

Mathew v Valentin
2019 NY Slip Op 34131(U)
December 24, 2019
Civil Court of the City of New York, Queens County
Docket Number: 69994/18
Judge: Julie Poley
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D

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BIPIN MATHEW,

Petitioner,

L&T 69994/18

Decision and Order

-against-

JOSE VALENTIN, HILDA COLL-VALENTIN,
JOHN AND JANE DOE,

Respondents.

-----X

Recitation, as required by CPLR 2219(a)

Notice of Motion and Affidavits Annexed.....	0
Order to Show Cause and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	0
Exhibits.....	3
Stipulations.....	0
Other.....	0

POLEY, J.

In this owner’s use holdover proceeding both parties are represented by counsel and have engaged in motion practice. By Decision /Order, dated June 25, 2019, this Court denied Petitioner’s motion to strike Respondents’ personal jurisdiction defense for improper service of the predicate notice and the Notice of Petition and Petition. The traverse hearing was scheduled for October 23, 2019. Prior to start of the hearing, Respondents waived their personal jurisdiction defense as to service of the predicate notice and the Court held a traverse hearing solely on service of the Notice of Petition and Petition. The hearing commenced on October 23, 2019 and concluded on December 5, 2019.

Petitioner called process server Keith Wohl to testify first. On direct examination, Mr. Wohl produced a copy of his current license, relevant pages of his log book, numerous

photographs of his GPS location at the time of service, a printout of the GPS coordinates at the time of service, and original certified mailing receipts for the Notice of Petition and Petition. (P. Ex. A, B 1-4 and C-G). All of the documents were admitted into evidence. Mr. Wohl credibly testified that on September 11, 2019, at approximately 8:00 pm, he arrived at the subject location and gained admittance into the building by pushing the lobby door open. He proceeded to go to the subject apartment, knocked on the door, waited a few minutes, and when no one answered he left. He described the building as a red brick three story attached building. The subject apartment was located on the first floor on the right, with the first floor containing two apartments. He described the door as having a nontransparent glass window on top. He credibly testified that he returned to the building on September 12, 2019, at 9:35 am, and again after gaining access into the building he proceeded to the subject apartment. He again knocked on the door, and when he did not receive an answer, he proceeded to place four (4) copies of the Notice of Petition and Petition under the apartment door by sliding them inside the apartment. After he slid the documents under the door, he made a notation in his log book, took photographs, and uploaded his location and time of service to his GPS records. Mr. Wohl testified that after he returned to his office, he supervised his staff in making the address labels and placing the documents in the envelopes, and that he personally went to the post office and mailed copies of the Petition and the Notice of Petition to all Respondents via regular and certified mail.

On cross-examination, Mr. Wohl testified that the documents do not appear in photographs of the subject door because he slid the documents under the door inside the apartment. When effectuating conspicuous service, it is his preferred method to first attempt to slide the documents under the door. If he is unable to do so, only then does he tape documents to the door. He credibly testified that he prefers the first method of service when possible because

he believes that sliding documents under the door provides a higher likelihood that the recipients will receive service. Mr. Wohl elaborated that sliding documents under the door eliminates the possibility that someone removes the documents from the door. He then credibly testified that the opening at the bottom of the subject door was large enough for him to completely slide the documents into the apartment one by one. He testified that he never jams the documents in the door as such method of service is not permitted by the regulations promulgated by the Department of Consumer Affairs. Petitioner did not call any other witness.

Next, Respondent Hilda Coll-Valentin testified. Mrs. Coll-Valentin testified that she has resided at the premises for approximately seven or eight years with her husband and their teenage daughter. Mrs. Coll-Valentin testified that she did not receive the Notice of Petition and Petition under her door or in the mail. Sometime last year, and prior to the start of this proceeding, Mrs. Coll-Valentin testified that they changed flooring in the apartment and added a weather strip to the bottom of the door to keep the wind from entering the apartment. Mrs. Coll-Valentin testified that the only documents she received that were slid under the door was her rent bill, which consists of two pages. She does not believe that the opening at the bottom of the door is large enough to allow a seven-page document to slide under the door, and testified that she went home and attempted to slide seven pages of regular size paper under the door but was unable to do so as the papers crunched and did not go through.

On cross-examination, Mrs. Coll-Valentin testified that she works full time and on a typical day leaves the house around 6:30 a.m. and that she does not return until around 6:30 p.m. in the evening. Mrs. Coll-Valentin testified that either she, her daughter or her husband picks-up the mail when they get home and that she did not find the Notice of Petition and Petition under her apartment door and did not receive them in the mail. Mrs. Coll-Valentin further testified that

she did not hear anyone knocking on the door at 8 p.m. on September 11, 2019, that her teenage daughter leaves the house around 7:15 a.m. and returns around 2:30 p.m., and that her husband leaves the house around 6:30 a.m. and returns around 6:00 p.m. in the evening.

Next, Mr. Jose Valentin testified. Mr. Valentin testified that he has resided at the premises for approximately eight years with his wife and daughter. Mr. Valentin testified that he leaves for work around 6:30 a.m. and returns around 6:30 p.m. in the evening. Mr. Valentin testified that at some point after the new owner acquired the building, they had a conversation where Mr. Valentin expressed interest in changing kitchen cabinets in his apartment and the new owner told him to wait. Right after that conversation, he received some notices about vacating. The remaining portion of Mr. Valentin's testimony was disoriented, and his recollection of specifics was not entirely reliable. He testified that one evening at approximately 10:00 p.m. his daughter told him that someone is trying to wedge some papers inside the apartment, and that he went to the front door and removed the wedged documents from the side of his door. Mr. Valentin was unable to recall the year, the month or the season in which any of this occurred. He also admitted that due to his limited knowledge of the English language, he could not say whether any of the documents allegedly wedged in the door pertained to service of the Notice of Petition and Petition. He testified that he gave the documents to his wife to read, but he was unable to confirm with any specificity whether the documents were in fact the Notice of Petition and Petition pertaining to the subject cause of action.

“Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and therefore, gives rise to a presumption of proper service.” (*Wells Fargo Bank N.A. v. Chaplin*, 65 A.D.3d 588, 589 [2nd Dep't. 2009]; see also, *Bankers Trust Co. of Cal. v. Tsoukasa*, 303 A.D.2d 343, 344 [2nd Dep't. 2003]). “However, when a [party] submits a

sworn denial of receipt containing specific facts to refute the statements in the affidavit of the process server, the prima facie showing is rebutted and the plaintiff must establish personal jurisdiction by a preponderance of evidence at a hearing.” (*U.S. Bank, N.A. v. Peralta*, 142 A.D.3d 988, 989 [2nd Dep’t. 2016]; *see also, Citibank N.A. v. Balsamo*, 144 A.D.3d 964 [2nd Dep’t. 2016]). Thus, the burden rests with Petitioner to prove, by preponderance of the evidence, that it caused the Petition and Notice of Petition to be served upon Respondent in accordance with RPAPL § 735.

RPAPL § 735 provides that service of the Notice of Petition and Petition shall be made by personal delivery or delivery to a person of suitable age or discretion residing or employed at the property sought to be recovered. The statute further provides that “if upon reasonable application ... admittance cannot be obtained and such person found” service can be effectuated “by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or by placing a copy under the entrance door of such premises...” and by mailing the Petition to Respondents by registered or certified mail and by regular first class mail within one day thereafter.

Because conspicuous place delivery is the least desirable of the three methods, nail and mail service may only be used after reasonable attempts at personal service were unsuccessful. (*Naman v. Sylveen Realty Co.*, 222 A.D. 2d 564 [2nd Dep’t 1995] *citing, Palumbo v. Estate of John Clark*, 94 Misc 2d 1 [Civ Ct, Bronx County 1978]). The reasonable application standard for RPAPL § 735 generally requires that there be at least two attempts at service prior to resorting to “nail and mail” service, with one attempt during regular business hours and one attempt outside business hours. (*Eight Associates v. Hynes*, 102 AD2d 746 [1st Dep’t 1984]).

There is no dispute that Respondents are natural persons who resides at the premises sought to be recovered. Respondents did not allege that the process server's photographs depicted an incorrect location, nor did Respondents credibly testify that anyone of suitable age or discretion was home on either of the two dates and times during which the process server attempted to effectuate personal service. The Court credits the process server's testimony that he slid the Notice of Petition and Petition under Respondents' door. Based on the process server's credible testimony, stamped mailing receipts, GPS coordinates, log book and affidavits of service of the process server, the Court finds that Petitioner demonstrated by a preponderance of the evidence that RPAPL §735 has been complied with.

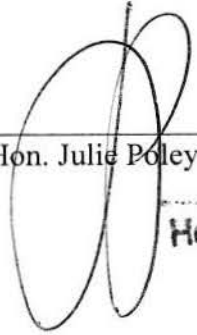
The statutory mandate is not that Respondents receive the Petition, instead, constitutional due process requires that the service be reasonably calculated to appraise the party of pending litigation. (See, *Dobkin v. Chapman*, 21 NY 2d 490 [1968]; see also, *City of New York v. Chemical Bank*, 122 Misc.2d 104 [Sup Ct, New York County 1983]). Under the circumstances of this case, the Court finds that Petitioner proved by a preponderance of the evidence that the Notice of Petition and Petition were served on Respondents in accordance with RPAPL § 735.

Accordingly, the Court overrules traverse. The proceeding is marked off-calendar to complete discovery as previously ordered by this Court. The parties may seek to restore this proceeding by stipulation or motion on notice after completion of discovery. In the event the proceeding is not restored by December 31, 2020, the proceeding is deemed dismissed.

This constitutes the Decision/Order of the Court.

Dated: December 23, 2019
Queens, New York

**Civil Court
of the
City of New York**
DEC 24 2019
**ENTERED
QUEENS COUNTY**

Hon. Julie Poley

Hon. Julie Poley

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