the great and controlling principle.' Matter of Albano v. Kirby, 36 N.Y.2d 526, 529-30, 330 N.E.2d 615, 369 N.Y.S.2d 655 (1975). One must be mindful of the spirit and purpose of the statute along with the objectives of the enactors when interpreting a statute. See id. at 530-31. [T]he enacting body will be presumed to have inserted every provision for some useful purpose.' Id. at 530. See also McGowan v. Mayor of City of N.Y., 53 N.Y.2d 86, 423 N.E.2d 18, 440 N.Y.S.2d 595 (1981). To interpret that the Legislature meant 'due diligence' to be a term other than the legal term of art commonly associated with personal service, along with the accompanying standard, when the Legislature is, in fact, addressing personal service would be nonsensible. If the Legislature intended only service by R.P.A.P.L. §735, then it would surely have not used the term 'due diligence.' Hence, the court reads the 'due diligence' requirement in the Act as having the same meaning as the 'due diligence' standard mentioned in C.P.L.R. §308(4). See, e.g., Seward Park Housing Corp. v. Cohen, 287 A.D.2d 157, 734 N.Y.S.2d 42 (1st Dep't 2001) … ."5

Weighing the arguments asserted by the respondent and the applicable statutes and case law, the Court grants the motion to dismiss. The Appellate Term, Second Department, has determined that:

> "The process server has an affirmative duty to make genuine inquiries to ascertain a defendant's whereabouts … 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.*)."6

Pursuant to the foregoing, the motion to reargue is granted. Upon reconsideration the motion to dismiss is granted upon the failure to use "due diligence" in effectuating service of the Notice of Termination and the Petition and Notice of Petition. The proceeding is dismissed without prejudice.

Hon. Jeannine Baer Kuzniewski, J.H.C.

Dated: August 8, 2022

So Ordered

Hon. Jeannine Baer Kuzniewski, J.H.C.

5 421 Mott LLC v. Cherry, 2022 NYLJ LEXIS 441, *7-8

6 Bel Air Leasing LP v Johnston, 73 Misc 3d 809, 812 [Civ Ct, Kings County 2021]