

SCAN

**SHORT FORM ORDER**  
**SUPREME COURT - STATE OF NEW YORK**

Present:

HON. ROBERT ROBERTO, JR.  
Justice

TRIAL/IAS PART 3  
NASSAU COUNTY

\_\_\_\_\_  
COUNTY OF NASSAU,

Plaintiff(s),

Index No. 10282/00

-against-

Motion Date: 10/22/01

DAVID JONES,

Cal. No.

SEQ. # 142

Defendant(s).  
-----

The following papers read on this motion 2

- Notice of Motion/Order to Show Cause.....X/X
- Answering Affidavits .....
- Replying Affidavits .....
- Briefs: Plaintiff(s)/Petitioner(s) .....
- Defendant(s)/Respondent(s) .....

Upon the foregoing papers it is ordered that the motion by the plaintiff for summary judgment and the cross motion by the defendant for dismissal of the complaint are decided as follows:

Defendant's cross motion is based on want of personal jurisdiction. Both the defendant and his wife, with whom he lives, adamantly deny receipt of process.

The affidavit of service sworn to by the County's process server indicates that he served the defendant in this automobile forfeiture action by "nail and mail" pursuant to CPLR 308(4). Under the statute resort to this method will be approved only on a showing of due diligence in first attempting to effect personal delivery pursuant to sections 308(1) (personal delivery directly to the defendant) or (2) (delivery to a person of suitable age and discretion at the defendant's residence or workplace). It is settled law that if all the previous attempts were made at the defendant's residence during the work week during business hours, when working people

SCAN

cannot be expected to be home, and where no attempt had been made to locate defendant's place of employment, due diligence has not been demonstrated. See, e.g., Gantman v Cohen, 209 AD2d 377; Moss v Corwin, 154 AD2d 443.

In the present case, the process server states that he made only three attempts over the course of several months: July 25, 2000, at 3:15 p.m.; August 24, 2000, at 2:55 p.m.; and October 3, 2000, at 12:15 p.m. All the attempts therefore were during business hours, during the work week. This is insufficient, as a matter of law, to establish due diligence. Gantman v Cohen, supra. The Court therefore finds that resort to CPLR 308(4) could not be had, that jurisdiction over the person of the defendant never was acquired, and that the complaint must be dismissed on that ground. CPLR 3211(a)(8).

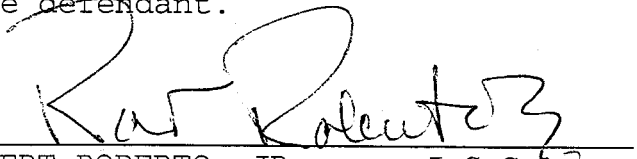
Accordingly, the County's motion for summary judgment is denied, the defendant's cross motion is granted and this action is dismissed.

Moreover, the relevant statute provides that this action has to be commenced within 120 days of the seizure of the defendant's automobile. Nass Cty Admin Code § 8-7.0(g)5. As this period has long since expired, the County is time-barred from commencing another such action, and the nature of the present dismissal forecloses resort to CPLR 205. Under these circumstances, there is no basis for continuing to hold defendant's property.

Therefore, upon presentation of a certified copy of this order and proper proof of the defendant's identity and ownership, the plaintiff County's property clerk, police or other agent currently in possession of defendant's 1990 Mercedes automobile, VIN No. WDBEA51E9LB193718, is hereby directed to release such vehicle to the defendant.

**ENTERED**

DEC 24 2001



Date: December 20, 2001

NASSAU COUNTY CLERK'S OFFICE      ROBERT ROBERTO, JR.,      J.S.C.