SUPREME COURT OF THE STATE OF NEW YORK **Index No.:10847/1998**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 002/003**

PREMIER CAPITAL, INC.,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

ROBERT D. WILKINS and
LOUISE WILKINS,

Defendants

The following items were considered in the review of this motion for a

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant, Louise Wilkins' ("Louise"), motion to vacate the default judgment entered against her is denied. Plaintiff's cross motion pursuant to CPLR §§ 5251, 5210, 5225 and 5227 seeking the return of funds transferred in violation of a restraining notice, a Testimonial Subpoena and Subpoena Duces Tecum and contempt is granted in part.

Facts

This action commenced by filing a summons and complaint on March 13, 1998, seeking a money judgment upon a Note. According to the affidavit of Carmine A. Convertino, plaintiff's process server, he affixed a copy of the summons and complaint to the door at 36 Susanna Lane, Staten Island, NY on April 4, 1998. Convertino further avers that on April 6, 1998 a copy was mailed to 36 Susanna Lane, Staten Island, NY. Defendant does not contest that her residence was 36 Susanna Lane, Staten Island, NY.

On April 11, 2007 plaintiff served Citibank, N.A. at 5810 Amboy Road, Staten Island, NY with a Restraining Notice. On that same date plaintiff served defendants Robert D. Wilkins

and Louise Wilkins with a Restraining Notice and Notice to Judgment Debtor at 36 Susanna Lane, Staten Island, NY and 88 Annadale Road, Staten Island, NY., respectively. On April 20, 2007, plaintiff served Robert D. Wilkins with a Subpoena Duces Tecum with Restraining Notice via substituted service by serving a person of suitable age and discretion at 88 Annadale Road, Staten Island, NY and mailing the same in an envelope marked personal and confidential on April 23, 2007. Plaintiff served Louise Wilkins personally on May 18, 2007 with a Subpoena Duces Tecum with Restraining notice at 36 Susanna Lane, Staten Island, NY.

On April 23, 2007 defendant Louise Wilkins transferred Ninety Four Thousand Dollars ($94,000.00) to her daughter Janine Wilkins from her Citibank account. Defendant Louise, argues that she was holding the money for her daughter Janine. Louise claims that only Twelve Thousand Dollars ($12,000.00) of that sum was her savings.

Defendant moves this court to vacate the default judgment taken against Louise. Plaintiff opposes this motion and cross moves to have the Ninety Four Thousand Dollars ($94,000.00) transfer reversed and redeposited into Louise's Citibank Account. Plaintiff also seeks that this court hold Louise in contempt and impose appropriate sanctions.

Discussion

A court may vacate a default judgment on the motion of a party in two instances. First, pursuant to CPLR § 317

> [a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgement, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. . .

Second pursuant to CPLR § 5015 which states:

> The court which rendered a judgment or order may relieve a party form it upon such terms as ay 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 judgement or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgement or order, within one year after such entry; or
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> 2. newly-discovered evidence which, if introduced at trial, would probably have produced a different result and which could not have been discovered in time to more for a new trial under section 4404; or
>
> 3. fraud, misrepresentation, or other misconduct of an adverse party; or
>
> 4. lack of jurisdiction to render the judgment or order; or
>
> 5. reversal, modification or vacatur of a prior judgement or order upon which it is based. . .[1]

In each of the above instances the court is motivated by a public policy concern that " . . . disposition of controversies on the merits is favored . . . to that purpose defaults will be vacated upon a proper showing of excuse and the absence of willfulness."[2] This policy comes with one caveat. In certain circumstances the defendant " . . . may be required to make full and complete disclosure of a meritorious defense."[3]

Professor Seigel in his treatise *NY Practice*, *4th Ed.*, states that:

> [t]he New York rule of thumb is that a motion to vacate a default requires two showings: (1) an excuse for the default and (2) an "affidavit of merits" . . . in which defendant is required to satisfy the court that she has a meritorious defense. This offers assurance that vacating the default will not be a wasted effort; that the defendant does have a reasonable position on the merits and is not just wasting time.[4]

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[1] CPLR § 5015(a)

[2] *Benadon v. Antonio*, 10 AD2d 40 [1960]

[3] *Id.*

[4] Seigel, NY Practice, 4 ed, § 108.

In the case presently before the court plaintiff alleges that defendant, Louise, was properly served pursuant to CPLR § 308(4) that states:

> where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person 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 in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing. . .

Plaintiff argues that nearly ten years after service was effected by "nail and mail"it was improper due to lack of due diligence on the part of the process server. Judge Ponterio previously confirmed that the process server had exercised due diligence before resorting to nail and mail service when he granted plaintiff's motion for a default judgment. Defendant, Louise, does not challenge the fact that 36 Susanna Lane, Staten Island, NY is her "dwelling place or usual abode." Additionally, defendant, Louise, does not make an affirmative statement that she never received the copy sent by mail to 36 Susanna Lane, Staten Island, NY.

The statute is explicit as to what constitutes proper substituted service. Therefore, based on the foregoing, this court must conclude that this court never had jurisdiction over the defendant for the purposes of rendering a verdict. It is the finding of this court that the Supreme Court had jurisdiction over Louise at the time the default decision was rendered.

Furthermore, defendant's attorney misapprehend's the concept of excusable default as laid out in CPLR § 5015(a). Defendant attorney's contention that the defendant herein may vacate a default is without basis in law. In this case, a clerk's Judgment was entered on March 5, 2002. The statute states in pertinent part that a court may relieve a default judgment under " . . . the ground of . . . excusable default, . . . if the moving party has entered the judgement or order or order, within one year after such entry . . ." In this case, plaintiff entered the a clerk's Judgment

on March 5, 2002. Defendant, Louise, did not move this court to be relieved of the default judgment on the grounds of excusable default until August 3, 2007. Assuming, *arguendo*, that defendant, Louise, brought this motion in a timely fashion she does not state any other reason for her default other than improper service.

Since defendant, Louise, has not raised an excuse for her default this court need not consider whether she has meritorious defenses to the claims raised by plaintiff.

Pursuant to the powers granted in CPLR §§ 5251 and 5210 this court may punish individuals for contempt. In this action, plaintiff moves this court to hold defendant Louise in contempt for her transfer of funds in the amount of Ninety Four Thousand Dollars ($94,000.00) to her daughter Janine. Said transfer occurred on April 23, 2007. However, defendant Louise was not served with Subpoena Duces Tecum with Restraining Notice until May 18, 2007. On its face this transfer does not appear to be wilful. Therefore this court will not hold defendant Louise, in contempt.

But, given the fact that said transfer was effectuate by Citibank after it received a Restraining Notice, defendant, Louise, shall return the Ninety Four Thousand Dollars ($94,000.00) to her Citibank account.

Conclusion

It is the finding of this court that personal jurisdiction properly existed over Louise Wilkins at the time the default judgment was entered against her. Furthermore, the defendant's arguments to vacate the default on the grounds of excusable default are not timely, nor has defendant laid out any grounds by which excusable default could be inferred. Defendant's motion to vacate the default judgment is denied.

Plaintiff's cross motion seeking the return of Ninety Four Thousand Dollars ($94,000.00) improperly transferred after serving Citibank, N.A. with a restraining notice and contempt is granted with respect to returning said funds to Louise Wilkins' Citibank Account. That portion of the motion seeking to hold defendant, Louise, in contempt is denied.

Accordingly it is hereby:

ORDERED, that defendant, Louise Wilkins, return the amount of Ninety Four Thousand Dollars ($94,000.00) to her Citibank Account; and it is further

ORDERED, that defendant, Louise Wilkins, submit to an examination under oath concerning all matters relevant to the satisfaction of the judgment on **Friday, March 28, 2008** at **2:00 P.M.** at the office of the defendant's counsel in Richmond County.

ENTER,

DATED: February 13, 2007

Joseph J. Maltese
Justice of the Supreme Court