Cleaning Out the Gutter Service:

How Do We Solve Process Server Fraud in NYC's Housing Court?

by Austin Poor

Dorothy Hayward was 81-years old, in 2017. She lived alone in a small, rent controlled apartment in the Highland section of the Bronx, on the hill overlooking Yankee Stadium. on University Avenue, in Highbridge – the mostly residential neighborhood just north, up the hill, from Yankee Stadium – in a relatively large building with 6 stories and 55 apartments. She paid $550 per month in rent. Her sole source of income was her Social Security check of $472 a month. She was only able to afford her apartment rent because she received a Section 8 housing voucher that covered 85% of the rent.

On November 16th, 2016, to celebrate her 82nd birthday, Dorothy's daughter picked her up and took her to the daughter's New Jersey home where Dorothy stayed throughout the holidays. When Dorothy returned to her apartment on January 8th, she found her apartment locks changed, the apartment interior renovated, and a new tenant renting the apartment for $1,260 per month. The building superintendent told her that she had been evicted.

Dorothy's story comes from a publicly available court record and is sadly typical of what can happen to tenants facing profit maximizing landlords, who are looking to swap out low rent tenants for higher rent payers, and how New York City Housing law practices favor unscrupulous landlords at the expense of tenants' rights under the law. There isn't good data to shed light on the scope of the problem, but it is still a serious problem nonetheless.

Evicted from her own home, Dorothy returned to her daughter's home to figure out what to do. Then Dorothy went to court.

Fortunately, Dorothy had some experience with civil court, from a couple unrelated cases in the early 2000s, so she went into the Bronx Housing Court to find out what happened. Dorothy discovered that in mid-August of 2016, her landlord began the eviction process, claiming that she wasn't paying her rent, and owed $935 in back-rent from February to August of 2016 and an additional $264 for "Major Capital Improvement" charges – where a landlord is allowed to charge all the tenants in a building for large-scale improvements to the building. Her landlord claimed they had sent a process server to deliver the eviction papers to Dorothy but

after two attempts at delivering the papers, they had served the papers through "Conspicuous Service."

In order to evict someone or take any other action against them in court, the plaintiff (in this case the landlord) must notify the defendant (in this case the tenant) of the suit and the impending court action. This allows the defendant to show up and defend his or her rights and dispute the plaintiff's claims. Law firms hire either individual process servers or process server companies, to serve the papers. Law firms hire either individual process servers or process server companies, to serve the plaintiff with legal papers, which is a prerequisite for any case proceeding to trial. Ideally, the process server finds the defendant, positively identifies the person being served "Are you John Doe?" and then hands the person the service papers. If the server cannot physically find the person after two attempts, New York State law allows for leaving the court papers in a conspicuous place the defendant will find, such as his front door mail slot. According to the New York State Court website, "papers are left for the defendant…in a place where they are likely to be found and copies are mailed." In housing court, this is often referred to as "Nail and Mail." Dorothy's landlord claimed the papers had been taped to her door and additional copies were mailed to her.

By the time Dorothy got to court, her landlord had moved all of her belongings out of the apartment, renovated, and rented it to a new tenant. The new tenant got a one-year lease and was paying $1260 / month. More than double Dorothy's rent, which stayed low due to rent stabilization. But once she was evicted, New York rent stabilization laws allow the landlord to increase the rent substantially.

With the help of Matthew Tropp, a free attorney from the Bronx office of the Legal Aid Society – one of a few organizations in New York City that provide pro bono legal assistance for qualifying low-income residents – Dorothy was able to prove to a judge that her landlord was wrong to evict her. Not only did they improperly serve her with the petition telling her they were taking her to court – and therefore they had no "jurisdiction" – but they also falsely claimed that she owed back-rent. Dorothy came prepared with paperwork from the New York City Housing Authority – the organization that handles Section 8 vouchers and pays the landlord the difference in rent – as well as payment receipts for her part of the rent, proving that she

didn't owe her landlord anything. The Judge ruled in Dorothy's favor and she was finally able to move back into her apartment.

Due to the substantial difference in rent paid by rent-stabilized tenants and the going market rate for an apartment, there is clearly a perverse incentive that exists for landlords to try everything in their power to displace their rent-stabilized tenants. Fortunately, in this case, Dorothy is tough and wouldn't give up without a fight, and based on her income level, she was able to get the help of a free lawyer. But that isn't always the case.

The Sixth Amendment to the Constitution of The United States guarantees every person the right "to have the Assistance of Counsel," but only in criminal cases. In civil cases – such as in housing court – there is no such guarantee. In August of 2017, Mayor Bill de Blasio passed legislation that would ensure access to counsel for low-income New Yorkers. "New York City," de Blasio said in a press conference, "will be the first city in the country to ensure anyone facing an eviction case can access legal assistance thanks to this new law."

According to Dolores Perez-Harvin, from Mobilization for Justice – another organization like Legal Aid Society that helps to provide representation for low-income residents – New York City's "Right to Counsel in Housing Court" law is being rolled out slowly. It is currently only up and running in four zip codes per borough – or 20 of 214 total. Ms. Perez-Harvin stated that they began by focusing "primarily on the zip-codes that generated the largest number of evictions." She also went on to say that for many of the same reasons, Mobilization for Justice has an extensive practice in the Bronx, "because it is the borough of the greatest need, the highest poverty, and the highest rate of eviction."

Still, free legal representation can only help so much. Dorothy's landlord was in the process of evicting her and she didn't even know about it. She was able to get free representation but only after she had already been evicted. This gets at an important part of the problem – cases where tenants are being tried in court without knowing it. For one of a variety of reasons, the process servers hired by the landlords aren't properly delivering their papers. This is what's commonly referred to among lawyers as "gutter service" or "sewer service" – as in, process servers are serving their papers to the gutter.

Tenant attorney Jeffrey McAdams is a former public defender from Philadelphia who worked alongside Philadelphia's new District Attorney, Larry Krasner, a self-described "progressive prosecutor." McAdams got into law to help but says he made the shift to Landlord/Tenant law after beginning to feel like he wasn't actually making a difference. He felt that in housing court he'd be able to affect positive change.

McAdams stated that "almost every affidavit of service that he's seen in the past few years has been false." It's a bold claim. An affidavit of service is the sworn statement made by a process server, which states that they properly delivered the papers they were tasked with delivering. In these housing court cases, that usually means the petition from the landlord telling the tenant that he is moving to evict them. So, McAdams is alleging that most of the affidavits of service he's seen, which were supposed to be sent to his clients, the tenants, to tell them to appear in court, were improperly served. Still, it's been affirmed and reaffirmed again and again by numerous tenant lawyers. Ultimately though, it only amounts to anecdotal accounts. What data exists to support or disprove their claims?

When it is suspected that an affidavit of service is fraudulent, the tenant's lawyer can call for a traverse (pronounced TRA'verse) hearing. According to Black's Law Dictionary, *traverse* is an old legal term that means "denial." In a Traverse Hearing the judge hears arguments from both sides regarding the veracity of the claim of proper service. If the judge decides that the affidavit is in fact false, the case will usually be dismissed. However, the dismissal is *without prejudice*, meaning the landlord can reserve the papers, properly this time, and continue on with the eviction case. Again, the result here is a system that tends to advantage landlords and disadvantage tenants. The potential benefit for landlords, of an unobstructed eviction trial in which they are likely to be awarded a default judgement, far outweighs the potential cost, of having to re-serve the paperwork. It's unfortunate, given that the housing court system is currently being used in a way that runs counter to its original purpose.

New York County Civil Court Judge Michelle Schreibner, who usually presides in Manhattan Housing Court, stated that "Housing Court was initially started in the early '70s – where up to that point it was a part of Civil Court, due to the prevalence of housing issues. It

was founded to help protect tenants and to help with code enforcement." Schreiber is well aware that the tenants enter Housing Court at a disadvantage – tenants are often unrepresented and are rarely aware of their rights, while landlords often have representation and are well versed in the housing court system. A common statistic repeatedly cited in housing court or by tenant advocacy groups is that generally, "90% of all tenants are unrepresented and 90% of landlords are represented." This just goes to show the baseline inequity that exists in the housing system. And it's something that tenant advocates are trying to fix. It's the reason they lobbied for and eventually got passed, the "Right to Counsel in Housing Court" law in New York City, but that's just part of the equation.

Over the years, the balance of power has slowly shifted out of the hands of the tenants and into the hands of the landlords. As McAdams sees it, "Housing Court has really been reduced to basically a collection agency for landlords. Where now only one part [e.g. court room] per borough handles cases where tenants sue their landlords while the others are all devoted to landlords suing their tenants."

Dolores Perez-Harvin, from Mobilization for Justice, as well as Judge Schreiber both told me that in Housing Court, most judges do their best to make sure tenants understand their rights and aren't getting railroaded by landlords. According to John Gorman, another tenant lawyer, courts can even offer one-time loans to tenants, known as "one-shot-deals," with low to no interest rates, to pay back their rent arears, if they can prove that the reason for their late rent is not recurring. In fact, Judge Schreiber, herself, used to be a pro bono lawyer for Mobilization for Justice, from 1987 to 1995. Yet, there's only so much a judge can do and not every judge comes from such a pro-tenant background.

The improper service from landlords in eviction cases is clearly an issue and often determines how the court ultimately rules in a case. But the size of this problem is hard to judge because the process service disputes are not well tracked by the courts.

There is clearly a startling lack of data on the prevalence of improper service and false affidavits of service. McAdams mentioned the New York City Department of Consumer Affairs, the agency responsible for licensing and regulation of the process server industry. Anytime a Traverse Hearing is conducted, process servers are required to notify the DCA (additionally, a

judge will often notify the DCA to make sure the process server does what they're supposed to).

I submitted a Freedom of Information Act request with DCA, in order to obtain copies of the results of all Traverse Hearings for the past five years but, as Traverse Records are only kept in individual process servers' files rather than together or in some meaningful, readily available form, DCA has stated that it will take them another year and a half to gather the relevant documents. That aside, in speaking with individuals from the County Clerk's office, as well as other lawyers and representatives from multiple process server companies, Traverse Hearings appear to be fairly uncommon relative to the prevalence of improper service, which seems counter-intuitive.

If these lawyers know that the service is improper, why aren't they calling for Traverse Hearings to get the landlord's cases dismissed?

Tenant lawyer, Arlene Boop, of Alterman and Boop, described one of her recent cases in which she suspected the original service wasn't accurate and so she asked for a Traverse Hearing. "It was pretty clear that it was a false affidavit," said Boop, "because no one occupied my client's apartment except she [sic], and she was at work the day they supposedly served her with the paperwork." Not only that but the process server's description of her client, on the affidavit, was completely wrong. "My client is a striking, 6-foot-tall, 160-pound, black woman with very long hair," continued Boop, "and they described a woman who was 5'3" to 5'8" with tan-skin – which would be unusual unless you were describing someone who, I don't know, might be Hispanic – 130 to 145 pounds, and hair: 'could not ascertain.' That's not even a valid description. If you couldn't ascertain, you better give a reason why." She also stated that cases of improper service are "reasonably common but it's hard to say how often you see them." The case Boop described, eventually ended up settling, which begins to explain the disparity between the frequency of Traverse Hearings and the frequency of improper service. The traverse report filed with the DCA by the process server for this case showed that there was a Traverse Hearing but that it didn't result in the case being dismissed, because it settled before the judge could reach a decision. This is a reason – though certainly not the only reason – the available data would vastly underrepresent the problem. As Boop put it, a Traverse Hearing

means “the case is dismissed, they start over, you start over, and you just increased the time you must spend before you get to the merits of the case.”

Boop recommended speaking with someone from another flaw firm – one of the largest firms (with 10 attorneys on staff) in the city that solely represents tenants in housing court cases, Himmelstein, McConnell, Gribben, Donoghue & Joseph, as they might be able to provide a different perspective based on the volume of cases their firm’s size allows them to handle.

Samuel Himmelstein, a partner at HMGDJ, was able to shed light on the some of the reasoning behind the apparent discrepancy. Himmelstein explained that the decision of whether or not to go through with a Traverse Hearing usually comes down to an accounting of the potential costs and the potential benefits for his client. If he suspects improper service, he’ll offer them the choice to either go through with the Traverse Hearing or not, but ultimately their choice is between paying him by-the-hour to go to the hearing when the best case scenario would usually be that the case gets thrown out without prejudice and then the landlord could re-serve the papers properly and they’d be back in court. Instead, he said, he’ll often use the threat of a Traverse Hearing – or “raise service” in legal parlance – as a bargaining tool. He told me that usually, at the outset of a case, the landlord’s lawyer will call him and ask, “Will you consent to jurisdiction?” meaning, “Do you agree that your client was properly served?” Then, if he suspects that his client wasn’t properly served, he will “interpose a defense of improper service” and then waive it in exchange for something to improve his client’s position, for example, by getting more time for his client to repay the back-rent owed. He did point out, though, that this approach might differ between fee lawyers, like Himmelstein, McAdams, Gorman, or Boop, and pro bono lawyers such as those from organizations like Legal Aid Society, MFJ, or Legal Services NYC, who represent low-income tenants, at no charge to their clients.

Himmelstein then went on to explain that in his experience the landlord firms he comes up against break down into two categories: higher-quality firms and lower-quality firms, or “eviction mills,” as he described them. High-quality landlord firms usually cost more, handle fewer cases per attorney at a given time, and are more likely to have proper service of process. In fact, according to Himmelstein, many times, they have process servers on staff who serve

their papers. Eviction mills, on the other hand, usually cost less and tend to operate on volume. They also tend to have a higher instance of improper service, he claimed, and hire independent process server individuals or companies.

Based on court records from the New York State eCourts online information portal as well as recommendations from several tenant lawyers, five firms who represent landlords were selected for review. Two would be considered "quality" firms –Belkin, Burden, Wenig & Goldman LLP and Rosenberg and Estis PC – and the other three, "eviction mills" – Gutman, Mintz, Baker and Sonnenfeldt LLP, Horing Welikson and Rosen PC, and Tenenbaum, Berger and Shivers LLP. None of the five firms responded to repeated requests for comments regarding how they handle their cases and the service of process.

Firm	Cases w/ Upcoming Scheduled Court Date	Attorneys in Martindale-Hubbell	Cases / Atty Ratio
BBW&G	214	33	6
R&E	85	75	1
GMB&S	2380	12	198
HW&R	865	10	87
TB&S	211	No data	-

Even without Traverse Records for their past cases, some correlative data is available from online court records. For each of the five law firms, at least 50% of their cases were against unrepresented tenants; with the greatest frequency, unsurprisingly, belonging to two of the three eviction mills at about 85% and the lowest being the "quality" firms at 62% and 53% for BBWG and R&E, respectively. That being said, the eviction mills tended to have fewer attorneys while tending to handle more cases. According to Martindale-Hubbell, a company which provides information on lawyers and law firms, R&E is listed as having 75 employees and handled 85 cases in the past year and BBWG lists 33 employees and handled 214 cases. As for the eviction mills, HWR has 10 employees but handled 865 cases and GMBS has 12 employees and handled 2380 cases. The third eviction mill firm, Tenenbaum, Berger & Shivers isn't listed on Martindale-Hubbell but handled 211 cases. Interestingly, this firm has a Facebook Page instead of a website and in their "about" section they describe themselves as a "Downtown

Brooklyn lawfirm specializing in volume and complex Landlord-Tenant and Real Estate litigation."

Still, though, there is no demonstrable proof of the extent of the problem. And is it even the lawyer's fault or is it the fault of the process servers who are failing to properly serve the papers they're hired to serve? Well, New York City, in fact, has some of the strictest regulations for process servers in the nation. For a long time, the process server business in New York City was seen as the wild west. Fraudulent service was rampant. It all came to a head in 2010, when then New York State Attorney General Andrew Cuomo prosecuted William Singler, the owner of a process server company called American Legal Process, for thousands of outrageous violations. After Singler pled guilty, Cuomo sought to have an estimated 100,000 default judgements vacated, from cases in which ALP failed to properly serve paperwork.

As a result, in April of 2010, then mayor Michael Bloomberg passed regulations which, as he stated in a press conference, "requires process servers to pass an exam, as well as post a surety bond to the Department of Consumer Affairs. Perhaps most importantly, the bill requires process servers to provide an electronic record of their work. A GPS device will automatically and independently verify the service of process at the location where such service was made or claimed to have been made. From now on, the Department of Consumer Affairs will have the tools it needs to conduct audits effectively – and crack down on fraudulent service." So, first, in order to get licensed, process servers must pass a test and post a surety bond so that, in the event that they are found to have been improperly serving papers, the DCA can fine them by taking their bond, rather than trying to collect from the person. Second, the law requires process servers carry a GPS device and to pay a 3rd party company to gather and store their location data, allowing the DCA to perform audits of process servers, to make sure they've actually gone to the locations they claimed to have gone.

According to the DCA, as of 2018, there are 49 businesses and 464 individuals with active process server licenses for the New York City area. A representative from Undisputed Legal, one of the larger process server businesses in the area, with seven offices spread out within the tri-state area, explained that of all the areas they operate in, New York City has the strictest regulations. Yet he feels that the regulations are important because as he said, "they're

there to protect the consumer." According to him, the salary for a process server can vary greatly and is based on the amount of papers they're able to deliver and their effectiveness. The typical salary for an entry level process server is $26,000 per year (for comparison, the NYCgov poverty threshold is $32,800 per year for a family), but he said that "it could easily be quadruple that for a good process server who knows what they're doing."

Next, I contacted two process server organizations, from the DCA's list of third-party organizations, to get an idea of what information they collect and store. Both are based out of Colorado and offer iPhone apps that allow process servers to record their location as well as to store and maintain their notes and any forms they're required to fill out, such as affidavits of service. In the case of a DCA audit, the process server tells the third-party who either sends the information to the DCA directly or sends it to the process server, in an "unmodifiable format" to pass along to the DCA. I asked both companies about how frequently process servers get audited. Interestingly, one said that "in the four years [he's] been at the company, he hasn't seen an audit from DCA" while the other said that "some years [he's] bombarded with them, some years there're none." Setting aside the frequency of the audits, though, the only information the third-party organizations are required to store is the process server location data which helps to ensure that they're actually going to the locations they're meant to go, but once they're there, there's no guarantee that they are properly serving the papers.

The Dorothy Heyward case is a perfect example of how process servers are still able to circumvent even New York City's strict regulations and either improperly serve or entirely fail to serve tenants. Matthew Tropp, the lawyer who represented Dorothy Heyward, said "we've long believed that when the landlords are serving by conspicuous service, or Nail and Mail, that they often don't do it or don't do it correctly."

So, who's ultimately to blame? Is it the process servers who aren't actually serving the papers they're hired to serve? Or the law firms who hire bad process servers? Or the landlords who hire cheap law firms? Or is the Housing Court that allows the process servers, the lawyers and the landlords to get away with improper service? Truthfully, the blame probably doesn't solely lie with just one group. That being said, as long as the landlords, their lawyers, and their process servers are allowed to get away with shoddy service of process, without further

regulation or penalties, they'll do it. But what rules could be put in place to prevent this from continuing?

Unfortunately, there isn't a clear answer. According to Matthew Tropp, the issue goes deeper. "We've long suspected it's a bigger problem," he said, "but I don't know if they could change it because all they're required by law to do is put in an affidavit of service and it would mean changing all of the statutes regarding service – which seems unlikely." That being said, there may still be some smaller solutions, short of completely revamping the laws and regulations for process servers. Justin La Mort, a supervising attorney at Mobilization for Justice, suggested, "one way to make it easier would be to make it simpler to access the GPS data from process servers." That way, tenant attorneys would have an avenue to more quickly check the basic validity of the service of process for their clients.

New York City's housing court system was created in the 1970s to protect tenants from their landlords. Now it's being used as a tool for landlords to bypass tenants' legal protections for financial gain. As rental prices in the city increase this problem is only going to get worse. Now's the time for New York to decide how it wants to handle process server regulation so that tenants like Dorothy Heyward aren't taken from their homes, unjustly, so their landlord can double the rent.