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Avoiding the Trap: Service of Process on Commercial Tenants Under RPAPL

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Summary eviction proceedings are highly technical and thereby set many traps for the inexperienced practitioner. The first snare is Real Property Actions and Proceedings Law (RPAPL) 735, which sets forth the manner in which papers instituting the summary proceeding, and some of the predicate notices to certain summary proceedings,[1] must be served.

Although RPAPL 735 bears some similarity to CPLR, it represents a different regime.[2] Practitioners, and some courts, have failed to distinguish the two.

This article, which will address service upon commercial tenants, will focus on the manner in which service may be effectuated properly under RPAPL 735 and will distinguish it from and, it is hoped, prevent confusion with, service under the CPLR.

General Considerations

RPAPL Article 7 is a statutory remedy and is therefore construed strictly - the failure to strictly adhere to its requirements deprives the court of jurisdiction.[3] The provisions regarding jurisdictional matters are applied with the most exactitude.[4]

Service under RPAPL 735 has withstood constitutional attack because it is reasonably calculated to inform the tenant of the proceeding.[5] Service which complies with RPAPL 735 provides in rem jurisdiction, which, upon the tenant's default, provides jurisdiction to grant a possessory judgment only.[6]

Service must also comply with CPLR Art. 3 in order to obtain a monetary judgment, unless the tenant appears and waives its objection to personal jurisdiction.[7]

Service effectuated under CPLR Art. 3 provides adequate service for a summary proceeding.[8] Service, however, under Business Corporation Law 306 may not be used to commence a summary proceeding.[9]

Any information regarding the business operations of a tenant, or the existence of any subtenants, must be conveyed to the process server to assist him or her in effectuating service.[10] If necessary, the process server is expected to review the papers himself.[11]

The provisions of a lease regarding notice or service of process can not limit or modify the requirements of RPAPL 735.[12] However, the lease may require additional notice than that required under the statute.[13]

RPAPL 735

In short, service under RPAPL 735 may be made: i) by personal delivery; ii) by service upon a person of suitable age and discretion employed at the property; or iii) by affixing a copy to the property or under the entrance door of the property. If service is made by either of the latter two methods, the papers must also be mailed to one or more addresses.

Service of papers commencing a summary proceeding, as well as certain predicate notices, shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who is employed at the property sought to be recovered, a copy of the [the papers], if upon reasonable application admittance can be obtained and such person found who will receive the papers.

If admittance cannot be obtained and such person found, service is effected by affixing a copy of the papers upon a conspicuous part of the property

sought to be recovered or placing them under the entrance door.

In the event that the papers are either delivered to a person employed at the property, affixed to the property or placed under the door, the papers must also be mailed by registered or certified mail and regular first class mail within one day after such service. The mailings must be made to the property and:

1. If the tenant is an individual, and does not reside at the property, at the last residence address of which the landlord has written information. If the landlord has no such written information, to the last business or employment address of which the landlord has written information.

2. If the tenant is a corporation (or joint stock or other unincorporated association), and i) its principal office or place of business is not at the property sought to be recovered and ii) the landlord has written information of such office within the state, to the last place of which the landlord has such information. If the landlord has no written information of such principal office, to any office or place of business within the state of which the landlord has written information.

Allegations as to such information which may affect the mailing addresses must be set forth in either the papers instituting the proceeding or in the affidavit of service.

Personal delivery under RPAPL 735 means in hand delivery.[14] This service, as to an individual, is the same personal delivery described in CPLR 308(1).

Although some courts have apparently failed to observe the distinction,[15] personal delivery under RPAPL 735 is not otherwise equivalent to the other forms of personal service under CPLR Art. 3.[16] In fact, RPAPL 735 was amended in 1965 to substitute personal delivery as the first form of service under the statute in place of service in the same manner as personal service of a summons in action.[17]

An individual employed at the property sought to be recovered is considered of suitable discretion where the nature of that person's relationship with the tenant sought to be served is such that it is more likely than not that the employee will deliver the papers to the tenant.[18]

Silverman v. BPPT Enterprises Corp. [19] held that an employee of a subtenant, who agreed to accept service, was a person of suitable age and discretion where the corporate tenant sought to be served had sublet the entire premises and the process server saw no indication that the tenant was located at the premises.[20] The only alternative for the process server, decidedly less palatable, would have been to affix the papers to the door of the property.[21]

However, in *Shammas v. W.D.K. Realty, Inc.,*[22] service upon an employee was rejected by the court where the tenant sought to be evicted was not located at the property and the landlord was aware of where the tenant was located.[23]*NYLJ,* April 13, 1994, p. 24, col. 6 (Civ. Ct., Kings Co.).[24]

In *50 Court Street Associates v. Mendelson and Mendelson,*[25] an office manager of a subtenant, which was not a party to the proceeding, was a person of suitable age and discretion. A secretary of one of the tenants named in the proceeding, who had previously accepted service of a predicate notice,[26] had signalled the process server to give the papers to this office manager. The court noted that the signalling secretary had already accepted service of the predicate notice. The court also observed that the subtenant had an incentive to protect its subtenancy by delivering the papers to the overtenant.

Ilfin Company, Inc. v. Benec Industries [27] found an employee of a co-tenant not to be a person of suitable age and discretion. First, as the landlord was aware, the co-tenants maintained separate businesses. Second, the employee served told the process server that i) he was not employed by the co-tenant contesting service and ii) was not authorized to accept service.

Silverman condones service upon an employee at the property sought to be recovered where the tenant sought to be served is no longer located at that property. However, cases holding otherwise should encourage the careful practitioner to effectuate CPLR service upon the tenant at its actual location. If this proves impracticable, one may move for permission to make expedient service under CPLR 308(5).[28]

Under *Iflin,* where the tenant is located at the property, process servers should find an employee of that tenant. If no such employee is found, a second attempt should be made at a time when such an employee is most likely to be found. If that is not successful, both substituted service (on the most

discrete employee at the property) and conspicuous place service should be utilized.

The fact that the process server makes a second attempt will hopefully insure that service is upheld. First, the second attempt should establish the reasonable application necessary before conspicuous place service may be utilized. In addition, the court will be more likely to uphold substituted service because a second effort was made to find an employee of the tenant sought to be served prior to service upon another employee.

In any event, as with the *Silverman* scenario, where you are unable to serve an employee of the tenant sought to be served, caution dictates that you try personally to serve the tenant under CPLR Art. 3 to discourage an *Iflin* defense.

Some courts have held that a single attempt at personal delivery or service upon a person employed at the property constitutes reasonable application before conspicuous place service may be utilized,[29] unless the landlord knew or should have known that service at the time of the attempt was likely to be unsuccessful.[30] Other courts, applying a stricter rule more often applied to residential proceedings,[31] require more than one attempt.[32]

Caution therefore dictates once again that a second attempt to serve a tenant be made prior to conspicuous place service.

The reasonable application standard for conspicuous place service is less rigorous than the due diligence required prior to nail and mail service under CPLR 308(4).[33] However, service must be attempted at a time which is reasonably calculated to effect personal service or service upon an employee.[34]

Affixing may be done in a place which, in the reasonable opinion of the process server, is sufficiently obvious to the [tenant] so to be expected to be seen.[35] Meanwhile, CPLR 308(4) nail and mail service allows affixing only upon the door of either the actual place of business, dwelling place or usual place of abode of the party sought to be served.

If the server chooses to affix rather than placing the papers under the door, RPAPL 735, like CPLR 308(4), requires actual affixation. Wedging inside the door will not do.[36]

The attorney or process server should ascertain from the landlord the existence of written notification involving alternate business addresses for the tenant.[37]

Although the statute only requires mailings to business addresses within the state, mailings should also be made to principal offices outside the state.[38] One case held that when the tenant is a partnership, the mailings are controlled by subdivision 1(b) of RPAPL 735 (applicable to individuals), which does not limit mailings to in-state addresses.[39]

The mailing must be made within one day after service on an employee or conspicuous place service.

Conclusion

Careful preparation is required prior to RPAPL 735 service. First, the lease and lease file must be reviewed in order to reveal any written information of any additional addresses. In addition, the lease may contain additional notice requirements.

The landlord and any managing agent must be contacted to ascertain whether the named tenant is still located at the property and whether the tenant has unusual hours. This information must be communicated to the process server.

Traverse hearings, especially in New York City, provide a painful way in which attorneys learn both the niceties of RPAPL 735 and the need for careful preparation.

Hopefully, this article will save a few practitioners such hard learned lessons.

Endnotes

1. RPAPL 711(2) (written rent demands which must be served before commencing a nonpayment proceeding); Real Property Law 232-a (notice to terminate month-to-month tenancies in New York City).
2. *City of New York v. Wall Street Racquet Club,* 136 Misc. 2d 405, 407, 518 NYS2d 737, 738 (Civ. Ct., N.Y. Co. 1987).
3. *MSG Pomp Corp. v. Doe,* 185 A.D.2d 798, 799, 586 N.Y.S.2d 965, 966 (1st Dep't 1992). *But see Lanz v. Lifrieri,* 104 A.D.2d 400, 401, 478 N.Y.S.2d 722, 723 (2d Dep't 1984).
4. 2 Rausch, *New York Landlord & Tenant,*29:13, p. 426 (3d ed. 1988).

5. *Velazquez v. Thompson,* 321 F. Supp. 34, 39 (S.D.N.Y. 1970), *aff'd,* 451 F.2d 202 (2d Cir. 1971).
6. *Oppenheim v. Spike,* 107 Misc. 2d 55, 437 NYS2d 826 (App. Term, 1st Dep't 1980); *Leven v. Browne's Business School, Inc.,* 71 Misc. 2d 842, 337 NYS2d 307 (Dist. Ct., Nassau Co. 1972). This rule has been criticized. Treiman and Feder, *Default Money Judgments in Summary Proceedings, NYLJ,* July 30, 1985, p. 1, col. 3.
7. *Leven v. Browne's Business School, Inc., supra.*
8. *Omabuild Corp. v. Dolron Restaurant, Inc., NYLJ,* July 1, 1992, p. 24, col. 3 (Civ. Ct., N.Y. Co.)
9. *Trump-Equitable 5th Avenue Co. v. McCrory Parent Corp., NYLJ,* Sept. 4, 1991, p. 21, col. 3 (Civ. Ct., N.Y. Co.); *Puteoli Realty Corp. v. Mr. D's Fontana Di Trevi Restaurant, Inc.,* 95 Misc. 2d 108, 407 N.Y.S.2d 118 (Dist. Ct., Suffolk Co. 1978).
10. *Ancott Realty, Inc. v. Gramercy Stuyvesant Independent Democrats,* 127 Misc. 2d 490, 486 NYS2d 672 (Civ. Ct., N.Y. Co. 1985).
11. *Maspeth Bowl Inc. v. P.M.P. Partnership, NYLJ,* Sept. 16, 1988, p. 22, col. 2 (Civ. Ct., Queens Co.).
12. *Lana Estates Inc. v. National Energy Reduction Corp.,* 123 Misc. 2d 324, 326, 473 N.Y.S.2d 912, 914 (Civ. Ct., Queens Co. 1984).
13. *Hendrickson v. Lexington Oil Co.,* 41 A.D.2d 672, 340 N.Y.S.2d 963 (2d Dep't 1973); *80-02 Leasehold Co. v. 1st Nationwide Bank,* NYLJ, March 30, 1994, p. 25, col. 4 (Civ. Ct., Queens Co.).
14. 90 N.Y. Jur.2d, Real Property - Possessory and Related Actions, 180 at p. 29.
15. *World's Busiest Corner Corp. v. Cine 42nd Street Theater Corp.,* 134 Misc. 2d 281, 510 NYS2d 796 (Civ. Ct., N.Y. Co. 1986); *Grabino v. Howard Stores Corp.,* 111 Misc. 2d 54, 443 NYS2d 626 (Civ. Ct., N.Y. Co. 1981).
16. *Trump-Equitable 5th Avenue Co. v. McCrory Parent Corp., supra.*
17. 1965 N.Y. Laws, c. 910, 7.
18. *50 Court Street Associates v. Mendelson and Mendelson,* 151 Misc. 2d 87, 572 NYS2d 997 (Civ. Ct., Kings Co. 1991).
19. 144 Misc. 2d 270, 543 NYS2d 885 (Dist. Ct., Nassau Co. 1989).
20. *Supra. See also Cooke Properties, Inc. v. Masstor Systems Corp., NYLJ,* Jan. 4, 1993, p. 21, col. 3 (Civ. Ct., N.Y. Co. 1993) (upholding service on an employee of a subtenant where the over-tenant was no longer in possession of the premises).
21. 144 Misc. 2d at 273, 543 NYS2d at 887. Indeed, nail and mail service will be upheld if papers posted are removed by a passing miscreant and never found by the tenant. *Hospitality Enterprises, Inc. v. Fuego, NYLJ,* June 5, 1980, p. 1, col. 4.
22. *NYLJ,* Feb. 26, 1992, p. 24, col. 3 (Civ. Ct., Kings Co.),
23. Although service could have been rejected solely on the ground that the landlord failed to mail to a business address of the tenant of which the landlord had written information, the court held that service at the premise was by itself improper.
24. *Mark Stamping Corp. v. Mark Cabinet Mfg. Corp., NYLJ,* April 13, 1994, p. 24, col. 6 (Civ. Ct., Kings Co.), also rejected conspicuous place service where the tenant no longer occupied the property. However, there the property was apparently unoccupied.
25. 151 Misc. 2d 87, 572 NYS2d 997 (Civ. Ct., Kings Co. 1991).
26. Service of this notice was not claimed to have been improperly served.
27. 114 Misc. 2d 411, 451 NYS2d 643 (Civ. Ct., N.Y. Co. 1982).
28. *City of New York v. Various Unnamed Occupants, NYLJ,* Dec. 22, 1993, p. 24, col. 4 (Civ. Ct., N.Y. Co.). *Cf. Callen v. DeKoninck,* 23 A.D.2d 757, 258 NYS2d 627 (2d Dep't 1965).
29. *Joseph E. Seagram & Sons Inc. v. Rossi,* 45 Misc. 2d 427, 257 N.Y.S.2d 60 (Civ. Ct., N.Y. Co. 1965). *See also Park Avenue Associates v. Nathaniel Kwit, M.D., P.C., NYLJ,* July 15, 1987, p. 11, col. 1 (App. Term, 1st Dep't); *Hospitality Enterprises, Inc. v. Fuego Restaurant Corp., NYLJ,* June 5, 1980, p. 11, col. 4 (App. Term, 1st Dep't); *Schwartz v. Power Conversion, Inc.,* 115 Misc. 2d 217, 453 N.Y.S.2d 989, 990 (City Co., Mount Vernon 1982) (single attempt, at 6:00 p.m., upon office upheld).
30. *Ancott Realty, Inc. v. Gramercy Stuyvesant Independent Democrats,* 127 Misc. 2d 490, 486 N.Y.S.2d 672 (Civ. Ct., N.Y. Co., 1985). *See also Palumbo v. Clark d/b/a Father John's,* 403 NYS2d 874 (Civ. Ct., Bronx Co. 1978).
31. *Eight Associates v. Hynes,* 102 A.D.2d 746, 476 NYS2d 881 (1st Dep't 1984).
32. *I.S.J. Management Corp. v. Essex Street Market*

Merchants, NYLJ, Jan. 8, 1991, p. 22, col. 4 (Civ. Ct., N.Y. Co.) (two attempts, with the second not sufficiently distinct, held insufficient); *Maspeth Bowl, Inc., supra* (applying the rule in residential cases which requires more than one attempt when the first attempt was made at a time when the process server knew or should have known that the tenant was working).

33. *Palumbo v. Estate of John Clark,* 403 N.Y.S.2d 874 (Civ. Ct., Bronx Co. 1978).

34. *Supra* note 29.

35. *161 Williams Associates v. Coffee,* 122 Misc. 2d 37, 469 NYS2d 900, 902 (Civ. Ct., N.Y. Co. 1983).

36. *Arkansas Leasing Co. v. Farag, NYLJ,* June 16, 1993, p. 29, col. 5 (Civ. Ct., Queens Co.).

37. *Cf. Lana Estates Inc. v. National Energy Reduction Corp.,* 123 Misc. 2d 324, 327, 473 NYS2d 912, 915 (Civ. Ct., Queens Co. 1984).

38. *Cooke Properties, Inc. v. Masstor Systems Corp., supra* (court, in upholding service on a sub-tenant's employee, noted that mailings were made to the tenant's out-of-state principal office).

39. *The Delmonico Hotel Co. v. Fiddler Gonzales & Rodriguez, NYLJ,* June 6, 1991, p. 23, col. 3 (Civ. Ct., N.Y. Co.).