

<b>Commerce Bank v 415 Greenwich Fee Owners, LLC</b>
2008 NY Slip Op 32857(U)
October 7, 2008
Supreme Court, Nassau County
Docket Number: 4732/06
Judge: Daniel R. Palmieri
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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x **TRIAL TERM PART: 48**  
**COMMERCE BANK, as assignee of  
FISCHBEIN BADILLO WAGNER HARDING, LLP,**

**Plaintiff/Judgment Creditor,**

**-against-**

**INDEX NO.:4732/06**

**MOTION DATE:9-15-08  
SUBMIT DATE:10-6-08  
SEQ. NUMBER - 004**

**415 GREENWICH FEE OWNERS, LLC,**

**Defendant/Judgment Debtor.**

-----x

**The following papers have been read on this motion:**

<b>Order to Show Cause, dated 8-22-08.....</b>	<b>1</b>
<b>Memorandum of Law in Support, dated 8-13-08.....</b>	<b>2</b>
<b>Affirmation in Opposition, dated 9-4-08.....</b>	<b>3</b>
<b>Memorandum of Law, dated 9-4-08.....</b>	<b>4</b>

This is a motion (i) pursuant to CPLR §5015 (a) (4) (lack of jurisdiction), by the defendant, to vacate the default judgment previously entered in this case and (ii) by a non-party Ethan Eldon (Eldon) to vacate the order of contempt against him issued by this Court on April 15, 2008. Plaintiff's request made without benefit of a notice of cross motion, which seeks to disqualify defendant's counsel, is denied without prejudice to the submission of a motion requesting such relief.

Defendant has controverted the affidavits of service pursuant to which plaintiff claims to have obtained jurisdiction over the defendant and Eldon. Although its complaint described defendant as a limited liability company upon whom service must be made according to CPLR §311-a. Service on defendant was made pursuant to CPLR §311 as if it were a corporation, on one Emma Cotalanotto "managing agent". According to the submissions, service of the Order to Show Cause dated March 31, 2008, seeking to punish Eldon for contempt was made by personal service at his residence pursuant to CPLR §308(1). Neither party has submitted the affidavit of service for the contempt motion.

Eldon states that neither he personally nor the defendant were ever served with process and denies knowing the person served, *ie* Cotalanotto and that she was ever an employee or connected in any way to the defendant. Eldon also states that the defendant has not operated at the stated address since November 1, 2004 and that he has no residency at the stated address.

An affidavit of service by plaintiff's process server which specifies the papers served, the person who was served, and the date, time, address and sets forth facts showing that service was made by an authorized person, and in an authorized manner, constitutes prima facie evidence of proper service. *Maldonado v. County of Suffolk*, 229 AD2d 376 (2d Dept. 1996). A sworn denial of service by a defendant will rebut the presumption of proper service where it refutes factual allegations in the process server's affidavit or presents a question of fact rather than baldly denying receipt of process. *Silverman v. Deutsch*, 283 AD2d 478 (2d Dept. 2001); *European Am. Bank v. Abramoff*, 201 AD2d 611 (2d Dept.

1994). Here Eldon has set forth sufficient specific facts to rebut the prima facie showing of service on the defendant and on him personally as to the contempt motion.

The motion to vacate the default on the grounds of lack of jurisdiction is granted to the extent that a traverse hearing shall be held to determine whether the defendant and Eldon were properly served with process.

The hearing on the issue of service is referred to the Calendar Control Part (CCP Part II) for October 30, 2008. Defendant and Eldon are directed to file and serve a Note of Issue at least ten days prior thereto and failure to do so shall be deemed a withdrawal by the defendant and Eldon of this motion. A failure to appear may be deemed a default within the meaning of 22 NYCRR 202.27 and subject the non-appearing party to an appropriate sanction provided for therein or any other sanction authorized by statute, regulation or rule.

The stays contained in the Order to Show Cause shall continue pending completion of the traverse hearing and determination of this motion.

Defendant also moves to vacate pursuant to CPLR §5015 (a) 1 and CPLR §317, which provide grounds for vacatur where jurisdiction exists.

A motion to vacate may be predicated upon CPLR §317 if made within one year of receipt of knowledge of the judgment, and the focus is on the manner of service. When a defendant is served by other than personal service, the provisions of this section become applicable. *Fleetwood Park Corp., v. Jerrick Waterproofing Co.*, 203 AD2d 238 (2d Dept. 1994). CPLR §317 is not applicable here because service is alleged to have been made personally pursuant to CPLR §311. Moreover, under CPLR §317 a defendant must also

show that it did not receive actual notice of the process in time to defend, *Brockington v. Brookfield Development Corp.*, 308 AD2d 498 (2d Dept. 2001), *Maines Paper and Food Service, Inc., v. Farmington Food Inc.*, 233 AD2d 595 (3d Dept. 1996), and there must be a showing of a meritorious defense from a person with knowledge of the facts containing factual material, and not merely conclusory allegations or vague assertions. *Peacock v. Kalikow*, 239 AD2d 188 (1<sup>st</sup> Dept. 1997). Here defendant has not met its burden of demonstrating that it obtained knowledge of entry of the judgment which was entered on December 8, 2006, less than one year prior to this motion. Defendant has failed to state when it obtained knowledge of the judgment as required by the statute. As to merit, while it is not necessary for a defendant to establish the validity of its defense as a matter of law, it is necessary to demonstrate a defense that is potentially meritorious. *Marinoff v. Natty Realty Corp.*, 17 AD3d 412 (2d Dept. 2005), *Cupoli v. Nationwide Insurance Company*, 283 AD2d 2d 961 (4<sup>th</sup> Dept. 2001). The quantum of proof necessary is not as great as is required to oppose summary judgment. *Bilodeau-Redeye v. Preferred Mutual Ins. Co.*, 38 AD3d 1277 (4<sup>th</sup> Dept. 2006). Here defendant has demonstrated a defense that is potentially meritorious by alleging that the debt was paid and has submitted documentary evidence which basically supports the contention. However, absent satisfaction of the notice requirement, such showing is of no avail.

A motion to vacate pursuant to CPLR §5015 (a) (1) places emphasis on the presence of an excusable default rather than the manner or means of service. A court may consider the application of either CPLR §317 or CPLR §5015 (a) 1, even where not raised by the moving party. The common feature of both statutes is the showing of a meritorious defense.

On a motion pursuant to CPLR §5015 (a) 1 a defendant must demonstrate a reasonable excuse for its delay in appearing and a meritorious defense. *DiLorenzo v. Dutton, Lumber Co.*, 67 NY2d 138 (1986). See, *Incorporated Vil. Of Hempstead v. Jablonsky*, 283 AD2d 55 (2d Dept. 2001); *Matter of Gambardella v. Ortov Lighting*, 278 AD2d 494 (2d Dept. 2000); *Parker v. City of New York*, 272 AD2d 310 (2d Dept.). This section requires that the application be made within one year after service of the judgment with notice of entry. Once again defendant has failed to satisfy its burden as to the timeliness of this motion and as an excuse for his default, defendant states that it did not receive service of process. Thus, if service is sustained defendant will have failed to offer a reasonable excuse and if service is not sustained, the action will be dismissed.

As to defendant's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a) (7), in the event that service is sustained, the default judgment will remain and the motion cannot be entertained. In the event service is found to be defective, the judgment will be vacated.

In either event the motion to dismiss for failure to state a cause of action becomes surplusage and thus moot. Therefore, at this juncture, it is denied as inapplicable.

Plaintiff's request contained in its opposition that defendant's attorneys should be disqualified is also premature for the same reasons and is thus denied.

In any event, that request has not been made by way of cross motion as it should have been. *Bucceri v. Frazer*, 297 AD2d 304 (2d Dept. 2002); *Vanek v. Mercy Hospital*, 135 AD2d 707 (2d Dept. 1987); *Greco v. Incorporated Village of Freeport*, 16 Misc.3d 1129A (Sup. Ct. Nassau County 2007, Palmieri, J.)

Plaintiff's disqualification request is based upon it being "common knowledge that some of the employees of the Cozen firm were former full-time partners or employees of the now defunct law firm of Fishbein, Badillo, Wagner, Harding, LLP (the Fishbein Firm) the accounts receivable of which [p]laintiff as assignee of the Fishbein Firm seeks to collect."


This statement is unsupported by any specific facts and is not made by any person with personal knowledge but rather an attorney who fails to set forth the basis of her statement. The affirmation of an attorney which fails to rely on any personal knowledge or on any documentation, is lacking in evidentiary value. *Feratovic v. Lun Wah, Inc.*, 284 AD2d 368 (3d Dept. 2001).

A challenging party carries a heavy burden of identifying the projected testimony of an advocate witness and must demonstrate how it would either be necessary to support the position of the client or be adverse. *See Broadwhite Associates v. Truong*, 237 AD2d 162 (1<sup>st</sup> Dept. 1997). Plaintiff has failed to sustain its burden to disqualify defendant's counsel.

Finally, despite suggestions to the contrary, this Court has not ordered Eldon's arrest. In this Court's decision dated August 1, 2008, this court denied such relief.

This shall constitute the Decision and Order of this Court.

DATED: October 7, 2008

ENTER  


**ENTERED**  
HON. DANIEL P. FARRELL  
Acting Supreme Court Justice

OCT 09 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**