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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART O

-----X
MOHAMMED ABUL HASHEM,

Petitioner,

Index No. L&T 301749/21
(Index #1)

-against-

SAVITRI SINGH, SEID LAFTAH s/h/a JOHN
DOE #1, JOHN DOE, JANE DOE,

**DECISION/ORDER
AFTER TRAVERSE
HEARING & UPON
MOTIONS**

Respondents.

-----X

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART O

-----X
MOHAMMED ABUL HASHEM,

Petitioner,

Index No. L&T 301750/21
(Index #2)

-against-

SAVITRI SINGH, MR. TALI s/h/a JOHN
DOE #1, JOHN DOE, JANE DOE,

Respondents.

-----X

Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondents' motions to dismiss:

Papers on #301749/21

Numbered

Notice of Motion & Affirmation/Affidavit/Exhibits Annexed.....	<u>1 (NYSCEF #40-41)</u>
Affirmation in Opposition & Affidavit/Exhibits Annexed.....	<u>2 (NYSCEF #42-45)</u>
Reply Affirmation & Exhibit Annexed.....	<u>3 (NYSCEF #46)</u>

Papers on #301750/21

Numbered

Notice of Motion & [Partial] Affidavit/Exhibits Annexed.....	<u>1 (NYSCEF #38)</u>
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Affirmation in Opposition & Affidavit/Exhibits Annexed..... 2 (NYSCEF #39-42)

Upon the foregoing cited papers, the decision and order on respondents’ motions to dismiss in the respective cases identified (and consolidated for determination herein, shall follow the decision and order after traverse hearing (jointly conducted for both index numbers)). The determinations after traverse hearing and upon the motions are incorporated in this Decision/Order.

PROCEDURAL HISTORY

These holdover proceedings brought pursuant to RPAPL § 713, which relate to 135-43 126 Street, South Ozone Park, New York 11420, were filed in April 2021.¹ The procedural histories are entwined with the legislation enacted in response to the COVID-19 pandemic. In both cases, respondents (Said Laftah and Tali Wahed, respectively) filed COVID-19 hardship declarations, which stayed the proceedings. *See* L 2020, ch 381, as amended by L 2021, ch 417. Thereafter, the same respondents filed Emergency Rent Assistance Program (ERAP) applications, which further stayed the proceedings. *See* L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 8, as amended by L 2021, ch 417, § 2, part A, § 4; *see also Ben Ami v. Ronen*, 2023 NY Slip Op 50456[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2023]. Petitioner moved to vacate the ERAP stays on both cases and the motions were granted on consent.

On August 31, 2022, both cases were transferred to Part X for trial. The transfer order provided that answers were due by September 9, 2022. Respondents’ attorney filed an answer on each index number on November 30, 2022.² Petitioner, through counsel, filed notices of rejection of both answers on December 1, 2022. In February 2023, respondents’ attorney filed

¹ Index No. L&T 301749/21 corresponds with the 1st Floor and Index No. L&T 301750/21 corresponds with the 2nd Floor.

² On Index No. L&T 301750/21, there is a notation that the answer (Doc. 23) is “returned for correction.”

motions seeking to deem the answers served and filed. By orders dated February 6, 2023, Judge Enedina Pilar Sanchez granted the motions to the extent of permitting the late answers on condition that the respective respondents make use and occupancy payments for February, March, and April 2023 by dates certain.³ Judge Sanchez's February 6, 2023 orders both provided that "[f]ailure to pay will be a basis to strike the late answer."

The proceeding was adjourned to May 2, 2023 for traverse and trial. On May 2, 2023, respondents' attorney made an oral application to dismiss (in effect, pursuant to CPLR § 409(b)) on the basis that petitioner had failed to comply with RPAPL § 733, insofar as the notice of petition and petition were not served upon respondents within the time frame permitted under the statute. The court declined the application without prejudice, as it did not find that the application was procedurally appropriate in oral form on the eve of trial. Separately, petitioner's attorney orally raised the issue of respondents' failure to pay all of the use and occupancy ordered by Judge Sanchez and requested that the answers be stricken. The court also denied this request, finding that the maximum penalty for failure to pay use and occupancy required by court order under the amended version of RPAPL § 745 is "immediate trial" (*see* RPAPL § 745(2)(d)(i)) and that the court was prepared to commence a trial forthwith.⁴ Since both respondents raised personal jurisdiction defenses, the court began a traverse hearing. *See Elm*

³ Respondents' attorney subsequently filed orders to show cause to reargue, seeking a reduction of the amount of use and occupancy due each month. There are no written decisions resolving these orders to show cause on NYSCEF, but the parties agreed that Judge Sanchez had granted them to an extent on the record on February 27, 2023.

⁴ While Judge Sanchez's orders cited to CPLR § 3025(b), relief for failure to pay use and occupancy in a summary proceeding must nonetheless be exclusively grounded in RPAPL § 745. *See Front St. Rest. Corp. v. Ciolli*, 55 Misc 3d 104, 106 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017]; *Quality & Ruskin Assoc. v. London*, 8 Misc 3d 102, 105 [App Term, 2d Dept, 2d & 11th Jud Dists 2005]. To the extent that the striking of the answers was contemplated by the orders, the court does not interpret the amended version of RPAPL § 745 to support such relief. *See e.g. 1588-1600 AMS LLC v. Gil*, 75 Misc 3d 1, 3 [App Term, 1st Dept 2022].

Mgt. Corp. v. Sprung, 33 AD3d 753, 755 [2d Dept 2006] [Personal jurisdiction is a “threshold issue[.]”].

The traverse hearing was conducted on May 2, 2023 and adjourned to May 22, 2023. Prior to May 22, 2023, respondents’ attorney filed motions on both cases, seeking dismissal pursuant to RPAPL § 733 and on the basis that petitioner vitiated its notices to quit herein by serving termination notices during the pendency of these proceedings.⁵ The court concluded the traverse hearing and heard argument on the motion. Decision was reserved on the hearing and the motion at the close of the appearance on May 22, 2023.

TRAVERSE HEARING

The traverse hearing was conducted jointly for both cases and concerned both the notices of petition and petitions and the predicate notices for the respective cases. Joseph Leggio testified as petitioner’s sole witness. Mr. Leggio testified that he is employed at Alstate Process Service Inc. as a process server and that he had been doing that work since 2007. He testified that he served papers at the subject premises on March 10, 2021 and November 21, 2021. When he served the notices to quit, he stated that he drove to the subject building. He saw a black Escalade and van in the driveway. Asked what he did at the property, Mr. Leggio testified that he rang the doorbell and knocked for the first-floor unit. He testified that someone came to the door and identified himself as Said Laftah. Mr. Leggio testified that Mr. Laftah gave his wife’s name as well. He then testified about his service notes, which were admitted as petitioner’s Exhibits 1 and 2.

Mr. Leggio testified that Mr. Laftah accepted the documents that were served and signed for them. Mr. Leggio described him as “cooperative.” Mr. Leggio testified about a photograph,

⁵ Opposition and reply papers were submitted on the motion.

which was admitted as petitioner's Exhibit 3, taken at the time of service. He testified that it depicted Said Laftah. Mr. Leggio testified that after he finished his service for the first floor, he completed his notes and went to the door for the second-floor unit.

Mr. Leggio testified that the person who answered the door for the second-floor unit gave only a last name (Tali). He further testified that he prepared notes, as he had for the first-floor unit. The court admitted the notes as petitioner's Exhibit 4.⁶ Mr. Leggio testified that he asked Mr. Tali if there were any other occupants in the unit and he (Mr. Tali) stated that there were no other occupants. He testified that he then served the notice to quit with referee's deed upon Mr. Tali but that Mr. Tali did not sign for the papers.

Subsequently, Mr. Leggio testified that he also took a photograph of the second-floor unit's door after the first-floor service. The photograph was admitted as petitioner's Exhibit 5. The photograph depicts the exterior of the building, showing both doors. Mr. Leggio then testified as to his preparation of the affidavits of service for the notices to quit. Mr. Leggio also testified as to mailing copies of both notices. The affidavits of service for the respective units were admitted as petitioner's Exhibits 6 and 7.

Mr. Leggio next testified that he returned to the subject building for service of the notice of petition and petition. He testified that he "might have" gone to the second-floor unit first. He knocked on the second-floor door and the person who answered "seemed to have been the same person" that he served before. He testified that the person accepted the papers.

As for the first-floor unit, Mr. Leggio testified that the same person, Said Laftah, answered the door. He testified that Mr. Laftah accepted the documents (notice of petition and petition). Mr. Leggio then described the preparation of the affidavits of service for the notices of

⁶ Exhibit 4 could not be located after Mr. Leggio concluded his testimony and the court did not receive any replacement copy, so the traverse record lacks this document.

petition and petitions for each unit and both were admitted as petitioner’s Exhibits 8 and 9 (NYSCEF Docs. 8-11 on both 301749/21 and 301750/21).⁷ Mr. Leggio testified that he inquired of respondents’ military status and confirmed that he was licensed to serve process.

On cross-examination, Mr. Leggio was asked if he had testified before. He replied that he had, maybe a dozen times. When questioned about the photograph admitted as petitioner’s Exhibit 5, he replied that it showed the outside of the property. When asked why there was no picture of the second-floor occupant, he testified that the occupant did not open the door widely enough to get a person in it [a photograph].

Next, Mr. Leggio was asked about the height of the respective occupants served. He confirmed that the affidavits showed both Mr. Laftah and Mr. Tali as being 5’8” to 5’11”. When asked if he saw Mr. Tali face-to-face, Mr. Leggio testified that he was on the stoop and that Mr. Tali was standing at the door. He described the meeting as “brief.” Mr. Leggio was also asked to explain why a different party, The Bank of New York, was listed as the plaintiff on the work notes admitted as petitioner’s Exhibits 1 and 2. He replied that he did not know who the bank was and was not familiar with it. Finally, when asked if he made any effort to learn occupants’ names at the subject premises before the notices to quit were issued, he replied that he did not.

On redirect, Mr. Leggio testified that the second-floor tenant gave a name of Mr. Tali. He stated that he did not know Mr. Tali and had never seen him before.

Tali Wahed was the first witness called by respondents. He testified that he lives with his wife and five (5) children on the second floor of the subject building. He stated that he had lived in the subject premises since 2012. When asked if he had ever seen the first witness (Mr. Leggio), he replied that he had not. He was asked about his height, and he responded that he was

⁷ As with petitioner’s Exhibit 4, the hard copies of the affidavits of service labeled Exhibits 8 and 9 were not located, but the affidavits were filed to NYSCEF and reference is made to them there accordingly.

6'6". The court admitted Mr. Wahed's NYS driver's license as respondents' Exhibit 3. The license lists a height of 6'6". When specifically asked if he had seen Mr. Leggio in March 2021 or November 2021, Mr. Wahed responded that he had never seen him.

On cross-examination, Mr. Wahed was asked if he worked. He replied that he works as a process server and as a limousine driver. He confirmed that he was aware of "most of" the requirements for serving process but denied that he knew how to thwart a process server. When asked if he was a process server in November 2021, Mr. Wahed testified that he was not yet licensed at that time. He stated that he was working as "black car" driver at the time for Stride Limo.⁸ He testified that from March through November 2021, he worked every day. He testified that he had four (4) vehicles at the time. He also testified that he had five (5) children, including a newborn.

When specifically asked about November 23, 2021, Mr. Wahed testified that he could not remember if he was home. When shown the photo admitted as petitioner's Exhibit 5, he testified that it did not help him remember whether he was home on the date in question.

On redirect, Mr. Wahed testified that there was no doubt in his mind that he was not personally served with the court papers. He also confirmed that he is 6'6" tall.

Said Laftah testified as respondents' second and final witness. He testified that he had never seen the process server, Mr. Leggio, before. When asked if the description of him in the affidavits of service matched him, he replied in the negative. Mr. Laftah then testified about photographs of himself (respondents' Exhibits 4A-4C). He testified that Exhibit 4A was taken in 2021, that Exhibit 4B was taken before 2021, and that Exhibit 4C was taken in 2019. When asked if he shaves his head, he testified that he did.

⁸ See *Singh v. City of New York*, 2023 NY Slip Op 02141, *1 [2023] for a description of "black cars" vis-à-vis yellow taxis.

On cross-examination, Mr. Laftah was asked if he takes “selfies.” He responded that he had taken them but that he does not generally take them. He was then asked if he had shaved his head over the last four (4) years. He replied that he had, approximately every two (2) months. Mr. Laftah then confirmed that he was married and testified that his wife was named Yemina. Asked if his signature was at the bottom of Mr. Leggio’s notes for the service of the notice to quit (petitioner’s Exhibit 1 and 2), he denied that it was. He then denied being served papers on March 10, 2021, or on November 23, 2021. However, he did confirm that he received court notices and appeared in court. He then testified that he did not receive either the notice to quit or notice of petition and petition by mail. He confirmed that he lived on the first floor of the subject building.

When asked what his employment was on November 23, 2021, Mr. Laftah replied that he drove a car. He testified that he drove every day. However, when asked if he came home for lunch, he testified that he would sometimes. Finally, he was asked if he had ever dyed his hair. He replied that he did not; he only shaved it.

On redirect, when asked again if his signature was on petitioner’s Exhibits 1 and 2, Mr. Wahed testified that it was not. The hearing then concluded.

DISCUSSION & DETERMINATIONS AS TO TRAVERSE HEARING

The court will first address service of the notices of petition and petitions, since their service affects personal jurisdiction, while service of the predicate notices affects a required condition precedent for both proceedings but is not jurisdictional. *See Tzifil Realty Corp. v. Temamnee*, 46 Misc 3d 144[A], 2015 NY Slip Op 50196[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]; *716 Realty, LLC v. Zadik*, 38 Misc 3d 139[A], 2013 NY Slip Op 50194[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]. At a traverse hearing, the party

prosecuting the case (i.e. plaintiff or petitioner) has the burden of proof by a preponderance of the evidence. *See e.g. Wells Fargo Bank, NA v. Chaplin*, 65 AD 3d 588 [2d Dept 2009]; 77 *Commercial Holding, LLC v. Central Plastic, Inc.*, 46 Misc 3d 80, 83 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014].

The court finds that petitioner did not meet its burden of proof in Index No. L&T 301750/21, for the second-floor unit. Although Mr. Leggio testified to service of the notice of petition and petition upon a person he referred to as Mr. Tali, his credibility was undermined by multiple facts. First, no photograph was taken of Mr. Tali. The only photograph purportedly taken of the second-floor unit, at the time of service of the notice to quit, was at a distance, showing the whole front of the property (petitioner's Exhibit 5). In contrast, petitioner presented a photograph of the first-floor occupant (albeit only for the service of the notice to quit) (petitioner's Exhibit 3). Mr. Leggio's explanation that he did not have sufficient time to photograph the second-floor door, even before or after the service, strained credulity. Moreover, the description of the person served as 5'8-5'11" bore no relationship to Mr. Wahed, who testified repeatedly that he was 6'6" tall, which was corroborated by his driver's license (respondents' Exhibit 3).

While petitioner attempted to suggest that Mr. Wahed may have been home at the time of the service of the notice of petition and petition, it did not establish the same. Mr. Wahed was questioned about a photograph that did not come into evidence on cross-examination as to whether his car was present. He replied then that the photograph did not refresh his memory as to whether he was at home. Mr. Wahed's consistent testimony was that he could not recall if he was at home on the date of service. Petitioner, who at all times had the burden of proof (77

Commercial Holding, LLC, 46 Misc 3d at 83), offered no affirmative evidence demonstrating that Mr. Wahed has at home at the time of service.

Accordingly, traverse is sustained as to the notice of petition and petition on Index No. L&T 301750/21 and the petition is dismissed without prejudice.⁹ The clerk shall issue a judgment dismissing the petition in Index No. L&T 301750/21. See CPLR § 411. Respondent’s motion to dismiss in that proceeding is denied as moot and without prejudice. The court also does not reach any determination as to service of the notice to quit in Index No. L&T 301750/21, as any such determination has also been rendered moot. See *Elm Mgt. Corp.*, 33 AD3d at 755.

As for Index No. L&T 301749/21, the court finds that petitioner failed to meet its burden of proof, albeit for different reasons. While Mr. Leggio testified to personal service upon Mr. Laftah on November 23, 2021, his lack of documentation of the service was striking, when compared to his documentation of the service of the notice to quit. Unlike with the service of the notice to quit upon Mr. Laftah, petitioner presented no notes about the details of the service, nor anything purporting to be signed by the person served (*cf.* petitioner’s Exhibits 1 and 2). Additionally, no photograph of the door or the person served was presented; this was at variance with the photograph admitted as petitioner’s Exhibit 3, which depicted the person served at the first-floor unit with the notice to quit. Nor did petitioner present any logbook or other electronic record of the service. See *e.g.* *115 Mulberry LLC v. Giacobbe*, 46 Misc 3d 1229[A], 2015 NY Slip Op 50343[U] [Civ Ct, Kings County 2014]; *505 W. 143rd v. Coppedge*, 2013 NYLJ LEXIS 7369 [Civ Ct, NY County, August 28, 2013, Index No. 90627/2012]; *Masaryk Towers Corp. v.*

⁹ The petition is dismissed as against all respondents. Since alleged substitute service occurred upon all respondents other than “Mr. Tali” (Mr. Wahed), petitioner’s failure to establish personal service upon him necessarily results in a lack personal jurisdiction as to all respondents. See RPAPL § 735(1); *Macchia v. Russo*, 67 NY2d 592, 595 [1986] [“[N]otice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.”].

Vance, 12 Misc 3d 1172[A], 2006 NY Slip Op 51157[U] [Civ Ct, NY County 2006] [Referencing the laws and rules requiring process servers to maintain records of service]. The only proof memorializing the service of the notice of petition and petition was the affidavit of service, which is not sufficient, on its own, to “support a finding of jurisdiction.” *77 Commercial Holding, LLC*, 46 Misc 3d at 83.

As with Mr. Wahed, Mr. Laftah was consistent in denying that he was served with the notice of petition and petition. While he did not highlight a material difference in the description of him in the affidavit with his actual appearance, petitioner nonetheless did not carry its burden of proving personal service upon him insofar as its case was lacking in credible testimony and evidence, as detailed in the preceding paragraph.¹⁰

Consequently, traverse is sustained as to the notice of petition and petition on Index No. L&T 301749/21 and the petition is dismissed without prejudice.¹¹ The clerk shall issue a judgment dismissing the petition in Index No. L&T 301749/21. *See* CPLR § 411. Respondent’s motion to dismiss in that proceeding is denied as moot and without prejudice. The court also does not reach any determination as to service of the notice to quit in Index No. L&T 301749/21, as any such determination has also been rendered moot.

CONCLUSION

Upon the determinations made herein, Index No. L&T 301749/21 and Index No. L&T 301750 are both dismissed for lack of personal jurisdiction after traverse hearing. The clerk is directed to issue judgments dismissing the petition without prejudice in both proceedings. The motions to dismiss in both cases are denied as moot and without prejudice. This Decision/Order

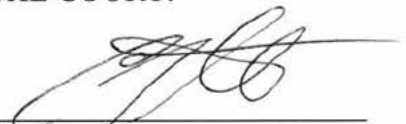
¹⁰ The substantial evidence of the service of the notice to quit gives credence to petitioner’s general awareness of Mr. Laftah’s appearance at the time of the service of the notice of petition and petition.

¹¹ The petition is dismissed as against all respondents in Index No. L&T 301749/21, for the same reasons as those detailed in Footnote 9, *supra*.

will be filed to NYSCEF. The parties are directed to pick up their exhibits within 35 days or they may be destroyed at the court's discretion in compliance with DRP-185.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
May 26, 2023



HON. CLINTON J. GUTHRIE
J.H.C.

~~ORDERED - HON. CLINTON J. GUTHRIE~~