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**TRAVERSE HEARING TRANSCRIPTS**

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On March 5, 2020, this Court held a traverse hearing.

To the extent relevant, the parties stipulated to the admission of five documents into evidence. First, [REDACTED]'s (B [REDACTED]) Process Server's license was admitted into evidence (Plaintiff's Exhibit 1). The license indicates that B [REDACTED] was a licensed Process Server in the City of New York. The license had an expiration date of February 28, 20

At the hearing, plaintiff elicited testimony from B [REDACTED], who testified, in pertinent part, as follows: B [REDACTED] is a licensed process server, who some time around October 31, 2018, was asked by plaintiff to serve the summons and complaint in this action upon defendant. On October 31, 2018, as was his custom and practice, B [REDACTED] set out to serve process.

Pursuant to 22 NYCRR 208.1(b), the court can waive compliance with any of the Uniform Rules for the New York State Trial Courts when good cause is shown. However, to the extent that there exists strong public policy to support the rules and regulations governing service of process, strict compliance with said rules is required. As such, the court shall

Defendant also testified at the hearing, stating, in pertinent part, as follows: on October 31, 2018, she resided at 3405 with her daughter and no one else. On that day, she worked from 10am-6pm and commuted to work by bus. As was her custom and practice, when she

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# Case Details

## **TRANSCRIPT #1 (51 Pages)**

### **Issues:**

- Validity of CPLR 308(2) substituted service.
- Validity of CPLR 308(4) affix-and-mail service.
- Whether affix-and-mail (“nail and mail”) service impracticable.
- Whether court order for publication (CPLR 308(5)) procured by plaintiff’s fraud.
- Whether process server exercised due diligence prior to resorting to CPLR 308(5) court-ordered service by publication.
- Conflicting affidavits of service, one averring affix-and-mail service and the other stating that subject address vacant. Use of latter affidavit to procure order authorizing service by publication.
- Cross-examination of process server re:
  - (i) failure to ascertain defendant’s place of employment prior to resorting to affix-and-mail service; and
  - (ii) second, conflicting affidavit of service alleging subject address vacant.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination; redirect examination)
- Voir dire examination of process server re his Affidavit of Service
- Second process server (direct examination; cross-examination; redirect examination)
- Defendant (direct examination; cross-examination)

1 1

1 2 DIRECT EXAMINATION BY MR. L

1 3

1 4 Q. Mr. , good morning, sir.

1 5 A. Good morning.

1 6 Q. What is your occupation?

1 7 A. I'm a process server.

1 8 Q. And how long have you been a process server?

1 9 A. The better part of nine years.

2 0 Q. And what kind of cases do you handle on the  
2 1 day-to-day?

2 2 A. Foreclosure, matrimonial. I contract work from  
2 3 County Social Services and Child Protective  
2 4 Services. A vast variety of legal service.

2 5 Q. And in the course of your employment as a process

6

Q. And you are not familiar with CPLR 308, are you?

7

A. Vaguely.

8

Q. Okay.

9

A. I know CPLR is the law that guides process servers.  
I couldn't quote it.

11

Q. So you never read 308, did you?

12

A. I may have.

13

Q. Before you did this service, you never looked at  
14 requirements --

# Case Details

## **TRANSCRIPT #2 (48 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service.
- Whether delivery of process to person of suitable age/discretion followed by mailing.
- Process server cross-examined on failure to check box on affidavit of service re: follow-up mailing.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination; redirect examination; recross-examination)
- Voir dire examination of process server re his Affidavit of Service
- Defendant (direct examination; cross-examination)

On October 4, 2016, upon plaintiff's motion for a default judgment - premised upon defendants' failure to interpose an answer to the complaint - the Clerk entered judgment in plaintiff's favor in the amount of \$14,531.76. On April 17, 2020, upon V \_\_\_\_\_'s motion to, *inter alia*, vacate the judgment and dismiss the action for want of personal jurisdiction, this Court granted the motion to the extent of ordering a traverse hearing. On December 14, 2020, this Court denied plaintiff's subsequent application seeking reargument of the decision dated April 17, 2020, adhering to its decision requiring a traverse hearing.

On February 8, 2021, this Court held a traverse hearing.

At the hearing, the parties stipulated to the admission of the following documents into evidence:

First, the affidavit of service executed by

(Plaintiff's Exhibit 1). Said affidavit

Here, upon consideration of all the evidence offered at the traverse hearing, the Court finds that plaintiff failed to establish that defendant was served with the summons and complaint in this action such that the judgment entered on October 4, 2016 must be vacated pursuant to CPLR § 5015(a)(4). Significantly, at traverse hearing, the plaintiff

# Case Details

## **TRANSCRIPT #3 (65 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service.
- Process server's testimony re:
  - (i) log book and field sheet as business records;
  - (ii) NYC Dept. of Consumer Affairs recordkeeping requirements for process servers;
  - (iii) GPS photos as part of process server's proof.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination)
- Defendant (direct examination; cross-examination)

Significantly, [redacted] testified that before resorting to conspicuous service or leaving a particular location, he knocked on the door and waited two minutes. Thereafter, [redacted] testified that it then took him 10 seconds to fill out his logbook. Despite the foregoing he testified that it took him only seven to eight minutes to get to 2180, which per the Google Maps printouts was three miles away. This means that [redacted] would have been able to drive three miles, in New York City, in only seven to eight minutes. The logbook entries

# Case Details

## **TRANSCRIPT #4(89 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service.
- Process server's testimony re: log book, GPS and Independent Server Record of Service as business records required by NYC Department of Consumer Affairs for process servers.
- Court's observations re demeanor and veracity of process server, defendant, as witnesses.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination)
- Defendant (direct examination; cross-examination)
- Extensive colloquy among judge and counsel re demeanor and veracity of witnesses.

20                   THE COURT: Sir?

21                   MR. M : Good afternoon, Your Honor. This is,  
22                   as opposing counsel stated, a traverse hearing. The issue  
23                   is the fact that the plaintiff claimed service at a property  
24                   address on defendant, , who is the owner.

25                   However, did not reside there.

1                   Furthermore, we intend to present evidence and have  
2                   submitted evidence in our underlying motion that she never  
3                   lived there and certainly not at the time when she was  
4                   served.

5                   Further, Your Honor, service took place on a  
6                   Saturday at which is a Jewish area. It is not  
7                   allowed, and it is, I think, statutorily prohibited.

8                   THE COURT: I don't think so, sir.

9                   MR. M : Saturday service?

10                  THE COURT: Saturday service is not prohibited,  
11                  unless you have a case law that -- case law may have changed  
12                  since I last looked at it, because it's been a while since I  
13                  have had somebody contest Saturday service, but last time I  
14                  checked Sunday service was still considered not appropriate,  
15                  but I don't know that they have outlawed Saturday service.

# Case Details

## **TRANSCRIPT #5 (69 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service.
- NY General Business Law section 89-ee provision that “it shall be unlawful” for process server to fail to comply with all legal requirements for service of process.
- 22 NYCRR Section 208.29 provision requiring process server to bring license to Traverse Hearing.
- Process server cross-examined on failure to produce license at Hearing.
- Process server’s testimony re field sheet, GPS photo, and log book as business records required by NYC Dept. of Consumer Affairs to be kept by process servers.
- Defendant’s motion to strike process server’s testimony for failure to comply with General Business Law Section 89-ee and 22 NYCRR Section 208.29.

## **IN THIS TRANSCRIPT**

### **Testimony of:**

- Process server (direct examination; cross-examination)
- Defendant (direct examination; cross-examination; redirect examination)

21                   THE SPECIAL REFEREE: I am now satisfied as to my  
22 questions.

23                   Mr. W , would you like to engage in voir dire  
24 at this time?

25                   MR. W : I would.

26                   THE SPECIAL REFEREE: Your witness. Please  
2 proceed, remembering that this is voir dire and not cross.

3                   MR. W : It goes to the foundational issues,  
4 Judge, so it may be not -- it may -- it will be voir dire,  
5 but it's not necessarily going to be confined to questions  
6 solely about the making of the video.

7                   THE SPECIAL REFEREE: I'll deal with the  
8 questions that potentially go beyond the video as you ask  
9 them; but I'm just asking you to remember this is voir dire  
10 and not cross, which you will also have the chance to do  
11 later.

12                  VOIR DIRE EXAMINATION

13                  BY MR. W

# Case Details

## **TRANSCRIPT #6 (44 Pages)**

### Issues:

- Validity of CPLR 308(4) affix-and-mail service.
- Process server's failure to ascertain and attempt service at defendants' place of business.
- Defendants, husband and wife, unrepresented at Traverse Hearing.
- Process server's Field Sheet silent as to follow-up mailing.
- Unrepresented defendant wife cross-examined process server regarding no attempt to ascertain defendants' place of employment prior to resorting to affix-and-mail service.
- Unrepresented defendant wife cross-examined process server re absence of postal date stamp from documents submitted as proof of follow-up mailing.
- Defendant selected not to testify or call any witnesses.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination)
- Defendants did not testify or call any witnesses

11                   THE COURT: All right. So then you can do  
12                   redirect if you need to.  
13                   So at this point in time, you're going to relax,  
14                   all right, we're going to have cross-examination, but  
15                   you're used to this, so you may inquire.  
16                   MR. BI : Thank you, Judge.  
17                   CROSS-EXAMINATION  
18                   BY MR. BI :  
19                   Q     Good afternoon, Mr.        .  
20                   A     Good afternoon.  
21                   Q     Mr.        , plaintiff's counsel asked you a little  
22                   while ago about how many people you served since 20    and your  
23                   answer was thousands; remember saying that?  
24                   A     Correct.  
25                   Q     In the past couple of years, have you had Traverse  
1                   hearings specifically with me as defendant's counsel?  
2                   A     Yes.  
3                   Q     And a majority of

# Case Details

## **TRANSCRIPT #7 (126 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service.
- Representative of mortgage loan servicer testifies as to residence address provided by defendant to mortgage lender. Defendant denies having ever resided at that address.
- Substituted service effected on Jewish defendant on a Saturday.
- Legal submissions re Saturday/Sabbath service.
- Defendant's adult daughter testifies that process server inquired about defendant but did not leave papers, as she told him defendant did not live there.
- Testimony and legal submissions re CPLR 308(2) service when defendant has more than one address.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination; redirect examination)
- Representative of mortgage loan servicer (direct examination; cross-examination; redirect examination)
- Defendant (direct examination; cross-examination; redirect examination)
- Defendant's daughter (direct examination; cross-examination)

COURT OFFICER: All rise.

THE CLERK: Supreme Court, County of  
, Part is now in session.

THE COURT: Good morning, everyone.

Please be seated.

Counsel, if you can note your appearances.

THE COURT: Good morning. Let me  
set the stage a little bit for what we have  
on our calendar this morning. This  
actually goes back to a decision and order  
of December last year by my predecessor.  
There was a motion by the plaintiff for an  
order confirming the referee's report and  
granting a judgment of foreclosure and  
sale.

6 Then there was also a motion by  
7 Mr. to vacate the default judgment  
8 against him and one of the issues raised in  
9 that motion, a very key issue was a lack of  
10 personal jurisdiction. He challenged the  
11 accuracy, shall we say, of the affidavit of  
12 service of the summons and complaint, et  
13 cetera, upon him, and raised certain points  
14 of fact that raised an issue that called  
15 for a traverse hearing.

16                   That is the piece of it, of this  
17                   complicated case, shall we say, that we are  
18                   going to address this morning. I just want

# Case Details

## **TRANSCRIPT #8 (132 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service.
- Process server barred by doorman from entering building to personally serve defendant or to affix papers to defendant's door. Process server returns to building minutes later and doorman partially opens door, whereupon server drops papers in partially open doorway.
- Admissibility of video footage from process server's button camera.
- Admissibility of video footage from private investigator's video camera.
- Process server cross-examined on his affidavit of service, which reflected checked boxes for mailing to both defendant's "last known residence" and "actual place of business" with defendant's address for each written in.

## **IN THIS TRANSCRIPT**

### **Testimony of:**

- Process server (direct examination; cross-examination)
- Voir dire examination of process server re video footage from his button camera.
- Voir dire examination of process server re postal receipts evidencing follow-up mailing.
- Private investigator (direct examination; cross-examination; redirect examination)
- Voir dire examination of private investigator re footage from his video camera
- Defendant elects not to call any witnesses; argues that plaintiff failed to make out a prima facie case of valid service.

1                   THE COURT: Let's go on the record.

2                   against                   et al. Index number           /2018. This  
3                   matter was sent at the request of Justice  
4                   -- to hear and report with respect to the issue of  
5                   service of summons and complaint upon defendants.

6                   Counsel, can you please state your name and  
7                   address for the record and who you represent.

8                   MR. T                   : Yes. For the plaintiff, Mr.

9                   ,                       T ,  
10   , New York 1 .

11                   THE COURT: Yes.

12                   MS. S                   : S. , pro  
13                   se defendant.

14                   THE COURT: I want to tell you the difference  
15                   between hear and report and hear and determine. You  
16                   currently have an open motion before Justice

17                   In any event, whatever you choose, there is  
18                   still that open motion you are going back to. The end  
19                   result this hearing will either be service is proper or  
20                   service is improper. It is not

# Case Details

## **TRANSCRIPT #9 (197 Pages)**

### Issues:

- Validity of CPLR 308(4) affix-and-mail service.
- Process server deceased.
- Foundation testimony for admission of Affidavit of Service into evidence (CPLR 4531).
- Whether deceased process server's Affidavit of Service demonstrated due diligence in attempting service pursuant to CPLR 308(1) and CPLR 308(2) prior to resorting to affix-and-mail service.
- Expert witness for defendant testifies as to standard in process serving community constituting due diligence sufficient to comply with CPLR 308(4).
- Defendant's neighbor testifies in opposition to averments in Affidavit of Service regarding due diligence attempts to serve defendant.
- Testimony of process service manager re investigation/searches conducted to ascertain defendant's actual place of business for purposes of complying with CPLR 308(4).
- Failure of Affidavit of Service to state name and/or address of neighbor who confirmed subject address as defendant's residence and who informed server of defendant's non-military service.

## **IN THIS TRANSCRIPT**

### **Testimony of:**

- Process service supervisor (direct examination; cross-examination; redirect examination)
- Defendant's wife (direct examination; cross-examination; redirect examination)
- Voir dire examination of defendant re written Hardship Relief application provided to plaintiff mortgage lender containing defendant's business address.
- Defendant's next-door neighbor (direct examination; cross-examination; redirect examination; recross-examination)
- Expert witness on due diligence in serving process in New York (direct examination; cross-examination; redirect examination; recross-examination)
- Voir dire examination of expert witnessre qualification to testify as expert regarding standard of due diligence in service of process.
- Defendant's son (direct examination; cross-examination); -Defendant's daughter (same)
- Defendant (direct examination; cross-examination)

6 MS. B : Your Honor, I'd like to move  
7 plaintiff's three into evidence.

8 THE COURT: Any objection?

9 MR. BI : Brief voir dire?

10 THE COURT: Please.

11 VOIR DIRE EXAMINATION

12 BY MR. BI :

13 Q Mr. , where it reads "previous attempts,"  
14 there's information contained in that line, that line contains  
15 the numbers 7/18/20 ampersand 6:20 p.m. that suggests July  
16 18th at 6:20 p.m.?

17 A That's showing an attempt.

18 Q Right. So that information was given by you?

19 A That would -- that was an attempt by me.

20 Q But that information that appears here, that

# Case Details

## **TRANSCRIPT #10 (42 Pages)**

### Issues:

- Validity of CPLR 308(4) affix-and-mail service.
- Process server testifies that he taped papers on defendant's door.
- Defendant denies seeing papers on his door; testifies that he found papers, without indicia of mailing, in his mailbox.

## **IN THIS TRANSCRIPT**

### **Testimony of:**

- Process server (direct examination; cross-examination; redirect examination)
- Defendant (direct examination; cross-examination)

15 THE COURT: Could I just say that is  
16 dated , 2020. I'm going to take that  
17 as a court exhibit if there's no objection.  
18 That tells me the purpose of this hearing, which  
19 is a Traverse slash -- can I call it a Traverse  
20 slash due diligence hearing?

21 MR. C : Yes, Your Honor.

Today plaintiff will present the  
testimony of , an employee of  
Process Service, Inc., who performed  
an investigation as to the place of business of  
, as well as the affidavit of  
service and the death certificate of the  
deceased process server, , in lieu  
of his testimony, which will show that on behalf  
of plaintiff and , Mr. made  
multiple attempts to serve the defendant at his  
home at , New  
York. And those attempts were pursuant to CPLR  
308(1) and 308(2) prior to the July 19, 20  
date of service on which he annexed the summons  
and

# Case Details

## **TRANSCRIPT #11 (45 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service.
- Process served at address provided by defendant on mortgage documents.
- Defendant testifies that, prior to alleged service, he informed plaintiff mortgage lender by telephone that he had moved from that address.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination)
- Defendant (direct examination; cross-examination)

8                   THE COURT: Did she ever ask where they were  
9 employed?

10          Q. Did you ever inquire as to where         S  
11 was employed?

12          A. No.

13          Q. So you never attempted to make service, you never  
14 made any attempt to make service at their place of  
15 employment?

16          A. That depends on

# Case Details

## **TRANSCRIPT #12(185 Pages)**

### Issues:

- Validity of CPLR 308(2) substituted (deliver-and-mail) service.
- Validity of CPLR 308(4) affix-and-mail service.
- Service at apartment building with doorman. Defendant's apartment on 29<sup>th</sup> floor.
- Process server unavailable. Admissibility of process server's affidavits of service under business records exception to hearsay rule.
- One affidavit avers 308(4) service by affixing papers to defendant's apartment door; second affidavit alleges deliver-and-mail service the next day via doorman in vestibule at defendant's building.
- Original affidavits of service not produced at Traverse Hearing. Whether testimony of two co-counsel from plaintiff's firm to authenticate copy of process server's affidavit constituted inadmissible hearsay. Colloquy: re CPLR and case law requirements re admissibility of photocopy of affidavit of service; applicability of "best evidence" rule.
- Due diligence efforts undertaken by plaintiff's counsel to locate unavailable process server. Admissibility of evidence that process server unavailable due to criminal conviction/incarceration to impeach veracity of affidavits of service.
- Defendant testifies that he never saw any legal papers affixed to his apartment door; never received any papers from the building doorman. Point-by-point denial of averments in affidavits of service.
- Preclusion of defendant's witnesses. Two doormen from defendant's building appeared, intending to testify that they rejected papers, advising process server that management policy prohibited them from accepting service on defendant's behalf. Both doormen precluded from testifying due to defendant's failure to exchange their names per court's pre-hearing directive.
- Colloquy: Whether defendant waived defective service of process by serving Notice of Appearance without objecting to service (CPLR 320).

### **IN THIS TRANSCRIPT:**

#### **Testimony of:**

- Plaintiff's counsel (direct examination; cross-examination; redirect exam; recross exam)
- Co-counsel for plaintiff (direct examination; cross-examination)
- Voir dire examination of plaintiff's counsel re authenticity of copy of affidavit of service.
- Voir dire examination of plaintiff's co-counsel re authenticity of copy of affidavit of service
- Defendant (direct examination; cross-examination; redirect examination).

1 THE COURT: This is against  
2 . The index number is of 2017.  
3 May I have your appearances, please.  
4 MR. : Good morning, your Honor.  
5  
6 , appearing on behalf of Plaintiff,  
7  
8 THE COURT: Can I ask you a question?  
9 MR. : Yes, sir.  
10 THE COURT: On your card, it says .  
11 MR. : I apologize, your Honor. The ZIP  
12 code is .  
13 MS. : Good morning, your Honor. My name is  
14 , from the law office of , in  
15 New York.  
16 THE COURT: Okay. I have before me an order of  
17 reference, it's dated October 4th, 2018, it says that I am  
18 to hear and determine, pursuant to the parties'  
19 stipulation, proper service/jurisdiction over the defendant

# Case Details

## TRANSCRIPT #13 (317Pages)

### Issues:

- Validity of CPLR 308(1) personal service via in-hand delivery to defendant.
- Process server testified that she delivered Summons at Queens, New York, address to man who saw defendant's name on Summons and acknowledged that he was the named defendant.
- Process server's testimony regarding operation of GPS tracker in documenting date, time and location of service.
- Extensive legal argument on foundation required for admissibility, as business record, of photograph imprinted with date, time and coordinates generated by GPS tracker.
- Defendant testified that he was in Bronx, New York, at the time he was allegedly served with process in Queens, New York.
- Defendant produced GPS timeline from his cellular phone in support of his claim that he was in Bronx, not Queens, at time of alleged service.
- Defendant denied having met process server or being at the service location at time claimed by process server. Extensive testimony by defendant and his friend that defendant neither resided nor worked at the location described by process server and that defendant merely maintained a mailbox at premises, where his friend had an office.
- Defendant's business associate testified that he was with defendant in the Bronx at the time process server claimed she personally served defendant in Queens.

### IN THIS TRANSCRIPT

#### Testimony of:

- Process server (direct examination; cross-examination)
- Defendant's friend (direct examination; cross-examination; redirect examination; recross examination)
- Defendant (direct examination; cross-examination; redirect examination; recross examination)
- Defendant's business associate (direct examination; cross-examination; redirect examination)

Proceedings

2

1                   THE CLERK: Remain seated. Come to order. Today  
2                   is Thursday October , 2018. Index number         of  
3    .  
4    Mortgage Servicing Corporation versus,  
5    ,  
6    et al.

7                   THE COURT: Appearances, please.

8                   MR. A    : Good afternoon, your Honor.

9                   A    of    on behalf of the plaintiff.

10                   MR. C   : For the defendant,

11                   C    , of counsel, I

12    , New York 1 .

13                   THE COURT: Good afternoon and thank you for your  
14                   patience, especially the plaintiff. It's been a long day.  
15                   Okay. So the burden is on the plaintiff in this Traverse  
16                   Hearing. Why don't we |

# Case Details

## **TRANSCRIPT #14 (54Pages)**

### **Issues:**

- Validity of CPLR 308(2) substituted(deliver-and-mail) service.
- Process server testified,using his Affidavit of Service to refresh his recollection, that he served defendant at his place of employment by leaving the papers with a female who gave her first name and said she was the manager, followed by mailing. Affidavit of Service contained a detailed physical description of the female.
- Defendant's Affidavit in Support of his motion to dismiss for lack of personal jurisdiction averred that he neither received nor was informed about the papers. Defendant's motion papers averred that there was no one at his place of employment having the name or fitting the description of the female who was allegedly served.
- Defendant was out of the jurisdiction and did not appear at the Traverse hearing.
- Manager from defendant's place of employment, called on behalf of defendant, denied receiving the papers or knowing anyone by the name contained in the Affidavit of Service.
- Manager cross-examined on similarity of her physical features to those of the person described in Affidavit of Service as having been served.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination)
- Manager from defendant's place of employment (direct examination; cross-examination)

Proceedings

3

1                   THE REFEREE: Good afternoon. I am

2                   Court Attorney/Referee

3                   This is number two on the calendar,

4                   against ; Board

5                   of Managers of ; City

6                   of New York Department of Finance; Parking

7                   Violations Bureau; New York City Environmental

8                   Control Board; New York City Transit Adjudication

9                   Bureau; and John Doe and Mary Doe, said names to

10                  just put in caption, in or lien upon premises

11                  being foreclosed herein. Index number of

12                  20 .

13                  This matter was referred by Justice

14                  to hear and report with recommendations with

15                  respect to the issue of a Travers hearing, whether

16                  or not service was effectuated upon the defendant,

17                  .

18                  Appearances for the record, please.

# Case Details

## **TRANSCRIPT #15 (63Pages)**

### **Issues:**

- Validity of CPLR 308(2) substituted(deliver-and-mail) service.
- Retired process server testified based solely on his Affidavit of Service and recollection of his pre-retirement business practices.
- Legal argument regarding admissibility of Affidavit of Service as past recollection recorded where process server is available and testifying at Traverse hearing.
- Cross-examination of process server on alleged history of “sewer service” and being past target of N.Y Attorney General investigation alleging he filed fraudulent Affidavits of Service in previous cases.
- Process server testified that he served female who identified herself by name and confirmed that defendant resided at the service address; followed up with mailing to defendant at same address.
- Defendant testified that no one fitting name or physical description provided by process server was ever a co-tenant or roommate at the service address.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination)
- Defendant (direct examination; cross-examination)

17

18                   THE COURT: Thank you.

19                   For the homeowner or prior homeowner.

20                   MR. R : Thank you, Your Honor.

21                   We are here today because

22                   Mr. , as the process  
23                   server of the affidavit of service, on its face  
24                   was not sufficient in establishing due  
25                   diligence.

1                   The Court said that Mr. 's  
2                   statements and exhibits were sufficient to rebut  
3                   that presumption, so now the burden is back on  
4                   the plaintiff to establish, with evidence beyond  
5                   the affidavit of service, that Mr. did  
6                   sufficient due diligence.

7                   On the face of the affidavit of service,  
8                   there are some issues. Number one, Mr.  
9                   does not even

23                   And lastly, we're going to have testify  
24                   an expert who will testify how due diligence is  
25                   supposed to be done. That Mr. 's  
1                   diligence, according to the affidavit of  
2                   service, was de minimus at best and not  
3                   sufficient to meet the requirements of the CPLR  
4                   of due diligence.

5                   Thank you, Your Honor.

6                   THE COURT: Would you like to call a  
7                   witness?

8                   Should I exclude witnesses in the  
9                   courtroom?

# Case Details

## TRANSCRIPT #16 (241Pages)

### Issues:

- Validity of CPLR 313 out-of-state service on defendant husband and wife in Oklahoma via CPLR 308(2) deliver-and-mail and CPLR 308(4) affix-and-mail.
- New York Supreme Court action against Oklahoma residents to foreclose mortgage on their New York real property.
- Whether Affidavit of Service of Oklahoma process server admissible pursuant to CPLR 4531 at Traverse Hearing in lieu of testimony without a showing of unsuccessful due diligence effort to secure his appearance to testify.
- Supervisor of process service agency testified as to skip tracing, Social Security Number verifier, and other methods utilized to locate defendants.
- Plaintiff rested on first day of Hearing after testimony of process service supervisor without any testimony or other evidence of due diligence effort to secure appearance of out-of-state process server.
- Legal argument as to whether plaintiff should be permitted on second day of Hearing, held after 40-day adjournment, to reopen case to adduce testimony of due diligence efforts made between first and second day of Hearing to secure appearance of out-of-state process server.
- Cross-examination of process service supervisor re due diligence efforts to secure appearance of out-of-state process server to testify, including, *inter alia*, adequacy of skip trace search.
- Cross-examination of process service supervisor re Amended Affidavit of Service containing additional information that person served confirmed (i) service address was defendants' residence and (ii) neither defendant was in military service.
- Cross-examination of process service supervisor re post office response to Change of Address and Box Holder Information Request.
- Admissibility of Affidavit from defendant wife's father, who was allegedly served in Oklahomaon behalf of defendants pursuant to CPLR 308(2) via deliver-and-mail, that he was unable to testify atTraverse Hearing due to illness and averring that he was never handed any legalpapers as claimed by Oklahomaprocess server.
- Defendant wife's father testified via skype, after 40-day adjournment, that service address washis home and that neither defendant ever resided there. Further, contrary to the claimof in-hand delivery contained in the Oklahoma server'sAffidavit of Service, he never met the server andthe papers were found on his doorstep.
- Defendant wife testified that the service address was never her home.

## IN THIS TRANSCRIPT

### Testimony of:

- Process service supervisor (direct examination; cross-examination; redirect exam;

recross exam)

- Voir dire examination of process service supervisor re Affidavit of Non-Service initially received from Oklahoma process server.
- Voir dire examination of process service supervisor re due diligence email communications with Oklahoma process server during 40-day adjournment between first and second day of Traverse Hearing.
- Defendant wife's father (direct examination; cross-examination; redirect examination)
- Defendant wife (direct examination; cross-examination; redirect examination)

7           Q. Are you familiar with the due diligence necessary  
8 for nail and mail service?

9           A. Yes.

10          Q. Was Mr.               supposed to do his due diligence  
11 before he filed the affidavit of service?

12          A. I see that he did make attempts at different days,  
13 different times and received neighbor confirmation.

14          Q. Does it say anywhere on there that he attempted  
15 anything, any searches or attempts to discover Mr.               's  
16 employment?

17          A. No.

18          Q. Does it say anywhere on here what neighbors that he  
19 asked questions or tried to disseminate information concerning  
20 Mr.               's whereabouts?

21          A. It does not.

22          Q. Does it state anywhere on this affidavit of service  
23 that he attempted to

# Case Details

## **TRANSCRIPT #17 (111Pages)**

### **Issues:**

- Validity of CPLR 308(2) substituted service via deliver-and-mail.
- Methodical laying of foundation by plaintiff's counsel for admitting twelve exhibits into evidence.
- Process server testified, based on Affidavit of Service, that he served defendant by deliver-and-mail at Amboy Street address. He previously attempted service at Saratoga Avenue address but was told by a tenant that defendant did not reside there.
- Defendant testified that he never resided at Amboy Street address and always resided at Saratoga Avenue address.
- Defendant, in support of his claim of lack of personal jurisdiction, introduced into evidence income tax returns, correspondence from tax authorities, bank statements, and other documentary evidence.
- Defendant testified that his brother, who had the same surname, resided at the Amboy Street address at the time of alleged service.
- Defendant introduced into evidence pleadings and Affidavit of Service from a previous case in the same court in which he was a named defendant, was served at the Saratoga Avenue address, and did not contest service of process in that case.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination; redirect examination)
- Defendant(direct examination; cross-examination)

Q. Okay. In Plaintiff's Exhibit 1, the Affidavit of Service, in the second paragraph under the caption, there is a list of documents that were -- that you say were served upon Mr.

Mr. . . Are you familiar with those documents?

A. I'm trying to see exactly where you are.

Q. The second paragraph that starts --

A. Yes, okay. So this paragraph (indicating.) Are you talking about the paperwork entailed -- that I left at the house?

Q. Yes.

A. Am I familiar with them as far as the legalities of them? No.

Q. Do you know what a Notice of Commencement of Action Subject to Mandatory Electronic Filing is?

A. No, sir, I don't.

Q. Okay. How do you know that was included in what you served?

A. The entire packet that's given to me is kept together (indicating) and I just make sure that this all goes together at the same spot.

Q. But you don't know if it was in that entire packet?

A. I couldn't say for sure, no.

Q. And the Certificate of

# Case Details

## **TRANSCRIPT #18 (50Pages)**

### **Issues:**

- Validity of CPLR 308(1) service on defendant husband via in-hand delivery.
- Validity of CPLR 308(2) substituted service on defendant wife via delivery to husband and follow-up mailing to wife.
- Process server testified that he served defendants, husband and wife, at their Suffolk County residence.
- Process server, based in Suffolk County, testified that he was not required to be licensed to serve process in Suffolk County and that he maintained no logbook, GPS tracking records or photographs.
- Process server testified that defendant husband, whom he pointed out at the Traverse hearing, came to the door and confirmed the address but refused to acknowledge his identity or to accept the papers. Server testified that he walked across the street toward the neighbor's house to inquire about defendants' military status, whereupon defendant husband caught up with him and took two sets of the papers from him.
- Process Server followed up with a mailing to both defendants. Server erroneously addressed follow-up mail to Avenue instead of Drive; error reflected in his Affidavit of Service.
- Server cross-examined on discrepancy between his testimony and his Affidavit of Service regarding street number of defendants' residence.
- Defendant husband denied ever having met the process server prior to seeing him at the Traverse hearing.
- Defendant wife testified that she had no knowledge of process server's visit to the residence. Defendant wife admitted on cross-examination, as testified to by the process server, that at the time of alleged service there was a black Mercedes-Benz automobile with vanity plates and a white dog in the driveway.

## **IN THIS TRANSCRIPT**

### **Testimony of:**

- Process server (direct examination; cross-examination; redirect examination)
- Defendant husband (direct examination; cross-examination)
- Defendant wife (direct examination; cross-examination)

COURT OFFICER: Just past that (handing.)

THE WITNESS: Okay.

A. I got it.

Q. Have you seen those documents before?

A. Yes, I have.

Q. When did you first see them?

A. Part of it I saw in an envelope that was left in my mailbox. It was unaddressed -- well, it was addressed to me with the return address of the law firm that represented the mortgage company, and there was no postage on it. The flap of the envelope was tucked in the back. It wasn't sealed. And then the rest of the packet, I believe the first time I had seen

# Case Details

## **TRANSCRIPT #19 (48Pages)**

### **Issues:**

- Validity of CPLR 308(2) substituted service via delivery to building concierge and follow-up mailing to defendant.
- Process server had no independent recollection of service and relied upon his Affidavit of Service and his custom and practice.
- Process server testified, based on Affidavit of Service, that he left papers with concierge of defendant's building.
- Affidavit of Service did not state that concierge denied process server access to defendant's apartment.
- Process server testified regarding his policy and procedure for serving a defendant who resides in a doorman or concierge building.
- Process server testified that it was his practice not to deliver papers to a concierge without first seeking permission to go up to a defendant's apartment.
- Process Server testified that if, as was the case here, his Affidavit of Service stated that he left the papers with the concierge, he was either denied access to go to defendant's apartment or defendant authorized the doorman/concierge by phone to accept the papers. Since his Affidavit of Service stated that he left the papers with the concierge, he was denied access to defendant's apartment.
- Plaintiff subpoenaed defendant to testify regarding role of concierge in controlling access to his apartment; however, defendant did not appear or present any evidence.
- Building manager, subpoenaed by plaintiff, testified that building policy prohibited visitors from passing the lobby unless the concierge called the unit owner/resident and got permission to allow access to the apartment.

## **IN THIS TRANSCRIPT**

### **Testimony of:**

- Process server (direct examination; cross-examination)
- Building manager subpoenaed by plaintiff (direct examination; cross-examination)

4 THE COURT: Counsel, can you enter your  
5 appearances, please.

6 MR. C : Your Honor, C , from  
7 , on behalf of Plaintiff, . I  
8 have with me my partner and my colleague  
9 (indicating).

10 MR. B : B , B-  
11 , New York, representing  
12 for the traverse hearing.

13 Good morning, Judge.

14 THE COURT: Good morning.

22 THE COURT: Well, my order said, give each other a  
23 week's notice of any witnesses. So Mr. can testify,  
24 you can cross-examine the other side's witnesses, but you  
25 can't introduce witnesses that you give them a few hours'  
1 notice about.

2 So they will be excluded.

3 MR. B : Well, they asked for 24 hours'  
4 notice and they got notice yesterday afternoon, Judge.

5 THE COURT: My order said six -- seven days in  
6 advance.

7 MR. B : Judge, I'm looking at an e-mail, if  
8 I may, from the Court, which says that, should the parties  
9 wish to submit a briefing in advance of the hearing, they  
10 must do so by June 6th and such briefing should include the  
11 names of witnesses.

12 THE COURT: Shall.

# Case Details

## **TRANSCRIPT #20 (61Pages)**

### Issues:

- Validity of CPLR 308(2) substituted service on defendant by in-hand delivery to his wife and follow-up mailing to him.
- Process Server testified, based solely on Affidavit of Service, that he delivered papers to defendant's wife.
- Process server did not produce his license in effect at the time of service or his notes, field sheet or logbook.
- Legal argument re seemingly conflicting statutory requirements for recordkeeping and retention period.
- Plaintiff argued that statute required process server's field sheet, log book and notes to be retained for three years, whereas service in question occurred some nine years prior to Traverse hearing.
- Defendant argued that General Obligations Law requires process server, without qualification or limitation as to time, to produce records at Traverse hearing. Defendant's counsel argued that failure to produce records impaired his ability to effectively cross-examine process server.
- Cross-examination of process server on statutory obligation to maintain/retain records.
- Defendant denied knowledge of service and testified to discrepancies between his wife's physical characteristics and those described in the Affidavit of Service as the person to whom papers were delivered.
- Defendant's wife testified that she never met the process server prior to seeing him at the Traverse hearing.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Process server (direct examination; cross-examination)
- Defendant(direct examination; cross-examination; redirect examination; recross exam)
- Defendant's wife (direct examination; cross-examination; redirect examination)

1 - Plaintiff - Cross

2 A. Yes.

3 Q. And you weren't aware, Mr. , that CPLR 308  
4 requires ordinary first class mail rather than certified  
5 mail, right?

6 A. Yes, I am.

7 Q. And --

8 A. But he asked that I send it certified mail.

9 Q. So you never sent any by regular first class mail;  
10 is that correct?

11 A. No, I did not.

12 Q. Only the three certificated?

13 A. Yes.

14 Q. But you were aware, you say at that time that --

13 THE COURT: Back on the record.

14 Q. All right. And you asked the doorman if he was the  
15 doorman and he responded yes, didn't he?

16 A. Yes, he did.

17 Q. And he was standing in the vestibule area; is that  
18 correct?

19 A. Yes.

20 Q. And you testified also on October 22nd that you  
21 couldn't open the exterior door, you remember testifying to  
22 that?

23 A. Yes.

24 Q. Now, you have seen that he opened the door for you,  
25 right?

26 A. Yes.

# Case Details

## **TRANSCRIPT #21 (42Pages)**

### **Issues:**

- Validity of CPLR 308(1) service by in-hand delivery to defendant wife.
- Validity of CPLR 308(2) substituted service on defendant husband by delivery to his wife followed by mailing to defendant husband.
- Process Server failed to comply with subpoena to appear for Traverse hearing (see also, Transcript #16).
- Plaintiff made application, pursuant to CPLR 4531 and over defendant's objection, to introduce process server's Affidavit of Service into evidence as *prima facie* proof of proper service of Summons.
- Plaintiff's further application, also pursuant to CPLR 4531 and over defendant's objection, to introduce Affidavit of Service of subpoena on process server to appear for Traverse hearing as proof of due diligence effort to secure process server's appearance.
- Plaintiff rests without calling any witnesses.
- Defendant wife testified that she never met a process server and was never served with legal papers.
- Defendant husband testified that he was never served and never received any legal papers from his wife.

### **IN THIS TRANSCRIPT**

#### **Testimony of:**

- Defendant wife (direct examination; cross-examination; redirect examination; recross exam)
- Defendant husband (direct examination; cross-examination; redirect examination)

1

- Plaintiff - Cross

2

Q. And without saying personal and confidential?

3

A. I don't recall if the envelope said personal and confidential.

5

Q. And you didn't make any copies of the envelopes before you sent them, did you?

7

A. No.

9

10 Q. And do you understand the purpose of a  
11 Travers hearing?

12

A. Yes.

13

Q. What is your understanding of the it?

14

A. That whoever I had served is claiming that they were never served.

16

Q. And, as a process server, what type of records do you keep?

18

10

THE COURT: All right. Well, in these cases, there's always a clear winner and a clear loser with respect to legal issues. To me, the issue is clear. Although, I understand and respect that one side is not going to be satisfied with the decision.

15

But based upon the credible evidence presented to this Court and the testimonial evidence, including the credible testimonial evidence, this Court finds that the

16

17

# Case Details

## TRANSCRIPT #22 (291Pages)

### Issues:

- Validity of CPLR 308(1) service by in-hand delivery to defendant wife at marital home.
- Validity of CPLR 308(2) substituted service on defendant husband by delivery to his wife followed by mailing to defendant husband.
- Validity of CPLR 308(1) service by in-hand delivery to defendant husband at marital home.
- First of three process server witnesses testified regarding skip trace procedure and field sheets.
- First process server testified that she announced her purpose when defendant wife came to the door, whereupon defendant wife denied that she was the defendant named on the Summons and became belligerent. Server placed papers through partially open door just before defendant wife slammed it shut.
- Second process server testified that defendant husband was handed the Summons after denying that he was the defendant named on the Summons but acknowledged having the same name.
- Cross-examination of second process server regarding defendant husband's physical characteristics contained in Affidavit of Service.
- Third process server testified that he served defendant husband by in-hand delivery after defendant husband denied being the person named on the Summons.
- Defendant husband failed to appear; produced an alibi witness who testified that defendant husband was with him at a pizzeria discussing business at the time defendant husband was allegedly handed the papers by the second process server.
- Defendant wife, estranged from defendant husband, testified that she was at a charity event 45 minutes' drive away at the time of alleged in-hand delivery of process to her at her home. Defendant wife introduced photographs of herself at the event which she claimed substantiated her testimony.
- Cross-examination of defendant wife on discrepancies between averments in her Affidavit in Support of motion challenging personal jurisdiction and her testimony at the Traverse Hearing.

### IN THIS TRANSCRIPT

#### Testimony of:

- First process server (direct examination; cross-examination; redirect examination; recross exam; further direct examination; further cross-examination)
- Second process server (direct examination; cross-examination; redirect examination; recross exam)
- Third process server (direct examination; cross-examination)
- Defendant husband's alibi witness (direct examination; cross-examination)
- Defendant wife (direct examination; cross-examination; redirect examination)

8 MR. S : Plaintiff has no further  
9 witnesses, that's correct.

10 THE COURT: So you rest?

11 MR. S : Yes.

12 THE COURT: Okay. What is defendant's view?

13 Is there a witness or witnesses you wish to call?

14 MR. W : I first wish to make a motion. I  
15 am not sure that could be entertained, but I would move  
16 to dismiss based upon the failure to prove a prima facie  
17 case on a number of grounds.

18 THE COURT: That motion is going to

10 Q. Okay. In Plaintiff's Exhibit 1, the Affidavit of  
11 Service, in the second paragraph under the caption, there is  
12 a list of documents that were -- that you say were served upon

13 Mr. . Are you familiar with those documents?

14 A. I'm trying to see exactly where you are.

15 Q. The second paragraph that starts --

16 A. Yes, okay. So this paragraph (indicating.) Are you  
17 talking about the paperwork entailed -- that I left at the  
18 house?

19 Q. Yes.

20 A. Am I familiar with them as far as the legalities of  
21 them? No.

22 Q. Do you know what a Notice of Commencement of Action  
23 Subject to Mandatory Electronic Filing is?

24 A. No, sir, I don't.

25 Q. Okay. How do you know that

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