

3.31. Affidavit of Service or Posting Notice by Person Unavailable at Trial (CPLR 4531)

An affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead, mentally ill or cannot be compelled with due diligence to attend at the trial.

Note

This rule restates verbatim CPLR 4531.

The statute provides that an affidavit of a person who has served, posted, or affixed a notice, which shows such service, posting or affixing, is prima facie evidence of the service, posting, or affixing when that person is deceased, mentally ill or cannot be compelled with due diligence to testify at a trial.

The specified “notice” includes all forms of judicial process (*see Gordon v Nemeroff Realty Corp.*, 139 AD2d 492, 492 [2d Dept 1988] [“Pursuant to both statutory and decisional law, where a process server dies after service and prior to a hearing as to whether service was properly effected, his affidavit of service (in this case of a summons and complaint) shall be received as prima facie evidence of service provided it is not conclusory and devoid of sufficient detail”]; *Laurenzano v Laurenzano*, 222 AD2d 560, 561 [2d Dept 1995] [due diligence was established in an attempt to locate the process server, allowing for the use of the affidavit of service that “contained ‘sufficient factual detail’ ” to establish service of summons and complaint]).

By making the affidavit “prima facie” evidence of service, posting, or affixing, the statute thereby provides a hearsay exception for the admissibility of that affidavit. While the affidavit is thus admissible and is “prima facie evidence” of the accuracy of the affidavit of the service, posting, or affixing, evidence may be introduced to rebut the affidavit’s accuracy or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

