

NY CLS CPLR R 4531

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New York

Consolidated Laws Service >
Civil Practice Law And Rules (Arts. 1 — 100) >
Article 45 Evidence (§§ 4501 — 4551)

R 4531. Affidavit of service or posting notice by person unavailable at trial

An affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead, mentally ill or cannot be compelled with due diligence to attend at the trial.

History

Formerly § 4531, add, L 1962, ch 308; amd, L 1962, ch 315, § 1; L 1978, ch 550, § 7, eff July 24, 1978.

Annotations

Notes

Prior Law:

Earlier statutes: CPA § 371; CCP § 927.

Advisory Committee Notes:

This rule is the same as former § 371 with minor language changes. The phrase “where it is necessary upon the trial of an action to prove the service, posting or affixing of a notice” is omitted as unnecessary, since the affidavit will not be relevant and the evidence will be inadmissible unless its use is necessary on the trial.

Notes to Decisions

I.Under CPLR

1.Generally

II.Under Former Civil Practice Laws

2.Generally

I. Under CPLR

1. Generally

Process server's affidavit, which constitutes prima facie evidence of service under CLS CPLR § 4531, was effectively rebutted where (1) defendant testified that he had never been personally served and that he was not even in his office because he was recuperating from serious car accident on date process was supposedly served, (2) his secretary corroborated his testimony, and (3) plaintiff failed to offer further substantive evidence in reply. *Carlino v Cook*, 126 A.D.2d 597, 511 N.Y.S.2d 38, 1987 N.Y. App. Div. LEXIS 41736 (N.Y. App. Div. 2d Dep't 1987).

Affidavit of deceased process server was properly admitted into evidence under CLS CPLR § 4531 where it contained sufficient factual detail and descriptive information to establish prima facie that personal service was made. Plaintiff established personal jurisdiction over corporate defendant solely by evidence of affidavit of deceased process server where (1) affidavit contained sufficient factual detail and description to establish prima facie that personal service was made, (2) defendant's store manager, who witnessed accident, could not state with certainty that he was absent from store on date process was served, and (3) physical description in affidavit of person allegedly served did not vary substantially from manager's physical appearance. *Gordon v Nemeroff Realty Corp.*, 139 A.D.2d 492, 526 N.Y.S.2d 595, 1988 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 2d Dep't 1988).

Defendant was not entitled to vacatur, on ground of improper service of process, of judgment of mortgage foreclosure and sale where deceased process server's affidavit of service was properly admitted and, with additional testimony at hearing, proved jurisdiction by preponderance of evidence. *Capital Resources Corp. v Auguste*, 266 A.D.2d 330, 698 N.Y.S.2d 303, 1999 N.Y. App. Div. LEXIS 11541 (N.Y. App. Div. 2d Dep't 1999).

In a commercial holdover proceeding, the court determined that because the process server's affidavit did not fall within one of the three circumstances enumerated in N.Y. C.P.L.R. 4531, it could not be admitted into evidence by the landlord. Landlord failed to show that the affidavit came within an exception to the hearsay rule. *Cobble Hillbillies, LLC v Interior Design*, 782 N.Y.S.2d 600, 4 Misc. 3d 987, 2004 N.Y. Misc. LEXIS 1290 (N.Y. Civ. Ct. 2004).

II. Under Former Civil Practice Laws

2. Generally

Where town clerk certified by affidavit that he posted copies of zoning ordinance, his certificate is presumptive evidence that ordinance was properly posted, without specifying period of posting. *Longo v Eilers*, 93 N.Y.S.2d 517, 196 Misc. 909, 1949 N.Y. Misc. LEXIS 2973 (N.Y. Sup. Ct. 1949).

Research References & Practice Aids

Jurisprudences:

57 NY Jur 2d Evidence and Witnesses § 109. .

58 NY Jur 2d Evidence and Witnesses § 535. .

58A NY Jur 2d Evidence and Witnesses § 979. .

86 NY Jur 2d Process and Papers § 124. .

3 Am Jur 2d, Affidavits §§ 6., 18., 19.

13C Am Jur Legal Forms 2d, Notice, Forms 186:14.– 186:21.

18B Am Jur PI & Pr Forms (Rev ed), Notice, Forms 13.– 17.

Law Reviews:

Evidence symposium. 52 Cornell L.Q. 177.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4531, Affidavit of Service or Posting Notice by Person Unavailable at Trial.

Matthew Bender's New York AnswerGuides:

Matthew Bender's New York Practice Guides:

LexisNexis AnswerGuide New York Civil Litigation § 10.08. Admitting Record Under Exceptions to Admission Requirements.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 50.28.

Matthew Bender's New York Evidence:

2 Bender's New York Evidence § 127.07. Specific Presumptions.

Matthew Bender's New York Checklists:

Checklist for Introducing Documents and Information into Evidence LexisNexis AnswerGuide New York Civil Litigation § 10.05.

Texts:

3 New York Trial Guide (Matthew Bender) § 40.53.

Hierarchy Notes:

NY CLS CPLR, Art. 45

Forms

Forms

Affidavit of Posting of Notice

[Caption]

_____, being duly sworn, deposes and says, that he is over 18 years of age; he resides in the county of _____, and State aforesaid; that on the _____ day of _____, 20_____, he posted copies of the notice which is hereto annexed in _____ conspicuous public places within the incorporated Village of _____, and that the places in which the said notices were posted, are respectively as follows:

[Describe here the various places in which said notice was posted.]

[Signature of deponent]

[Print name to be signed]

[Jurat]

[Annex copy of notice]

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