SHORT FORM ORDER **INDEX NO. 31201/2006**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

RONIT ADLER and SHOSHANA ADLER as trustees and executors under the last will and testament of ABRAHAM ADLER, and RONIT ADLER and SHOSHANA ADLER, both individually and ABEAD REALTY CORP.,

Plaintiffs,

-against-

ORLY ADLER YERUSHALMI, as Administrator of the Estate of EMANUEL YERUSHALMI, also known as "MANO FALCON," also known as "MANO FALCON," also known as "MANO," also known as "MANO FALCHANE," deceased, ORLY ADLER YERUSHALMI, individually, and TROY PEREZ,

Defendants.

ORIG. RETURN DATE: MAY 1, 2008
FINAL SUBMISSION DATE: MAY 29, 2008
MTN. SEQ. #: 003
MOTION: MOT D RRH

PLAINTIFFS' ATTORNEY:
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Upon the following papers numbered 1 to 7 read on this motion TO VACATE DEFAULT JUDGMENT.
Notice of Motion and supporting papers 1-3; Answering Affirmation and supporting papers 4, 5; Reply Affidavit and supporting papers 6, 7; it is,

ORDERED that this motion by defendant ORLY ADLER YERUSHALMI for an Order vacating the default judgment granted by this Court on May 2, 2007, and amending the caption to name ORLY ADLER YERUSHALMI as the Administrator of the Estate of EMANUEL YERUSHALMI, is hereby **GRANTED** solely to the extent provided hereinafter. The Court has received an affirmation in opposition to the instant application from plaintiffs.

This action was commenced to recover money damages as a result of defendants' alleged fraud, misrepresentation, and conversion of the assets of plaintiffs. The causes of action asserted in the complaint relate to the management and control of real property owned by plaintiff, ABEAD REALTY CORP., the Estate of ABRAHAM ADLER, and RONIT ADLER and SHOSHANA ADLER, as trustees and executors. The Seventh cause of action is against defendant ORLY ADLER YERUSHALMI only for identity theft and fraud.

By Order dated May 2, 2007, this Court granted an application by plaintiffs for a default judgment against defendants EMANUEL YERUSHALMI and ORLY ADLER YERUSHALMI only, on the grounds that those defendants failed to appear and answer in this action within the statutory time period. In the Order of May 2, 2007, the Court set the matter down for an Inquest on June 21, 2007, to assess damages against these two defendants. The Inquest was conducted on June 21, 2007, without the participation of either defaulting defendant. At the conclusion of the Inquest, the record was held open pending the Court's receipt of documentation to supplement the record. Plaintiffs submitted such documentation, and by Order dated April 2, 2008, which was recalled and vacated by an Amended Order dated April 29, 2008, the Court granted the following money judgments in favor of plaintiffs:

(1) Against defendants ORLY ADLER YERUSHALMI as Administrator of the Estate of EMANUEL YERUSHALMI, also known as "MANO FALCON," also known as "MANO FALKON," also known as "MANO," also known as "MANO FALCHANE," deceased, and ORLY ADLER YERUSHALMI, individually, on their first through fourth causes of action, in the amount of $310,551.69, with statutory interest thereupon from December 1, 1993;

(2) Against defendant ORLY ADLER YERUSHALMI as Administrator of the Estate of EMANUEL YERUSHALMI, also known as "MANO FALCON," also known as "MANO FALKON," also known as "MANO," also known as "MANO FALCHANE," deceased, on their fifth cause of action, in the amount of $239,700.00, with statutory interest thereupon from June 24, 1999; and

(3) Against defendant ORLY ADLER YERUSHALMI as Administrator of the Estate of EMANUEL YERUSHALMI, also known as "MANO FALCON," also known as "MANO FALKON," also known as "MANO," also known as "MANO FALCHANE," deceased, on their sixth cause of action, in the amount of $17,100.00, with statutory interest thereupon from March 12, 1996, and in the amount of $28,000.00, with statutory interest thereupon from August 13, 2002.

Plaintiffs have not alleged that they entered judgments against defendants in accordance with the foregoing.

Defendant ORLY ADLER YERUSHALMI ("defendant") has now filed the instant application to vacate the default judgment granted by this Court on May 2, 2007, and to amend the caption to name ORLY ADLER YERUSHALMI as the Administrator of the Estate of EMANUEL YERUSHALMI.

Initially, the Court notes that by Order dated April 2, 2008, which was recalled and vacated by an Amended Order dated April 29, 2008, this Court granted an application by plaintiffs to substitute ORLY ADLER YERUSHALMI as Administrator of the Estate of EMANUEL YERUSHALMI as defendant in this matter to reflect the fact that she had been appointed Administrator of the Estate of the deceased defendant, EMANUEL YERUSHALMI, also known as "MANO FALCON," also known as "MANO FALKON," also known as "MANO," also known as "MANO FALCHANE." Accordingly, that branch of the instant application is **DENIED** as moot.

With respect to that branch of the instant application to vacate the default, defendant alleges that the underlying summons and complaint were served on November 2, 2006, at 15-47 209th Street, Bayside, New York, by "nail and mail" service. Defendant alleges that they lived at this address from 1994 to April of 2006, but vacated in April of 2006 pursuant to a Stipulation of Settlement of the parties dated April 4, 2006 ("Stipulation"), entered in a Supreme Court, Queens County action filed by ORLY ADLER YERUSHALMI and EMANUEL YERUSHALMI. As such, defendant argues that plaintiffs were aware that the Yerushalmi family was no longer living at 15-47 209th Street, Bayside in November of 2006.

Furthermore, defendant alleges that she has meritorious defenses to this action. Defendant alleges that the first through fourth causes of action in the complaint seek damages based upon, among other things, property damage to the Bayside property. Defendant alerts the Court that issues regarding the Bayside property were the subject of at least two prior actions between the parties, and thus plaintiffs are precluded from re-litigating them in this action. Moreover, defendant alleges that plaintiffs violated certain terms of the Stipulation, in that they failed to provide defendant with a "punch list" of work that

needed to be completed prior to defendant vacating the premises. The Stipulation provides that if the work was not completed by defendants, then defendants were to deposit sufficient money in escrow to reimburse plaintiffs for their costs to perform the work. Instead of complying with this procedure, defendant alleges that plaintiff commenced this action approximately seven months later. Moreover, defendant denies any allegations of fraud by plaintiffs with respect to the utility bills at the Bayside property.

In addition, defendant denies the allegations of fraud by plaintiffs with respect to a parcel of land located at 729 Bruckner Boulevard, Bronx, New York, in that defendant argues EMANUEL YERUSHALMI never fraudulently induced plaintiff SHOSHANA ADLER to pay him sums of money. Defendant argues that these allegations were raised, or could have been raised, in a Supreme Court, Bronx County action filed by EMANUEL YERUSHALMI and TROY PEREZ against ABEAD REALTY CORP., and SHOSHANA ADLER and RONIT ADLER, as trustees under the will of ABRAHAM ADLER, with respect to an option to purchase the Bronx property. By Order dated March 24, 2006 (Renwick, J.), the Court granted a motion by the plaintiffs therein to enforce their option to purchase the Bronx property.

Defendant similarly denies any allegations of fraud with respect to plaintiffs' sixth cause of action. In the sixth cause of action, plaintiffs allege that ORLY ADLER YERUSHALMI and EMANUEL YERUSHALMI charged plaintiffs twice for the replacement of a roof on a building located at 106-18 Northern Boulevard, Corona, New York. Defendant contends that the roof was replaced once prior to a fire at the premises, and then had to be replaced again after the fire. Also, defendant denies any allegations of identity theft with respect to plaintiffs' seventh cause of action. Defendant claims that in 2006, a credit card was opened with plaintiff SHOSHANA ADLER as the primary holder, and defendant as a secondary signatory on the card, at the request of SHOSHANA ADLER. Defendant further claims that any charges placed on the card by defendant were paid for by defendant.

In opposition, plaintiffs argue that contrary to defendant's assertions, service was not effectuated at 15-47 209th Street, Bayside, New York, but rather at 13-75 209th Street, Bayside, New York, their residence at the time. In support thereof, plaintiffs have submitted two affidavits of service, each dated November 22, 2006, as well as a copy of a mortgage made by defendants in connection with the 13-75 property on or about March 1, 2007. Plaintiffs argue that defendants

not only defaulted in answering the complaint, they failed to oppose the motion for a default judgment, failed to appear at the Inquest, and failed to oppose plaintiffs' motion to amend the caption filed after the Inquest, notwithstanding the fact that plaintiffs allegedly gave notice to defendants of the foregoing.

With respect to defendant's proffered defenses, plaintiffs argue that the Court conducted a full Inquest on June 21, 2007, in which it heard the testimony of two witnesses and received documentary evidence in support of plaintiffs' claims herein. As such, plaintiffs refer the Court to the Inquest in which testimony and evidence were introduced regarding, among other things, the damages to the Bayside property, and defendant EMANUEL YERUSHALMI's embezzlement of money in connection with the Bronx and Corona properties.

In reply, defendant alleges that the property at which service was effectuated was merely an uninhabitable, vacant investment property, and that defendant and her family never resided there. Defendant contends that defendant and her family were residents of Florida at the time of service, and that plaintiffs were fully aware of this fact. The Court notes that "Exhibit 2" to defendant's reply papers was alleged to be a copy of defendant EMANUEL YERUSHALMI's Florida driver's license, although no such copy was submitted to the Court. Defendant claims she only became aware of this action from other family members in late July of 2007, only days after her husband and co-defendant EMANUEL YERUSHALMI passed away.

A motion to vacate a default judgment may be made upon a showing of a reasonable excuse and a meritorious defense within one year after service of a copy of the order with written notice of its entry (*see* CPLR 5015[a][1]; *see e.g. Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). In addition to showing that the default was excusable, the moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (*see Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (*see I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]).

Here, the Court finds that defendant has proffered a reasonable excuse for her default, and potential meritorious defenses to this action. As

discussed, defendant alleges that service of the summons and complaint by "nail and mail" service was not effectuated at her actual dwelling place or usual place of abode, but rather at an investment property (*see* CPLR 308 [4]).

In view of the foregoing, this motion to vacate the default Order dated May 2, 2007, is **GRANTED** to the extent that the parties are directed to appear for a traverse hearing on **December 4, 2008, at 10:00 a.m., in Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead**, to determine the propriety of service of the within summons and complaint.

Finally, defendant's request for the imposition of sanctions against plaintiffs and their counsel must be **DENIED**, as defendant had not sought this affirmative relief in her notice of motion (*see* CPLR 2214 [a]).

The foregoing constitutes the decision and Order of the Court.

Dated: September 30, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court