CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D

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204 43rd Owners Corp.,

Petitioner,

-against-

Brenda Pimentel, Geovanna Pimentel,
Rebecca Pimentel,
"John Doe" and/or "Jane Doe"

Respondent.

Subject premises: 204-16 43rd Avenue, Apt #3A
Bayside, New York 11361

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Index No. 308001/2021

Mot. seq. no. 01 & 02

DECISION/ORDER

Hon. Maria Ressos
Judge, Housing Court

Recitation as required by CPLR 2219(a), of the papers considered in review of petitioner's motion (Seq. 01) to vacate the ERAP stay and respondent's cross-motion (Seq. 02) pursuant to CPLR 3211(a)(8) to dismiss the proceeding for lack of jurisdiction.

Papers	**Numbered**
Notice of Motion, NYSCEF Doc. # 12	1
Affirmation and Affidavit in Support, NYSCEF Doc. # 13, 14	2
Notice of Cross-Motion, NYSCEF Doc. # 19	3
Affirmation in Support of Cross-Motion, NYSCEF Doc. # 20	4
Affirmation in Opposition to Cross-Motion, NYSCEF Doc. # 24	5
Court File, NYSCEF Doc. # 1-24	

Upon the foregoing papers, the Decision/Order on the instant motions is as follows:

This licensee holdover proceeding was commenced by Notice of Petition and Petition dated November 11, 2021 seeking possession of the subject premises located at 204-16 43rd Avenue, Apt #3A, Bayside, Queens 11361. The Ten (10) Days Notice of Termination of License and/or Notice to Quit, incorporated in the Notice of Petition and Petition, purported to terminate respondents' license to be at the premises, allegedly given to them by the tenant of record, Geovane G. Pimentel. The Notice alleges Geovane G. Pimentel surrendered possession of the subject premises on or about February 2020 and demanded that respondents surrender possession by no later than October 19, 2021.

The case was first calendared in January 2022. Respondent, Brenda Pimentel, retained counsel, the Legal Aid Society (LAS), and a notice of appearance was filed in February 2022. Shortly after, the case was placed on the Emergency Rental Assistance Program (ERAP) Administrative Calendar pending a determination of the rental arrears application (Application No. 0199B). Petitioner filed the instant motion in August 2022 (Seq. 01) seeking an order vacating the

ERAP stay. Respondent filed a pre-answer cross-motion (Seq. 02) in response seeking dismissal of the proceeding. The court heard argument on November 21, 2022 and reserved decision on the papers.

As an initial matter, petitioner's motion (Seq. 01) is granted to the extent of vacating the ERAP stay. Respondent did not provide opposition to the motion. At first, petitioner was seeking to vacate the stay based on the legal argument that ERAP funds were intended to assist tenants and the respondent is just a licensee. Petitioner argues that awaiting a determination on the application is futile because petitioner does not have privity of contract with respondents and maintaining the stay "would lead to an absurd result, not contemplated by the statute." See, *Kelly v Doe*, 2022 NY Slip Op 22077 (Civ. Ct. Kings Co. 2022) and *Actie v. Gregory*, 2022 NY Slip Op 501117[U] (Civ. Ct. Kings Co. 2022). Respondents were never tenants and the landlord will not accept ERAP payments even if the application gets approved. The Court adds that the stay is also vacated because the Office of Temporary and Disability Assistance (OTDA) has reached a determination on the application.[1]

By counsel, respondent moves to dismiss (Seq. 02) pursuant to CPLR 3211 (a)(8) for lack of jurisdiction. Specifically, that the Notice of Petition was not served in accordance with Part A, § 5(b)(2) of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEFPA"), as amended by Part C, Subpart A, §3(2) of Chapter 417 of the Laws of 2021, because petitioner did not demonstrate due diligence in serving respondents before resorting to substituted service. The affidavit of service of the Notice of Petition and Petition indicates that substituted service was effectuated on a "Jane Doe" on December 22, 2021, which was the first and *only* attempt at service. See, NYSCEF Doc. # 15. Respondent points out that the affidavit of service fails to include what genuine inquiries were made, if any, as to the whereabouts of the parties sought to be served to attempt personal service. Respondent argues there is a distinction between substitute service and personal "in-hand" service and that under CEEPFA's heightened standard, due diligence is required before resorting to *any* type of service other than "in-hand."

In opposition, petitioner argues that respondent is mischaracterizing the legal standard of due diligence. Essentially, the due diligence standard does not apply to cases where substituted service was made because substituted service is a type of "personal service." Instead, due diligence is to be exercised before resorting to nail and service. Petitioner points out that all the case law cited to by respondent's counsel specifically talks about where service was done by affixation. Finally, petitioner mentions that respondent's motion was not supported by an affidavit of someone with personal knowledge contesting service. However, while it is true that respondent must plead sufficiently detailed and specific allegations to be entitled to a hearing on service of process, the question at this juncture is a legal one because it pertains to compliance with a statute. Respondent would be required to sufficiently support any claims of improper service in an answer to be entitled to a traverse hearing. See, *Baer v. Lipson*, 194 A.D.2d 787, 599 N.Y.S.2d 618 (2d Dep't 1993), *Barett v. Silva*, 12/16/2009 N.Y.L.J. 27, (Col. 3) (Civil Court, Kings County), and *Pierre-Blanc v. Jones*, 10/06/2009 N.Y.L.J 27, (Col. 1) (Civil Court, Kings County).

[1] As of December 13, 2022, the ERAP Status web page shows a provisional approval of the application, landlord pending.

Pre-CEEPFA, service of process by "affix and mail" was allowed after attempts at personal service to satisfy a "reasonable standard." *RPAPL 735*. CEEPFA Part A, § 5 (2) required that service of the Notice of Petition and the COVID-19 Hardship Declaration by personal delivery or, if service could not be made by "due diligence," then pursuant to RPAPL 735. See, *Suero v. Rivera*, 2022 NY Slip Op 22031 [74 Misc 3d 723] (Civil Court, Queens County) citing to *Bel Air Leasing LP v. Johnston*, 73 Misc 3d 809 (Civil Court, Kings County 2021). This applied to cases that were commenced between December 28, 2020 and January 15, 2022. The legal question as to the adequacy of service has been presented to several courts of concurrent jurisdiction. Consistently, courts found that there is no "magic" number of attempts to determine whether the due diligence standard was met. One court found that due diligence "is not defined by statute and this state's courts have not established a definition. In other words, there is no rigid standard and whether due diligence has been exercised and it is determined on a case-by-case basis. *Baker v. Cruz*, 2022 NY Slip Op 50397(U) [75 Misc 3d 1206(A)] (Civil Court, Bronx County), and *Li-Seabrooks v. Pimento*, 2022 NY Slip Op 22131 [75 Misc 3d 562] (Civil Court, Bronx County). Due diligence will differ from case to case. See, *Barnes v City of New York*, 51 NY2d 906, 907, 415 NE2d 979 [1980]. The Second Department measures "quality" over quantity and inquires as to whether a genuine effort must be made about the whereabouts of the party to be served. See, *Bel Air Leasing LP v. Johnston*, 73 Misc 3d 809 (Civil Court, Kings County 2021) citing *Faruk v. Dawn*, 162 AD 3d 744, 745-746 (2d Dept 2018).

However, the court need not reach the question of whether the due diligence standard was met if petitioner successfully effectuated personal service. This begs the question of what constitutes "personal service" and whether substitute service falls in that category *in the context of due diligence*. Petitioner argues that substituted service is a type of personal service because a natural person was handed the papers. As recounted by the court in *Johnston*, the legal concept of due diligence is derived from CPLR 308. *Id.* CPLR 308 section(s) 1, 2, and 4 state, in relevant part:

> **§ 308. Personal service upon a natural person**
> Personal service upon a natural person shall be made by any of the following methods:
> 1. by delivering the summons within the state to the person to be served; or
> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business [...]
> 4. where service *under paragraphs one and two cannot be made with due diligence* [emphasis added], by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" [...]. *McKinney's CPLR § 308.*

Based on the language of the statute alone, it is clear to this court that substituted service is considered a type of "personal service upon a natural person" and that *only* where delivery to the person to be served *or* a person of suitable age and discretion cannot be done with due diligence, is when a party may resort to the use of nail and mail. Here, there was no need for petitioner to make an inquiry beyond the first attempt because they successfully served a natural person in

compliance with CPLR 308 which designates that due diligence is required only if service under sections 1 *and* 2 cannot be achieved.

While respondent concedes that substitute service is a form of personal service, counsel makes the claim that the Second Department has "long distinguished" between "personal delivery" and "personal service" as described in *Matter of Velez v. Smith*,149 A.D.2d 753, 754 (2d Dep't 1989). However, the outcome in that case is discernable. In *Smith*, the Appellate Division Second Department affirmed a decision dismissing a petition for lack of personal jurisdiction. In that case, an order to show cause (OSC) was signed on the last day for commencing the proceeding and service on respondent was to be made by personal delivery. A hearing on the issue uncovered that service was made on respondent's grandmother who happened to reside at the same building as respondent, but not in the same unit. The *Smith* court confirmed that service was improper because the OSC used the terms "delivering personally" and not "personal service." An order to show cause must be served in the way prescribed by the court and not by alternative means. The court in *Smith* found that personal delivery under CPLR 308 was *not* the correct mode of service instructed in that OSC and service "by unauthorized means" did not confer jurisdiction. *Id.*

Smith relies on another Second Department case that delves into lack of jurisdiction and service. *Dolores Selby v. Jewish Memorial Hospital*, 130 AD2d 651, 515 N.Y.S.2d 580 (Appellate Division, 1987), reversed a Kings County Supreme Court's finding that service was properly effectuated on a doctor. In the context of a medical malpractice lawsuit, a receptionist personally accepted service on behalf of a doctor after claiming to have authority to do so. The court found that service outside of the presence of the person to be served does not constitute personal service under CPLR 308. *Id.* At the very end of that opinion, the court in *Jewish Memorial Hospital* noted that "service could properly have been effected pursuant to CPLR 308(2) by the mailing of a copy of the summons and complain" to the doctor at his residence. *Id.* Summarily, personal service could have been achieved had the process server mailed a copy of the papers after substitute service was done on the receptionist. These lines of cases further support that substitute service under CPLR 308, so long as it is completed by proper mailing, is sufficient to confer personal jurisdiction. Once service is accomplished under CPLR 308(1) or (2), the party obtaining jurisdiction need not demonstrate due diligence.

In conclusion, petitioner's motion (Seq. 01) to vacate the ERAP stay is granted and respondent's motion (Seq. 02) is denied for the aforementioned reasons. The portion of petitioner's motion seeking an order directing respondent to file an answer by a date certain is also granted. Respondent, Brenda Pimentel, is directed to file an answer by December 30, 2022. This matter is adjourned for settlement or trial on January 26, 2023 at 9:30am in Part D, Room 406.

This constitutes the Decision/Order of the Court. A copy of this Decision/Order to be uploaded to NYSCEF.

Dated: December 29, 2022
Queens, NY

Hon. Maria Ressos

Maria Ressos, J.H.C.