



Plaintiff alleges that defendant failed to deliver rental payments for April 2008 and every monthly payment thereafter, even after plaintiff having demanded same; defendant abandoned the premises; defendant left property behind after said abandonment; and that, due to defendant's failure to leave the premises broom clean, plaintiff was made to incur the expense of removing defendant's property. Plaintiff, therefore, sought damages for defendant's alleged breach of the parties' lease agreement, a declaratory judgment declaring that it has no obligations owed or owing to defendant, and ejectment.

The affidavit of the plaintiff's process server demonstrated that, on September 20, 2008, defendant was served with a summons and complaint by delivery to a person of suitable age and discretion at defendant's place of residence. Since no answer was served, plaintiff sought and obtained a default judgment by this court, dated January 27, 2009. Upon the foregoing papers, defendant now seeks to vacate the default and, either dismiss the action for lack of personal jurisdiction pursuant to CPLR 5015(a)(4), claiming improper service of process, or allow defendant to submit a late answer pursuant to CPLR 317, CPLR 3012(d), and/or CPLR 5015(a)(1).

A default judgment must be vacated under CPLR 5015(a)(4) when defendant demonstrates lack of jurisdiction; furthermore, defendant need not demonstrate a meritorious defense for the vacatur in this instance (*see, Hossain v Fab Cab Corp.*, 57 AD3d 484 [2<sup>nd</sup> Dept. 2008]; *Matter of Qadeera Tonezia D.*, 55 AD3d 606 [2<sup>nd</sup> Dept. 2008]; *Thakurdyal v 341 Scholes St., LLC*, 50 AD3d 889 [2<sup>nd</sup> Dept. 2008]).

Pursuant to CPLR 308(2), personal service shall be made

“by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business.”

Defendant is not entitled to vacate the default judgment based upon lack of personal jurisdiction. The process server's affidavit submitted by plaintiff constituted prima facie evidence of proper service pursuant to CPLR 308(2), and defendant's mere denial of receipt was insufficient to rebut the veracity of said affidavit (*see, Mortgage Elec. Registration Sys., Inc. v Schotter*, 50 AD3d 983 [2<sup>nd</sup> Dept. 2008]; *425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 845 [2<sup>nd</sup> Dept. 2008]; *Francis v Francis*, 48 AD3d 512 [2<sup>nd</sup> Dept. 2008]). Defendant does not come forth with any evidence tending to show that notice pursuant to CPLR 308(2) was improper (*see, e.g., Mauro v Mauro*, 13 AD3d 345 [2<sup>nd</sup> Dept. 2004];

*Roseboro v Roseboro*, 131 AD2d 557 [2<sup>nd</sup> Dept. 1987]). First, defendant does not specifically rebut the presumption that the address listed on the affidavit of service was not, in fact, his residence (*see, Carrenard v Mass*, 11 AD3d 501 [2<sup>nd</sup> Dept. 2004]; *Chesman v Lippoth*, 271 AD2d 567 [2<sup>nd</sup> Dept. 2000]; *Foster v Jordan*, 269 AD2d 152 [1<sup>st</sup> Dept. 2000]; *cf. In Ja Kim v Dong Hee Han*, 37 AD3d 662 [2<sup>nd</sup> Dept. 2007]). On the contrary, defendant admits to being the owner of the residence, and, a review of the record indicates that this address was also listed as defendant's on the subject lease agreement.

Second, defendant does not deny that there was, in fact, a person present at defendant's home to accept service (*see, e.g., Roberts v Anka*, 45 AD3d 752 [2<sup>nd</sup> Dept. 2007], *lv. to appeal dismissed*, 10 NY3d 789 & 10 NY3d 851 [2008]; *Anderson v GHI Auto Serv., Inc.*, 45 AD3d 512 [2<sup>nd</sup> Dept. 2007]; *Chesman*, 271 AD2d at 568; *Granite Mgt. & Disposition v Sun*, 221 AD2d 186 [1<sup>st</sup> Dept. 1995]) by submitting direct contradictory evidence that substituted service was not effectuated (*see also, Lattingtown Harbor Prop. Owners Assn., Inc. v Agostino*, 34 AD3d 536 [2<sup>nd</sup> Dept. 2006]).

Defendant only surmises, in his affidavit that, if the summons and complaint were served on one of his tenants in the home, defendant was not made aware of it. However, "[t]he 'leave and mail' method affords a defendant fair notice but does not place unreasonable burdens on a person seeking to commence an action. As long as a summons is served properly under the statute, the fact that it inadvertently goes astray does not affect jurisdiction" (86 NY Jur 2d Process and Papers § 68; *see also, Granite Mgt. & Disposition*, 221 AD2d at 187). As such, a traverse hearing need not be conducted since defendant did not raise any issue of fact regarding proper service (*see, Beneficial Homeowner Serv. Corp. v Girault*, 60 AD3d 984 [2<sup>nd</sup> Dept. 2009]; *Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732 [2<sup>nd</sup> Dept. 2008]; *cf. McCray v Petrini*, 212 AD2d 676 [2<sup>nd</sup> Dept. 1995] [hearing will only be held if there is a question of credibility]).

Defendant, in the alternative, also seeks to vacate the default judgment pursuant to CPLR 317, CPLR 3012(d), and/or CPLR 5015(a)(1). Unlike CPLR 3012(d) or CPLR 5015(a)(1), CPLR 317 does not require a defendant to establish a reasonable excuse for the default. CPLR 317 permits a defendant who has been "served with a summons other than by personal delivery" to be permitted to defend the action upon a showing that said defendant "did not personally receive notice of the summons in time to defend and has a meritorious defense" (*see, Girardo v 99-27 Realty, LLC*, 62 AD3d 659 [2<sup>nd</sup> Dept. 2009]; *Ferguson v Shu Ham Lam*, 59 AD3d 387 [2<sup>nd</sup> Dept. 2009]; *Barreno v S.K. Foods Corp.*, 55 AD3d 519 [2<sup>nd</sup> Dept. 2008]). However, defendant has not demonstrated that CPLR 317 applies here.

The Second Department case of *Cavalry Portfolio Servs., LLC v Reisman* (55 AD3d 524 [2008]) is similar to the case at bar. The court in *Cavalry* held that the defendant received the notice of summons by way of CPLR 308(2) in time to defend the action, and, therefore, was not entitled to vacatur under CPLR 317. “The affidavit of service attesting that the summons and complaint were mailed to the defendant’s correct residence address created a presumption of proper mailing and of receipt. The defendant’s allegations that she did not personally receive notice of the summons in time to defend the action did not overcome the presumption of proper mailing” (*id.* at 525; *see also, Malik v Noe*, 54 AD3d 733 [2<sup>nd</sup> Dept. 2008]; *Coyle v Mayer Realty Corp.*, 54 AD3d 713 [2<sup>nd</sup> Dept. 2008]; *96 Pierrepont, LLC v Mauro*, 304 AD2d 631 [2<sup>nd</sup> Dept. 2003]; *De La Barrera v Handler*, 290 AD2d 476 [2<sup>nd</sup> Dept. 2002]; *Udell v Alcamo Supply & Contracting Corp.*, 275 AD2d 453 [2<sup>nd</sup> Dept. 2000]).

As discussed in detail above, defendant’s bare denial of receipt is insufficient to demonstrate lack of notice of the action in time to defend. Since defendant did not show that his default was excusable under CPLR 3012(d) or CPLR 5015(a)(1), or that he was not served by personal delivery under CPLR 317, defendant is not entitled to vacate the default judgment.

Accordingly, defendant’s motion is denied, and the matter is set down for an inquest on damages, upon plaintiff paying the appropriate fee to the Clerk and filing the proper papers, to be held in Part 32, before the undersigned, on October 8, 2009, at 2:15 P.M.

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Hon. Charles J. Markey  
Justice, Supreme Court, Queens County

Dated: Long Island City, New York  
July 8, 2009

**Appearances:**

**For the Plaintiff:** Borchert, Genovesi, LaSpina & Landicino, P.C., by Helmut Borchert, Esq., 19-02 Whitestone Expressway [suite 302], Whitestone, NY 11357

**For the Defendant:** Jerald D. Krepel, Esq., 401 Broadway, New York, NY 10013