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2024-10-04

### Hossain v. Cherry

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[\*1]

<b>Hossain v Cherry</b>
2024 NY Slip Op 24265
Decided on October 4, 2024
Civil Court Of The City Of New York, Queens County
Sanchez, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on October 4, 2024

Civil Court of the City of New York, Queens County

**MD Alamgir Hossain, Petitioner(s),**

**against**

**Amanda Cherry, SMITH BEAULIERE,  
"John" "Doe", "Jane" "Doe", Respondent(s).**

Index No. LT-319152-23/QU

Enedina Pilar Sanchez, J.

*Procedural Background:*

On June 6, 2024 the Decision/Order granted Petitioner a final judgment of possession and warrant of eviction after an inquest. The holdover was predicated upon a 60-day termination notice. Petitioner thereafter obtained the warrant of eviction, and the warrant was executed after Marshal's notice of eviction.

Respondent Beauliere filed a Post-Eviction Order to Show Cause on September 26, 2024. The emergency Order to Show Cause was first heard on September 27, 2024. During the arguments presented, the other Respondent in the courtroom stated that papers were not received. Upon an examination of the Affidavit of Service, the Affidavit provides that service

was on a person described as a 13-year-old female.

Based upon the question whether the 13-year-old was a person of suitable age and discretion to accept service, the matter was adjourned to allow the process server, who is also Petitioner's counsel, to appear in court and address the question presented. The matter was adjourned to September 30, 2024 at 9:30 am. On September 30, 2024, the Court was informed that counsel/process server was not available due to a previously scheduled event and the matter was adjourned to October 1, 2024.

*Testimony and Argument:*

On October 1, 2024, the matter was heard and sworn testimony given. Counsel/process server testified that on January 12, 2024 he took the papers to the subject premises. The 13-year-old answered the door. Neither her parents nor any other adult was home. She was asked her age and whether the Respondents were there. The process server was at the subject premises "no more than 2 minutes" and he left the papers with the 13-year-old. The "work order" of the process server provides that the last day to serve was January 12, 2024; and that for service to be valid upon a responsible person of suitable age and discretion the minimum age is 16-years old.

The case had been noticed to be heard on January 22, 2024 and the Respondents did not appear.

The Affidavit of Services provides that the papers were delivered on January 12, 2023 and the testimony was that that date was an error, that the date was meant to be January 12, 2024.

Counsel also argued that he should be allowed to call the 13-year-old so that he could [\*2]conduct an examination in support of his claim that the 13-year-old was a person of suitable age and discretion. The Court noted that the 13-year-old was not in the courtroom but probably in school as most 13-year-olds are required to be under the laws of the State of New York.

After the testimony, counsel/process server argued that a 13-year-old is a person of suitable age and discretion and that as such the service of the papers was proper. Counsel cited caselaw for the proposition that service of papers upon a 13-year-old is proper as a matter of law.

### Discussion and Conclusion:

The testimony established that there was little inquiry from the process server to discern and conclude that service upon a 13-year-old would be proper as a person of suitable age and discretion. The very form relied upon by the process server, presented as evidence to the court, and used to enter the details about the location, the date by which to serve, and the persons to serve state that a responsible person to serve must be at minimum 16 years old.

Here, the minimal time that was spent, no more than 2 minutes, and that it was the first attempt to serve the papers, indicate that this was a "rush job." The assigned court date was ten (10) days out, on January 22, 2024, and service had to be at minimum 10 days before the proceeding was scheduled to be heard. RPAPL §733. January 12, 2024 was the absolute last day to serve the papers. The option of affixing the papers to the door and then mailing thereafter would not have complied with the statutory time frame required for proper service. Instead of going back in the evening to see if an adult was at the subject premises, the papers were given to a 13-year-old, on the first attempt and at 3:38 pm when most parents or adults are at work.

The case cited by the process server, [\*Choi Yin Chi v. Miller\*, 63 Misc 3d 354](#) [Sup Ct Queens Co 2019] does not stand for the proposition that a 13-year-old is a person of suitable age and discretion. "The court stresses that it has a great deal of difficulty finding that a 13 year old is a person of suitable age and discretion upon whom a summons may be served. (See CPLR 308 [2]; see also Wells Fargo Bank Minn. v. Roman, 10 Misc 3d 1075[A], 814 NYS2d 893, 2006 NY Slip Op 50082[U], 2006 WL 176959 [Sup Ct, Richmond County 2006].) In that respect, the court notes that the Court of Appeals has apparently never addressed the issue of service upon a young teenager. When confronted with a case in which service of process was disputed, the Court of Appeals noted that "no question has been raised concerning the fact that the youngsters, one 14 and the other 15, were of 'suitable age and discretion.' " at 358.

The burden is upon the process server and not upon the 13-year-old to show that they are of suitable age and discretion. The facts and arguments presented cannot support a finding that the 13-year-old was of suitable age and discretion and as such the traverse is sustained.

As the traverse is sustained, the default final judgment of possession must be vacated.

Absent a final judgment of possession, there can not be a warrant of eviction and the warrant is vacated, although it had been executed.

Accordingly, the post-eviction Order to Show Cause is granted, and Respondents are restored to possession forthwith, and the case is dismissed without prejudice.

This Decision/Order will be filed to NYSCEF. Petitioner is directed to mail to each Respondent, via First Class Mail, a copy of this Decision/Order and file proof thereof to NYSCEF.

Petitioner's counsel may retrieve his exhibit from the court attorney.

This constitutes the Decision/Order of the Court.

Dated: October 4, 2024  
Queens, New York  
SO ORDERED,  
HON. ENEDINA PILAR SANCHEZ,  
J.H.C.

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