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

PRESENT: TOLUB Justice PART 15

NEIMAN DIAMOND LTD., ET AL.

-v-

TERRY KATZ

INDEX NO. 104585/00

MOTION DATE 1/12/07

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum opinion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/7/07

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

----------x

NEIMAN DIAMOND LTD and
NEIMAN DIAMOND, INC.,

Plaintiffs,

-against-

JERRY KATZ,

Defendant.

----------x

Index No. 104585/00
Mtn Seq. 002

WALTER B. TOLUB, J.:

By this motion, defendant moves to vacate a January 13, 2004 judgment (the "default judgment") and plaintiffs cross-move for an order pursuant to CPLR 602(a) and 2001, consolidating this action with the case captioned Neiman Diamond Ltd. and Neiman Diamond, Inc., v. Denrose New York, Inc., Denrose Trading Co., Inc., Moshe Deutsch, and Martin Fischler, New York County Index No. 603802/2003 (the "second action"). Plaintiffs also seek an order amending the default judgment to include the amount of the judgment obtained in the second action against Denrose Trading Co., Inc. ("Denrose"), which plaintiffs claim is defendant's alter ego. Alternatively, in the event this court vacates the default judgment, plaintiffs seek an order amending the instant complaint to include a claim against defendant for the amount of the judgment obtained against Denrose in the second action.

Until 2004, the parties in this action were members of the Diamond Dealers Club ("DDC"), an organization whose membership is

limited to individuals in the business of selling precious gems.[1] Under the bylaws of the DDC and individual membership agreements, all disputes arising out of dealings with other members of the diamond business are arbitrated before a DDC arbitration panel (Notice of Cross Motion, Exhibits F and G; see also, In re Application of Sims v. Siegelson et al., 246 AD2d 374 [1st Dept. 1998).

From what this court can ascertain from the papers submitted,[2] the genesis of this action seems to stem from the June 1994 sale of diamonds from Denrose Trading Company, Inc., ("Denrose Trading") to Denrose New York, Inc. ("Denrose New York"). The sale was made in exchange for a promissory note ("Denrose Promissory Note"), a security agreement, and a personal guaranty of indebtedness by Martin and Nadine Fischler (Reply Affidavit and Opposition to Cross-Motion). It appears that during the same time frame, plaintiff Neiman Diamond, Inc., consigned an unknown quantity of diamonds[3] to defendant Katz and an entity identified as "Denrose Diamonds" (Order to Show Cause, Exhibit 4, Affidavit in Support of Plaintiffs' application for

---

[1] Defendant appears to have resigned from the club in May of 2004 (Order to Show Cause, Exhibit 7).

[2] Plaintiff commenced this action by service of a summons with notice. It appears that a detailed complaint was not served.

[3] Again, plaintiffs' submissions fail to detail the nature of the transaction which it claims as the basis for this action.

Default Judgment). The Denrose promissory note was defaulted upon in November of 1996, and, in February of 1998, Plaintiff Neiman Diamond, Inc., assigned and transferred all of its assets, including the outstanding assignments, to Plaintiff Neiman Diamond, Ltd. (collectively, "Plaintiffs").

In March of 2000, plaintiffs commenced the instant action "to obtain judgment for breach of contract conversion goods [sic] and monies had received [sic]" (Order to Show Cause, Exhibit 4, Summons With Notice) by serving a copy of a Summons with Notice addressed to defendant upon a receptionist for the building which houses the Diamond Dealers Club at 580 Fifth Avenue, New York, New York. On April 4, 2001, having not obtained an answer from defendant, plaintiffs moved for a default judgment. Plaintiffs' motion was granted on May 2, 2001, and it was directed that an order of default be settled on notice (Notice of Cross-Motion, Exhibit E). The default judgment was filed with the County Clerks' Office on January 13, 2004 (Order to Show Cause, Exhibit 2).

Independent of plaintiffs' action, at some point in 2000, defendant, who appears to have been the founder, sole shareholder, assignee and successor-in-interest to Denrose Trading, commenced an action against Denrose New York after the promissory note was defaulted upon (Reply Affidavit and Opposition to Cross Motion). This action, bears the caption Katz

v. Denrose New York Inc., Martin Fischler and Nadine Fischler (Index No. 602801/2000) ("the Katz action").[4] More significantly, defendant's address, as plaintiff in the Katz action, is identified as 303 East 57th Street, New York, New York, and the principal place of business for Denrose Trading is identified as 579 Fifth Avenue, Suite 1125, New York, New York.

Motion to Vacate the Judgment

In late November of 2006, defendant brought the instant motion seeking to vacate the judgment entered against him in 2004. Defendant's motion is largely predicated upon the contention that this court lacked jurisdiction over him at the time that the default judgment was issued.[5] Specifically, defendant argues that he was never properly served with the instant action because the location at which the Summons with Notice was delivered was neither his residence nor actual place of business. Defendant additionally argues that he never authorized the receptionist of the DDC to accept service of legal documents on his behalf.

CPLR 308 establishes four methods by which service may be

---

[4] The court notes that the index number for this action, which was not included with the papers, was obtained from a search of the Court's records.

[5] Defendant also asserts that even if service were proper, the claims are barred by the statute of limitations and by the bylaws of the DDC which requires that all disputes be arbitrated.

effectuated upon an individual. The summons may be delivered to the person to be served (CPLR 308(1)); delivered to the person or someone of suitable age and discretion at the actual place of business or residence, followed by mailing a copy of the summons to the person to be served at his actual place of business (CPLR 308(2)); served upon the person designated as an agent for service pursuant to CPLR 318 (CPLR 308(3)); or, as an alternative, the statute provides for what is commonly referred to as "nail and mail" service (CPLR 308(4)).

Plaintiffs in this action attempted to serve defendant by delivering a copy of the Summons with Notice to the receptionist at the DDC. Although defendant was in fact a member of the DDC at the time the action was commenced, and while the receptionist for the DDC may have had the authority to accept documents pertaining to issues being arbitrated under the DDC's rules and by-laws, there is no evidence to support the contention that the receptionist had the authority to accept service for defendant under the CPLR (see, Matter of Estate of Gottesman, 127 AD2d 563 [2nd Dept 1987]; Donaldson v. Mellville, 124 AD2d 361 [3rd Dept 1986]).

Moreover, since the location of service was neither defendant's principal place of business nor his residential

address,[6] plaintiffs' attempted service also fails to comport with the requirements of CPLR 308(2). Since plaintiffs have not demonstrated "by a preponderance of credible evidence, that service was properly effected" (Kearney v. Neurosurgeons of New York, 31 Ad3d 390 [2nd Dept. 2006]), the default judgment obtained against the defendant must be, and is, vacated for lack of jurisdiction. For the same reasons, the action is dismissed. Accordingly, it is

ORDERED that defendant's motion to vacate the judgment entered against him on January 13, 2004 is vacated and it is further

ORDERED that the action is dismissed for lack of jurisdiction; and it is further

ORDERED that the cross-motion advanced by plaintiffs is denied in its entirety.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/7/07

HON. WALTER B. TOLUB, J.S.C.

[6] Plaintiffs' argument that until December, 2006 they lacked the knowledge that defendant had an office elsewhere is at best, in this age of electronic records for personal and corporate information, unavailing.