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SHORT FORM ORDER

SCAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

JP MORGAN CHASE BANK, NA.,

INDEX NO.: 21355/09

Plaintiff,

MOTION DATE:4-7-10
SUBMIT DATE:4-28-10
SEQ. NUMBER - 001

-against-

GROUP, INC., and STEPHEN P. VISCUSI,

Defendant.

----------x

The following papers have been read on this motion:

Order to Show Cause, dated 3-26-10.....1
Affirmation in Opposition, dated 4-5-10.....2
Amended Affirmation in Opposition, dated 4-16-10.....3
Reply Affirmation, dated 4-19-10.....4
Reply Affirmation, dated 4-23-10.....5

The motion by the individual defendant 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 January 21, 2010, in the amount of $95,794.61. Defendant's application to vacate is supported by his own affidavit 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, defendant's attorney does not profess to possess personal knowledge of any facts asserted but has, to a limited extent, employed his affirmation as a vehicle to refer to other competent evidence.

Defendant first argues that the judgment which was entered by the clerk, CPLR §3215(a) should be vacated because the submission does not contain the affidavit of service which should comply with CPLR §308.2 as required by CPLR §3215(f).

Defendant is correct that the submission is inadequate to support entry of judgment by the clerk, however, it has been held in this Department that standing alone, the failure to comply with CPLR §3215(f), does not render the default judgment a nullity nor entitle the defendant to a vacatur of his default. *See Arujo v. Aviles*, 33 AD3d 830 (2d Dept. 2006), the remedy being denial of judgment entry with leave to renew.

As to service, in his affidavit, defendant makes the bald statement, unsupported by any evidence and with no reference to the affidavit of service, that he was not personally served with a summons and complaint in this action.

As to a showing of merit, defendant states that plaintiff acted in bad faith without notice and that he disputes the amount owed. He also states that he did not believe that he was personally responsible for the corporate debt. No reference is made to the allegations of the complaint which refer to a specific credit account, the documents or to specific amounts of charges and payments.

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 AD2d 238 (2d Dept. 1994). CPLR §317 is applicable here because service is alleged to have been made pursuant to CPLR §308.2, commonly referred to as "substituted service." 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), 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 such as we have here. *Peackock v. Kalikow*, 239 AD2d 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 AD3d 412 (2d Dept. 2001).

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 didn't believe that he was personally liable and that he disputes the balance owed. 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 NY2d 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 is granted but not for the reasons offered by defendant. The plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction over the defendant was obtained by proper service of process, *Munoz v. Reyes*, 40 AD3d 1059 (2d Dept. 2007). A process server's affidavit stating proper service in accordance with CPLR §308, constitutes *prima facie* evidence of proper service. *Wells Fargo Bank, N.A. v. Chaplin*, 65 AD3d 588 (2d Dept. 2009); *Sandor Realty Corp. v. Arvis*, 209 AD2d 682 (2d Dept. 1994). Once a *prima facie* showing is made, 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 AD2d 478 (2d 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.

However, it is not necessary to examine defendant's proffered excuse because plaintiff has failed to satisfy its initial burden of making a prima facie showing of proper service.

Plaintiff's affirmation in opposition is from its attorney, who implies that service was made on a doorman. There is no affidavit, other than of service, from the process server. The affidavit of service refers to service upon "John Doe security." The service affidavit

does not describe the building, gives no information as to John Doe, such as his location, posture or role, does not say that he requested access, was denied access, rang the bell, identified himself or give any other information whatsoever.

While it is true that substituted service may be made on a doorman, there must be some minimal proof of the person served and his role, station or relationship to the defendant. *F.I. duPont, Glore Forgan & Co. v. Chen*, 41 NY2d 794 (1977); *Charnin v. Cogan*, 250 AD2d 513 (1st Dept. 1998); *Rosenberg v. Haddad*, 208 AD2d 468 (1st Dept. 1994); *See also Kearney v. Neurosurgeons of New York*, 31 AD3d 390 (2d Dept. 2006).

In short, plaintiff's opposition fails to demonstrate that at least facially, service was made pursuant to CPLR §308.2 and based on the foregoing, the Court finds that plaintiff has failed to acquire jurisdiction over the individual 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 11, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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