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Mujica v. Baez

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART S

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ANGELA MUJICA,
Petitioner/Landlord,

L&T Index No. 325784/2022

- against -

DECISION/ORDER

ASHLEY BAEZ,
426 E. 159th Street
Apartment C
Bronx, New York 1045

Respondent-Tenant,

“JOHN DOE” and “JANE DOE,”

Respondents/Unknown Occupants,

NEW YORK CITY HOUSING AUTHORITY SECTION 8,

Respondent.

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HON. MALAIKA N. SCOTT-MCLAUGHLIN, J.H.C.

Recitation, as required by CPLR 2219 (a), of the papers considered in review of respondent’s motion to dismiss the petition pursuant to CPLR Section 4401:

Papers	Numbered
Respondent’s Motion, Affirmation, and memorandum of Law	1
Petitioner’s Affirmation in Opposition	2
Respondent’s Reply Affirmation	3

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Introduction and Procedural History

Petitioner, Angela Mujica, commenced this lease expiration holdover proceeding against Ashley Baez (“Respondent”), “John Doe,” “Jane Doe” (collectively “Respondents”) and the New York City Housing Authority (“NYCHA”) to recover possession of Apartment C located at 426 E. 159th Street, Bronx, New York 10451 (“Subject Premises”).

Petitioner issued a Notice of Intent Not to Renew Lease Thirty (30) Day Notice of Termination, dated June 14, 2022 (“Notice of Termination”), which states, in pertinent part, that:

“PLEASE TAKE NOTICE THAT ANEGA MUJICA is the landlord/deed of the above described premises and hereby elects not to renew your NYCHA Section 8 lease, which expires on August 31, 2022

...

“UPON YOUR FAILURE TO REMOVE ON OR BEFORE THE 31ST DAY OF AUGUST, 2022 the Landlord will commence a summary holdover proceeding in the Civil Court of Bronx County pursuant to law to remove you . . .”

Thereafter, Petitioner commenced this proceeding after service of the Notice of Petition and Petition upon Respondents on or about September 1, 2022. In the Petition, Petitioner plead that “Respondent ASHLEY BAEZ is the NYCHA Section 8 tenant of the premises”.

Respondent Baez appeared in the matter and retained counsel. Respondent filed a Verified Answer, dated December 1, 2022 (“Answer”), asserting a general denial and affirmative defenses, including a traverse claim. In particular, Respondent asserted that Petitioner failed to comply with the service requirements of the “Williams Consent Decree”.

After several adjournments, the matter was sent out for traverse and trial and assigned to Part S on December 8, 2022. After conducting a conference, the Court set the matter down for a traverse hearing.

Hearing

The Court conducted the traverse hearing over the course of two (2) days – September 28, 2023, and November 6, 2023. At the hearing, Petitioner called two witnesses: Process Server Ahmad Farhat (“Process Server A. Farhat”) and Process Server Omar Farhat (“Process Server O. Farhat”).

Petitioner entered the following documents into evidence: (1) Process Server A. Farhat's license; (2) Process Server A. Farhat's logbook for service of the Notice of Termination; (3) original certified mailing receipts, dated June 22, 2022 for Respondent, John Doe and Jane Doe for service of the Notice of Termination; (4) a priority mail express 1-day mailing receipt for service upon NYCHA of the Notice of Termination; (5) two GPS records, dated June 21, 2022 and September 13, 2022, respectively; (6) Process Server O. Farhat's license; (7) Process Server O. Farhat's logbook for service of the Notice of Petition and Petition; and (8) original certified mailing receipts, dated September 14, 2022, for Respondent Baez, NYCHA, John Doe, and Jane Doe, for service of the Notice of Petition and Petition. Upon Petitioner's request, the Court took judicial notice of the contents of the court file, including the Affidavits of Service, the Notice of Termination, Notice of Petition and Petition.

Process Server A. Farhat credibly testified that he is a licensed process server. He testified that he was retained by Petitioner's counsel to serve process of the Notice of Termination in this proceeding in June 2022. He further testified that he records his service of process in his logbook, which he does as part of his ordinary course of business.

Process Server A. Farhat testified that on June 18, 2022 at 1:55 p.m., he gained access to the Subject Building to serve process of the Notice of Termination and that he went to the Subject Premises and that he then rang the bell and knocked on the entrance door of the Subject Premises. He testified that he waited and that no one answered and that he then left the Subject Building. He also testified, that he went to the Subject Premises at 9:25 a.m. on June 21, 2022 and that he was not able to effectuate personal service after knocking on the door and ringing the doorbell. Instead, he affixed a copy of the Notice of Termination to the door of the Subject Premises. He testified that, after he effectuated conspicuous service, he performed mailing of the Notice of Termination the next day. He testified that he served NYCHA by overnight priority mail.

On cross examination, Process Server A. Farhat testified that he was hired by Petitioner's counsel to service process of the predicate notice upon Respondents and NYCHA. He testified that he was provided a key to the Subject Building by Petitioner's counsel and that he returned said keys to Petitioner after completing service of the predicate notice. Process Server A. Farhat described the Subject Building. He described his service of process of the predicate notice upon Respondents.

Petitioner then called Process Server O. Farhat as a witness. Process Server O. Farhat testified that he is a licensed process server and that he was retained by Petitioner's counsel to serve process of the Notice of Petition and Petition in this proceeding in September 2022. He further testified that he records his service of process in his Logbook, which he does as part of his ordinary course of business.

Process Server O. Farhat testified that on September 12, 2022 at 1:29 p.m., he gained access to the Subject Building to serve process of the Petition and Notice of Petition. He stated that he went to the Subject Premises and that he knocked on the entrance door of the Subject Premises. He testified that he waited and, when no one answered, he then left the Subject Building. He also testified, that he went to the Subject Premises at 6:05 a.m. on September 13, 2022 and that he was not able to effectuate personal service after knocking on the door. Instead, he affixed three copies of the Petition and Notice of Petition to the door of the subject premises.

Process Server O. Farhat testified that, after he effectuated conspicuous service, he performed mailing of the Notice of Petition and Petition the next day to Respondents by regular first-class mail and certified mail. He also testified that he served NYCHA by regular and certified mail.

Upon cross-examination, Process Server O. Farhat testified that he was hired by Petitioner's counsel to serve papers for Petitioner. He was given a key to enter the Subject Building

and taped three copies of the Petition and Notice of Petition on the door of the Subject Premises after attempting personal service. Petitioner then rested.

Respondent moved orally, pursuant to CPLR 4401, for a judgment as a matter of law to the extent of dismissing the Petition. The Court set a motion schedule for Respondent to submit a written motion and for Petitioner to submit opposition. The Court then adjourned the matter to December 18, 2023 for oral argument. On December 18, 2023, the Court heard oral argument and then reserved decision.

Findings of Fact and Conclusions of Law

CPLR 4401 provides that “[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions.”

At a traverse hearing, Petitioner bears the burden of proof in establishing, by a preponderance of the credible evidence, that service upon Respondents was properly effectuated in accordance with Real Property Actions and Proceedings Law (“RPAPL”) § 735. “It becomes [R]espondents’ burden then to come forward with evidence that service was improper” (*Lee v Liu*, 2007 NY Misc LEXIS 3397 [Civ Ct, NY County 2007]). “If [R]espondent does so, the Court must determine whether [P]etitioner has established by a preponderance of the evidence that service was proper” (*Lee v Liu*, 2007 NY Misc LEXIS 3397 [Civ Ct, NY County 2007]).

Petitioner’s pleadings admit that Respondent receives NYCHA Section 8 subsidy. Thus, Petitioner is bound by the *Williams* Consent Decree, as established in *Williams v NYCHA*, 81 Civ 1801 (SDNY 1995)(“*Williams* Consent Decree”). As NYCHA is the Section 8 administrator for Respondent, it is required to be properly notified of Petitioner’s notices so that it can act

accordingly. The *Williams* Consent Decree requires that NYCHA must be served with the Notice of Petition and Petition as the state law requires or by overnight mail (*see Williams v NYCHA*, 81 Civ. 1801 [SDNY, 1995], Paragraph [6][b][2]; *see also Johnson v Woods*, NYLJ, Sep 6, 2017 at 33 [Civ Ct, Queens County 2017]). Thus, Petitioner's *prima facie* burden is to show service of process upon NYCHA in compliance with Real Property Actions and Proceeding Law ("RPAPL") § 735, which governs service in summary proceedings, and the *Williams* Consent Decree, which permits service by overnight mail (*see 433 W. Assocs v Murdock*, 276 Ad2d 360 [1st Dept 2000]; *see also Grote St. Apts., LP v Philip*, 2023 NY Slip Op 30755(U)[Civ Ct, Bronx Co. 2023]).

RPAPL § 735 provides, in pertinent part, that:

"1. Service of the notice of petition and petition shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; or 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, . . .

"2. The notice of petition, or order to show cause, and petition together with proof of service thereof shall be filed with the court or clerk thereof within three days after; . . ."

Thus, the statute permits service by affixation and mailing, if, after 'reasonable application', admittance to the Subject Premises cannot be obtained and a suitable person [cannot be] found to receive the documents" (*Lee v Liu*, 2007 NY Misc LEXIS 3397 [Civ Ct, NY County 2007]).

Here, based on the testimonial and documentary evidence, the Court grants Respondent's motion for judgment as a matter of law. The Court finds that Petitioner did not establish that Petition and Notice of Petition were properly served upon NYCHA in compliance with the

Williams Consent Decree. Process Server Omar Farhat, corroborated by his Affidavit of Service, credibly testified that he served NYCHA solely by regular and certified mail with the Notice of Petition and Petition. Hence, Petitioner did not show that it served NYCHA in compliance with RPAPL §735 or by overnight mail, as required by the *Williams* Consent Decree. Additionally, NYCHA is a necessary party in this action. Therefore, based on the foregoing, NYCHA was not properly served in this matter and Petitioner did not satisfy its burden during the traverse hearing.

Conclusion

Accordingly, Respondent's motion is granted. The Petition is dismissed without prejudice.

The parties are directed to pick up its exhibits within 60 Days or they will either be sent to Petitioner or destroyed at the Court's discretion and in compliance with DRP-185 (<http://www.court.state.ny.us/courts/nyc/civil/directives/DRP/SRP185.pdf>).

This constitutes the Decision and Order of this Court, which is being uploaded to NYSCEF.

Dated: Bronx, New York
April 5, 2024



MALAIKA N. SCOTT-MCLAUGHLIN, J.H.C.