

489 MM Realty LLC v Zelaya

2025 NY Slip Op 33144(U)

July 30, 2025

Civil Court of the City of New York, Kings County

Docket Number: Index No. 311423-24

Judge: Sergio Jimenez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART J

-----X

489 MM REALTY LLC,
Petitioners,

Index No. 311423-24

DECISION/ORDER

-against-

ALBERT ZELAYA, LIZA ZELAYA, ALBERT
ZELAYA JR., JOHN DOE and JANE DOE
Respondents.

-----X

Present:

Hon. Sergio Jimenez
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent’s notice of motion (Seq. 1) and petitioner’s notice of cross-motion (Seq. 2) any other relief as the court may find appropriate:

Papers Numbered

- Notice of Motion (Seq. 1) with affidavits and exhibits.....1 (NYSCEF #8-11)
- Notice of Cross-Motion (Seq. 2) and Affirmation in Opposition and exhibits.....2 (NYSCEF #13/16)
- Affirmation in Opposition and Reply.....3 (NYSCEF # 13/20)
- Affirmation in Reply.....4 (NYSCEF # 14/22)

In this holdover proceeding, the parties are disputing a single issue: whether the service was effectuated correctly on the predicate notice as asserted in the affidavit of service. It is undisputed that the service was made upon on Albert Zelaya Jr. despite the statement that it was made on Albert Zelaya. “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” (*see Wells Fargo Bank N.A. v. Chaplin*, 65 A.D.3d 588 [2nd Dep’t. 2009]). However, once an appropriate challenge is made, the court can make a determination either at trial or, if there are no facts in dispute, pursuant to a motion. Here, there are no facts in dispute. The service of the predicate notice was made as set forth in the affidavit. Respondent alleges that the service fails because it misidentifies the person served which changes the nature of the service. Petitioner alleges misrepresentations by the person who accepted service thereby invalidating the problems and cross-moved to amend the affidavit of service to conform with the now-known identities of the individuals under a technical error.

The Court of Appeals adheres to a strict compliance standard for personal service on the person to be served (*Dorfman v. Leidner*, 76 N.Y.2d 956 [1990]). The legislature has provided a variety of methods for serving people and service must be strictly adhered to (*Id.*).

This requisite for personal service on the person to be served has resulted in the dismissal of a variety of cases for lack of personal jurisdiction, such as when a process server is acting in good faith to try to effectuate personal service and there is “an express or implied misrepresentation of specific authority” to accept service (*Id.* [case dismissed for improper personal service when process server serves employee of the defendant doctor, even when employee informed process server that doctor would not meet process server in the waiting room and that “under such circumstances” the employee was authorized to accept service]; see *Espy v. Giorlando*, 56 N.Y.2d 640 [1982] [case dismissed for improper personal service when process server serves a nurse outside the presence of defendant doctor, even when nurse told process server she was authorized to accept service for the doctor]; *Macchia v. Russo*, 67 N.Y.2d 592 [1986] [case dismissed when process server delivers summons to respondent’s son who then went inside and gave it to respondent]).

Dismissal can be an option even in situations where a person misrepresents their identity to the process server. “In general, representations made by an individual who accepts the service of process are not binding on the defendant in the absence of proof that the defendant himself knew of such representations” (*Broman v. Stern*, 172 A.D.2d 475 [2nd Dep’t. 1991]; *Professional Billing Resources, Inc. v. Haddad*, 183 Misc.2d 829 [Civ. Ct. New York County 2000]).

The strict compliance standard for personal service is enforced with very limited exceptions. “There is only one recognized exception to the strict requirement of delivery to the person to be served. This exception applies when the person to be served is himself clearly attempting to resist or evade service, which may occur by misrepresentations as to identify or some affirmative act which evidences a deliberate attempt to resist service” (*Atlantic Northeast Dist. Church of Brethren v. First Haitian Church of Brethren of New York*, 3 Misc. 3d 1101[A] [Civ. Ct., Kings County 2004]). Petitioner holds the burden to show that respondent was to some extent aware of the misrepresentation, such that respondent knew of or participated in such misrepresentation to evade service (*Caudle v. Adler*, 146 A.D.2d 598 [2nd Dep’t 1989]). Here, the petitioner has not made any allegation that respondent knew or should have known of the misrepresentation. In fact, in this situation, having prepared the caption and hired the process server, the responsibility for not following up or making the distinction of two similarly named

individuals sought to be served lies with the petitioner not with any of the respondents. Petitioner's argument (and cross-motion) seeking to amend the affidavit of service is unavailing as it is unsupported by any affidavit of someone with personal knowledge regarding the circumstances under which the service was effectuated and the information gathered. Notably absent is any claim that the respondent Albert Zelaya had any knowledge of the occurrence or intent to avoid service. The court is sympathetic to the petitioner in this situation as its minor mistake could have averted dismissal, however, under the totality of the circumstances the petitioner who is seeking to avail themselves of a summary proceeding must act more diligently.

Respondent's motion is granted, petitioner's cross-motion is denied as moot. The proceeding is dismissed without prejudice. Respondent may seek a judgment of dismissal with the clerk. This constitutes the decision/order of the court.

Dated: July 30, 2025

Sergio Jimenez
Judge, Housing Court

Sergio Jimenez, JHC