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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: 47**

DISCOVER BANK,

INDEX NO.:19413/08

Plaintiff,

MOTION DATE:5-14-09
SUBMIT DATE:5-28-09
SEQ. NUMBER - 001

-against-

MICHAEL GESELOWITZ a/k/a
MICHAEL N GESELOWITZ,

Defendant.

----------x

The following papers have been read on this motion:

Order to Show Cause, dated 5-1-09.....1
Affirmation in Opposition, dated 5-12-09.....2
Reply Affirmation, dated 5-26-09-09.....3

Defendant's motion to vacate the default judgment herein pursuant to CPLR §5015(a)1, excusable default, CPLR §5015(a)4, lack of jurisdiction and presumably CPLR §317, meritorious defense, is granted pursuant to CPLR §5015(a)4, lack of jurisdiction and the action is dismissed.

Plaintiff obtained a judgment by default against defendant on March 6, 2009, in the amount of $16,420.18. Defendant's application to vacate is supported by his own affidavits

and affirmations of his attorney, which are of no probative value since defendant's attorney does not profess to have any knowledge of the facts. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, plaintiff's attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence.

In his affidavits, defendant makes the bald statement, unsupported by any evidence and with no reference to the affidavit of service, that he"was never served with a summons and complaint."

As to a showing of merit, defendant states by way of reply that "I never made an agreement with plaintiff" and "I do not owe the amounts of money that plaintiff claims I owe." No reference is made to the allegations of the complaint which refers to a specific credit account.

A motion to vacate a default may be predicated upon CPLR 317 if made within one year after a defendant obtains knowledge of the entry of 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 A.D.2d 238 (2nd Dept. 1994). CPLR 317 is applicable here because service is alleged to have been made pursuant to CPLR 308.4, commonly referred to as "nail and mail." 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 A.D.2d 498 (2nd Dept. 2001), 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. *Peackock v. Kalikow*, 239 A.D.2d 188 (1st Dept. 1997). While it is not necessary for a defendant to establish the validity of its defense as a matter of law, it is necessary to present a defense that is potentially meritorious. *Marinoff v. Natty Realty Corp.*, 17 A.D.3d 412 (2nd Dept. 2001).

Here, for the reasons noted above, defendant has not demonstrated a defense that is potentially meritorious since his showing of merit consists entirely of his terse statement, without more, that he never made an agreement with plaintiff and does not owe any money. As such the judgment cannot be vacated pursuant to CPLR 317.

A motion to vacate pursuant to CPLR 5015 (a)1, places emphasis on the presence of an excusable default rather than the manner of service. A court may consider the application of CPLR 5015(a)1, even where not raised by the moving party. On a motion pursuant to CPLR 5015 (a)1, the defendant must demonstrate a reasonable excuse for its delay in appearing and a meritorious defense. *Dilorenzo v. Dutton, Lumber Co.*, 67 N.Y.2d 138 (1986). Here the Court finds that defendant has not proffered a meritorious defense and other than his claim of lack of service, which is addressed below, he has failed to offer a reasonable excuse for his failure to defend. Therefore CPLR 5015(a)1, is unavailable to the defendant.

Defendant's claim of lack of jurisdiction based on CPLR §5015(a)4, lack of jurisdiction, is granted but not for the reasons offered by defendant. A process server's affidavit stating proper service in accordance with CPLR 308, constitutes *prima facie* evidence of proper service. *Sandor Realty Corp. v. Arvis*, 209 A.D.2d 682 (2nd Dept. 1994). A conclusory denial of receipt of the summons and complaint is insufficient to raise an issue of fact which would entitle a defendant to a traverse hearing. *Id.* 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 that baldly denying, as defendant has done here, receipt of process. *Silverman v. Deutch,* 283 A.D.2d 478 (2nd Dept. 1994). Here, the defendant has failed to controvert the affidavit of service or to set forth sufficient facts to warrant a traverse hearing, having only hinted at conclusory allegations of improper service. At no point does the defendant claim he did not live at the address where service of process was mailed and affixed to the door.

Service by "nail and mail" pursuant to CPLR §308.4 may be employed where service under CPLR §308.1 (personal service) or CPLR §308.2 (delivering to a person of suitable age and discretion) cannot be made with due diligence.

The affidavit of service submitted here discloses three attempts at service at three different times, including two week days and a Saturday, however, no showing of due diligence to serve by way of CPLR §308.1 or 2 has been proffered. Thus, the affidavit of service, which is the only testimony submitted by the process server is insufficient to show

that the process server exercised the due diligence necessary to serve someone under CPLR §308.4. *Leviton v. Unger*, 56 AD3d 731 (2d Dept. 2008).

The affidavit of service states "served documents as [sic] last known address per attorneys records", however, the statute requires that service be made at the actual place of business, dwelling place or usual place of abode of the person to be served. Notably absent from this list is any reference to the defendant's "last known address" and notably absent from plaintiff's opposition is any evidence that the served location meets any of the requirements of the statute. *Merchants Ins. Group v. Coutrier*; 59 AD3d 602 (2d Dept. 2009); *State Insurance Fund v. Khondoker*, 55 AD3d 525 (2d Dept. 2008).

Further, a failure to make a genuine inquiry about a defendant's whereabouts and place of employment has been held to fail the test of due diligence even where three service attempts have been made at defendant's home. *McSorley v. Spear*, 50 AD3d 652 (2d Dept. 2008).

Due diligence has been held to be absent when there has been no attempt to locate a business address, *Sanders v. Elie*, 29 AD3d 773 (2d Dept. 2006), where the process server failed to attempt to learn the working habits of defendant from neighbors, *County of Nassau v. Yohannan*, 34 AD3d 620 (2d Dept. 2006) or when there has been no attempt to check telephone listings or governmental records to ascertain where service may be made. *Estate of Waterman v. Jones,* 46 AD3d 63 (2d Dept. 2007) Balkin, J.

In short, plaintiff's opposition fails to demonstrate that service could not be made with due diligence and fails to demonstrate what efforts have been made to effect personal or

substituted service. A mere showing of several attempts at service such as on this case, is not necessarily enough. Due diligence has been said to refer to the quality of the effort made not the quantity or frequency. *Estate of Waterman v. Jones, supra.*

Based on the foregoing, the Court finds that plaintiff has failed to acquire jurisdiction over the defendant, the motion to vacate the judgment is granted and the action is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 28, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
JUN 01 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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