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40-42 94th St Realty LLC v. Priego

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| 40-42 94th St Realty LLC v Priego |
| 2023 NY Slip Op 50660(U) |
| Decided on July 5, 2023 |
| Civil Court Of The City Of New York, Queens County |
| Ressos, 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| This opinion is uncorrected and will not be published in the printed Official Reports.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 July 5, 2023

Civil Court of the City of New York, Queens County

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| <p>40-42 94th St Realty LLC, Petitioner(s)</p> <p>against</p> <p>Angel Priego; MIGUEL ROSAS; COLUNBA MORALES; "John" "Doe"; "Jane" "Doe", Respondent(s)</p> |
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Index No. LT-301588-20/QU

Maria Ressos, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion: Entire e-File on NYSCEF Doc No.'s 1 through 25.

Upon the foregoing cited papers, the Decision/ Order on the motion (Seq. 01) is granted for the following reason(s):

The facts and timeline surrounding this summary holdover proceeding are mainly undisputed. For ease of reference, the court will recite these facts chronologically in a bulleted list:

- February 2018: Respondent(s) moved into the subject premises, a duplex, located at 40-42 94th Street, Apt. 3L and 4L, Elmhurst, NY 11373.

- November 2019: Electrical fire at the subject premises. *See, NYSCEF Doc. No. 12.*
- December 2019: Department of Housing Preservation and Development ("DHPD") issued a vacate order for the subject premises effective December 17, 2019. *See, NYSCEF Doc. No. 13.*
- December 2019: Respondent(s) found temporarily shelter in the Bronx.
- January 2020: Respondent(s) relocated to emergency HRA family shelter in Queens located at 201-15 Jamaica Avenue, Hollis, NY 11423.
- July 2020: Petitioner attempted service of the predicate Ninety (90) Day Notice of Termination ("Notice") on respondent(s). *See, NYSCEF Doc. No. 20.*
- First attempt: July 29, 2020 at 7:49pm
- Second attempt: July 30, 2020 at 11:45am. On second attempt, affixed and mailed copies on July 30, 2020.
- Additional mailing of papers was made by regular and certified mail to Angel Priego at 175-10 88th Avenue, Jamaica, NY 11432.
- October 2020: Respondent(s)' tenancy was terminated by the Notice effective October 31, 2020.
- November 2020: Petitioner attempted service of the Notice of Petition and Petition dated November 2, 2020. *See, NYSCEF Doc. No. 5.*
- First attempt: December 7, 2020 at 7:30pm
- Second attempt: December 8, 2020 at 11:15am. On second attempt, affixed.
- Mailed copies on December 9, 2020.
- February 2021: Respondent, Angel Priego, commenced an illegal lockout proceeding [*2](Index Number: 10023-21). *See, NYSCEF Doc. No. 16.*
- October 2021: The instant holdover case first appeared on the court's calendar in Part Z.
- March 2022: The illegal lockout proceeding was discontinued.
- May 2022: Respondent(s) moved back into the subject premises.

By counsel, Angel Priego, seeks dismissal of the proceeding pursuant to CPLR 3211(a)(7)/(8) and RPAPL § 735, alleging that petitioner did not properly effectuate service of the Notice of Petition and Petition, and the Ninety (90) Day Termination Notice by extension,

upon reasonable application. Petitioner commenced the instant proceeding seeking to recover possession of the subject premises located at 40-42 94th Street, Apt. 3L and 4L, Elmhurst, NY 11373 by serving respondents with a Notice of Petition and Petition by conspicuous place service. The Ninety (90) Day Notice of Termination, incorporated in the pleadings, was also served by nail and mail at the premises. Respondent alleges petitioner was on notice that due to the apartment's uninhabitable condition from the electrical fire, respondents were not residing at the subject premises. In fact, petitioner *knew* they were living at the Queens shelter at the time he attempted service and for almost two years after the fire. Respondent goes so far as to say petitioner visited the family at the shelter to discuss repair status and even tried to get him to give up the tenancy. *See, NYSCEF Doc. No. 10.*

In opposition, petitioner confirms that due to the fire, respondents had to seek temporary shelter. Petitioner recounts that their process server mailed an additional copy of the Notice to Angel Priego at 175-10 88th Avenue, Jamaica, New York 11432, where he believed respondent was temporarily staying. Petitioner avers that during respondent's initiated illegal lockout proceeding, where he alleged constructive eviction, the parties spoke about the holdover case. As such, respondent cannot plead ignorance of this holdover case. Petitioner's counsel further states that even though respondent was in a shelter, he maintained legal possession of the premises, received mail and routinely visited the premises to monitor the progress of the fire restoration. *See, NYSCEF Doc. No. 19.* Respondent counters arguing that discussion of the holdover in another proceeding does not overcome the statutory requirements of service of the pleadings.

Summary proceedings exist entirely by statute and demand strict compliance. Under RPAPL § 735, before a process server resorts to conspicuous place service, there must be a showing that, upon *reasonable application*, admittance to the premises cannot be obtained and/or a proper person cannot be found to whom process may be delivered. *NY RPAPL § 735.* The standard under RPAPL § 735 is not as stringent as that of CPLR 308, which requires due diligence. The purpose of a reasonable application standard is "to assure a reasonable expectation of success in finding a person on the premises." *NY RPAPL § 735(1).* *See, [Palmer House Owners Corp. v. Duchesneau, 64 Misc 3d 146\(A\)](#), 2019 WL 3947711 (App. Term 2nd Dept. 2019).* Making two attempts at personal delivery to a tenant, when at least one of the attempts occurred during non-working hours, *normally* satisfies the "reasonable application" standard for permitting service by affixing a copy of the pleadings on a conspicuous part of the property.

RPAPL § 735 (1)(a) states, in pertinent part: " [...] 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, (a) if a natural person, as follows: *at the property sought to be recovered, and if such [*3]property is not the place of residence of such person and if the petitioner shall have written information of the residence address of such person, at the last residence address as to which the petitioner has such information ...[emphasis added].*" The term "residence" is defined by its purpose within RPAPL § 735 to "mean the particular locality where the tenant is *actually living at the time the summary proceeding is commenced* [emphasis added]." See, *417 E Realty Assocs. v. Ryan*, 442 N.Y.S.2d 880, 884 (Civ. Ct. 1981). This would require an additional mailing to that address for proper service of process. The court in *65 Cent. Park W., Inc. v. Greenwald* found that mailing of additional copies of a predicate notice to respondent at a nursing home complied with RPAPL § 735(1)(a), where the landlord had written information of the residence of the tenant. 127 Misc 2d 547, 486 N.Y.S.2d 668 (Civ. Ct. 1985), see also, *Parras v. Ricciardi*, 2000 NY Slip Op. 20312 (Civ. Ct. Kings Co. 2000). Similarly, in *417 E. Realty Assocs. v. Ryan*, the court found that *despite tenant having actual notice of the proceeding*, the landlord failed to comply with RPAPL § 735 by attempting service and mailing papers to the premises *only*, while respondent was residing in Minnesota.

The "reasonable application" standard "requires a knock or a ring on a door, and a wait sufficient to secure a response or to determine that there shall be no response." NY RPAPL § 735(1). See, [Harbor Tech LLC v. Correa](#), 69 Misc 3d 969, 134 N.Y.S.3d 652 (Civ. Ct. Kings Co. 2020). However, an attempt at service "must not be unlikely to succeed or the court may find it equivalent to no attempt at all." See, *161 Williams Assocs. v. Coffee*, 122 Misc 2d 37 (Civ. Ct. 1983), citing *815 Park Owners, Inc. v. West LB Administration*, N.Y.S.2d 1015 (Civ. Ct. NY Co., 1983); *Palumbo v. Estate of Clark*, 403 N.Y.S.2d 874 (Civ. Ct. Bronx Co., 1978).

Here, the record clearly shows that petitioner had actual notice that respondent was not residing at the subject premises at the time they attempted service of both the predicate notice and the Notice of Petition and Petition. To that point, petitioner sent an additional copy of the Notice to an address different from the subject premises'. Angel Priego attests that his family was residing at an emergency family shelter located at 201-15 Jamaica Avenue, Hollis, NY 11423 since January 2020. The process server sent the additional mailing to 175-10 88th Avenue, Jamaica, NY 11432 in July 2020—These addresses do not match up. The Court notes that the additional mailing was only to Angel Priego, and the affidavit of service does

not allege four more mailings, one for each named respondent. While it is unclear where petitioner got the 88th Avenue address from, the extra mailing shows at least *some knowledge* that respondent may not be at the subject premises. For certain, petitioner was on notice of the DHPD Order to Repair/Vacate Order due to fire damage issued on December 16, 2019. The Order described the following conditions: fire damaged to ceiling and walls, broken windows and plywood, no electricity and no gas service. *See, NYSCEF Doc. No. 13*. The Court takes judicial notice of the HPD Online website which indicates this Order was not rescinded until February 2022.

The Court finds that given the facts of this case, petitioner's attempt at service did not comply with the reasonable application standard required under the statute. Petitioner's efforts were not calculated to apprise respondent(s) of the proceeding and the *one* additional mailing of the predicate notice, to the incorrect address, falls short. Petitioner's opposition does not include an affidavit or anything in support with any investigations taken or efforts to determine respondents' residence, which evidently could not be the subject premises, such that service of process would not amount to a "a mere gesture." *See, Denis v. Fisher, 66 Misc 3d 433, 434* (Civ. Ct. Queens Co. 2019), citing to *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Whether respondent became aware of the proceeding *after the [*4]fact* is irrelevant here.

Summarily, the attempts at service here were not made at a time when the process server could reasonably expect someone to be home given the condition of the premises, the Vacate Order in place, and based on the allegations in respondent's un rebutted affidavit that petitioner had first-hand information respondents were in a shelter. Given lack of proper service of the Notice of Petition and Petition, the Court lacks personal jurisdiction. *See, Brooklyn Heights Realty Co. v. Gliwa, 92 AD2d 602, 459 N.Y.S.2d 793* (Appellate Division, 2nd Dep't 1983). Accordingly, respondent's motion is granted in its entirety and it is ORDERED that this proceeding is dismissed, without prejudice. This constitutes the Decision/Order of the Court, a copy of which will be uploaded to NYSCEF.

Date: July 5, 2023

Judge of the Housing Court

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