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Leifer v Moskowitz
2022 NY Slip Op 22343
Decided on November 9, 2022
Civil Court Of The City Of New York, New York County
Stoller, 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 November 9, 2022

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

<p>Meyer H. Leifer, Petitioner,</p> <p>against</p> <p>Roselee Moskowitz, Respondent.</p>

Index No. 307300/2022

For Petitioner: Heather Ticotin

For Respondent: Respondent appeared pro se (Roselee Moskowitz)

Jack Stoller, J.

Meyer H. Leifer, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Roselee Moskowitz, the respondent in this proceeding ("Respondent"), seeking possession of 365 West 28th Street, Apt. 5J, New York, New York ("the subject premises") on the ground of termination of a license. Respondent interposed a personal jurisdiction defense. The Court held a traverse hearing on October 14, 2022 and October 31, 2022.

The affidavit of service of the notice of petition and petition, dated June 14, 2022, states that Zanekee Pow ("the Process Server") attempted to serve Respondent the notice of petition and petition on June 13, 2022 at 8:23 p.m. and June 14, 2022 at 12:50 p.m., that the Process Server was unable to serve Respondent by personal delivery at those two times, and that the Process Server resorted to conspicuous place service. The affidavit of service describes a door and a floor as "grey" and walls as "beige." Respondent's answer specifically denied that the Process Server attempted service on June 13, 2022 and June 14, 2022, thus outlining the scope of the traverse hearing. [*Kenmore Assoc. Lp v. Burke*, 67 Misc 3d 496](#), 497 (Civ. Ct. NY Co. 2020), [*Manhattan Realty Co. 1, LP v. Goldman*, 61 Misc 3d 1205](#)(A)(Civ. Ct. NY Co. 2018).

The record at the hearing

The Process Server testified that he has served landlord/tenant documents at the subject premises; that he served the notice of petition and petition on Respondent; that he entered the building in which the subject premises is located ("the Building"); that he knocked and there was no answer; that the same thing happened the next time; and that he left the papers on the door.

On the first day of the hearing, the Process Server did not bring a bound logbook to [*2]Court. Instead, the Process Server brought a printout from an electronic logbook that only contained the entries of the two attempts at service at the subject premises. The Court adjourned the matter for Petitioner to produce full logbook entries for the days on which the Process Server attempted service, which Petitioner submitted into evidence on the adjourned date. The electronic logbook entries show that the Process Server's attempt at service on June 13, 2022 was at "23:00" and that the Process Server's attempt at service on June 14, 2022 was at "12:50." The Process Server testified that the electronic logbook technology does not permit him to enter a change in an entry in the logbook; that the Process Server can, however, add an additional line to a logbook if there is an error; that when he signs an affidavit of service, he checks to make sure that the time is correct; and that he possibly entered in the wrong time on the logbook application.

Petitioner submitted into evidence photographs that the Process Server took of the exterior of the building in which the subject premises is located ("the Building").

The Process Server testified on cross-examination that the photographs were taken around the same time as the attempt at service; that he got into the Building because it is a busy building and there are a lot of people coming in and out; that he has glasses because he is nearsighted; that is he not colorblind; that on June 13, 2022 he knocked at the door and did not get an answer; that he waited about five minutes; that no one answered the door; that he did not hear anyone in the subject premises; that he then exited the Building; that on June 14, he left the papers in front of the subject premises on the second attempt; that he posted the papers with tape; that he did not notice anything unusual about the door; that he saw a grey door; that the door is labeled with its apartment number; and that he does not recall a name on a door.

Respondent submitted into evidence a request that she had submitted to the Court for an audio record of the first date of the traverse hearing.

Respondent testified that the date on the Process Server's photographs was at the same time as the time of the attempt at service in the Process Server's affidavit of service; that she was not home on the Process Server's second attempt; that she was at home on the Process Server's first attempt at service; that she was never out of the subject premises; that "they" leave the door to the subject premises unlocked although not ajar, so anyone could just walk in; that the door and the walls and floor are not the colors that the process server attested to; that it takes a long time to get from the outside of the Building to the subject premises; that the door and the floor are not grey; that at 8:30 at night she was at home with Petitioner, who lives in the subject premises, and a night nurse was there; and that her practice is to answer the door when someone knocks.

Respondent testified on cross-examination that she did not receive the petition; that she knew to appear in Court because after the Court dismissed a prior holdover proceeding that Petitioner had commenced against her, Petitioner's counsel said that another case would be forthcoming and she kept on calling the Court; that she had an attorney at the last case; that she called the clerk's office; that she did not have a working phone for a time; that she did not appear virtually in a prior court date; and that she has always appeared in person.

Respondent testified on redirect examination that she has never been in Court virtually and that Petitioner's attorney appeared virtually.

Daniella Leifer ("Petitioner's Daughter") testified that she lives in Brooklyn; that Petitioner is her father; that Petitioner lives at the subject premises; that she is at the subject premises once a week; that the door of the subject premises is a greyish tan color; that the floors [*3] in the hallway have a linoleum texture two-tone off-white pattern with some darker brown tiles; that she has a key to the subject premises; that whether she has to use a key varies; and that she was there when someone from Meals on Wheels came and they knocked on the door.

Petitioner's Daughter testified on cross-examination that the floor is two-tone, a lighter color somewhat and she likened them to the floors in the Courtroom, which are a neutral institutional color.

Discussion

A process server shall bring to a traverse hearing all records in the possession of the process server relating to the matter at issue 22 N Y C R R §208 29 Petitioner's effort to comply with this rule consisted of the Process Server's production of two lines of an electronically-maintained logbook. The Process Server's production of an electronic logbook as opposed to a bound volume came in the wake of the Legislature's amendment of GBL §89-cc so as to permit process servers to maintain electronic logbooks in lieu of bound volumes, effective June 8, 2022, six days before the Process Server's first attempt at service 2022 NY ALS 189, 2022 NY Laws 189, 2022 NY Ch. 189, 2022 NY AB 1713. To the extent that this recent change in the law contributed to any uncertainty regarding the extent of records the Process Server had to produce, dismissal of the proceeding would not have been equitable.

[\[FN1\]](#)

Even if the Court would not dismiss the proceeding, however, logbooks are an important resource for the cross-examination of a process server. *Clearview 1719, LLC, supra*, 35 Misc 3d 148(A)(App. Term 2nd Dept. 2012), *Hudson House, LLC v. Gabriel*, 195 Misc 2d 453, 454 (App. Term 2nd Dept. 2002). The record of all attempts at service on a particular date opens up avenues of cross-examination for the party challenging service, *Inter-Ocean Realty Assocs. v. JSA Realty Corp.*, 152 Misc 2d 901, 904 (Civ. Ct. NY Co. 1991), for example, when a process server logs attempts at service implausibly close in time to one another relative to their distance from one another. *See, e.g., 2437 Valentine Assocs., LLC v. Valverde,*

[70 Misc 3d 1216](#)(A)(Civ. Ct. Bronx Co. 2021). Notably, the amended GBL §89-cc conditions a process server's maintenance of electronic logbooks on the availability of "all data" review by "any and all" interested parties. Accordingly, the amended GBL §89 cc does not relieve process servers from production at traverse hearings of logs for the entirety of days at issue in traverse hearings. Thus, the Court adjourned the matter for the Process Server to produce the full logs, as he did.

The Process Server testified to the mundane, unremarkable details of the service, supported by a photograph of the exterior of the Building which is consistent with his presence there. [See *Unifund CCR LLC v. Seifullah*, 66 Misc 3d 1232](#)(A)(Civ. Ct. Bronx Co. 2020). The Process Server's description of the Building was similar to Petitioner's Daughter's description of the Building. The entries on the entirety of the logbook for the days that the Process Server [*4] attempted service show that he had ample time to get to the subject premises from his prior attempts at service and that the subject premises was the Process Server's last service on that day. The Process Server's entry of "23:00" as the time of the first attempt at service was clearly a typographical error consistent with the entry of "8:23" on the affidavit of service, particularly in the context of the Process Server's testimony that he does not serve process at 11:00 at night. *Citibank, N.A., supra*, 144 AD3d at 476 (testimony regarding general practices was sufficient to raise a presumption of proper service).

Respondent testified that she was not home at the second attempt at service. Respondent therefore did not demonstrate an adequate foundation to challenge the Process Server's testimony regarding his second attempt at service. Respondent testified that she was at home during the first attempt at service and that she did not hear anyone come to the door at that time. Respondent also disputed the Process Server's characterization of the colors of the door and the floors.

To the extent that Respondent's testimony about the first attempt conflicts with the Process Server's testimony, the Court can accord the testimony of a disinterested witness like a process server more weight than an interested witness like a party. *Kardanis v. Velis*, 90 AD2d 727, 727-28 (1st Dept. 1982). Two other factors weigh in favor of the Process Server. First, Respondent testified that the Process Server did not accurately describe the door and the floors but did not actually testify what color they were. Petitioner's Daughter likened the color to the floors of the Courtroom, which are the kind of drab, institutional color that reasonable people could characterize in different ways.

Second, Respondent referenced a prior holdover proceeding that Petitioner had discontinued against her earlier in 2022 because the Process Server at that time undisputedly served the wrong apartment. The photograph in evidence shows that the Process Server was at the very least at the Building at the time of the first attempt at service. In order for Respondent's narrative to prevail, the Court would have to find that the Process Server took the trouble to come to the Building but, with full knowledge that Respondent had already successfully challenged his prior service, did not come to the subject premises itself even though he did not have to serve any other papers that day. The implausibility of this scenario does not outweigh the credible evidence that the Process Server made the first attempt at service.

Accordingly, the Court denies the traverse and dismisses the personal jurisdiction defense. The Court calendars this matter for a pre-trial conference on November 18, 2022 at 10:30 a.m. in part R, Room 851 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: November 9, 2022
New York, New York

HON. JACK STOLLER, J.H.C.

Footnotes

Footnote 1: In any event, a process server's failure to produce a logbook at a traverse hearing does not dispositively warrant a dismissal of the proceeding. *Weissman v. Ryan*, 37 Misc 3d 136(A)(App. Term 1st Dept. 2012), [Clearview 1719, LLC v. Vega](#), 35 Misc 3d 148(A)(App. Term 2nd Dept. 2012). *See Also Citibank, N.A. v. K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476 (1st Dept. 2016)(defects in logbook maintenance and/or production do not otherwise defeat proof of proper service, especially when supported by other corroborating evidence).

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