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COURT OF APPEALS
STATE OF NEW YORK

MESTECKY,

Appellant,

-against-

NO. 120

CITY OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
October 18, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: First matter on this
2 afternoon's calendar is appeal number 120, Mestecky v. the
3 City of New York.

4 Counsel.

5 MR. MESTECKY: May it please the court, my name
6 is Christopher Mestecky, Guercio & Guercio, for the
7 petitioner-appellant. I resp- - - I respectfully request
8 two minutes of rebuttal.

9 CHIEF JUDGE DIFIORE: Yes, sir. Of course.

10 MR. MESTECKY: Okay. Thank you. It is an honor
11 to be arguing a due process case in front of this court
12 involving the property that's owned by my father who
13 immigrated to this country from a place where notice and an
14 opportunity to be heard were not fundamental aspects of
15 their court system.

16 CHIEF JUDGE DIFIORE: Mr. Mestecky, the statute -
17 - - this you would agree is a case of statutory
18 interpretation, correct?

19 MR. MESTECKY: I - - - I do, Judge.

20 CHIEF JUDGE DIFIORE: So the statute says that
21 the notices of violation have to be served as directed by
22 Article 3 of CPLR except that in cases involving notice of
23 violations that are issued by the Buildings Department
24 there are different rules.

25 MR. MESTECKY: Right.



1 CHIEF JUDGE DIFIORE: How is that not plain on
2 its face?

3 MR. MESTECKY: Yes, Judge. It's - - - it's
4 actually - - - the starting proposition is that all notice
5 of - - - of violation must be served in accordance with
6 Article 3 of the CPLR and then except that. And this
7 enumerated exception is a method of substitute service.
8 And the plain language of the statute incorporates a
9 preliminary requirement that there must be an attempt at
10 personal service upon the respondent before you utilize
11 that method of substitute service. And I believe that - -
12 - that reading and that interpretation, as was held in
13 Horizon by the Second Department, is wholly consistent with
14 the plain language of the statute and also the legislative
15 history of the statute.

16 JUDGE STEIN: Counselor, this statute refers to a
17 "reasonable attempt." Did - - - can - - - is that language
18 anywhere in CPLR Article 3, "a reasonable attempt"?

19 MR. MESTECKY: That - - - that language is not
20 specifically found in the - - - in the statute of Article
21 3. However - - -

22 JUDGE STEIN: The reason I asked that question is
23 because then it seems to me that the reference in
24 subdivision (b) here to the - - - to CPLR Article 3 is not
25 to a reasonable attempt as provided in Article 3 of the



1 CPLR but rather to the persons who are provided for in - -
2 - in Article 3 of the CPLR. Why isn't that the most plain
3 interpretation of that language?

4 MR. MESTECKY: I - - - I agree with that
5 interpretation. However, the persons that are referenced
6 in Article 3 and the requirements are those individuals.
7 So in order to serve process personally on an individual
8 under Article 3, and in this case it would be CPLR 308, the
9 methods are enumerated. There has to be a personal attempt
10 at service, actually hand delivering that document to the
11 individual. You could deliver it to suitable agents - - -

12 JUDGE STEIN: But what I'm suggesting - - - I
13 don't know if you understood my question, that it doesn't
14 refer to what the attempt must consist of. It refers to
15 the person that the attempt must be made so that it's not
16 dictating - - -

17 MR. MESTECKY: I believe - - -

18 JUDGE STEIN: - - - how - - -

19 MR. MESTECKY: I believe it does because the - -
20 - the plain language says "as provided for in Article 3 of
21 the CPLR and Article 3 of the BCL." And - - -

22 JUDGE RIVERA: Well, that's - - - that - - - I
23 think that's the point that's being made. It's whether or
24 not as provided for is referring to the person as opposed
25 to the methodology because otherwise what's the point of



1 this alternative way of service that's provided in this
2 statute, not in Article 3?

3 MR. MESTECKY: So - - - so the purpose of the
4 statute is clearly to make it less onerous than the
5 requirements of service under the CPLR. But less onerous
6 doesn't mean not onerous. And I think that's a distinction
7 that - - - that needs to be made.

8 JUDGE RIVERA: But - - - and isn't attempt pretty
9 clear that you're talking about one not several?

10 MR. MESTECKY: I - - - I respectfully disagree
11 with that interpretation because the language - - - the
12 plain language says "a reasonable attempt." The term
13 "reasonable" is there to justify a due diligence standard.
14 Had the legislature wanted it to say a single attempt that
15 language clearly could be there. It could have said a
16 single attempt or a attempt but there was a - - -

17 JUDGE RIVERA: Well, it's modifying attempt.
18 It's still explaining what - - - by how one measures the
19 attempt. It's not suggesting that it - - - it's reasonable
20 only because you do it several times.

21 MR. MESTECKY: I - - - I agree with that. I
22 think it doesn't necessarily have to be multiple attempts,
23 but the attempt has to be reasonable. And that means that
24 a - a determination that one attempt is always enough
25 cannot be the - - - what the meaning of the statute is.

1 JUDGE WILSON: What - - - what good here would a
2 second visit have done?

3 MR. MESTECKY: In - - - in - in this case, if the
4 attempt were reasonable - - - and I believe there's a whole
5 host of cases that - - - that discuss the reasonableness of
6 the - - - the attempt, there would be evidence in the
7 record as to the specific attempts to find out where the
8 petitioner-appellant resided. It - - - clearly the tenant
9 knows where he resides. We never had an opportunity at the
10 hearing to - - - to address that reasonableness because
11 there was a denial of that request to have the hearing
12 officer appear.

13 However, any case where there's a dispute as to
14 the service you would have the individual come in and you
15 would examine that issue as to the reasonableness of the
16 attempt. With these notices of violation, on its face the
17 affidavit of service merely provide knocked on the door,
18 posted. That cannot be what the legislature intended, and
19 I think going back to some of the questions with regard to
20 the understanding of the plain language of the statute, you
21 do have to look at the legislative history. In the
22 legislative history, Governor Carey's memorandum filed with
23 the bill dated in July of 1979 specifically addresses this
24 issue, and it provides for this alternative method of
25 service. And the quote, and it's at record 322, is that



1 it's contemplated in quote, "In instances where attempts to
2 personally deliver the notice have been unsuccessful."

3 JUDGE FAHEY: It seems that you're - - - you're
4 relying on a conflict between the Departments, between the
5 First and the Second and specifically the Second Department
6 case First Horizon, I think it's Home Loan Program. I - -
7 - I don't remember the rest of the title and the RPAPL
8 Section 735 in an analogy to that argument. Do you want to
9 outline those for us?

10 MR. MESTECKY: Sure. The - - - the arguments in
11 that case was the RPL had the same term reasonable. It
12 used the term reasonable diligence. And First Horizon - -
13 -

14 JUDGE FAHEY: I thought it was application.

15 MR. MESTECKY: Reasonable application, you're
16 correct, Judge. And in that case the court reviewed that
17 matter and said that term reasonableness imports the due
18 diligence requirements. If the - - - if the court just
19 wanted it to be going to the site and posting, if the
20 legislature wanted that, that could have happened. But the
21 reasonableness and the case law with regard to reasonable
22 and what a reasonable application would be, First Horizon
23 said that - - - that terminology is similar, it's akin, and
24 that - - - that requires a - a fact-specific analysis as to
25 what happened on each case for the service. And that - - -



1 that is also a significant issue in this case in that the
2 record is wholly devoid of - - - of those issues because -
3 - -

4 JUDGE FAHEY: What is - - - what effect do you
5 think the nature of the mailings has on your - - - on your
6 notice argument, the nature of the mass mailings? Does it
7 have any effect on it?

8 MR. MESTECKY: I think it - - - it goes to the
9 same - - - same argument which is the - - - the actual
10 inspector has to not just explain the reasonableness of the
11 attempt that he made but also the reasonableness of what
12 mailings - - -

13 JUDGE FAHEY: I see.

14 MR. MESTECKY: - - - there were made.

15 JUDGE FAHEY: Thank you.

16 MR. MESTECKY: And without that witness, clearly,
17 the affidavit of - - - of service was put into evidence.
18 There's no evidence at the hearing as to the mailings and
19 what happened with regard to those mailings.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. MESTECKY: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel.

23 MR. MCCANN: May it please the court, Max McCann,
24 counsel for respondents. The legislature amended the
25 charter specifically to move away from the very service



1 regime that Mestecky is asking this court to impose. And
2 it did so for good reason, and that's because requiring
3 inspectors to serve notices of premises-related violations
4 the same way you would serve a summons and complaint in
5 order to initiate a civil lawsuit doesn't work. The
6 problems with that system are well documented in the
7 record.

8 JUDGE STEIN: So many of these properties are not
9 owner occupied, but - - - but is there a system by which
10 the owners can register or somehow make their actual
11 residence known?

12 MR. MCCANN: Absolutely, Your Honor, and it's
13 quite easy to do so.

14 JUDGE STEIN: Okay.

15 MR. MCCANN: The owner of a premises can register
16 with the Department of Finance to receive tax bills at a
17 certain location, their home address, their office address.
18 They can register with HPD as, in fact, they should. And
19 they can also register with the issuing agency - - -

20 JUDGE STEIN: And are those addresses, are they
21 necessarily in New York State or New York City or could
22 they be anywhere?

23 MR. MCCANN: They could be anywhere, Your Honor.
24 And that underscores the ease with each owners of premises
25 can receive notice under this - - -



1 CHIEF JUDGE DIFIORE: Counsel, you say the owner
2 can register. Are they required to register?

3 MR. MCCANN: I - - - I believe under the Multiple
4 Dwelling Law the owners, depending on the type of property,
5 are required to register with HPD. And if they do so, if
6 they take that one small step, they're going to receive
7 notice just as Mr. Mestecky did in this case in five out of
8 the nine challenged violations.

9 JUDGE RIVERA: Well, they pay taxes, right?

10 MR. MCCANN: That's correct.

11 JUDGE RIVERA: So where do they register the
12 address for - - - to where - - - where their tax bill is
13 sent?

14 MR. MCCANN: For five of the nine violations, the
15 tax bill was registered to Mr. Mestecky's home address, and
16 so once he took that small step of registering with the
17 Department of Finance, every subsequent violation that was
18 issued to him from that point was issued to both addresses,
19 the premises and the Bayside address that he listed with
20 the Department of Finance.

21 JUDGE STEIN: Can I ask you about the - - - the
22 proof of mailing? So were the affidavits of mailing
23 attached as exhibits to the answer or were they presented
24 at - - - at any of the hearings?

25 MR. MCCANN: The affidavits of service were



1 attached to the answer only to explain the things that the
2 hearing officer took official notice of. The rules were
3 quote broad for the ALJs in these types of hearings to take
4 official notice of - - -

5 JUDGE STEIN: No. But did the - - - did the ALJs
6 base it on the affidavits of mailing or did they base it on
7 this SVBI screen?

8 MR. MCCANN: That's right. The ALJs would have
9 based it on the SVBI screen.

10 JUDGE STEIN: Okay. That's what I want to - - -
11 oh, SVBI. Okay. Let - - - let me just ask you about that.
12 As I understand it, and correct me if I'm wrong, that
13 indicates that the letters were prepared to be sent to this
14 contractor who actually does the serving. It - - - it's
15 not proof that they were actually sent or even printed and
16 certainly not that they were actually mailed.

17 MR. MCCANN: Respectfully, it is, Your Honor.
18 The - the environmental control board has a contract with
19 an outside vendor who batch prints all of the notices of
20 violations and decisions that are entered on that SVBI
21 screen on a daily basis. They - - - so it's - - -

22 JUDGE STEIN: So without the - - - without
23 something from the vendor, does that screen tell you
24 anything more than that ECB put it on the screen for the
25 vendor to then do what the vendor is supposed to do?



1 MR. MCCANN: That's exactly what it says, and
2 based on the reliability of the vendor, the ALJs know that
3 if it's in the SVB1 screen, the mailing went out.

4 JUDGE STEIN: Oh, so you're just basing it on the
5 general reliability of the vendor and assuming that it - -
6 - it's always done properly.

7 MR. MCCANN: Well, from the experience of the
8 ALJs, yes, Your Honor, that's a safe assumption which is
9 confirmed by the affidavits of mailing that are included in
10 the record that we did attach to the answer in order to
11 explain the things that the ALJs are taking official notice
12 of. So - - -

13 JUDGE RIVERA: But - but isn't his argument that
14 they were actually mailed just to the wrong address and
15 that that wasn't good enough?

16 MR. MCCANN: Respectfully, no, Your Honor.

17 JUDGE RIVERA: No? Okay.

18 MR. MCCANN: Mestecky argues that four of the
19 nine violations were only sent to the location of the
20 premises but it's undisputed that he had not registered
21 another address.

22 JUDGE RIVERA: No. No. No. I understand that
23 but that - - - that's what I'm saying. He - - - clarify
24 for me. Is he contesting that they were actually mailed to
25 the premises as opposed to his other address?



1 MR. MCCANN: Right. I think Mr. Mestecky is only
2 claiming that he didn't receive them and of course - - -

3 JUDGE RIVERA: As opposed to that you actually
4 mailed them.

5 MR. MCCANN: Right. And - - - and of course
6 service is effective at the time of mailing not at the time
7 of receipt. Right. So the - - - the legislature
8 considered competing interests here and it crafted a
9 service regime that balances those interests and it allows
10 inspectors to make a single reasonable attempt at personal
11 service at the premises before affixing the notice to the
12 premises and mailing the notice to the premises and other
13 addresses that the owner may have on file with the
14 agencies. Mr. Mestecky is asking this court to overturn
15 the legislative prerogative and to undue that solution that
16 the legislature came up to solve this well-documented
17 problem. Unless there are any other questions, this court
18 should affirm.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. MCCANN: Thank you.

21 CHIEF JUDGE DIFIORE: Mr. Mestecky.

22 MR. MESTECKY: Just with regard to some of the
23 arguments that - - - that counsel made. I think the - - -
24 a good point that's - - - that was raised here is that the
25 majority of these items that are contained in this record



1 were never submitted at the hearing below. And 72(a)
2 Realty Associations v. ECB makes clear that in an Article
3 78 the court can only consider those documents and evidence
4 that were submitted.

5 JUDGE RIVERA: But - but part of your argument is
6 that they actually mailed it only to the premises once,
7 right?

8 MR. MESTECKY: Yes. We - - - we dispute - - -

9 JUDGE RIVERA: You're not disputing the mailing
10 once to the premises for several of these violations,
11 correct?

12 MR. MESTECKY: We're - - - we are disputing the
13 mailing to where the petitioner-appellant resides, the
14 Bayside address for all of them. He never received those -
15 - - those documents.

16 JUDGE RIVERA: Yes. But I thought your argument
17 was that for several of these mailings his position - - -
18 excuse me, client's position is that they were mailed to
19 the premises on one occasion and that's where they've - - -
20 they failed to comply.

21 MR. MESTECKY: Yes. We - - - we - - -

22 JUDGE RIVERA: So you're conceding the mailing.
23 You just say the mailing's not good enough.

24 MR. MESTECKY: We're - - - we're saying the
25 mailing doesn't satisfy the city charter because the city



1 charter requires the mailings to go to multiple locations,
 2 not just the premises of the location. With regard to
 3 counsel's argument that there was some kind of failure on
 4 my client's part to register this property, the only
 5 evidence in the record is a tax bill that was submitted by
 6 my client a few months after the service which indicates
 7 the address was changed. This - - - this issue was never
 8 raised at the hearing, and therefore there's no evidence in
 9 the record as to whether he failed to change addresses or
 10 not. But I think a significant issue is that the mailing
 11 requirements also require the ECB to review the - - - the
 12 files that they have in their own office. And it's our
 13 position and it's our position at the hearing that the ECB,
 14 because of prior violations on this property, knew that he
 15 resided at the Bayside address. And had they looked in
 16 their own files, they would have mailed all these
 17 violations to the - - - to the - - -

18 JUDGE RIVERA: Well, how many got sent to the
 19 Bayside address?

20 MR. MESTECKY: Zero. It is our position that
 21 zero of them were - - - were received at the - - - at the
 22 Bayside address. And just one - - - one final point that I
 23 think is important to note is that the transcript of the
 24 second hearing has never been produced in the record of
 25 this matter. And those involved, the October and December



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NOVs, there's a requirement for the appeals board to review the transcript and the record and that's gone. The - - - it's never been presented. Just for that basis alone those NOVs should be dismissed.

CHIEF JUDGE DIFIORE: Thank you, sir.

MR. MESTECKY: Thank you.

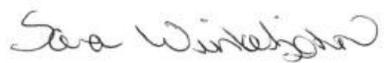
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Mestecky v. City of New York, No. 120 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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