COMMERCIAL LANDLORD/TENANT

When Service Is Made On a Co-Tenant's Employee

By **Warren A. Estis**

And **William J. Robbins**

A recent decision by the Appellate Term, Second Department (2nd, 11th and 13th Judicial Districts) in *SYZ Holdings, LLC v. The Brecht Forum Inc.*,[1] addressed the issue of whether suitable age and discretion service could properly be made on one corporate respondent tenant by serving an employee of another corporate respondent tenant. The case demonstrates the kind of details concerning service of process that practitioners often need to consider in handling summary proceedings.

In *SYZ Holdings*, the landlord brought a commercial non-payment proceeding in Civil Court, Richmond County, against The Brecht Forum Inc. (Brecht) and Concerned Citizens for Family Preservation Inc. (Concerned Citizens). Service on these respondents was effected by leaving two copies of the notice of petition and petition with "Ms. Campbell," a Concerned Citizens employee, and then by mailings. The mailings for Brecht were sent to the premises and to the address for Brecht set forth in the lease, with the latter mailing returned as undeliverable.

Two default final judgments were awarded against both respondents, one for possession and rent, and the other for possession and attorney's fees, costs and disbursements. Thereafter, Brecht moved to vacate these judgments and dismiss the petition as against it, arguing that it was not properly served. In the alternative, it argued that its default was excusable. After a traverse hearing, the civil court denied Brecht's motion.

The Appellate Term, however, concluded that service was defective. Accordingly, it reversed the civil court's order. It granted Brecht's motion, vacating the default judgments pursuant to CPLR 5015(a)(4), and dismissing the petition, as against Brecht for lack of personal jurisdiction. Presiding Justice Michael L. Pesce and Justices Joseph G. Golia and Marsha L. Steinhardt all concurred in the decision.

The court in *SYZ Holdings* began by setting out various general propositions. It stated that the burden of proving personal jurisdiction is on the party asserting that such jurisdiction exists, and that in evaluating whether to sustain service, the circumstances of the particular case must be considered. Quoting *Rector, Trinity Church v. Chung King House of Metal Inc.*,[2] it noted that where service on a tenant is sought to be effected by service on an employee of a different tenant, "the essential inquiry is whether the person served with papers is likely to transmit [the] papers to the respondent."

The court continued, quoting from *Ilfin Co. Inc. v. Benec Industries Inc.*,[3] that:

> As a general rule, in a business setting, it would be unfair and improper to say that an employee of another tenant [i.e., a co-tenant in the same premises], not employed by the tenant on whom service is intended, would be one of suitable age and discretion. Their relationship to each other is simply too remote.[4]

It also cited *Robbins Fulton Corp. v. Bergen Tile of Brooklyn Inc.*[5] In that case, the Appellate Term had stated that "[i]n this landlord-tenant holdover proceeding, landlord's service of process on a manger of the subtenant did not result in jurisdiction over the tenant."

The court then addressed the facts of the case before it, finding that the landlord had failed to meet its burden of establishing that service on the Concerned Citizens employee was proper service on Brecht. It pointed to Brecht's unrebutted evidence that the person served had never been employed by Brecht and was not authorized to accept service on Brecht's behalf, and to the process server's testimony that no inquiry had been made to determine whether that person was in any way affiliated with Brecht or authorized to accept service on its behalf.

The court did not accept various arguments made by the landlord. It stated that the fact that the Concerned Citizens employee had failed to reject the papers for Brecht was not, in itself, sufficient to establish that service on her was proper to effect service on Brecht. The court concluded that the landlord had "provided no evidence which would support its assertions on appeal that [the two respondents] were 'united in interest by virtue of their joint business relationship' or that there was a 'mutual principal agent relationship thus empowering each to act for the other.'"

Immediately following the above-quoted statement, the court in *SYZ Holdings* cited *World's Busiest Corner Corp. v. Cine 42nd Street Theater Corp.*[6] That case suggests that where there is a unity of interest, service on an employee of one respondent might also effect jurisdiction over the other respondent. There, as in *SYZ Holdings*, however, the court found that no evidence had been presented of the claimed unity of interest.

Reasonings of the Court

The following are points to consider in reviewing the reasoning of the court in *SYZ Holdings*:

In addressing suitable age and discretion service, RPAPL 735(1) refers to delivering the notice of petition and petition to, and leaving it personally with, "a person of

No universally applicable, general rule can be stated as to the efficacy of serving a respondent by serving an employee of a different entity. That determination will be very fact specific.

suitable age and discretion who resides or is employed at the property sought to be recovered." As the courts both in *Ilfin* and in *Rector, Trinity Church* pointed out, that language does not limit such service to persons employed at the premises by the particular respondent for which service is intended.

Indeed, *Rector, Trinity Church* is an example of a case where service on a person not employed by the tenant sought to be served was held to be proper service on that tenant. The situation there did not involve co-tenants. Rather, the "suitable age and discretion" person who had been served was the principal of a company that rented and sold audio equipment. That company regularly stored equipment at the tenant's premises, and the tenant (which operated a recording studio at the premises) was one of that company's primary customers. A principal of the tenant (one John King) was a co-owner of the audio equipment company.

Furthermore, the person served frequently came to the tenant's premises to check on the equipment stored there and, at Mr. King's request, the landlord had issued a building pass to him. He had interacted with the landlord's personnel on matters concerning the tenant's space. Both Mr. King and the person served on occasion referred to the person served as John King's "agent" in matters pertaining to the tenant's leasehold. When he was served, he was in an office identified as Mr. King's. The court in *Rector, Trinity Church* concluded that:

> All of these facts demonstrate that [the person served] was a likey person to transmit court papers to the respondent [tenant].[7]

Therefore, it held that the tenant had been properly served.

Similarly, there are cases which have held, on the specific facts of those cases, that jurisdiction was obtained over a tenant by service on an employee of a subtenant. (This contrasts with the holding in the *Robbins Fulton Corp.* case—cited in *SYZ Holdings*—where the court held that, in that particular holdover proceeding, service on the subtenant's manager did not result in jurisdiction over the tenant.)

For example, in *Inter Credit Corp. v. 888 Enterprises Inc.*,[8] a Civil Court, New York County case, the named respondent-tenant was "888 Enterprises Inc., d/b/a Fuji Restaurant." It was undisputed that the person served was an employee of Fuji. The respondent argued, however, that it did not operate under the assumed name of Fuji Restaurant, that it and Fuji were separate entities and that, accordingly, service on a Fuji employee did not constitute proper service on it.

The court rejected that argument. It stated that although it appeared that respondent and Fuji were two separate entities, Fuji was "clearly operating in the 1st floor premises with respondent's [tenant's] knowledge as a subtenant." It noted that an officer of Fuji was also a 40 percent shareholder in the respondent-tenant and was the wife of the tenant's principal. The court concluded that "the legal relationship between respondent [tenant] and Fuji is such that service on Mr. Chan, an employee of Fuji, was 'the method best calculated to apprise respondent [tenant] of the pending lawsuit.'"

In support of its holding, the court in *Inter Credit Corp.* cited another Civil Court, New York County decision, *Cooke Properties Inc. v. Masstor Systems Corp.*[9] That case, too, involved service on employees of the sublessee of the respondent-tenant and the tenant's challenge to the propriety of such service. The court in *Cooke Properties* viewed the inquiry it had to make as being "whether 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." It stated the guiding principle governing that inquiry as follows:

> ...[A] person is considered to be of suitable age and discretion where the nature of his or her relationship with the person or entity to be served makes it more likely than not that they will deliver process to the named party.[10]

The court concluded that "[u]nder the circumstances presented," service was proper because it was "the method best calculated to apprise respondent of the pending lawsuit." The court emphasized that the respondent was no longer located in New York State, but rather in California. Therefore, if suitable age and discretion service had not been used, then petitioner's "only recourse would have been to affix the notice of petition and petition to the premises and to mail a copy the next day," i.e., to effect nail and mail service. "Clearly," the court continued, "service upon on an employee is better calculated to provide notice than affixing and mailing...and affixing and mailing would have been sufficient."

The court in *Cooke Properties* also emphasized that the factual situation was distinguishable from *Ilfin* because the case before it involved a sublessor and a sublessee, not co-tenants sharing office space. The court viewed that as a significant distinction because, in its view:

> ...[C]ommon sense would dictate that it behooves a subtenant to notify its sublessor of a pending summary proceeding. After all, the threat of eviction to the prime tenant is a threat to the undertenant's right to remain in occupancy.[11]

In *SYZ Holdings*, the Concerned Citizens employee was served for purposes of effecting service both on her employer and on co-tenant/co-respondent Brecht. When, as in *SYZ Holdings*, one person is served for multiple respondents, it is important that the proper number of copies of the pleadings be served. In *SYZ Holdings*, the process server gave the person served two copies, one for Brecht and one for Concerned Citizens. Thus, no issue was created in the case based on the number of copies of the pleadings that were served.

In *World's Busiest Corner* (one of the cases cited in *SYZ Holdings*), however, that was the very issue. In that case, seeking to commence a non-payment proceeding against a tenant and a subtenant, the petitioner delivered a single copy of the notice of petition and petition to the manager of the theater which was the property in question. The respondents then argued that the court had no jurisdiction because there were two of them and only a single copy of the petition and notice of petition was delivered to the theater manager. The court dismissed the petition.

The court cited an Appellate Division, Fourth Department decision in *Raschel v. Rish*,[12] which stated that "personal jurisdiction over separate defendants may not be obtained by service of a single summons on a person who

The Appellate Term stated that the burden of proving personal jurisdiction is on the party asserting that such jurisdiction exists, and that in evaluating whether to sustain service, the circumstances of the particular case must be considered.

qualifies...as a person of suitable age and discretion...under CPLR 308(2)." The court in *World's Busiest Corner* stated that "[t]he pertinent language of that statute and RPAPL 735 is the same."

In *World's Busiest Corner*, the petitioner alleged there was a unity of interest between the tenant and the subtenant, i.e., that the subtenant was the tenant's assignee and that the two had a common ownership and management. The court found that no evidence of those purported facts had been presented. However, the court commented that if the unity of interest had been established, then "it would, perhaps, be immaterial which respondent employed the theatre manager" because service would then be reasonably calculated to apprise the interested party of the action. In other words, the court seemed to suggest that where there was such a unity of interest, delivery of one copy of the pleadings might be sufficient to serve both parties so united in interest.

Conclusion

In short, from a petitioner's point of view, it is obviously best when using suitable age and discretion service to serve an employee of the entity sought to be served. As *SYZ Holdings*, the cases cited therein and various related cases show, however, no universally applicable, general rule can be stated as to the efficacy of serving a respondent by serving an employee of a different entity. That determination will be very fact specific.

1. NYLJ, Dec. 21, 2010, p. 30, col. 5, 2010 WL 5058362, 2010 N.Y. Slip Op. 20494 (App. T. 2nd, 11th and 13th Jud. Dists.).
2. 37 HCR 572A, NYLJ, July 7, 2009, p. 27, col. 3 (Civ. Ct. N.Y. Co.).
3. 114 Misc.2d 411, 451 N.Y.S.2d 643 (Civ. Ct. N.Y. Co. 1982).
4. NYLJ, Dec. 21, 2010, p.30, at col. 6, quoting 114 Misc.2d at 413.
5. 16 HCR 202B, NYLJ, June 6, 1988, p. 28, col. 1 (App. T. 2nd and 11th Jud. Dists.).
6. 134 Misc.2d 281, 510 N.Y.S.2d 796 (Civ. Ct. N.Y. Co. 1986).
7. 37 HCR at 574.
8. 7 Misc.3d 1023(A), 801 N.Y.S.2d 235 (Civ. Ct. N.Y. Co. 2005).
9. 21 HCR 1, NYLJ, Jan. 4, 1993, p. 22, col. 2 (Civ. Ct. N.Y. Co.).
10. Id.
11. Id.
12. 120 A.D.2d 945, 502 N.Y.S.2d 852 (4th Dept. 1986), appeal granted, 68 N.Y.2d 803, 506 N.Y.S.2d 866 (1986), and order aff'd, 69 N.Y.2d 694, 512 N.Y.S.2d 22 (1986).

WARREN A. ESTIS *is a founding partner at Rosenberg & Estis, and* WILLIAM J. ROBBINS *is a partner at the firm.*