2021-04-21

LATCHMAN v. HARDNETT

1CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D

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SEERAJ LATCHMAN, L&T 51153/20

Petitioner,

-against- DECISION AND ORDER

MARY HARDNETT,

Respondents (Tenant),

John Doe, Jane Doe

Respondents (Undertenants).

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Present:

Hon. Sergio Jimenez
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion seeking to dismiss the petitioner on various grounds and for any other relief as the court may deem proper:

Papers	Numbered
Order to Show Cause.....	
Notice of Motion and Affidavits Annexed	1
Answering Affirmations/Affidavits	2
Replying Affirmations.....	3
Exhibits	
Memorandum of law.....	

Petitioner, Seeraj Latchman, owns the premises located at 101-66 125th Street Apt. 4C in South Richmond Hill, New York 11419. Respondent (Mary Hardnett) has allegedly lived in the subject premises since 2013. Petitioner brought this holdover petition seeking possession of the premises following a termination of tenancy due to alleged improper conduct by respondent or her family. The proceeding was first on the court's calendar on January 30, 2020 and was adjourned to February 27, 2020. On that date, it was set for settlement or trial on March 27,

2020. Before that appearance could take place, the court system was slowed by the global pandemic emergency. The proceeding was administratively stayed until January 22, 2021 where it was assigned to the HMP part which connected respondent with counsel and adjourned the proceeding to Part D on February 23, 2021. Thereafter, respondent filed the instant motion seeking dismissal and after being fully briefed, the court held virtual arguments on April 6, 2021. Following said argument, the court reserved decision.

Respondent's Motion and Petitioner's Opposition

The instant motion seeks dismiss pursuant CPLR §3211(a)(7) and/or (8) the proceeding for failure to properly serve the notice of termination, notice of petition and petition correctly, for failure to serve a proper notice to cure, for failure to serve a proper notice of termination, partially dismissing the claim about fights and loud noises for not being in the notice to cure, dismissing the claim seeking money as a substantial obligation of the lease and, in the alternative, granting leave to file the included answer and granting discovery. Petitioner opposes all branches of the notice but withdraws the claim for money and does not oppose the answer being submitted and for discovery if what respondent seeks exists.

Respondent argues that the service was improper for two reasons. First, that the address read "Richmond Hill" not "South Richmond Hill," and that, therefore, the service, as a matter of law, cannot be proper. She avers in her affidavit that she has never lived in Richmond Hill but rather all her correspondence has always come to "South Richmond Hill." Respondent's counsel states that there are separate post offices in Richmond Hill and in South Richmond Hill. Petitioner opposes this argument stating that they are interchangeable with the use of the correct zip code. In *Rochdale Holding Corp. v. Neuendorf*, 784 N.Y.S. 2d 924 (2004), the court held "the

fact that the mail was addressed to zip code 10022, rather than zip code 10021, did not render service defective" where the correct street address and county were set forth. Here not only were the street and county correct but the zip codes also matched. The court agrees with petitioner, the United States Postal Service, which handles billions pieces of mail per year, has a mechanism for addressing these types of situations.

Secondly, respondent argues that the service did not comply with RPAPL §735 because it could not have been conspicuous placement service because the attempts to serve were both made outside of work hours and then not displayed, but rather slid under the door. It is undisputed that the service attempts were Friday night at 8:20pm and Saturday at 1:42pm, both done by Petitioner's attorney. In the Second Department at least two attempts at personal service are required, one during normal working hours and one attempt when a person working normal business hours could reasonably be expected to be home are required to satisfy the reasonable application standard. See *Martine Associates LLC v. Minck*, 5 Misc3d 61 (App Term 2d Dept 9th & 10th Jud Dists, 2004); Gristmill Realty, LLC v. Roa, 69 Misc.3d 142(A) (App. Term 2d Dept, 9th & 10th Jud Dists, 2020); *Tinker LTD Partnership v. Berg*, 906 N.Y.S. 2d 784 (2010). As such, the requirements for conspicuous service have not been satisfied.

Petitioner counters stating that due to a refusal of service, the standard shifts to a different one and becomes one of substituted service. Respondent's attorney's affidavit of service does not make a claim of substituted service. However, statements both on Petitioner's affidavit in opposition to the motion to dismiss and the Petitioner's attorney's oral arguments raise a possible claim of substituted service. Respondent's affidavit claims that on the second attempt, the knocking on the Respondent's door resulted in an answer from inside the apartment, who refused to accept service. RPAPL 735 does not require consent to accept service and refusal will not

vitiate a substitute service. However, appellate courts have found that a person being served must be aware that he is being served with process. *Bossuk v. Steinberg*, 58 NY2d 916 (1983); *Spector v. Berman*, 119 AD2d 565 (App Div 2d Dept, 1986); *Hall v. Wong*, 119 AD3d 897 (App Div 2d Dept, 2014); *First Owner Corp. v. Riverwalk Garage Corp.*, 784 N.Y.S. 2d 844 (2004). The claims of substituted service were not made on the affidavit of service nor did the Attorney who served the papers provide the court with an affirmation sustaining any possible claim of substituted service. Neither party could point to any specific exception to RPAPL §735 that would allow an exception to its strict mandates following a refusal of service. Therefore, a sole claim of refusal made by someone an unknown person to the server is insufficient as a matter of law to change the nature of the service itself.

Respondent also brought to the court's attention that regardless of how service was effectuated that there would be a problem regarding the mailing because they allege that since it was marked as sent from the South Richmond Hill post office, that office was not open after the purported attempt at service and therefore must have been sent *before* the attempted service. However, as this was not raised in the papers, the court will not consider such an argument. It is undisputed that the service attempts were Friday night at 8:20pm and Saturday day at 1:42pm, both were done by petitioner's counsel himself, both outside of working hours. Nothing presented converted this conspicuous placement service to substituted service as pled in the affidavit of service. As such, service was defective as a matter of law. No traverse hearing is required as the service attempts were facially defective. *Doji Bak, LLC v. Alta Plastics*, 51 Misc 3d 148(A)(App Term 2d Dept, 2016).

The court grants respondent's motion in part and denies the motion in part. The court grants respondent's motion to dismiss the proceeding on failure to serve the notices correctly as

stated above. All other aspects of the motion are denied as moot or without merit. Petition is dismissed, the clerk is instructed to enter a judgment of dismissal in favor of the respondent. Nothing in this order precludes Petitioner from seeking remedy in this or another court following proper service. This constitutes the Decision and Order of the Court.

Dated: April 21, 2021
Queens, New York

Sergio Jimenez
Judge, Housing Court

Sergio Jimenez, JHC

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