STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

FIVE STAR EQUIPMENT, INC.,

Plaintiff, DECISION AND ORDER

v.

Index #2006/09043

M.P. JONES COMPANIES, INC.,

Defendant.

Defendant, M.P. Jones Companies, Inc., moves by Order to Show Cause for an order vacating a default judgment entered on September 16, 2006 and dismissing the action without prejudice, with leave to refile in Onondaga County. The Order to Show Cause also contained a TRO enjoining and restraining plaintiff from taking any action to enforce the judgment. Defendant claims that no notice of the action was received prior to entry of judgment. Plaintiff allegedly served defendant via mail and by service upon the Secretary of State.

Moreover, defendant claims that the default judgment was improperly entered because it was not supported by an affidavit of a party stating the facts constituting the claim, default, and amount due. Defendant alleges that the only affidavit submitted in support of the default was from plaintiff's counsel. Defendant further states that additional service by mail of the complaint pursuant to CPLR §3215(g)(4)(I) was not provided.

Defendant further claims that it has a meritorious defense, insofar as payments made to Plaintiff were not credited against the amount demanded in the complaint. Also, defendant asserts that it not agree to pay reasonable attorneys fees, and that the credit application bearing the name and signature of Melissa Hornung-Jones is not her true signature. Ms. Hornung-Jones also points out in her affidavit that her name is misspelled elsewhere near the top of the application and that the signature both fails to match her true signature and is "Melissa Hornung," whereas she signs her name "Melissa Hornung-Jones."

Section § 5015 of the CPLR states in pertinent part:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry. . .
>
> 4. lack of jurisdiction to render the judgment or order....

Vacatur under CPLR 5015(a)(4): Compliance with CPLR §3215(f)

In support of the motion to vacate, defendants assert that plaintiff was required under CPLR §3215(f) to submit "proof by affidavit made by the party of the facts constituting the claim, the default, and the amount due." Affirmation of P. Hartnett,

Esq. dated November 17, 2006 at ¶8. Defendants further note that a verified complaint can substitute for the required affidavit as to the facts and amount due. Id. at ¶10. If a party proffers neither an affidavit from a party with knowledge nor a verified complaint, defendant concludes that "the entry of a default judgment is erroneous, and is deemed a nullity, regardless of whether the defendant's default was 'excusable.'" Id.

While several appellate division decisions have addressed this issue, the Court of Appeals declined to reach this issue. See Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 71 (2003). The Second Department has held in at least two instances that a failure to include an affidavit of merit from a party or verified complaint would render the default judgment a nullity. Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); Goodyear v. Weinstein, 224 A.D.2d 387 (2d Dept. 1996). More recent Second Department cases, however, have distanced themselves from such a holding and, to the contrary, have declined to allow vacatur on such grounds alone. See Neuman v. Zurich North America, __ A.D.3d __, 207 WL 57929 (2d Dept. Jan. 9, 2007); Aranjo v. Aviles, 33 A.D.3d 830 (2d Dept. 2006); Coulter v. Town of Highlands, 26 A.D.3d 456 (2d Dept. 2006); Roberts v. Jacob, 278 A.D.2d 297 (2d Dept. 2000); Bass v. Wexler, 277 A.D.2d 266 (2d Dept. 2000). Under this view, plaintiff's failure to include either an affidavit pursuant to CPLR §3215(f) or a verified complaint is only a

"procedural" failure and does not render the judgment a nullity, Freccia v. Carullo, 93 A.D.2d 281, 289 (2d Dept. 1983), thus requiring the moving party to show excusable default and a meritorious defense. Neuman, supra; Aranjo v. Aviles, supra.

Every other department in the state treats a default entered in the manner accomplished here a "nullity." Natradeze v. Rubin, 33 A.D.3d 535 (1st Dept. 2006); Hann v. Morrison, 247 A.D.2d 706, 708 (3d Dept. 1998); Westcott v. Niagara-Orient Agency, Inc., 122 A.D.2d 557, 558 (4th Dept. 1986).

Accordingly, inasmuch as I am bound by the Fourth Department's view, the motion is granted. See also, 180 Siegel's Practice Review 2 (December 2006). Furthermore, inasmuch as plaintiff chose an incorrect venue, the motion to dismiss is granted without prejudice to a refiling in Onondaga County.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 30, 2007
Rochester, New York