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2023-08-11

### 2825 Snyder LLC v. Clery

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Civil Court of the City of New York  
County of Kings

Index # **LT-304552-23/KI**



2825 Snyder LLC

Petitioner(s)

-against-

Sabrina L Clery; Herbert M Thompson

Respondent(s)

**Decision / Order  
After Hearing**

This is a summary nonpayment proceeding that commenced in February 2023. The subject premises are known as 2825 Snyder Avenue, Apt 3B, Brooklyn, NY 11226.

Respondent Sabrina Clery retained the Legal Aid Society (LAS) as counsel. LAS filed a motion seeking various relief. The motion was granted on consent to the extent that the amended answer was deemed served and filed. The balance of the motion seeking discovery was held in abeyance until the issue of service of the 14 Day Notice could be decided at a traverse hearing.

On August 1, 2023, this Court held a traverse hearing. Before the hearing commenced, the parties stipulated that the hearing would be limited only as to whether there was a reasonable application as to the service of the 14 Day Notice.<sup>1</sup>

Sabrina Clery was sworn in and testified. It was undisputed that there was a flood in the apartment that caused Clery to stay in Airbnb apartments while the damage was repaired. It was also undisputed that respondent Clery received an email from Velocity Management dated January 10, 2023. The email stated that there will be no access to the apartment from Thursday through Monday due to the ongoing repairs in the apartment and that it is anticipated that Clery will be able to return to the apartment by “either Monday, 1/16/23 in the afternoon or latest by Tuesday, 1/17/2023 in the morning.” It is also undisputed that the process server attempted to serve the 14 Day Notice on January 12, 2023 (Thursday) and January 13, 2023 (Friday). *See Affidavit of Service NYSCEF Doc. 1*

Clery testified that after she regained access to the apartment, she saw two copies of the 14 Day Notice on her door but that she did not receive them by mail.

Petitioner did not present any witnesses.

At the conclusion of the hearing, both sides made brief closing statements.

Respondent seeks dismissal of the proceeding as the service of the 14 Day Notice did not meet the reasonable application standard required by *RPAPL 735*.

*RPAPL 735* requires that a petitioner in a summary proceeding make a reasonable application at personal service before resorting to “nail and mail” service. The reasonable application standard is less stringent than the due diligence standard for service under *CPLR 308*.

<sup>1</sup> The Court notes that Peter Stoute, the process server, appeared and was prepared to testify. Based on the stipulation of both sides, Mr. Stoute was excused as there was no dispute as to whether he actually went to the subject premises as affirmed in the Affidavit of Service dated 1/13/23.

However, reasonable application under RPAPL 735 requires a reasonable expectation of success. *see 159 W. 23rd LLC v Spa Ciel De NY Corp.*, 66 Misc 3d 139(A) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]. “Attempts at service which are predestined to fail are not considered reasonable attempts.” *See 91 Fifth Ave. Corp. v Brookhill Prop. Holdings, LLC* 51 Misc 3d 811 [Civ Ct NY County 2016]

Clery’s testimony was clear and unequivocal. Personal service was attempted on January 12, 2023 and January 13, 2023. Those were the exact days that Clery had no access to the apartment due to continued repairs. Management office was clearly aware of the fact that she will not be present at the premises. In fact, it was the management that notified Clery that her apartment will not be accessible during those days. Attempts at service on the days the petitioner knows the premises are not accessible by the respondent cannot be held to have a reasonable expectation of success. *See 159 W. 23rd LLC v. Spa Ciel De NY Corp., supra*

Based on the above, traverse is sustained as to the service of the 14 Day Notice. Since proper service of the 14 Day Notice is a condition precedent to a summary proceeding (*see Hernco, LLC v. Hernandez*, 46 Misc.3d 137(A)(App. Term 2nd Dept. 2015) ) this matter must be dismissed without prejudice.

The Court notes the statement made by petitioner’s counsel that the process server, Peter Stoute, should not be penalized for this traverse being sustained. Mr. Stoute was just following instructions and he was not aware of the fact that Clery was not residing in the subject premises at the time the service of 14 Day Notice took place.

The Court does not need to address the branch of the motion seeking discovery as it is moot.


Accordingly, it is ORDERED that the traverse is sustained. And it is further

ORDERED that this case is dismissed without prejudice. And it is further

ORDERED that the balance of the motion is denied as moot.

This constitutes Decision/Order of the Court.

Date: August 11, 2023  
Brooklyn, NY

  
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\_Hon. Agata E. Rumprecht-Behrens  
Housing Court Judge