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Service of Process & Traverse Hearings in Landlord-Tenant Actions & Proceedings

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John G. Hall, a former Chair of the Real Property Law Section, shown here with his family, was the recipient of the Section's Professionalism Award at the Annual Meeting in January. The Award was presented in recognition of John's outstanding legal career, which exemplifies the highest standards of ethical and professional conduct.

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Service of Process and Traverse Hearings in Landlord-Tenant Actions and Proceedings

By Gerald Lebovits and Matthias W. Li

I. Introduction

Service-of-process requirements in summary proceedings are more technical than in plenary actions.[1] Practitioners who do not understand the often seemingly arbitrary rules can lose cases they should win. This article untangles the law on service under the New York Real Property Actions and Proceedings Law (RPAPL) and the New York Civil Practice Law and Rules (CPLR) and discusses how practitioners can get or oppose traverse hearings and have them sustained or overruled.

II. Service of Process

A. Service Generally

A landlord must effect proper service of process for the court to obtain personal jurisdiction over a tenant. Service of process in landlord and tenant actions and proceedings in New York is governed by RPAPL 735, which covers service of process in summary proceedings, and by CPLR Article 3, which covers service of process in plenary actions.[2]

RPAPL 735 is a statutory remedy. The right to maintain a summary proceeding does not exist at common law. RPAPL 735 is strictly construed, as is CPLR Article 3. A departure from the requirements of RPAPL 735 or CPLR Article 3 for service of process is not curable and mandates that the proceeding be dismissed.[3] That a tenant has actual notice of the proceeding is not what confers jurisdiction on the court, even though constitutional due process requires simply that service be reasonably calculated under the circumstances to appraise the litigants about the case and to give them a chance to object.[4] What counts is not notice or receipt but whether service complies with the RPAPL or the CPLR.[5]

Service of process effected under the RPAPL sometimes conforms to the CPLR's dictates, but not always.

The terms of residential lease obligations about service, place of service, or other manner of notice may not modify or restrict RPAPL 735. If a conflict arises about service between a residential lease and RPAPL 735, the conflict must be resolved in favor of the statutory requirements,[6] although a lease may require notice in addition to what the RPAPL requires.[7] In commercial cases, courts are more likely than in residential cases to accept lease terms that limit statutory requirements.[8]

The respondent in a summary proceeding must be served with a notice of petition and a petition.[9] Each named respondent must be served individually,[10] even if each named respondent is part of the same family.[11] Additionally, each lease signatory must be made a respondent and served separately.[12]

In *Friedlander v. Ramos*, the court held that "[t]he object of the RPAPL 733 (1) service requirement is to ensure that respondents receive adequate notice and an opportunity to prepare defenses that they may have."[13] Under RPAPL 733, the process server should serve the petition and notice of petition on each respondent "at least five and not more than twelve days before the time at which the petition is noticed to be heard."[14] If a petition and notice of petition, served pursuant to RPAPL 735, are served fewer than five days before the return date, service is defective and the court will lack jurisdiction over the proceeding.[15] Similarly, a petition served more than 12 days before it is noticed to be heard is defective.[16]

The question sometimes arises whether a court may grant *nunc pro tunc* relief and retroactively permit short filing under RPAPL 733(1) when a tenant has received less than the required five-day notice. In *445 East 85th Street v. Phillips*, the landlord, which had not timely sought *nunc pro tunc* relief, argued that its filing short was excusable and not a jurisdictional defect.[17] The court disagreed and stated that "[s]hort filing denies a tenant adequate time to prepare for court. It is not a simple, ministerial indiscretion."[18] In *K.N.W. Assocs. v. Parish*, however, the court held that the short filing did not prejudice the respondent and thus granted the petitioner's motion for *nunc pro tunc* relief.[19]

B. Service Methods

RPAPL 735 permits a process server to effect service in three different ways: personal delivery, a form of personal service; substituted service to a person of suitable age and discretion who lives or is employed at the premises sought to be recovered, the other form of personal service; or conspicuous-place service, sometimes referred to as "nail and mail" or "affix and mail."[20]

1. Personal Delivery

RPAPL 735(1) provides that "service of the notice of petition and petition shall be made by personally delivering them to the respondent." Similarly, CPLR 308(1) provides that personal delivery on a natural person is effected "by delivering the summons within the state to the person to be served." Personal service can be in-hand delivery or substituted service. Personal delivery is effected when the petition and notice of petition are hand-delivered to the named respondent under RPAPL 735.[21] Personal service is the optimal method of service for a landlord

because it always satisfies the service requirements for money judgments under CPLR Article 3 and decreases the possibility that traverse will be raised and sustained;[22] it is also the optimal method for a tenant because it most assures that the tenant is apprised of the action or proceeding and has an opportunity to defend.

Personal delivery of the petition and notice of petition may be made wherever the tenant, or an authorized representative, may be found.[23] RPAPL 735(1)(a) forbids a default to be entered against tenants not served at their last residence address, even if the landlord learns about the tenant's other residence through attempts to serve. This rule prevents landlords from accidentally evicting people who are in hospitals or nursing homes, or temporarily living with relatives or friends.[24]

Personal delivery is complete immediately on the delivery of a copy of the papers to the intended recipient.[25] The original petition and notice of petition, or order to show cause, should be filed with the court clerk, along with proof of service, within three days after personal service has been effected.

When effecting service on a corporate respondent, personal delivery must be made pursuant to RPAPL 735(1) and comply with CPLR 311(1), which permits personal delivery to be made on an officer, director, managing, general agent, cashier or assistant cashier, or any other agent authorized by appointment or law to receive service on the entity's behalf.[26] Delivery of papers to a mere employee, without any inquiry about the employee's status in the corporate hierarchy or any effort to determine whether the employee is authorized to accept service, is insufficient to effect personal delivery on the corporation, unless the employee is an authorized agent or enumerated corporate official.[27]

Unlike service under CPLR Article 3, RPAPL 735 forbids service on a corporate tenant through the Secretary of State. When effecting service under RPAPL 735 to a corporate respondent, and when a corporate officer, director, agent, or cashier cannot be found, substituted or conspicuous-place service should be used.[28]

Unlike the CPLR, the RPAPL does not specify how personal delivery is effected on a partnership. When serving a partnership, reference should be made to CPLR Article 3.[29] CPLR 310, which governs personal service on a partnership in civil actions, authorizes delivery of papers to any partner of the partnership, the managing or general agent of the partnership within the state, the person in charge of the office within the state of the partnership, or any agent or employee of the partnership authorized by appointment to receive service.[30]

2. Substituted Service

If personal delivery cannot be made on the named respondent, the petitioner may effect service under RPAPL 735(1) "by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it. . . ."[31] CPLR 308(2) provides that service on a natural person is effected "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."

To determine whether the person served is of suitable age and discretion under RPAPL 735, courts look to whether that individual was likely to transmit the papers to the actual tenant.[32] When effecting substituted service of process, the recipient must reside or be employed at the premises and have the kind of relationship to the tenant from which it can reasonably be expected that the recipient will deliver the papers to the tenant.[33] A process server should ascertain the individual's identity and nexus to the tenant.[34]

When delivery is made to a minor, courts will inquire about the minor's discretion and authority.[35] The age of the person receiving process is a relevant factor, and the statute does not set a fixed minimum age for that person. Courts have therefore been reluctant to establish a benchmark under which service is defective. In *Village of Nyack Housing Authority v. Scott*, the court found that "[w]hile the adoption of the 'suitable age' language in RPAPL 735 implies that 'at some point a person should be deemed by the court, as a matter of law, to be too young to have a valid status as deliveree' we cannot say that a 13-year-old is incapable of accepting service as a matter of law, under RPAPL 735."[36] Other courts have held in the context of service or process that minors as young as age 12 are persons of suitable age and discretion.[37]

Delivery of process to a commercial tenant's employee at the premises sought to be recovered is sufficient to establish jurisdiction over the tenant, regardless of the individual's status in the business organization. In a commercial holdover proceeding, *Manhattan Embassy Co. v. Embassy Parking Corp.*, the court found that the process server properly effected substituted service on the corporate respondent by delivering papers to a garage attendant, who was tenant's employee, who was employed at the premises sought to be recovered, whose job involved performing responsible functions, and who was served only after he told the process server that no manager was on the site.[38]

When effecting service of process on a landlord's employee, a person will be considered of suitable age and discretion if the nature of the relationship with the person to be served makes it more likely than not that the employee will deliver process to the named party.[39] If building personnel like a security guard, doorman, or concierge unrea-

sonably impede a process server's efforts, these individuals should not be served or accept service on the respondent's behalf.[40] If repeated attempts to secure access are unsuccessful, an *ex parte* application authorizing an alternate means of service under CPLR 308(5) is a wise procedural course.[41]

When delivery is made on a commercial tenant's subtenant, service of process may be insufficient, absent a "unity of interest," to confer jurisdiction over the tenant, if the tenant was not also served with process.[42] In *Ilfin Co., Inc. v. Benec Industries, Inc.*, the court held that service on an employee of the respondent's co-tenant failed to comply with RPAPL 735. According to the court, the individual was not a person of suitable age and discretion, and the process server unreasonably believed that the employee was an appropriate person to accept service for this co-tenant.[43] When several companies are under one person's control at the same premises, however, acceptance of process by an employee of one is effective as to all.[44]

Because RPAPL 735 requires that the person accepting service reside or work in the actual premises sought to be recovered, delivery to a tenant's temporary visitor or neighbor might prove insufficient to confer jurisdiction.[45] By contrast, a person living in the subject premises with the respondent's permission and having no other place to live is a person who "resides" at the premises. The Legislature has not provided a specific time period in which a person must remain in the premises to be said to reside there. Determining a sufficient length of time for an individual to be a "resident" is a question of fact.[46]

Unlike personal delivery, which may be effected wherever the respondent or appropriate agent may be found, substituted service requires the delivery to be made at the premises sought to be recovered.[47] Additionally, when substituted service is used, a copy of the papers must be mailed to each respondent both by registered or certified mail and by regular first-class mail within one day of the delivery.[48]

Proof of substituted service should be filed with the court clerk within three days after completing the mailings.[49] Service is complete on filing proof of service.[50]

3. Conspicuous-Place Service

The third method of service of process is conspicuous-place service, or nail-and-mail or affix-and-mail. RPAPL 735(1) provides that conspicuous-place service of the petition and notice of petition may be effected "if admittance cannot be obtained . . . by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises."

Similarly, CPLR 308(4) provides that nail-and-mail service may be effected on a natural person when "service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode."

Conspicuous-place service may not be effected under RPAPL 735 until a reasonable application has been made to obtain admittance and find a person who will receive process. It is thus the least desirable of the three RPAPL service methods.[51] An allegation of conspicuous-place service is the most easily controverted at a traverse hearing. It is the service method most likely to raise an inference of improper service.

With affix-and-mail service, the pleadings may be affixed to a conspicuous part of the premises. "Affixing" means that the pleadings should be affixed to the front entrance or doorway of the tenant's unit or space, if possible, or "placed" under that entrance door.[52] The papers should be affixed in a place where, in the process server's reasonable opinion, it will be sufficiently obvious that the tenant will see them.[53] Service must not be unlikely to succeed, or predestined to failure, or the court may find it equivalent to no attempt at all.[54] If the papers are inappropriately affixed, the action or proceeding will be dismissed.[55]

In *Citibank, N.A. v. Mendelsohn*,[56] after affixing the petition and notice of petition to the door of the building rather than to the door of the apartment sought to be recovered, the petitioner argued that the outer bounds of the premises extended to the outside of the building because unidentified occupants did not allow its process server in. The court found that the tenants had no control over access to the building and that the process server, who was working on the buildings owner's behalf, could have easily gained access to the building. The court concluded that the pleadings were not affixed to a conspicuous part of the premises.

In *Pentecost v. Santorelli*, however, the court held that the "conspicuous part" of the premises may "extend to the location at which the process server's progress is arrested."[57] Similarly, in *F. I. duPont, Glore Forgan & Co. v. Chen*, the court found that "if a process server is not permitted to proceed to the actual apartment by the doorman or some other employee, the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested."[58]

4. "Reasonable Application" Standard

Before engaging in conspicuous-place service, a process server must make reasonable application to effect personal service on a tenant. The process server may make either personal delivery or substituted service. Legally, neither method of personal service is preferred to the other,[59] although in-hand service is the safest mode of service for both landlord and tenant. Courts will determine

the meaning of "reasonable application" by assessing whether the process server's efforts were calculated to succeed.[60] If landlords have information about a tenant that would make service easier to effectuate, and therefore more likely that the tenant is notified of the action or proceeding, the reasonable-application standard requires the landlords to pass the information along to their attorneys, who in turn should notify their process server.[61] A landlord's knowledge is imputed to a process server.[62]

In *Elizabeth Broome Realty Corp. v. Sakas*,[63] the process server, at her first attempt at personal service, accepted the concierge's word that the tenant was not at home and therefore did not visit the tenant's apartment. On her second attempt at personal service, the process server affixed the pleadings to the apartment's entrance door. The court held that the first attempt was a nullity because the process server did not attempt to gain admittance to the apartment. The court explained that to perfect a reasonable attempt at personal delivery or substituted service, a process server must use a method with some expectation of success.[64]

Absent information about when the respondent may be expected to be at home, and to adhere to the reasonable-application requirement, a process server should make at least two attempts to deliver the papers: one during regular business hours, the other before or after regular business hours.[65]

The reasonable-application standard under RPAPL 735 is not as stringent as the due-diligence requirement under CPLR Article 3. Although no rigid rule determines whether due diligence has been exercised in attempting to effect service so as to permit substituted service under CPLR 308, several courts, like the *Lara v. 1010 E. Tremont Realty Corp.*[66] court, have held that three attempts to serve on three different days and at different times during the day constitutes "due diligence" under CPLR 308(4).

The differences in service requirements under the RPAPL and CPLR have been cause for controversy over the years. One controversy is whether a court must award a money judgment against a tenant who defaults after receiving a petition and notice of petition by substituted or duly diligent conspicuous-place service.[67] One line of cases, following *In re McDonald*,[68] holds that only personal jurisdiction is gained and therefore that a monetary judgment can be awarded only when a tenant is served in hand or has appeared. *McDonald* requires landlords in nonpayment proceedings and in holdovers seeking use and occupancy to institute two cases against a defaulting tenant: one, a summary proceeding for possession; the other, a plenary action for rent.

On the other hand, the Appellate Term, First Department, in *Oppenheim v. Spike* stated, albeit in dictum, that duly diligent conspicuous service entitles a landlord to a default money judgment.[69] The *Oppenheim* court found that the only reason the Civil Court's "*money* judgment for rent was a nullity" was that "there is no indication that the process server had used due diligence before resorting to conspicuous service."[70] This issue was examined in *Dolan v. Linnen*, in which the court wrote that *McDonald* should not apply to modern-day residential nonpayment or holdover proceedings and that "no constitutional, statutory, or practical reason prevents duly diligent plenary action CPLR 308 (4) conspicuous service from conferring personal jurisdiction in RPAPL summary proceedings"[71] if the landlord complies in effecting service with both the RPAPL and the CPLR.

Even when the process server has reason to believe that the tenant will be at home during normal business hours, a single service attempt made at that time is insufficient.[72] Courts will require that a second attempt be made before or after normal work hours.[73] In *Eight Associates v. Hynes*, for example, the process server effected conspicuous-place service after making only one attempt at personal service shortly after 12 p.m. on a Friday.[74] The court found that one attempt to serve process during normal working hours before effecting conspicuous-place service did not satisfy the RPAPL 735 reasonable-application standard.

In *Metropolitan Life Ins. Co. v. Sharpf*, the court asked, "What then are normal working hours? The court finds that such hours are 9:00 a.m. to 5:00 p.m. (Monday through Friday) with one hour subtracted at the beginning and added at the end of the day for transportation."[75] Following that case, service should not be attempted when it would be reasonable to expect the recipient to be resting or asleep.[76]

Similarly, attempts at service of process on Sundays are prohibited, as are efforts on other days that the landlord knows are days of religious observance for the tenant, if service is maliciously designed to harass.[77] Attempts at service on Saturdays or before normal work hours will not be rejected if the process server's inquiry reveals that it is a time when a residential respondent could reasonably be expected to be home.[78] In some cases, reasonable application might require that a delivery attempt be made at all other known locations before conspicuous-place service may be effected at the premises sought to be recovered.[79]

If finding out the tenant's whereabouts proves impractical, or if service cannot be made at the tenant's home or business, a landlord may move ex parte under CPLR 308(5) for leave to use an alternate service method.[80] In *BHNJ Realty Corp. v. Rivera*,[81] for example, the petitioner used conspicuous-place service and respondent defaulted. After discovering that respondent was incarcerated, petitioner moved to withdraw the original proceeding and pursuant to CPLR 308(5) serve the

Riker's Island Detention Center office designated to receive legal documents on its inmates' behalf. The court granted the petitioner's motion, stating that "[i]f a petitioner has knowledge of the whereabouts of respondent and that service of process at the premises in the manner prescribed by statute will not give notice to respondent then the attempt to serve respondent by the statutory modes of service will not meet constitutional due process standards since it is not reasonably calculated to apprise respondent of the proceeding."[82]

When a process server effects conspicuous-place service, a copy of the petition and notice of petition must be mailed to each respondent by certified mail or registered mail and by regular mail within one day of the papers' affixation.[83] Proof of service should be filed with the court clerk within three days after completing the mailings.[84] Service is complete on filing of the petition (outside New York City), the notice of petition, or order to show cause, and proof of service with the court clerk.[85]

C. Commercial Tenants

Service on a commercial respondent should be attempted when that party normally conducts its business. Otherwise, service might be deemed unreasonable, and the case will be dismissed.[86]

As with service on a residential tenant, service on a commercial tenant must comply with CPLR Article 3 to obtain a monetary judgment unless the tenant appears and waives its objections to personal jurisdiction.[87] Service under Business Corporation Law (BCL), allowing service on the Secretary of State as agent of a domestic or authorized foreign corporation, may not be used to commence a summary proceeding.[88] In *Puteoli Realty Corp. v. Mr. D's Fontana di Trevi Restaurant, Inc.*,[89] the landlord began a proceeding under the RPAPL and served the tenant under BCL 306. The court noted that summary proceedings under the RPAPL are statutory devices by which jurisdiction may be acquired quickly and that because the petitioner failed to follow the RPAPL 735 service requirements, the tenant's motion to dismiss for lack of personal jurisdiction had to be granted.

To comply with the reasonable-application requirements, a process server may be required to make delivery attempts at all other known locations before conspicuous-place service may be effected at the premises sought to be recovered. Doing so assures that the tenant is afforded actual notice of the proceeding's pendency.[90] If finding out the tenant's whereabouts proves impractical, a landlord may move the court *ex parte* for leave to use an alternate service method.[91]

D. Mailing Requirements

A petitioner that effects substituted or conspicuous-place service must comply with RPAPL 735(1)(a) or (b), which require the petitioner to mail a complete copy of the petition and notice of petition to the respondent both by regular mail and by registered mail or certified mail within one day after the substituted or conspicuous-place service. The process server must be able to demonstrate that the mailings carried the correct postage and were deposited with the post office.[92] RPAPL 735(1)(a) and (b) require mailings to locations other than the subject premises if the respondent does not reside at the subject premises or, if a business, its principal place of business is elsewhere.[93]

Mailings to a natural person should be addressed to the tenant at the property sought to be recovered. If the premises are not the tenant's current place of residence, or if other addresses are known to the landlord, the landlord must make additional mailings to those alternate addresses.[94] If the respondent does not appear to reside at the premises sought to be recovered, and the petitioner has no knowledge of the respondent's actual residence address, the papers may be sent to the respondent's last known place of business or employment.[95]

If the tenant is a corporation, joint-stock, or other unincorporated association, the mailings should be sent by registered or certified mail and by regular first-class mail to the premises sought to be recovered. If the premises are not the tenant's principal place of business or principal office, then an additional mailing should be made to the respondent's principal office or place of business in the state, if the landlord has written information of that address. If the landlord has only actual or constructive notice of another office or business address for the tenant, other than the premises sought to be recovered, a copy of the papers should be sent to the other known addresses.[96] Although RPAPL 735 requires mailings only to business addresses in the state, it is advisable to send the mailings to principal offices outside the state, if those addresses are available.[97]

When effecting substituted or conspicuous-place service, which require a mailing, the failure properly to address envelopes that contain the predicate notice and pleadings might result in the proceeding's dismissal.[98] In *Avakian v. De Los Santos*,[99] the court held that it lacked personal jurisdiction over the defendant because the zip code in the defendant's summons and complaint was incorrect. Later, in *New York City Housing Authority v. Fountain*, the court, citing *Avakian*, found under the RPAPL that "[a]ny delay in receipt may result in an unjustified default. Therefore, zip codes are significant and particularly necessary in summary proceedings."[100] The rule is different in plenary actions. CPLR 308(2) service is valid even if the mailing following substituted service contains the wrong zip code.[101] To avoid the possibility of dismissal, all mailings should include at least the recipient's name; street number or name; unit designator; city and state

or authorized two letter abbreviation, and correct five digit ZIP+4 Code.[102]

E. Filing Requirements

RPAPL Article 7 is strictly construed. Cases are often dismissed for lack of adherence to filing requirements. It is important that practitioners are aware of the fine points concerning the filing requirements.

When a court clerk or a judge of the New York City Civil Court, a City Court outside New York City, or a District Court issues a notice of petition, a copy of the notice should be filed with the court clerk, when an index number is usually assigned.[103] In the New York City Civil Court, the original petition should be filed with the court clerk upon issuance of the notice of petition.[104] Once service is complete, the notice of petition or order to show cause (and the petition in courts outside the New York City Civil Court), together with proof of service, which is typically in the form of a notarized affidavit, should be filed with the court clerk within three days after personal delivery to the respondent or the completion of the mailings when service has been effected by substituted or conspicuous-place service.[105]

Defects in the content of an affidavit of service are treated as minor or amendable. They will not lead to dismissal if service was properly effected.[106] Proof of service not timely filed is a jurisdictional defect. The court may issue a *nunc pro tunc* order authorizing a late filing, which will allow the tenant time to answer the petition to run anew upon service of the order permitting the late filing, with notice of entry.[107] On the other hand, because RPAPL 735(2) directs that proof of service be filed with "the clerk of the court," technical noncompliance with the RPAPL, such as filing proof of service with the judge instead of the clerk, has sometimes resulted in dismissal.[108]

When filing a notice of petition with proof of service in the New York City Civil Court in a residential Housing Part proceeding, the petitioner must also submit stamped postcards addressed to all respondents at the premises sought to be recovered and to the other address(es) at which process was served.[109] No default judgment for failure to answer may be entered against a tenant unless the petitioner has complied with the postcard requirement.[110] This postcard should state the respondent's name, address, and ZIP Code. The postcard's return address should reflect the appropriate address of the court clerk's office to which the respondent is being directed.[111] The reverse side of the postcard must contain the following notice in English and Spanish:

> Papers have been sent to you and filed in court asking this court to evict you from your residence. You must appear in court and file an answer to the landlord's claim. If you have not received the papers, go to the housing part of the civil court immediately and bring this card with you. If you do not appear in court, you may be evicted. You may also wish to contact an attorney.

III. Traverse Hearings

Service of process that violates the strict requirements of RPAPL 735 will make the landlord vulnerable to attack based on lack of *in personam* jurisdiction.[112] The objection may be made by a motion or pre-answer motion to dismiss or as an affirmative defense in the tenant's answer.[113]

The hearing held on the issue of service is known as a "traverse" hearing. When no answer or motion to dismiss for lack of personal jurisdiction is made, an objection to jurisdiction is waived, and the court has full jurisdiction for *in personam* and *in rem* judgments.[114] Additionally, in *Textile Technology Exchange, Inc. v. Davis*,[115] the court held that "interposing a counterclaim related to plaintiff's claims will not waive the defense of lack of personal jurisdiction, but that asserting an unrelated counterclaim does waive such defense because defendant is taking affirmative advantage of the court's jurisdiction." And in *Washington v. Palanzo*,[116] the court held that extensive participation in litigation causes the party to waive objections to personal jurisdiction. However, merely filing a notice of appearance and procuring an extension of time to answer does not waive personal-jurisdiction objections.[117]

Although some trial courts have characterized notice-related irregularities as impinging on the court's subject-matter jurisdiction, this characterization has not met with appellate concurrence.[118] It is a defense of personal jurisdiction.

A. Obtaining a Traverse Hearing

When material issues of fact regarding personal jurisdiction arise, a traverse hearing is required.[119] It is necessary to have a sworn affidavit denying proper service to be entitled to a traverse hearing.[120] An affidavit from a person with personal knowledge—not an attorney—is required.[121]

The affidavit creates only a presumption of service. For a tenant to merit a hearing on whether service was done according to RPAPL or the CPLR, the tenant's answer or motion must set forth specific factual allegations that raise genuine issues of fact about the propriety of the process server's efforts. Conclusory statements that the service of process was defective because it was not served in accordance with RPAPL 735 are insufficient.[122] Instead, the process server's affidavit must be credibly and specifically refuted.[123] Otherwise, the objection or affirmative defense may be stricken, or the pre-answer motion or motion to dismiss denied, without a hearing.[124] Courts have applied these rules to objections to service of predicate notices, petitions, notice of petitions, and HP proceedings.[125] An affidavit of service may be insufficient to give the

court jurisdiction if it fails to show that service could not be made personally.[126] Additionally, an affidavit of service, on its own, is inadequate when the tenant disputes not only the service but also what was attached to the petition.[127]

The facts of *230 Equity Inc. v. Kahn*[128] illustrate what a tenant may allege to secure a traverse hearing. One of the respondents averred that she was in her studio apartment when the process server claimed to have effectuated conspicuous service and that it was impossible for the server to have attempted personal service before he resorted to conspicuous service. According to that respondent, if the process server had attempted to serve the petition and notice of petition personally, she would have heard him knock, given that she was then on the telephone in her studio apartment. Petitioner argued that the respondents presented a conclusory denial of a knock on the door and that they did not deny any relevant fact in the server's affidavit of service. Granting the respondents' motion for a traverse hearing, the court wrote that "[a]lthough [the process server's] affidavit notes [that] he effected service when [the respondent] would have been dialing the telephone, respondents have created an issue of fact about whether [the process server] engaged in a reasonable attempt to serve personally before resorting to conspicuous service."[129]

B. The Process Server

A petition and notice of petition may be served by anyone who is not a named party to the action or proceeding and who is at least 18 years old.[130] A licensed process server under the New York General Business Law is defined as person, other than attorneys to an action acting on their own behalf, who (1) derives income from the service of papers in an action; or (2) has effected service of process in five or more actions or proceedings in the 12 month period immediately preceding the service in question.[131] Unlicensed persons who serve process must state by affidavit that they have not served process more than five times in that year.[132] The New York City Administrative Code requires that process servers be licensed.[133] But an otherwise-valid service of process is not rendered invalid, and the court is not deprived of jurisdiction, solely because the process server violated the New York City Administrative Code.[134] In that case, the process server should be punished, however.[135]

People who serve process are regulated by legislative enactments because improper service of process causes those who might have insufficient knowledge or legal assistance to suffer the most. To this end, process servers who testify at traverse hearings conducted in New York City must bring their license and all records in their possession relating to their service efforts.[136]

C. The Logbook

The General Business Law requires process servers to keep legible records of all service effected. The record is referred to as a process server's "logbook." The logbook should include the action's or proceeding's title; physical description and name of the person served, if known; date and time all service attempts were made and completed; address where service was affected; nature of the papers served; court where the papers are returnable; and action's or proceeding's index number, if one has been assigned. If conspicuous-place service was effected in New York City, the logbook should also note the color of the door on which any papers were affixed. [137] These entries should be kept chronologically in a bound volume and maintained for two years.[138]

If the propriety of service of process is challenged, the process server will be required to present the logbook containing these records. Strict compliance with a process server's record-keeping rules is required when a tenant questions the propriety of service.[139]

D. The Traverse Hearing

At a traverse hearing, the petitioner or plaintiff bears the burden of proving the propriety of service of process.[140] That burden is usually met by introducing the process server's testimony and records. If the landlord is successful, the traverse is overruled and the case may proceed to trial. Otherwise, the tenant's challenge is sustained and the proceeding is dismissed.[141]

The court will determine whether service was properly effected based on the *prima facie* evidence and the witnesses' credibility.[142] Although some courts excuse the process server's failure to present a license during traverse hearings, the absence of other relevant records might result in dismissal.[143] This combats the persisting problem of process servers who fail to use appropriate efforts to effectuate service, a scourge called "sewer service."[144]

CPLR 4531 permits an affidavit of service to be admitted as *prima facie* evidence of the delivery, posting, or affixing of a document when the process server is dead, mentally ill, or cannot be compelled with due diligence to attend the hearing. An affidavit of service that omits a process server's license number is "unlawful."[145]

Once a case is referred to a hearing judge for traverse, the judge is advised to wait a reasonable time for the process server to appear, and to appear with the necessary license and records. Several impatient judges who have dismissed cases have been reversed.[146]

IV. Conclusion

Before delivery of service of process is effected, or when the time might come to attack or defend a case on personal jurisdiction, the wary practitioner, whether for the landlord or the tenant, should

become familiar with the technical requirements of RPAPL 735 and CPLR Article 3. The requirements are technical, to be sure, but one person's technicality is another's due process.

Endnotes

1. *See generally Dolan v. Linnen*, 195 Misc. 2d 298, 299, 753 N.Y.S.2d 682, 683 (Civ. Ct., Kings & Richmond Co. 2003) (Gerald Lebovits, J.).
2. *See* CPLR 101, which provides that "[t]he civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."
3. Andrew Scherer, *Residential Landlord-Tenant Law in New York* at § 7:153, at 7–61 (2005 ed.).
4. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950); *see also Velazquez v. Thompson*, 451 F.2d 202 (2d Cir. 1971) (holding that RPAPL 735 service is constitutional because it is reasonably calculated to inform tenants of proceedings against them).
5. *E.g.*, *Raschel v. Rish*, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 389, 390, 504 N.E.2d 22, 24 (1986) (mem.); *Macchia v. Russo*, 67 N.Y.2d 592, 595, 505 N.Y.S.2d 591, 593, 496 N.E.2d 680, 682 (1986) (*per curiam*); http://www.courts.state.ny.us/reporter/3dseries/2006/2006_26008.htm, 2006 N.Y. Slip Op. 26008, at *3 (Civ. Ct., N.Y. Co., Jan. 13, 2006) (Gerald Lebovits, J.) (finding that "notice is a matter of due process, not getting lucky").
6. *Lana Estates, Inc. v. Nat'l Energy Reduction Corp.*, 123 Misc. 2d 324, 326, 473 N.Y.S.2d 912, 914 (Civ. Ct., Queens Co. 1984); 2 Joseph Rasch, Landlord and Tenant Incl. Summary Proceedings § 29:12, at 425 (Robert F. Dolan 4th ed. 1998).
7. *E.g.*, *Lana Estates*, 123 Misc. 2d at 326, 473 N.Y.S.2d at 914.
8. *See, e.g.*, *Bogatz v. Extra Touch Int'l, Inc.*, 179 Misc. 2d 1029, 1031, 687 N.Y.S.2d 558, 560 (Civ. Ct., Kings Co. 1998) (finding subject matter jurisdiction in commercial summary proceeding although required predicate notice was not served as required by RPAPL 735).
9. *See Dep't of Hous. Pres. & Develop. v. Cauldwest Realty Corp.*, 15 H.C.R. 34A, N.Y.L.J., Feb. 10, 1987, p. 5, col. 1 (App Term 1st Dep't (*per curiam*) (holding that party never served with process cannot be added as respondent, even if that party testified on corporate respondent's behalf).
10. *Lam v. Wrzesinki*, 25 H.C.R. 61B, N.Y.L.J., Feb. 10, 1998, p. 18, col. 6 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.) ("While each petition set forth the names of the three respondents, [leaving two sets with the undertenants] was insufficient to satisfy the requirements of section 735 . . . as the petitioners were required to serve a copy upon each respondent.").
11. *World's Busiest Corner Corp. v. Cine 42nd St. Theater Corp.*, 134 Misc. 2d 281, 282, 510 N.Y.S.2d 796, 797 (Civ. Ct., N.Y. Co. 1986).
12. *Sohn v. Kong*, 21 H.C.R. 667A, N.Y.L.J., Dec. 22, 1993, p. 25, col. 2 (Civ. Ct., Bronx Co.) ("Where a party has signed a lease, the landlord-petitioner has knowledge and is required to name and serve the leaseholder tenant. Failure to do so requires a dismissal of the petition.").
13. 3 Misc. 3d 33, 34, 779 N.Y.S.2d 327, 328 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).
14. RPAPL 733(1); *accord Berkeley Assocs. Co. v. Di Nolfi*, 122 A.D.2d 703, 705, 505 N.Y.S.2d 630, 632 (1st Dep't 1986) (holding that when landlord used conspicuous-place service and filed affidavit of service one day before proceeding was noticed to be heard, RPAPL 733(1) not strictly adhered to because, under RPAPL 735(2)(b), conspicuous-place service is complete on filing of proof of service).
15. *See 445 E. 85th St. v. Phillips*, 2003 N.Y. Slip Op. 51270(U), 2003 WL 22170112,, at *2, 2003 N.Y. Misc. LEXIS 1182 (Civ. Ct., N.Y. Co., Sept. 12, 2002) (Gerald Lebovits, J.) ("The statute's requirements give a tenant some time to consult with an attorney to prepare for the first court date, to appear in court, to gather evidence, and to negotiate a settlement."); *Interstate Realty v. Smalls*, N.Y.L.J., Apr. 23, 1996, p. 27, col. 4 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.) ("Inasmuch the notice of petition and petition were not served at least five days before the time at which the petition was noticed to be heard, the petition must be dismissed. . . .").
16. *Frank v. Ange*, 82 Misc. 2d 465, 465, 370 N.Y.S.2d 365, 366 (Rochester City Ct. 1975).
17. 2003 N.Y. Slip Op. 51270(U), WL 22170112, 2003 N.Y. Misc. LEXIS 1182.
18. *Id.*, WL 22170112, at *2; *accord* B*ranson Assocs., L.P. v. Bentley*, 6 Misc. 3d 1040(A), 800 N.Y.S.2d 343, 2005 N.Y. Slip Op. 50361(U), 2005 WL 670729 (Albany City Ct., Mar. 23, 2005).
19. 5 Misc. 3d 1019(A), 799 N.Y.S.2d 161, 2004 N.Y. Slip Op. 51462(U), 2004 N.Y. Misc. LEXIS 2362 (Civ. Ct., N.Y. Co., Sept. 23, 2004).
20. *See* RPAPL 735; *City of N.Y. v. Clark*, 234 A.D.2d 120, 650 N.Y.S.2d 709 (1st Dep't 1996) (holding that CPLR 308(5) permits alternate service methods in context of summary proceeding).
21. N.Y. Jur. 2d, Real Property: Possessory and Related Actions § 180; Rasch, *supra* note 6, at § 29:12, at 425.
22. CPLR 308(1); *see, e.g.*, *Walber 419 Co. v. Office Design Assocs./Shepard Martin, Inc.*, 20 H.C.R. 257A, N.Y.L.J., May 5, 1992, p. 21, col. 1 (Civ. Ct., N.Y. Co.).
23. *Rodney Co. N.V., Inc. v. Riverbank Am.*, 25 H.C.R. 525B, N.Y.L.J., Oct. 7, 1997, p. 26, col. 5 (Civ. Ct., N.Y. Co.).
24. *See, e.g.*, *Parras v. Ricciardi*, 185 Misc. 2d 209, 212 –13, 710 N.Y.S.2d 792, 795 (Civ. Ct., Kings Co. 2000).
25. RPAPL 735(2)(a); *Park Holding Co. v. Grossman*, 21 H.C.R. 129C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 (App. Term 1st Dep't) (*per curiam*).
26. CPLR 311(a)(1); *Manhattan Embassy Co. v. Embassy Parking Corp.*, 164 Misc. 2d 977, 979, 627 N.Y.S.2d 245, 246 (Civ. Ct., N.Y. Co. 1995).
27. *Manhattan Embassy Co.*, 164 Misc. 2d 977 at 979, 627 N.Y.S.2d 245 at 246.
28. *Trump-Equitable 5th Ave. Co. v. McCrory*, 19 H.C.R. 544A, N.Y.L.J., Sept. 4, 1991, p. 22, col. 3 (Civ. Ct., N.Y. Co. 1991).
29. *See* CPLR 101; Daniel Finkelstein & Lucas A. Ferrara, *Landlord Tenant Practice in New York* at §§ 14:151, at 14–89, 15:310, at 15–188 (2006 ed.).
30. CPLR 310; Finkelstein & Ferrara, *supra* note 29, at §§ 14:151, at 14-89, 15:310, at 15–188.
31. *Accord 319 W. 48th St. Realty Corp. v. Al's Pub Corp.*, 18 H.C.R. 608C, N.Y.L.J., Dec. 27, 1990, p. 21, col. 5 (App. Term 1st Dep't) (*per curiam*).
32. *See, e.g.*, *Ilfin Co. v. Benec Indus., Inc.*, 114 Misc. 2d 411, 413, 451 N.Y.S.2d 643, 645 (Civ. Ct., N.Y. Co. 1982) ("When determining whether service was proper the inquiry must be: Under the circumstances, is it fair to say that the manner of service used is one that, objectively viewed, is calculated to adequately and fairly apprise the respondent of an impending lawsuit?").
33. Scherer, *supra* note 3, at § 7:176, at 7–69.
34. *See Manhattan Embassy Co.*, 164 Misc. 2d at 981, 627 N.Y.S.2d at 247.
35. *See Zellars v. Hanse*, 23 H.C.R. 521A, N.Y.L.J., Aug. 16, 1995, p. 24, col. 1 (Civ. Ct., Kings Co.).
36. 1 Misc. 3d 22, 23, 767 N.Y.S.2d 562, 563 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2003) (mem.) (citation omitted).
37. *See, e.g.*, *Durham Prods., Inc. v. Sterling Film Portfolio, Ltd., Series A*, 537 F. Supp. 1241, 1245 (S.D.N.Y. 1982).
38. *Manhattan Embassy Co.*, 164 Misc. 2d at 981, 627 N.Y.S.2d at 247.
39. *50 Ct. St. Assocs. v. Mendelson & Mendelson*, 151 Misc. 2d 87, 91, 572 N.Y.S.2d 997, 998 (Civ. Ct., Kings Co. 1991).

40. *Napic, N.V. v. Fverfa Investments, Inc.*, 193 A.D.2d 549, 549, 597 N.Y.S.2d 707, 708 (1st Dep't 1993) (mem.) (finding jurisdiction over defendant not acquired by delivering process to building's concierge and mailing another copy to defendant's unit); *Colonial Nat'l Bank, U.S.A. v. Jacobs*, 188 Misc. 2d 87, 88, 727 N.Y.S.2d 237, 239 (Civ. Ct., N.Y. Co. 2000) ("Service on a person of suitable age and discretion is effective only at defendant's actual dwelling. Outside that proximity to the intended party, the inference that delivery to her is 'reasonably likely' fails.") (internal citations omitted).

41. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709–10 (holding that Civil Court properly authorized service under CPLR 308(5) after petitioner proved that it had made three unsuccessful attempts to gain access to building through various entrances and that mailboxes in building's front entrance were non-functional); Finkelstein & Ferrara, *supra* note 29, at §§ 14:158, at 14-93, 15:318, at 15–193.

42. *Ilfin Co.*, 114 Misc. 2d at 413, 451 N.Y.S.2d at 645 ("As a general rule, in a business setting, it would be unfair and improper to say that an employee of *another tenant*, not employed by the tenant on whom service is intended, would be one of suitable age and discretion.") (emphasis in original).

43. *Id.* at 414, 451 N.Y.S.2d at 645; *accord* Peter M. Wendt & Lisa S. Ngai, Service of Process in Summary Eviction Proceedings 10 (unpub. manuscript for N.Y. County L. Ass'n CLE, Mar. 31, 2003).

44. *Arvic Realty v. RST Assoc., LP*, 31 H.C.R. 410A, N.Y.L.J., July 30, 2003, p. 19, col. 2 (Civ. Ct., N.Y. Co.).

45. *See Feenjon Corp. v. Tulipane*, 16 H.C.R. 188C, N.Y.L.J., May 27, 1988, p. 22, col. 2 (App. Term 1st Dep't) (*per curiam*) (holding that although papers were delivered to party visiting tenant, petition was dismissed because recipient lacked requisite nexus to unit).

46. *Kahn v. Sosin*, 130 Misc. 2d 515, 516, 496 N.Y.S.2d 678, 680 (Civ. Ct., N.Y. Co. 1985).

47. *Pena v. Aadal*, 17 H.C.R. 12C, N.Y.L.J., Jan. 13, 1989, p. 22, col. 6 (Civ. Ct., N.Y. Co.).

48. RPAPL 735(1); *Cassidy v. County of Nassau*, 146 A.D.2d 595, 597, 536 N.Y.S.2d 520, 521 (2d Dep't 1989) (mem.) (awarding partial summary judgment because sheriff's office failed to mail copies of warrant of eviction within one day of posting it at tenant's apartment).

49. RPAPL 735(2).

50. *Id.* 735(2)(b); *Park Holding Co.*, 21 H.C.R. 139C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 ("When service of the notice of petition and petition is made other than by personal delivery to respondent, it is not complete until the filing of the proof of service.").

51. *See Eight Assocs. v. Hynes*, 102 A.D.2d 746, 748, 476 N.Y.S.2d 881, 883 (1st Dep't 1984), *aff'd*, 65 N.Y.2d 739, 492 N.Y.S.2d 739, 492 N.Y.S2d 15, 481 N.E.2d 555 (1985).

52. RPAPL 735; *161 Williams Assocs. v. Coffee*, 122 Misc. 2d 37, 39, 469 N.Y.S.2d 900, 902 (Civ. Ct., N.Y. Co. 1983); *Pentecost v. Santorelli*, 31 H.C.R. 392B, N.Y.L.J., July 17, 2003, p. 25, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

53. *161 Williams Assocs.*, 122 Misc. 2d at 39, 469 N.Y.S.2d at 902.

54. *See id.*, 469 N.Y.S.2d at 902.

55. *Ark. Leasing Co. v. Farag*, 21 H.C.R. 321A, N.Y.L.J., June 16, 1993, p. 29, col. 5 (Civ. Ct., Queens Co.); *see Rodwin v. Townsend*, 286 A.D.2d 569, 730, 730 N.Y.S.2d 587, 588 (4th Dep't 2001) ("[T]he process server mailed the papers to respondent and left them between the screen door and inner door of respondent's home. The process server did not thereby properly affix the papers to respondent's door . . . .").

56. 25 H.C.R. 598A, N.Y.L.J., Nov. 12, 1997, p. 30, col. 3 (Civ. Ct., Kings Co.).

57. 31 H.C.R. 392B, N.Y.L.J., July 17, 2003, p. 25, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

58. 41 N.Y.2d 794, 797, 396 N.Y.S.2d 343, 346, 364 N.E.2d 1115, 1117 (1977).

59. *See Palumbo v. Clark's Estate*, 94 Misc. 2d 1, 6, 403 N.Y.S.2d 874, 876–77 (Civ. Ct., N.Y. Co. 1978) ("While it is true that the Legislature removed the higher burden of 'due diligence' from the statute, it did not make conspicuous place service a method of service initially and unconditionally available.").

60. *Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883 ("Under the facts present herein, one attempt to serve process during 'normal working hours' did not satisfy the 'reasonable application' standard set forth in RPAPL 735. In so doing we do not rule that such service during 'normal working hours' would be insufficient under all circumstances.").

61. *See Ancott Realty, Inc. v. Gramercy Stuyvesant Indep. Democrats*, 127 Misc. 2d 490, 491, 486 N.Y.S.2d 672, 674 (Civ. Ct., N.Y. Co. 1985).

62. *30-40 Assoc. Corp. v. DeStefano*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6 (App. Term 1st Dep't) (*per curiam*); *Sie Jie Mei, Inc. v. Ashare*, 31 HCR 681A, N.Y.L.J., Dec. 10, 2003, p. 19, col. 1 (Civ. Ct., N.Y. Co.) (stating that in landlord-tenant matters, process server has duty, in effecting proper service, to communicate to landlord difficulties with service of process).

63. 21 H.C.R. 515A, N.Y.L.J., Oct. 13, 1993, p. 22, col. 5 (Civ. Ct., N.Y. Co.).

64. *Id.*; *see also Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883.

65. *See generally Har Holding v. Feinberg*, 26 H.C.R. 195A, N.Y.L.J., Apr. 2, 1998, p. 29, col. 3 (App. Term 1st Dep't) (*per curiam*) ("Tenant failed to controvert the process server's affidavit which set forth two prior attempts at personal service, one in the afternoon and one in the evening before conspicuous-place service was effected."); *N.Y. St. Hous. Finance v. Fawcett*, 12 H.C.R. 298A, N.Y.L.J., Dec. 19, 1984, p. 19, col. 5 (Civ. Ct., N.Y. Co.) (same).

66. 205 A.D.2d 468, 468, 614 N.Y.S.2d 6, 6 (1st Dep't 1994) (*per curiam*).

67. *See Dolan*, 195 Misc. 2d at 299, 753 N.Y.S.2d at 683.

68. 225 A.D. 403, 233 N.Y.S. 368 (4th Dep't 1929).

69. *See Oppenheim v. Spike*, 107 Misc. 2d 55, 56, 437 N.Y.S.2d 826, 828 (App. Term 1st Dep't 1980) (*per curiam*).

70. *Id.*, 437 N.Y.S.2d at 828 (emphasis added).

71. 195 Misc. 2d at 321, 753 N.Y.S.2d at 698. Since *Dolan*, two Nassau County judges have discussed the matter. Agreeing with *Dolan* is *Guevra v. Cueva*, 5 Misc. 3d 1024(A), 799 N.Y.S.2d 160, 2004 N.Y. Slip Op. 51531(U), 2004 WL 2827675 (Dist. Ct. Nassau Co., Dec. 8, 2004). Disagreeing is *Arnold v. Lyons*, 2003 N.Y. Slip Op. 50766(U), 2003 WL 2004246 (Dist. Ct. Nassau Co., Mar 31, 2003).

72. *See* 102 A.D.2d at 748, 476 N.Y.S.2d at 883 (holding single attempt to effect personal or substituted service during normal working hours insufficient because there is no reasonable expectation that an individual will be at home during those hours).

73. *See, e.g.*, *Kalikow 78/79 Co. v. Naughton*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3 (App. Term 1st Dep't) (*per curiam*) (upholding conspicuous-place service because process server made three attempts, two outside normal working hours.).

74. *See* 102 A.D.2d at 746, 476 N.Y.S.2d at 882.

75. 124 Misc. 2d 1096, 1098, 478 N.Y.S.2d 567, 570 (Civ. Ct., N.Y. Co. 1984).

76. *See id.*, 478 N.Y.S.2d at 570 (holding service attempts between 10:30 p.m. and 6:00 a.m. unacceptable).

77. *Hessel v. Hessel*, 6 Misc. 2d 861, 861, 164 N.Y.S.2d 519, 520 (Sup. Ct., N.Y. Co.) ("If this action were commenced by service of the summons and complaint in New York State on Sunday such service would be void.").

78. *See, e.g.*, *45 Prospect Apts. v. Copeland*, 17 H.C.R. 23D, N.Y.L.J., Jan. 2, 1989, p. 26, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("The actions of the process server in going to tenant's home at 6:45 a.m. on a weekday morning, without making any prior inquiry as to whether tenant would be home at that time, did not suffice as a reasonable application. . . .").

79. *See, e.g.*, *DeStefano*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6 ("The record supports Civil Court's finding that landlord had knowledge of tenant's incarceration and that conspicuous place service at the subject apartment would not give actual notice to the tenant, who also suffers from a psychiatric impairment."); *Kalikow 78/79 Co.*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3.

80. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709.

81. 144 Misc. 2d 241, 242, 543 N.Y.S.2d 883, 884 (Civ. Ct., N.Y. Co. 1989).

82. *Id.* at 244, 543 N.Y.S.2d at 885.

83. RPAPL 735(1).

84. *Id.* 735(2).

85. *Id.* 735(2)(b); *Park Holding Co.*, 21 H.C.R. 139C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 ("When service of the notice of petition and petition is made other than by personal delivery to respondent, it is not complete until the filing of the proof of service.").

86. *See Naman v. Sylveen Realty Co.*, 222 A.D.2d 564, 565, 636 N.Y.S.2d 344, 345 (2d Dep't 1995) (mem.) ("The process server attempted to serve the notice of petition and petition during the [tenant's] posted office hours. This attempt encompassed a reasonable expectation of success and thus satisfied the requirement of 'reasonable application.'"); *Chase Manhattan Bank, N.A. v. Beary*, 14 H.C.R. 176B, N.Y.L.J., May 21, 1986, p. 15, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("Attempted personal service at 6:30 at night, after usual business hours, on office tenant, is not reasonable attempt at personal service.").

87. *Leven v. Browne's Business School, Inc.,* 71 Misc. 2d 842, 842–43, 337 N.Y.S.2d 307, 308–09 (Dist. Ct., Nassau Co. 1972).

88. Andrew R. Brodnick, *Avoiding the Trap: Service of Process on Commercial Tenants Under RPAPL*, N.Y.L.J., June 8, 1994, p. 5, col. 2 (citing *Omabuild Corp. v. Dolron Rest., Inc.*, 20 H.C.R. 412A, N.Y.L.J., July 1, 1992, p. 24, col. 3 (Civ. Ct., N.Y. Co.)).

89. 95 Misc. 2d 108, 110, 407 N.Y.S.2d 118, 120 (Dist. Ct. Suffolk Co. 1978).

90. *See, e.g.*, *Kalikow 78/79 Co.*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3; *30-40 Assocs.*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6.

91. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709.

92. *See Marrero v. Escoto*, 145 Misc. 2d 974, 975, 554 N.Y.S.2d 375, 376 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1990) (mem.) ("In the absence of proof by the petitioner that this envelope had the proper postage for certified mail, or in the absence of any stamp by the post office to establish that the envelope was treated as certified mail, it is the conclusion of this court that petitioner has failed to establish that the certified mail copy was ever sent to the appellant.").

93. *Lana Estates*, 123 Misc. 2d at 327, 473 N.Y.S.2d at 915 ("'[S]ubstituted' or 'conspicuous place' service requires that a copy of the notice of petition and petition be sent by regular and certified mail to a corporate respondent addressed to the subject premises *and* also to the corporate tenant's last known principal office or principal place of business if this is 'not located on the property sought to be recovered.'") (emphasis in original); *Delmonico Hotel Co. v. Fiddler Gonzalez & Rodriguez*, 19 H.C.R 360A, N.Y.L.J., June 12, 1991, p. 23, col. 4 (Civ. Ct., N.Y. Co.).

94. *Weise v. Gershman*, 90 Misc. 2d 799, 800, 396 N.Y.S.2d 316, 317 (Civ. Ct., Kings Co. 1977) (noting that RPAPL 735 "provides for substituted service on a natural person, when the premises are not his residence, not only at the premises but also by registered or certified mail at the respondent's residence if petitioner has 'written information' of the residence address").

95. *See* RPAPL 735(1)(a).

96. *See id.* 735(1)(b); *E.O.R.. Five of N.Y. v. Fountain House, Inc.*, 23 H.C.R. 576A, N.Y.L.J., Sept. 22, 1995, p. 26, col. 1 (App. Term 1st Dep't) (*per curiam*) (holding that process must be mailed to corporate address when conspicuous-place service on corporation is attempted and landlord has written information that corporation's principal office of place of business is not located on property sought to be recovered).

97. *See Cooke Props., Inc. v. Masstor Sys. Corp.*, 21 H.C.R. 1A, N.Y.L.J., Jan. 4, 1993, p. 21, col. 3 (Civ. Ct., N.Y. Co. 1993) (noting, in upholding service on sub-tenant's employee, that mailings were made to tenant's out-of-state principal office); *Delmonico Hotel Co.*, 19 H.C.R.360A, N.Y.L.J., June 12, 1991, p. 23, col. 4 (holding that when tenant is partnership, mailings are controlled by RPAPL 735(1)(b), which does not limit mailings to in-state addresses).

98. *See Foster v. Cranin*, 180 A.D.2d 712, 712–13, 579 N.Y.S.2d 742, 743 (2d Dep't 1992) (mem.) (dismissing because of incorrect mailing); Finkelstein & Ferrara, *supra* note 29, at §§ 14:182, at 14–105, 15:342, at 15–205.

99. 183 A.D.2d 687, 688; 583 N.Y.S.2d 275, 278 (2d Dep't 1992) (mem.).

100. 172 Misc. 2d 784, 794, 660 N.Y.S.2d 247, 254 (Civ. Ct., Bronx Co. 1997) citing 6 RCNY § 2-238.

101. *See Karlsson & Ng v. Cirincione*, 186 Misc. 2d 359, 360–61, 718 N.Y.S.2d 783, 784–85 (Civ. Ct., N.Y. Co. 2000).

102. S*ee* Wendt & Ngai, *supra* note 43, at 11.

103. 22 NYCRR 208.42(h) (Civ. Ct.); 22 NYCRR 210.42(d) (City Ct.); 22 NYCRR 212.42(d) (Dist. Ct.).

104. Civ. Ct. Act § 401(c).

105. CPLR 306(d); RPAPL 735(2); Finkelstein & Ferrara, *supra*, note 29, at §§ 14:147 at 14–87, 15:307, at 15–187.

106. *See, e.g.*, *Halpern v. State Furniture Co.*, 186 Misc. 551, 553, 61 N.Y.S.2d 618, 619 (App. Term 1st Dep't 1946) (*per curiam*) ("[A]n omission to place upon the copy petition served the name of the notary, is not a jurisdictional defect.").

107. Civ. Ct. Act § 411; UDCA § 411; UCCA § 411; UJCA § 411; *Fame Equities & Mgmt. Co. v. Malcolm*, N.Y.L.J., Oct. 28, 1996, p. 27, col. 4 (App. Term 1st Dep't) (*per curiam*).

108. *See, e.g.*, *Shields v. Benderson Dev. Co., Inc.*, 76 Misc. 2d 322, 323 350 N.Y.S.2d 549, 551 (Monroe County Ct. 1973).

109. 22 NYCRR 208.42(i).

110. *Id.* 208.42(i)(2).

111. *Id.* 208.42(i)(1).

112. *Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883; Finkelstein & Ferrara, *supra* note 29, at §§ 14:236, at 14–127, 15:393, at 15–227.

113. *See, e.g.*, *Baer v. Lipson*, 194 A.D.2d 787, 787, 599 N.Y.S.2d 618, 619 (2d Dep't 1993) (mem.), *appeal dismissed*, 83 N.Y.2d 788, 611 N.Y.S.2d 127, 633 N.E.2d 481 (1994) (denying respondent's motion to vacate default judgment because respondent failed to assert defense of lack of personal jurisdiction and did not rebut proof of service by affidavit or statement based on personal knowledge).

114. *New Generation Mgmt. Corp. v. Park*, 32 H.C.R. 289A (Civ. Ct., N.Y. Co. 2003).

115. 81 N.Y.2d 56, 59, 595 N.Y.S.2d 729, 730, 611 N.E.2d 768, 769 (1993).

116. 192 Misc. 2d 577, 580, 746 N.Y.S.2d 875, 877-78 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

117. *2290 12th Ave. LLC v. Doe*, 30 HCR 695A, N.Y.L.J., Dec. 5, 2002, p. 22, col. 5 (Civ. Ct., N.Y. Co.).

118. *Parkchester Apts. Co. v. Walker*, 24 H.C.R. 488A, N.Y.L.J., Sept. 16, 1996, p. 28, col. 3 (App. Term 1st Dep't) (*per curiam*) ("The purported defects in the demand were not 'jurisdictional.' 'The failure of petitioner to comply with a statutory notice requirement . . . represents merely the

failure to comply with a condition precedent to suit and cannot properly be said to affect the court's jurisdiction.'") (quoting *170 W. 85th Tenants Ass'n v. Cruz*, 173 A.D.2d 338, 339, 569 N.Y.S.2d 705, 707 (1st Dep't 1991) (mem.)). (alteration in *Walker*); Finkelstein & Ferrara, *supra* note 29, at § 14:235, at 14–127.

119. *67-25 Dartmouth St. Corp. v. Silberman*, 21 HCR 409A, N.Y.L.J., Aug. 11, 1993, p. 24, col. 5 (Civ. Ct., Queens Co.).

120. *Glorious v. Siegel*, 33 HCR 74A, 5 Misc. 3d 1015(A), 5 Misc.3d 1015(A), 798 N.Y.S.2d 709, 2004 N.Y. Slip Op. 51378(U), *4, 2004 WL 2609413, at *4 (Civ. Ct., N.Y. Co., Sept.15, 2004) (Gerald Lebovits, J) (denying traverse because "[r]espondent did not assert the allegations of improper service in a sworn affidavit included in his answer as required by CPLR 3020"); *106 E. 116th St., LLC v. Vergas*, 33 H.C.R. 185A, N.Y.L.J., Mar. 16, 2005 p. 19, col. 3 (Civ. Ct., N.Y. Co.) (holding that personal-jurisdiction defense will be stricken if process server's affidavit of service is wholly proper on its face and if person with knowledge does not contradict by affidavit).

121. *See, e.g.*, *Hasbrouck v. City of Gloversville*, 102 A.D.2d 905, 477 N.Y.S.2d 486, 487 (3d Dep't 1984) (mem.), *aff'd*, 63 N.Y.2d 816, 483 N.Y.S.2d 214, 472 N.E.2d 1042 (1984) (mem) (discussing summary-judgment motions).

122. *Clarkson Arms v. Arabatiz*, 19 H.C.R. 424B, N.Y.L.J., July 3, 1991, p. 23, col. 6 (App. Term 1st Dep't) (*per curiam*) (holding bare conclusory remarks that service of process fails to comply with RPAPL 735 are insufficient to warrant hearing); *De Meo v. Travalos*, 12 H.C.R. 256C, N.Y.L.J., Nov. 7, 1984, p. 13, col. 3 (holding that sworn denial of receipt of process requires traverse hearing).

123. *Jackson v. Hertz*, 20 H.C.R. 65A4, N.Y.L.J., Aug. 19, 1992, p. 23, col. 3 (Civ. Ct., N.Y. Co.) (holding that when tenant moves to dismiss for lack of personal jurisdiction, landlord must attach copy of affidavit of service to opposing papers).

124. *See In re Shaune TT*, 251 A.D.2d 758, 758, 674 N.Y.S.2d 457, 458 (3d Dep't 1998) (holding respondent's "conclusory denial of service was insufficient to raise an issue of fact necessitating a traverse hearing"); *Carlino v. Cook*, 126 A.D.2d 597, 598, 511 N.Y.S.2d 38, 40 (2d Dep't 1987) (mem.) (allowing party to refute process server's affidavit of service by "detailed and specific controversions" of pertinent allegations).

125. *See Worrell v. 845 E. 136th St., Inc.*, 129 A.D.2d 528, 529, 514 N.Y.S.2d 380, 380 (1st Dep't 1987) (mem.); *see* Wendt & Ngai, *supra* note 43, at 14 (citing *Runyon v. Mirsky*, N.Y.L.J., Feb. 24, 1992, p. 3, col. 1 (App. Term 1st Dep't) (*per curiam*)).

126. *Matthews v. Carman*, 122 App. Div. 582, 586, 107 N.Y.S. 694 (1st Dep't 1907) (*per curiam*).

127. *President St. v. Bernstein.*, 21 H.C.R. 337A, N.Y.L.J., June 23, 1993, p. 30, col. 5 (Civ. Ct., Kings Co.).

128. 7 Misc. 3d 1009(A), 2003 N.Y. Slip Op. 51754(U), 2003 WL 24038304, N.Y. Misc. LEXIS 1992 (Civ. Ct., N.Y. Co., Aug. 8, 2003) (Gerald Lebovits, J.).

129. *Id.*, 2003 N.Y. Slip Op. 51754(U), at *2, 2003 WL 24038304, at *2, 2003 N.Y. Misc. LEXIS 1992.

130. CPLR 2103(a); *Grid Realty Corp. v. Gialousakis*, 129 A.D.2d 768, 768, 514 N.Y.S.2d 760, 760 (2d Dep't 1987) (mem.) (upholding propriety of corporate officer's service of process); *N.Y. City Hous. Auth. v. Smith*, 18 H.C.R. 469A, N.Y.L.J., Oct. 3, 1990, p. 23, col. 4 (Civ. Ct., N.Y. Co.) (upholding landlord's employee's service of petition and notice of petition).

131. GBL §§ 89-u, 89-cc; *see also* GBL § 89-t; N.Y.C. Admin. Code §§ 27–403 (providing that in New York City, process servers are persons who charge a fee or who serve process five or more times "in the twelve month period immediately preceding the service in question" and are subject to licensing and record-keeping requirements).

132. Scherer, *supra* note 3, at § 7:154, at 7–61.

133. N.Y.C. Admin. Code §§ 20–403.

134. *E.g.*, *Timur on Fifth Ave. Inc. v. Jim, Jack & Joe Realty Corp.*, N.Y.L.J., Sept. 29, 2000, p. 29, col. 1 (App. Term 1st Dep't) (*per curiam*); Scherer, *supra* note 3, at § 7:159, at 7–63.

135. *See, e.g.*, *Barr v. Dep't of Consumer Affairs*, 70 N.Y.2d 821, 823, 517 N.E.2d 1321, 1322 (1987) (upholding fine and revocation of license of process server who consistently failed to maintain proper records of service of process); Scherer, *supra* note 3, at § 7:159, at 7–63.

136. 22 NYCRR 208.29; *see also Cent. Conn. Teachers Fed. Credit Union v. Raton*, N.Y.L.J., Apr. 24, 1997, p. 32, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("Such records are vital to a proper cross examination."); *Citibank, N.A. v. Mendelsohn*, 25 H.C.R.598A, N.Y.L.J., Nov. 12, 1997, p. 30, col. 3 (Civ. Ct., Kings Co.) ("The first [proceeding] was dismissed because the process server failed to produce his logbook. . . .").

137. GBL §§ 89-u, 89-cc.

138. *Id.* § 89-u; 89-cc; *see generally Leander v. Burnett*, 25 H.C.R 645A, N.Y.L.J., Dec. 3, 1997, p. 25, col. 5 (Civ. Ct., Kings Co.).

139. *Bullen v. Ctr. Garage Corp.*, 31 H.C.R. 486A, N.Y.L.J., Aug. 29, 2003, p. 19, col. 2 (Civ. Ct., N.Y. Co.).

140. *E.g.*, *Liberman v. Gelstein*, N.Y.L.J., Oct. 3, 1990, p. 21, col. 5, 18 H.C.R. 462A (Sup. Ct., N.Y. Co.).

141. On the other hand, the court in *475 Sixth Ave. Props. Corp. v. Otto*, 11 H.C.R. 176B, N.Y.L.J., July 13, 1983, p. 12, col. 1 (App. Term 1st Dep't) (*per curiam*), held that a traverse court may not impose traverse costs on a tenant whose traverse motion is overruled.

142. *E.g.*, *Silber v. A.J. Clarke, Inc.*, 14 H.C.R. 322D, N.Y.L.J., Sept. 26, 1986, p. 12, col. 4 (App. Term 1st Dep't) (*per curiam*) (overruling traverse based on process server's credibility).

143. *Inter-Ocean Realty Assocs. v. JSA Realty Corp.*, 152 Misc. 2d 901, 902, 587 N.Y.S.2d 837, 838 (Civ. Ct., N.Y. Co. 1991) (dismissing proceeding because process server failed to produce police report or other probative evidence about whereabouts of logbook: "Courts must strictly uphold compliance by process servers with the regulations to soundly effectuate a public policy that prevents questionable service practices."); *26th W. Assocs. v. Slattery*, 13 H.C.R. 373A, N.Y.L.J., Nov. 13, 1985, p. 13, col. 6 (Civ. Ct., N.Y. Co.) (holding that process server's log held minimal weight in traverse hearing); *Griffith v. Bessent*, 21 HCR 434A (Civ. Ct., Kings Co. 1993) (holding that failure to maintain bound log of service of process together with lack of independent memory of how many copies of process were served mandates dismissing petition).

144. Scherer, *supra* note 3, at § 7:155, at 7–62.

145. N.Y.C. Admin. Code §§ 89, 20–405.

146. S*ee, e.g.*, *Ezragim Assocs., LLC v. J.H. Design, Inc.*, 4 Misc. 3d 130(A), 791 N.Y.S.2d 869, 2004 N.Y. Slip Op. 50684(U), 2004 WL 1489858, 32 H.C.R. 398B, N.Y.L.J., June, 22, 2004, p. 23, col. 2 (App. Term 1st Dep't, June 17, 2004) (*per curiam*) ("[T]he court's refusal to grant landlord an adjournment of the traverse so that it could produce proof of the certified mailings of the demand for rent and nonpayment petition was an improvident exercise of discretion.").

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