

CIVIL COURT OF THE CITY OF NEW YORK

**CHIEF CLERK'S MEMORANDUM**

Subject: Failure to Answer Judgments

Class: CCM-197

Category: LT-30

Eff. Date: August 22, 2011

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**BACKGROUND**

Several requests for final judgment have been rejected by the Clerk in instances where commercial tenants were served by conspicuous place service pursuant to RPAPL § 735 and the conspicuous place service followed two attempts at service during business hours. The rejection is based on the process server failing to attempt one service during non-business hours, the 'reasonable application' standard that applies to service on residential premises.

The 'reasonable application' standard of RPAPL § 735 has been understood to mean two attempts at service, one during business hours and one during non-business hours, (Eight Associates v Hynes, 102 AD 2d 746 [1st Dept 1984]), and requires that notice fit the circumstances. One attempt at service during business hours and one attempt at service during non-business hours applies to residential premises, where the respondent might be at his/her place of employment during business hours, but at home outside working hours. The same does not apply to commercial premises.

Though the 'reasonable application' standard applies to commercial premises, the business vs. non-business hours requirement does not apply. The Appellate Division, Second Department held that a process server complied with the "reasonable application" requirement where the process server attempted to serve the notice of petition and petition only during the commercial tenant's posted office hours (Naman v Sylveen Realty Co, 222 AD 2d 564, 565 [2d Dept 1995]). Most recently, the First Department, Appellate Term held that a "process server's two attempts, during what common experience would dictate are normal business hours, were sufficient to permit conspicuous place service (809-811 Kings Highway, LLC v Pulse Laser Skin Care, 2009 NY Slip Op 52121U, 2 [App Term 2d & 11th Jud Dists]). The Appellate Term reasoned that "a "reasonable expectation of success" in finding a person on the premises . . . may come from a business's posted hours or from common experience" 809-811 Kings Highway, LLC v Pulse Laser Skin Care, 2009 NY Slip Op 52121U, 2 [App Term 2d & 11th Jud Dists]).

In Order to comply with the decisions of the Appellate Division, Second Department and the Appellate Term, First Department, we are establishing the following procedure with regard to applications for failure to answer judgment where the premises are commercial.

**PROCEDURE**

The clerk, upon reviewing an application for judgment where the premises are commercial will process applications for final judgment where service was made by conspicuous delivery:

- a) after two attempts at service, one during non-business hours and one during business hours
or
b) after two attempts at service both during business hours only

After the application for final judgment is processed it should be forwarded to the Judge for review.

Dated 9/21/11

/S/

Chief Clerk
Carol Alt