SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : PART 13

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DISCOVER BANK,

Plaintiff,

- against -

SUSAN JOY SLACK,

Defendant.

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DECISION AND ORDER

Index No.: 16191/10

Original Return Date: 10/28/11
Motion Seq. No.: 001

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 7 were submitted on this Order to Show Cause on November 14, 2011:

	Papers numbered:
Order to Show Cause, Affirmations (2) and Affidavit in Support	1-4
Memorandum of Law in Support	5
Affirmation in Opposition	6
Reply Affirmation	7

The motion by the Defendant, SUSAN JOY SLACK, for an Order pursuant to C.P.L.R. 5015 vacating and setting aside a Judgment on Default entered against her on December 1, 2010, is decided as follows:

The Complaint filed in this action alleges that the Defendant, SUSAN JOY SLACK, entered into an agreement with and utilized a credit card issued by the Plaintiff, DISCOVER BANK, pursuant to which she agreed to repay Plaintiff for such use. The Complaint further alleges that the Defendant failed to make payments due to the Plaintiff under the credit card agreement, leaving a balance of $17,424.96 due as of April 30, 2010. The Plaintiff commenced this action against the Defendant in or about August 2010 for breach of the agreement and for an account stated, and sought

monetary damages in the sum of $17,424.96, plus interest, costs, disbursements and reasonable attorneys' fees.

The Affidavit of Service of Osmond Tinglin alleges that on Thursday, September 2, 2010 at approximately 4:25 p.m., Tinglin attempted to serve the Defendant at her residence on West Penn Street in Long Beach, New York. He returned on Saturday, September 4, 2010 at 10:10 a.m., again without finding the Defendant home. Finally, on Wednesday, September 8, 2010 at 7:15 p.m., the process server alleges that he affixed a copy of the Summons and Complaint to the door at the Defendant's place of abode, and on September 13, 2010, served an additional copy of the Summons and Complaint upon the Defendant at her residence by first class mail. Pursuant to C.P.L.R. 3215(g)(3)(i), additional notice was given to the Defendant by the Plaintiff on September 17, 2010 by first class mail to her residence in Long Beach, New York. When the Defendant did not appear in this action, a Judgment on Default was entered against her and in favor of the Plaintiff on December 1, 2010 in the sum of $18,643.40.

In seeking to vacate the Judgment on Default, the Defendant argues that she became aware of this action when she received an Income Execution from the Sheriff. As expressed in her supporting Affidavit, the Defendant bases her application to vacate the Judgment on two grounds: (1) that she does not "recall" having a loan with the plaintiff or executing any written agreement with them; and (2) that as she was not personally served, this Court does not have jurisdiction over her and that the Judgment should be vacated.

A motion to vacate a default is one addressed to the sound discretion of the Court (*Abrams v. City of New York*, 13 AD3d 566 [2nd Dept. 2004]; *Giordano v. Patel*, 177 AD2d 468 [2nd Dept. 1991]). In order to vacate a judgment or order pursuant to C.P.L.R. 5015(a)(1), the Defendant must demonstrate an excusable default and a meritorious defense (*Kurtz v. Mitchell*, 27 AD3d 697 [2nd

Dept. 2006]; *Harkless v. Reid*, 23 AD3d 622 [2nd Dept. 2005]). In this case, the Defendant has demonstrated neither.

The Plaintiff bears the burden of establishing that the Defendant has been served in such a way so as to confer the Court with jurisdiction over the Defendant (*Kanner v. Gerber*, 197 AD2d 673 [2nd Dept. 1993]; *Frankel v. Schilling*, 149 AD2d 657 [2nd Dept. 1989]). An Affidavit of Service which sets forth the papers served, the person served, the date, time, and place at which service was made, and that the person who made service was authorized to serve process, constitutes *prima facie* proof of service (*Remington Investments, Inc. v. Seiden*, 240 AD2d 647 [2nd Dept. 1997]; *Maldonado v. County of Suffolk*, 229 AD2d 376 [2nd Dept. 1996]).

The party contesting service must place before the Court facts sufficient to rebut the presumption of service (*Kopman v. Blue Ridge Ins. Co.*, 296 AD2d 479 [2nd Dept. 2002]; *Frankel v. Schilling*, 149 AD2d 657 [2nd Dept. 1989]). The mere denial of receipt of a copy of the Summons and Complaint is insufficient to rebut the presumption of mailing (*Electric Insurance Company v. Grajower*, 256 AD2d 833 [3rd Dept. 1998]; *Spangenberg v. Chaloupka*, 229 AD2d 482 [2nd Dept. 1996]).

The Defendant argues that she never received any copy of the Summons and Complaint. She surmises that the mailed copy of the process was never delivered since it was mailed to the wrong zip code according to the affidavit of service (11516 instead of 11561). The Defendant does not dispute that at the time, she resided at the Long Beach address.

In determining a jurisdictional question under CPLR 308(4), a decidedly disfavored method of service to this Court based on the requirement of "due diligence", the Court must consider the following:

> Service of process must be made in strict compliance with statutory methods for

effecting personal service upon a natural person pursuant to CPLR 308 (*Macchia v Russo*, 67 NY2d 592, 594 [1986];see *Dorfman v Leidner*, 76 NY2d 956, 958 [1990]). CPLR 308 requires that service be attempted by personal delivery of the summons to the person to be served (CPLR 308 [1]), or by delivery to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode [CPLR 308 [2]). Service pursuant to CPLR 308 (4), commonly known as nail and mail service, may be used only where service under CPLR 308 (1) or (2) cannot be made with due diligence (*see Feinstein v Bergner,* 48 NY2d 234, 239 [1979]; *O'Connell v Post,* 27 AD3d 630 [2006]; *Simonovskaya v Olivo*, 304 AD2d 553 [2003]; *Rossetti v DeLaGarza,* 117 AD2d 793 [1986]). Nail and mail service is effected "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 . . . at his or her actual place of business" (CPLR 308 [4]).

Although "due diligence" is not defined in the statutory framework, the term has been interpreted and applied on a case-by-case basis (*see Barnes v City of New York,* 51 NY2d 906, 907 [1980]; *Singh v Gold Coin Laundry Equip.,* 234 AD2d 358 [1996]). " '[T]he due diligence requirement refers to the quality of the efforts made to effect personal service, and certainly not to their quantity or frequency' " [*Barnes v City of New York,* 70 AD2d 580, 580 [1979], *affd* 51 NY2d 906 [1980], *supra* [quoting from nisi prius]. A mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the "due diligence" requirement before resort to nail and mail service (*see County of Nassau v Long,* 35 AD3d 787 [2006]; *County of Nassau v Yohannan,* 34 AD3d 620, 620-621 [2006]; *Earle v Valente,* 302 AD2d 353 [2003]; *Annis v Long,* 298 AD2d 340, 341 [2002]). However, "due diligence" may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times (*see Lemberger v Khan,* 18 AD3d 447 [2005]; *Brunson v Hill,* 191 AD2d 334, 335 [1993]; *Mike Lembo & Sons v Robinson,* 99 AD2d 872 [1984]). For the purpose of satisfying the "due diligence" requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment (*see Sanders v Elie,* 29 AD3d 773, 774 [2006]; *Kurlander v A Big Stam, Corp.,* 267 AD2d 209, 210 [1999]; *Busler v Corbett,* 259 AD2d 13, 15 [1999]), " 'given the reduced likelihood that a summons served pursuant to [nail and mail service] will be received' " (*County of Nassau v Letosky,* 34 AD3d 414, 415 [2006], quoting *Gurevitch v Goodman,* 269 AD2d 355, 355 [2000]). ***Estate of Waterman v. Jones*, 46 A.D.3d 63, 65 [2nd Dept. 2007]**.

Here, the process server made three attempts to serve the Defendant at her actual place of abode before resorting to "nail and mail" service. One was made during normal working hours, one was made after normal working hours and one was made on a Saturday. The attempts to serve the Defendant were made at times reasonably calculated to find the Defendant at her residence. The

argument raised by the Defendant that because of a purportedly wrong zip code she did not receive the mailing of process does not rebut the presumption of affixing regularity nor the receipt of the additional CPLR 3215(g) notice mailed to her at the proper zip code. Defendant does not contest that the West Penn Street, Long Beach, New York address was her "dwelling place or usual place of abode" (see Income Execution, Exhibit "C" to moving papers). Further, she does not specifically deny receipt of a copy of the Summons and Complaint that was mailed to her at the Long Beach address in September 2010 [Exhibit "A" to moving papers]. Conclusory denials of service are insufficient to raise questions of fact rebutting the *prima facie* evidence of proper service contained in the Affidavit of Service (*96 Pierrepont, LLC v. Mauro*, 304 AD2d 631 [2nd Dept. 2003]; *Simmons First National Bank v. Mandracchia*, 248 AD2d 375 [2nd Dept. 1998]). While it may be apparent to Defendant's counsel that "Plaintiff didn't get it right – service wasn't properly accomplished" (Reply Affidavit, paragraph "6"), the Defendant's response is insufficient to rebut the presumption of valid service.

Since the Defendant has failed to place before this Court facts controverting service, she has not established an excusable default. The Defendant has also failed to establish a meritorious defense. She asserts that she does "not believe" she executed a written agreement with the Plaintiff and does "not recall having a loan through use of a credit card" with Plaintiff. There is no mention of any statements which she received for the credit card ending in 0471. As the Defendant has failed to set forth any legal basis upon which the Judgment on Default can be vacated, the motion must be denied.

Accordingly, after due deliberation, it is

ORDERED, that the motion of the Defendant for an Order pursuant to C.P.L.R. 5015, vacating and setting aside the Judgment on Default entered against her on December 1, 2010 is

denied in its entirety; and it is further

ORDERED, that the stay contained in the Order to Show Cause granted on October 11, 2011 is hereby **vacated.**

The foregoing constitutes the Decision and Order of this Court.

Dated: Mineola, New York
February 8, 2012

ENTER:

JOEL K. ASARCH, J.S.C.

Copies mailed to:
Forster & Garbus, LLP
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Richard A. Klass, Esq.
Attorney for Defendant