

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: 10 CYNTHIA S. KERN
GRN J.S.C.
Justice

PART 52

NYS PROFESSIONAL PROCESS

INDEX NO. 103433/11

- v - SENATORS ASSOCIATION

MOTION DATE _____

CITY OF NY

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is resolved pursuant to
the annexed stipulation.

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/18/11

PK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Michael A. Berlin
212-801-6124/518-689-1444
berlinm@gtlaw.com

July 18, 2011

FILED

JUL 19 2011

VIA FACSIMILE

Honorable Cynthia S. Kern
Supreme Court, New York County
80 Centre Street
New York, New York 10013

NEW YORK
COUNTY CLERK'S OFFICE

Re: Matter of New York State Professional Process Servers Assoc., et al. v. The City of New York, et al. Index No. 103433/11

Your Honor:

Attached is an executed version of the parties' Stipulation of Settlement and Discontinuance for your review. The case had been scheduled for argument this coming Wednesday, July 20, 2011, but the parties are requesting that in light of the settlement, it be taken off the Court's calendar.

Please let me know if you have any questions or issues you would like us to expand upon.

Very truly yours,

GREENBERG TRAUIG, LLP



Michael A. Berlin

MAB/jnp
Enclosure

cc: Jerold Horowitz (w/enc.)
Senior Counsel
The City of New York
Law Department
100 Church Street, Room 5-189
New York New York 10007

NY 241,343,385v1 7-18-11131847010100

RECEIVED
JUL 18 2011
PART 52

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X

In the Matter of the Application of
NEW YORK STATE PROFESSIONAL PROCESS
SERVERS ASSOCIATION, LARRY YELLON, ROBERT
GILLIS,

**STIPULATION OF
SETTLEMENT AND
DISCONTINUANCE**

Petitioners/Plaintiffs,

For a Judgment Pursuant to Article 78 and § 3001 of
the Civil Practice Law and Rules,

Index No. 103433/11

-against-

Hon. Cynthia S. Kern
Part 52

THE CITY OF NEW YORK, acting by and through the
DEPARTMENT OF CONSUMER AFFAIRS,
COMMISSIONER JONATHAN MINTZ, and NYC
COUNCIL, AND MAYOR MICHAEL BLOOMBERG,

Respondents/Defendants.

X

FILED

JUL 19 2011

NEW YORK
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WHEREAS, the New York State Professional Process Servers Association
("NYSPPSA"), and two of its officers, Larry Yellon and Robert Gillis (collectively, the
"Petitioners") commenced the above-captioned, hybrid Article 78 proceeding/declaratory
judgment action (the "Action") against the City of New York, the New York City Department of
Consumer Affairs ("DCA"), DCA Commissioner Jonathan Mintz, the New York City Council
(the "Council"), and Mayor Michael Bloomberg (collectively, the "Respondents"), by the filing
of a Petition on March 21, 2011; and

WHEREAS, the petition sought to set aside various provisions of Local Law 7 of
2010, and rules promulgated by DCA, setting forth new record-keeping and bonding
requirements for the licensure of process servers operating in New York City; and

WHEREAS, on March 21, 2011, Petitioners moved this Court for a preliminary injunction and Justice Cynthia S. Korn granted Petitioners' application for a temporary restraining order insofar that the Respondents are restrained from implementing and/or enforcing "that portion of the Regulations which require that the security settings for the converted PDF are set so that no edits or changes may be made to the document;" and

WHEREAS, DCA published proposed amendments to its rules in the City Record on May 12, 2011, and a hearing was held on June 13, 2011; and

WHEREAS, on May 26, 2011, Respondents cross-moved to dismiss the Petition/Complaint; and on June 29, 2011, Petitioners filed a reply memorandum of law;

WHEREAS, this matter having now been fully submitted to the Court and is scheduled for oral argument on July 20, 2011; and

WHEREAS, the parties now desire to resolve the claims raised in this litigation, without further proceedings and without admitting any fault or liability;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, as follows:

1. The above-referenced proceeding is hereby dismissed with prejudice, and without costs, expenses, or fees to either party, except that Petitioner's claims as to the constitutionality of Local Law 7 of 2010 are dismissed without prejudice.

2. Upon "So-Ordering" of this Stipulation of Settlement and Discontinuance, DCA shall arrange for publication and finalize the amendments to its rules as set forth in Exhibit A herein. Petitioners voluntarily and knowingly release, relinquish and forever discharge any right, cause of action, interest or claims, or rights of action, whether joint or several, known or

unknown, which Petitioners had or may have against any of the Respondents as to the final rule amendments as set forth in Exhibit A.

3. As a result of the dismissal set forth in Paragraph 1 above, Petitioners' motion for a preliminary injunction and Respondents' Cross-Motion to Dismiss the Action are hereby withdrawn, and the temporary restraining order is vacated.

4. This Stipulation of Settlement and Discontinuance contains all the terms and conditions agreed upon by the parties and no oral agreement entered into at any time nor any written agreement entered into prior to the execution of this instrument shall be deemed to exist, or to bind the parties, or to vary the terms and conditions contained herein, save as otherwise set forth herein. Each of the Petitioners represents and warrants that it has secured all approvals required to execute this Stipulation of Settlement and Discontinuance.

5. Nothing contained herein shall be deemed to constitute a policy or practice of the City of New York.

6. This Stipulation and Order, and the settlement it represents, is not related to and shall not be admissible in any other litigation or settlement negotiation.

7. Nothing contained herein shall be deemed to be an admission by the Respondents or any of their officials, employees, agents or representatives that they have in any manner or way violated the rights of any Petitioner, or the rights of any other person or entity, as defined in the constitutions, statutes, ordinances, rules or regulations of the United States, the State of New York, or the City of New York or any other rules, regulations or bylaws of any department or subdivision of the State of New York, or the City of New York, and the Respondents specifically disclaim any liability to, or any wrongful, discriminatory, or unlawful acts against, the Petitioners or any other person on the part of any of the Respondents. Nothing

contained here shall be deemed to be an admission by the Respondents or any of their officials, employees, agents or representatives that they have in any manner or way acted inconsistently with the requirements of state or federal law.

8. Facsimile copies of signatures shall be deemed originals. This stipulation may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Dated: New York, New York
July 13, 2011



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By: Michael A. Berlin



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By: Jerald Horowitz
Assistant Corporation Counsel

SO ORDERED:

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

EXHIBIT A

NOTICE OF ADOPTION

Notice of Adoption of Rules and Amendments to Rules regarding the licensing of Process Servers.

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of the Department of Consumer Affairs by Section 20-104(b) of Chapter 1, Title 20 of the Administrative Code of the City of New York and in accordance with the requirements of Section 1043 of the New York City Charter that the Department promulgates and adopts rules and amendments to existing rules regarding the licensing of process servers.

These rules and amendments were proposed and published on May 12, 2011. The required public hearing was held on June 13, 2011. This rule will take effect in thirty days.

Material being deleted is shown below in brackets and material being be added is underlined.

Statement of Basis and Purpose.

Section 20-104 (a) of the New York City Administrative Code gives the Commissioner jurisdiction and control over all licenses issued under Chapter 2 of Title 20 of such Code. Section 20-104 (b) grants the Commissioner the power to set forth rules necessary to carry out his or her powers and duties and to require licensees to keep such records as he or she may determine are necessary or useful to carrying out the purpose of Chapter 2.

Those powers include the authority to:

- set forth rules prescribing how licensees maintain records that they are by law required to keep;
- require that licensees, their employees and agents, conduct their activities consistent with the requirements of the laws applicable to the services of process in the City of New York and with standards of honesty and integrity; and
- require the licensees to notify the Department and the public when they fail to carry out their duties in a competent and lawful manner.

The amended Rule simplifies and clarifies the record keeping requirements that individual process servers and process serving agencies must meet.

Section 1 of the Rule amends Section 2-233 to simplify paper recordkeeping in three ways:

- It limits the obligation of an individual process server to include in his or her records the date of the filing of an affidavit of service in court to the instances when the individual process server personally files the affidavit.
- It limits the obligation of the individual process server to record the registered or certified postal receipt number of process delivered by such methods only when the individual makes the mailing himself or herself.

- It shortens the time that licensees must maintain paper records from seven years to three years and thereby reduces the expense of record maintenance.

Section 2 of the Rule amends Section 2-233a to clarify the electronic recordkeeping requirements:

- It clarifies that individual process servers and process server agencies may meet their obligation to maintain electronic records in a secure and unalterable manner by uploading the records to a third party, so long as the records cannot be changed once delivered to the third party.
- It simplifies the alternative method for licensees to maintain unalterable electronic records by permitting them to make two copies of the records on CD-ROM, DVD-ROM or other once-write medium, one copy of which must be stored off-site.
- It adds a method for licensees to correct typographical errors in or inadvertent omissions from the entry into electronic format of the information contained in the individual process server's paper records.

Section 3 of the Rule amends Section 2-236 to simplify the requirement that licensees report court challenges regarding the adequacy of the service of process:

- While continuing the requirement that the licensee notify the Department whenever it receives notice of such a challenge, it eliminates the requirement that the licensee automatically provide to the Department relevant documents concerning the challenge and imposes that requirement only when the Department specifically requests documents.
- It modifies the obligation that the licensee report to the Department the result of a challenge to service. A licensee must request a written report of the result of the challenge from the party for which it served process, or its attorney. If the licensee does not learn the result of the hearing in that manner, it must search for the result in the files of the clerk of the court where the hearing was scheduled to occur sixty days after the scheduled date of the hearing, and, if necessary, ninety days after the scheduled date of the hearing. The licensee must inform the Department in writing of the result within ten days after it receives the information, or, if was unable to learn the result, so notify the Department one-hundred days after the scheduled date of hearing.

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Material to be deleted is enclosed in brackets. Material to be added is underlined.

RULE

Section 1. Section 2-233 of subchapter W of Chapter 2 of title 6 of the Rules of the City of New York is amended to read as follows:

§ 2-233 Records.

(a) *Duty of individual licensees to keep records.* Each process server shall keep records in compliance with the provisions of 89-oc of the General Business Law, as follows:

(1) Each process server shall maintain a legible record of all service made by him as prescribed in this section.

(2) The record to be maintained shall include the following information, where applicable:

(i) the title of the action or a reasonable abbreviation thereof;

(ii) the name of the person served, if known;

(iii) the date and approximate time service was effected;

(iv) the address where service was effected;

(v) the nature of the papers served;

(vi) the court in which the action has been commenced;

(vii) the index number of the action, if known.

(3) If service is effected pursuant to subdivisions one, two, or three of section three hundred eight of the civil practice law and rules, the record shall also include the description of the person served, including, but not limited to, sex, color of skin, hair color, approximate age, height and weight and other identifying features.

(4) If service is effected pursuant to subdivision four of section three hundred eight of the civil practice law and rules, the record shall also include the dates, addresses and time of attempted service pursuant to subdivisions one, two or three of such section. All attempts must be entered in a separate, chronological entry.

(5) If an affidavit of service is filed with the court by the process server, the record shall include the date of such filing.

(6) Process servers shall retain each record required to be kept under this § 2-233(a) for a period of [seven] ~~three~~ years from the date of service. Where a process server is employed as a process server by any person, a copy of such records shall also be maintained by such person at his principal office in this state for the same period.

(b) *Licensees who serve process shall also maintain their records in the following manner:*

(1) The licensee shall make a separate and contemporaneous entry of the date, time and address of every attempted and effected service of process in chronological order in a bound, paginated volume.

(2) The licensee shall make entries in only one volume at a time, which shall contain every attempted and effected service made by the licensee, until all of the available space in the volume is filled.

(3) The written entry for each service shall include the type of service effected whether personal, substituted, [or] conspicuous, or corporate (i.e. on the Secretary of State).

(4) If service is effected pursuant to CPLR § 308(4) or RPAPL § 735(1), the entry shall include a description of the area adjacent to the door to which process is affixed including the color and composition of hallway walls, color and composition of hallway floor or doorstep, and location of premises in relation to stairs, elevator or entranceway.

(5) If service pursuant to RPAPL § 735(1) is effected by affixing a copy of the notice and

petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises then the record shall also include the dates, addresses and time of attempted service. All attempts must be entered in a separate, chronological entry.

(6) The entry shall include the name and license number of the process server organization from whom the process served was received, or, if not received from a process server organization, of such other person or firm from whom the process served was received.

(7) ~~If the individual process server completes~~ service made pursuant to RPAPL § 735(1) [in a manner other than by delivery of the notice of petition and petition to the respondent personally] ~~using registered or certified mail~~, the entry in the process server's record of service or attempted service shall include the postal receipt number of registered or certified mail.

(8) Corrections in records shall be made only by drawing a straight line through the inaccurate entry and clearly printing the accurate information directly above the inaccurate entry. All other methods of correction, including but not limited to, erasing, opaquing, obliterating, or redacting, are prohibited.

(c) *Duty of licensed process serving agencies to keep records.* Every process serving agency shall keep complete and accurate records with respect to each individual licensee to whom it distributes, assigns or delivers process to be served. Such records shall be kept in a searchable manner that permits ready identification of (i) the daily activity of each such individual licensee and (ii) any or all process assigned or distributed for service by the name of the person or entity from whom the process serving agency received such papers for service.

(1) The records shall at a minimum include:

(i) The name and license number of the individual licensee to whom process is distributed, assigned or delivered to be served;

(ii) All of the information required to be maintained pursuant to paragraphs (1) through (5) of subdivisions (a) and paragraphs (3) through (5), and (7), of subdivision (b) of this rule.

(iii) [A copy or a scan to a] ~~An~~ image file that legibly reproduces the original record in all details of the individual licensee's record maintained pursuant to subdivisions (a) and (b) of this rule for each day on which the individual licensee attempted or effected service of the process assigned to the individual licensee;

(iv) A copy of every routing sheet, work order or other written instruction given to the individual licensee;

(v) Copies of any notes, memoranda or other writings submitted by the individual licensee containing information related to the attempted or effected service of process;

(vi) A copy of every affidavit of service signed by the individual licensee.

~~(vii) If the individual process server or process serving agency completes service made under RPAPL § 735(1) using registered or certified mail, a record of the postal receipt number of registered or certified mail.~~

(2) Availability of records. All records shall be retained by the licensee for [seven] three years [or until] ~~unless the licensee receives a further order of the Department prior to such date~~ and shall be available for inspection by the Commissioner of Consumer Affairs or his designee.

Section 2. Section 2-233a of subchapter W of Chapter 2 of Title 6 of the Rules of the city of New York is amended to read as follows:

§2-233a Electronic Records.

Licensed process servers and process serving agencies must maintain records in an electronic format that is resistant to tampering.

(a) Process Servers. Process servers shall maintain electronic records in accordance with the provisions of this subdivision. A licensed process server may meet the requirement to maintain records in an electronic format as required by § 20-406.3 of the Administrative Code by

(1) scanning into an image file that legibly reproduces in all details on a daily basis the original record the process server maintains in a bound volume pursuant to [section]§ 2-233,

(i) the image file shall be named with the date of the service recorded in the bound volume and the process server's license number, and shall be date and time stamped with the date and time that the file was created; and

(ii) such scanning shall be done within [twenty-four hours] one business day from the last event that the record records; and

(iii) the process server must save the scanned image file to a portable media device at least once per week and shall maintain the portable media device in a manner designed to ensure its security and preservation, including by keeping it in a location separate from the original image file; and

(iv) such portable media device shall be labeled with the process server's last name, license number, and the date range of the records stored on the device; or by

(2) maintaining electronic records in accordance with the provisions set forth in subdivision (b) of this section.

(3) Nothing in this section shall be construed to relieve the licensed process server of the duty to maintain a bound, chronological, and contemporaneous record of service as provided under [section]§ 2-233 of this rule or an electronic record of service under § 20-410 of the Administrative Code.

(b) Process Serving Agencies. Process serving agencies shall maintain electronic records in accordance with this subdivision. Such agencies must maintain all information required to be maintained pursuant to [section]§ 2-233(c) of this rule.

(1) Licensees shall input information required to be maintained pursuant to § 2-233(c) into the electronic record-keeping system within [twenty-four hours] two business days after the last event recorded occurred.

(2) The licensee shall use an electronic records management system that:

(i) ensures the authenticity, reliability and integrity of the electronic records;

(ii) permits the efficient retrieval of electronic records;

(iii) contains a backup support system such that the electronic records shall be capable of being reconstructed in the event of an electronic or computer malfunction or unforeseen accident resulting in the destruction of the system or the information contained therein.

(3) The information required to be maintained pursuant to [section]§ 2-233(c)(1) shall be maintained

in electronic form in a format provided by the Department as an Excel spreadsheet and accessible at the following internet address: <http://www.nyc.gov/processserver> or [by a third party document management system in any of the following formats provided] by the licensee uploading the data to a third party service provider, provided that the permissions of that data will be secured so that the data cannot be edited once the upload has been saved and that the records shall contain such separate fields with parameters as follow:

(i) name of the individual process server to whom service is assigned, which will be entered as

last name, first name;

(ii) the license number of the individual process server to whom service is assigned, which will be specified as a seven digit number, where the first number shall be zero if the process server's license number is less than seven digits;

(iii) the title of the action or proceeding, if any;

(iv) the name of the person served, if known, which shall be entered as last name, first name;

(v) the date that service was effected, which shall be entered as MM/DD/YYYY;

(vi) the time service was effected, which shall be entered as military time;

(vii) the address where service was effected, which shall be entered as three different fields such that one field will be for the street address and any apartment number, the second field will be for the city or borough, and the third field will be for zip code;

(viii) the nature of the papers served;

(ix) the court in which the action has been commenced, which shall be entered as either Civil Court NYC, Civil Supreme, Criminal, Housing(L/T), or District Court, followed by the county of the court, the judicial department if appellate, or the federal district;

(x) the full index number, which shall be entered with all information necessary to identify the case, such as XXXXX/XX, unless the case is a Civil Local matter, in which case, it will include the prefix of CV, CC, LT, MI, NC, RE, SC, or TS;

(xi) if service was effected pursuant to subdivisions (1) through (3) of CPLR § 308, a description of the person served which shall consist of six fields, including sex, hair color, approximate age, height, weight, and any other identifying features provided by the process

SERVICE:

(xii) whether service was delivered, as indicated by a Y or N;

(xiii) the type of service effected, which shall be entered as a P for personal service, an S for substitute service, [or] a C for conspicuous service, or a CO for corporate service;

(xiv) if service was effected pursuant to subdivision (4) of CPLR § 308 or subdivision one of RPAPL § 735, a description of the door and the area adjacent.

(4) If the process serving agency elects to record the information required to be maintained pursuant to [section]§ 2-233(e)(1) itself rather than through a third-party provider, [it must convert such information into a portable document ("pdf") format] within [twenty four hours] two business days from the last event the record records it must copy the Microsoft Excel file containing such information, or a PDF of such Excel file, to a CD-ROM, DVD-ROM or other write-once media, and immediately make a second copy to write-once media, which second copy shall be stored off-site.

[(1) The process serving agency shall ensure that the security settings for this converted pdf are set so that editing and printing of the document is restricted and no edits or changes may be made to the document.]

(5) Licensees shall preserve the electronic records by either (a) submitting the record entries to a third party service on a daily basis or (b) copying the file to a portable media device within one week of a creation of the file. Such device must be maintained in a manner designed to ensure its security and preservation, including by keeping it in a separate off-site location. (c) Process servers shall not tamper with data or properties of any electronic record kept pursuant to this section after an image file is made by modifying, amending, deleting, rearranging or in any other way altering any such data or properties including but not limited to using a meta data scrubber or similar device or program.

(c) If a typographical error has occurred or if data contained in the process server's record maintained under § 2-233 was accidentally omitted from the electronic data entry;

(f) the original record must not be deleted;

(ii) a new record must be created and be marked "Amended" and the corrected data must be identified by entering it in italics.

(d) All electronic records maintained under § 2-233a must be retained for seven years and must be available for inspection by the Commissioner of Consumer Affairs or his designee.

Section 3. Section 2-236 of subchapter W of Chapter 2 of Title 6 of the Rules of the City of New York is amended to read as follows:

§ 2-236 Duty to Report Hearings Contesting Service.

(a) Whenever a process server or process serving agency receives any type of notice, including an oral communication, that a court has scheduled a hearing to determine whether service of process made or assigned by such licensee was effective, the licensee shall submit a report to the Department (attention of Counsel's Office), in writing, by certified mail, or by email to an address designated by the Department within ten days of receiving such notice. Such written report shall include:

(1) the title and index number of the action;

(2) the court and the judge before whom the hearing is scheduled;

(3) the date(s) of the hearing; and

(4) the name and license number of every licensee who effected service or assigned or distributed the process for service. [; and]

[(5)](b) On request, such licensee must provide copies of all records, including but not limited to, routing sheets, the pages of the licensee's log book for each day on which service of the process in issue was attempted or effected, and all affidavits of service, pertaining to the contested service.

[(b)](c)(1) The licensee shall [have an affirmative obligation] attempt to learn [and report to the Department] the result of [the] such hearing, including any judicial order or voluntary settlement resolving the challenge to service of process [within ten days of the issuance of a decision on or settlement of the challenge], by making a written or email request to the party on whose behalf the challenged service of process was made or the party's attorney for a written report of the result of the hearing. Sixty days after the date of the scheduled hearing. If the party or its attorney has not provided to the licensee a written report of the result of such hearing, the licensee shall search for the result in the file in the office of the clerk of the court where such hearing was scheduled to occur. If the clerk's file does not contain a result sixty days after the hearing, the licensee shall search for the result in the clerk's file ninety days after the scheduled date of such hearing. (2) The licensee shall report to the Department by certified mail or email (i) within ten days of learning the result, or (ii) that it made attempts to learn the result and was unable to do so not later than one-hundred days after the scheduled date of such hearing.

Index No.: 103433/11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
NEW YORK STATE PROFESSIONAL PROCESS
SERVERS ASSOCIATION, LARRY YELLON,
ROBERT GELLS,

Petitioners/Plaintiffs,

For a Judgment Pursuant to Article 71 and § 3001 of the
Civil Practice Law and Rules,

-against-

THE CITY OF NEW YORK, acting by and through the
DEPARTMENT OF CONSUMER AFFAIRS,
COMMISSIONER JONATHAN MITTZ, and NYC
COUNCIL, AND MAYOR MICHAEL BLOOMBERG,

Respondents/Defendants.

**STIPULATION OF SETTLEMENT AND
DISCONTINUANCE**

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LMF No. 2011-009470