1785 Broadway Realty Corp v Charles
2022 NY Slip Op 33181(U)
August 26, 2022
Supreme Court, Kings County
Docket Number: L&T Index No. 309793/21
Judge: Kimberley Slade
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART G
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1785 BROADWAY REALTY CORP

L&T Index No. 309793/21

Petitioner,

-against-

DECISION/ORDER

NATHAN CHARLES

Respondent-Tenant,

"JOHN DOE," "JANE DOE"
1233 ST JOHNS PLACE APT 1C
BROOKLYN, NY 11213

Respondents-Undertenants,

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Present: Hon. KIMBERLEY SLADE
Judge, Housing Court

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of this motion to dismiss pursuant to §3211(a)(8) for lack of personal jurisdiction

The papers considered in these motions are contained on NYSCEF entries 23 through 28 and *passim*.

This holdover proceeding was commenced in October 2021. After being calendared in the court's intake part, respondent filed a hardship declaration. Upon expiration of the hardship stay respondent filed an ERAP application in January of 2022, which triggered a further stay of this proceeding. Petitioner then moved by order to show cause to vacate the ERAP stay and the court granted that motion. Respondent now moves to dismiss the petition pursuant to CPLR 3211(a)(8) alleging that petitioner failed to employ the due diligence standard required at the time of service of the notice of petition and petition and thus there is no personal jurisdiction. Petitioner opposes the motion.

The Covid-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFPA") was in effect at the time this matter was commenced. CEEFPA, 2021 NY Chapter 417 Part C Subpart A Section 3 provides that "[s]ervice of the notice of petition with the attached copies of the hardship declaration and affidavits shall be made by personal delivery to the respondent, unless such service cannot be made with due diligence, in which case service may be made under section 735 of the real property actions and proceedings law." Respondent argues that petitioner's service of the notice of petition and petition does not comport with the requirements of the due diligence standard.

Due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality (*see Estate of Waterman v Jones*, 46 AD3d at 66 [2007]). For the purpose of satisfying the "due diligence" requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries as to the defendant's whereabouts and place of employment (*Estate of Waterman. Id. internal citations omitted*).

According to the affidavit of service, the process server attempted to personally deliver the petition and notice of petition to the respondent at the subject premises on Monday November 22, 2021 at 2:03 p.m., on Tuesday, November 23, 2021 at 6:39 p.m., and on Wednesday November 24, 2021 at 9:49 a.m. After these three attempts were unsuccessful, the process server affirms that he affixed a copy of the "notice of petition and petition and notice of electronic filing and notice to tenant with declaration and attorney list" upon the final service attempt on November 24, followed by a certified mailing. The affidavit of the process server fails to state any specifics as to whether any inquiry was made as to the respondent's routines or whereabouts, whether it is known that respondent is working, unemployed or any other fact that would shed light on the most likely time to find respondent at home to accept service.

Petitioner's opposition focuses on the specifics of the actual service made but remains silent as to the "genuine inquiry" prong of the due diligence standard and indeed, does not speak to whether any inquiry at all was made *prior to* attempting service. Additionally, while not specifically required by the process server there is nevertheless no affidavit refuting respondent's assertions and they are therefore undisputed. Petitioner's assertions that service was sufficient on its face fails to address the question of what, if, or whether any genuine attempt to ascertain when personal service was most likely to be accomplished. There is nothing in the motions or in the affidavits that addresses the inquiry required to establish due diligence.

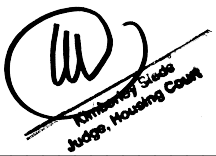
While there are cases that discuss the various time frames that constitute a facially sufficient affidavit and the times within which service attempts are most likely to find a respondent at home, this court does not determine that there is a specific formula or specific parameters that are required in every case, but does follow the well-entrenched rule that the attempts must be based upon a genuine inquiry as to a specific respondent. "The due diligence requirement refers to the quality of the efforts made to effect personal service, and certainly not to their quantity or frequency'" (*Barnes v City of New York*, 70 AD2d 580, 416 NYS2d 52 [1979], *affd* 51 NY2d 906, 415 NE2d 979, 434 NYS2d 991 [1980] (*other citations omitted*). Due diligence is not established if there is no evidence of any genuine inquiry made as to respondent's whereabouts (*See Serrarro v Staropoli* 94 AD3d at 1084, *McSorley v Spear* 50 Ad3d at 654).

Absent a genuine inquiry designed to learn when personal service is likely to be effective it would be difficult to ascertain the likelihood that a respondent would be home during the service attempts in this proceeding. An inquiry would procure additional information as to the respondent's employment and what his day-to-day life looks like – whether he commutes, works

from home, is unemployed, volunteers, etc. Alternatively, were an attempt made and nothing ascertained the server would at least be able to elaborate upon his or her inquiries. Here, there is no information as to any "genuine inquiries about the defendant's whereabouts and place of employment" *Estate of Waterman v Jones*, 46 AD3d 63, (2007) before the process server resorted to nail and mail service. Therefore, while the court does not find that the times specified in the affidavit of service are facially sufficient or insufficient it does find that in the absence of any information or response from petitioner detailing facts related whether a genuine inquiry was made that petitioner has not met the due diligence standard. Respondent's motion is granted and the petition is dismissed without prejudice to the commencement of a new proceeding.

Parenthetically, the court notes that it does not find that these attempts of service were *certainly* during "commuting hours" or "working hours" as argued by respondent. That argument oversimplifies the assessment of a *genuine* inquiry. For instance, a live away home care attendant may only be home on weekends. Unless a petitioner was aware of this, any attempts at personal service would likely be ineffective during weekdays. Additionally, while respondent argues that the likelihood of successful service near Thanksgiving was less likely to be successful, that again relies upon assumptions that may or may not be correct and it is just as likely that people are home preparing for a holiday as they are travelling.

Dated: Brooklyn, New York
August 26, 2022



Kimberley Slade, JHC