To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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USA RECYCLING, INC.,

Plaintiff,

-against-

UFS INDUSTRIES, INC., individually and doing business as SALLY SHERMAN FOODS & BALDWIN ENDICO REALTY ASSOCIATES, INC.,

Defendants.

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DECISION & ORDER

Index No.: 50129/14
Sequences Nos. 1 & 2

WOOD, J.

The following papers numbered 1-27 were read in connection with defendant's motion:

Defendants' Order to Show Cause, Counsel's Affirmation, Endico Affidavit, Exhibits. (Seq 1)	1-8
Defendant's Notice of Motion to Dismiss, Counsel's Affirmation, Endico Affidavit, Exhibits. (Seq 2)	9-15
Plaintiff's Counsel's Affirmation in Opposition to both Defendant's Applications, Moray's Affidavit, Exhibit, Memorandum of Law.	16-19
Defendant's Counsel's Affirmation in Reply to Vacate Action, Endico Affidavit, LoDolce Affidavit, Exhibits.	20-25
Defendant's Counsel's Affirmation in Reply to Dismiss, Endico Affidavit.	26-27

Sequence #1: Order To Vacate Default Judgment

Defendants move for an order vacating the judgment, entered on April 16, 2014, in favor of plaintiff in the total amount of $912,041.99 (the "Judgment"). In addition, defendants seek an order dismissing this action against them based upon lack of personal jurisdiction as well as plaintiff's improper amendment of the pleadings. Plaintiff opposes defendants' applications.

NOW, based on the foregoing, the motions are decided as follows:

Where a default judgment has been issued, a motion for relief may be made under CPLR § 5015(a). In pertinent part, CPLR § 5015(a) states, "the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct." CPLR § 5015 (a)(1) allows a court to vacate a prior judgment due to excusable default if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or if the moving party has entered the judgment or order within one year after such entry (Moore v. Day, 55 AD3d 80, 804 [2d Dept 2008]). It is well settled that to vacate a default, the moving party must demonstrate a "reasonable excuse for the default and the existence of a meritorious cause of action" (Scarlett v. McCarthy, 2 AD3d 623 [2d Dept 2003]; Matter of Heinz v. Faljean, 57 AD3d 665, 666 [2d Dept 2008]).

It is within the sound discretion of the Supreme Court to "determine what constitutes a reasonable excuse" (Star Indus., Inc. v. Innovative Beverages, Inc., 55 AD3d 903, 904 [2d Dept 2008]). This discretion is a "sui generis determination to be made by the court on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on

the merits" (Harcztark v. Drive Variety, Inc., 21 AD3d 876, 876-77 [2d Dept 2005]). Law office failure may be accepted as a reasonable excuse, but this will not be a valid excuse "where there is a pattern of willful default and neglect" (*Id.*). The commentary for CPLR § 2005 (Excusable Delay and Default) states that, "the underlying principle of excusing delays and defaults based on law office failure is that counsel's isolated neglect should not deprive a party of his or her day in court in the absence of prejudice to the opponent."

The determination of what constitutes a "meritorious defense" is also generally within the discretion of the trial court (Anamdi v. Anugo, 229 AD2d 408, 408 [2d Dept 1996]). In a motion to vacate a default judgment, the movant does not have to prove a particular claim or defense, but rather only to "set forth facts sufficiently establishing that such claim or defense is 'meritorious.'" (Id. at 409). However, "mere self-serving conclusions that a meritorious defense exists do not suffice" (Montrose Concrete Products Corp. v. Silverite Const. Co., Inc., 68 AD2d 904, 904 [2d Dept 1979]).

Here, the parties entered into a 7-year contract on August 6, 2009 where the defendants would pay the plaintiff $1,500,000 in 22 installments for performance of routine material recycling collection and disposal services at the defendants' location at 300 North MacQuesten Parkway, in Mt. Vernon. On December 8, 2012, the defendants unilaterally terminated the contract and gave the plaintiff 30 days notice of termination. At this point, the defendants had made 13 payments, constituting $682,000, with $818,000 yet to be paid. The plaintiff asserts that the contract states that the remainder of the contract ($818,000) must be paid within 30 days of the termination of the contract. According to the plaintiff, once the 30-day period expired, the plaintiff demanded the $818,000 from the defendants, but they did not comply.

The plaintiff commenced this action by electronically filing the summons and complaint on January 6, 2014. The original complaint was never served and was amended because it incorrectly listed Sally Sherman Foods as a "domestic corporation". On March 21, 2014, defendants' process server, James Monteleon, served an amended summons and complaint (along with Notice of Commencement of Action Subject to Electronic filing) to Michael LoDolce, the Vice President of Operations of Sally Sherman Foods (a division of the defendant, UFS Industries, Inc.) at 300 North MacQuesten Parkway, in Mount Vernon. It is disputed as to whether LoDolce actually accepted the summons and complaint on behalf of all of the defendants. Plaintiff completed service of the amended summons and complaint by electronically filing three affidavits of personal service later that day.

According to defendants, eleven days later on April 1, 2014, (and well within the twenty days after the service of the summons exclusive of the day of service), defendants' attorney allegedly mailed the answer to the amended summons and complaint to the plaintiff. The next day, the attorneys of both parties discussed the case at the Bronx Supreme Court for a hearing on another case between the plaintiff and one of the defendants.

On April 16, 2014, plaintiff's attorney filed for default judgment, which was entered by the Westchester County Clerk for $912,041.99 ($818,000 plus statutory interest of $94,041.99). Five days later on April 21, 2014, notices were sent to the Garnishee, Chase Bank was served with restraining notices, and default judgment documents were sent to the defendants. The day later, defendants' attorney electronically filed their belated answer and Order to Show Cause. Later on May 7, 2014, the defendants filed a second Notice of Motion seeking to dismiss due to lack of Personal Jurisdiction and improper amendment pleading.

The plaintiff argues that it never received the defendants' mailed answer and even if it had done so, they did not file it electronically in accordance with 22 NYCRR 202.5-bb(c). Defendants' attorney states that it was his belief that only certain documents had to be filed electronically.

Taking into consideration the parties' arguments and the equities involved here, and the strong public policy in favor of resolving cases on the merits, the court finds that defendants demonstrated a reasonable excuse for its alleged failure to timely answer the complaint. The parties' counsel's conversation in Bronx Supreme Court certainly evidenced defendants' intention not to default in this matter. Moreover, there was no great delay here since defendants' counsel filed an answer less than a week after the entry for default judgment, and 29 days after the service of the Amended Summons and Complaint. There is also no evidence that the plaintiff would be prejudiced, and that the actions of the defendants or their counsel was willful.

Further, the court finds that the defendants also have a meritorious defense since they set forth facts that sufficiently establish a defense. It is defendants' position that they were permitted to cancel the subject contract without penalty and that they did so and paid the plaintiff for all sums due to it up until the cancellation and for work actually performed. However, the plaintiff maintains that it remains undisputed that the said agreement required the plaintiff to perform services for 7 years , and when defendants terminated the contract the remaining balance was due.

Based upon the foregoing, defendants have demonstrated a reasonable excuse and meritorious defense to vacate the judgment.

Sequence #2: Motion to Dismiss Based on Lack of Personal Jurisdiction

As a preliminary matter, the court will address the plaintiff's amended summons and amended complaint. On January 6, 2014, the plaintiff filed its original summons and complaint with the Westchester County Clerk wherein Sally Sherman Foods was erroneously named "Sally Sherman Foods, Inc." After filing the summons, plaintiff learned that "Sally Sherman Foods" was a trade name bused by UFS Industries, Inc. On March 20, 2014, the plaintiff filed an Amended Summons and Complaint wherein the caption and the reference to Sally Sherman as a domestic corporation was corrected. Plaintiff's original summons had not been served prior to the Amended summons. Pursuant to CPLR §3025 (a), "a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it".

Under these circumstances, and in the interest of judicial economy, the court finds that the amended complaint, as it stands, is proper. To rule against the amendment would clearly frustrate the intent of CPLR 3025(a), which allows leeway to a party who acts expeditiously to correct its pleading, especially here, where the amendment made an insignificant change in the nature of the action, and no prejudice has been shown. Accordingly, this branch of defendants' motion is DENIED.

Further, the defendants move for an order to dismiss the action, claiming that one of the defendants, Baldwin Endico Realty Associates, Inc., was never served with the amended summons and complaint, and therefore, the court lacks personal jurisdiction. The plaintiff opposes defendants' application, offering an affidavit of service evidencing proper service upon defendant, *inter alia*, on March 21, 2014, the process server personally served the summons and complaint upon Mr. Michael LoDolce, Vice President of Sally Sherman Foods, at a division of UFS Industries, Inc. (as evidenced by his business card), at 300 North MacQuesten Parkway, in

Mount Vernon. In accordance with CPLR §311(a)(1), service upon a corporation shall be made by delivering the summons "to an officer, director, managing agent, general agent, cashier, or assistant cashier, or to any other agent authorized by appointment or by law to receive service".

Ordinarily, a process server's sworn affidavit of service constitutes prima facie evidence of proper service pursuant to CPLR § 308 (Lattingtown Harbor Property Owners Ass'n, Inc. v. Agostino, 34 AD3d 536 [2d Dept 2006]). But, in cases where there is conflicting evidence, a credibility determination is necessary. (*Id.* at 538). If there is an issue of fact as to whether the recipient of the service, "if not a managing agent, was cloaked with apparent authority to accept service on the party's behalf," a traverse hearing is necessary to determine if the service was proper and pursuant to CPLR § 311(a)(1). (Miterko v. Peaslee, 80 AD3d 736, 737 [2d Dept 2011]).

In New York, the term traverse in civil litigation means a pre-trial hearing used to determine whether the defendants in that action were properly served with process so as to invoke a court's jurisdiction (Barnaby v. Coreman, Inc., 25 Misc3d 855 [Sup Ct, Queens County 2009]). If there is a sworn denial that defendant was served with process, a hearing must be held whereby plaintiff has the burden of establishing jurisdiction by a preponderance of the evidence (Mortgage Access Corp. v. Webb, 11 AD3d 592, 593 [2d Dept 2004]; Bankers Trust Company of California, NA v. Tsoukas, 303 AD2d 343, 344 [2d Dept 2003]). If the evidence gathered at the hearing establishes that under the specific circumstances the plaintiff's process server "acted reasonably and with due diligence, and that service was effected in a manner calculated to give the appellant fair notice" then personal jurisdiction has generally been ruled as obtained.

Here, the defendants rebutted the process server's affidavit with affidavits of Mr. LoDolce, and Mr. Felix Endico, the president of Baldwin Endico Realty Associates, Inc. and an

officer of UFS Industries, Inc., stating that Baldwin Endico Realty Associates, Inc. had not been served since LoDolce is not associated with Baldwin Endico Realty Associates, Inc., and thus, are entitled to a hearing to determine the validity of service of process where plaintiff has the burden to establish jurisdiction by a preponderance of the evidence (Home Fed Sav. Bank v. Mahood, 260 AD2d 438,439 [2d Dept 1999]). Accordingly, a traverse hearing is ordered by this court, in accordance with 22 NYCRR §208.29 to determine the validity of service of process to Baldwin Endico Realty Associates, Inc.

Accordingly, it is hereby:

ORDERED, that, counsel and the parties are directed to appear on 9/9/14, 9:15 am 9:30 a.m., at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601, at the Settlement Conference Part, Courtroom 1600 , in order to schedule a traverse hearing on the issue of whether defendant Baldwin Endico Realty Associates, Inc. was properly served, and it is further

ORDERED, that since the defendants' motion to vacate the Judgment is GRANTED, the temporary restraining order issued by this court on April 22, 2014, against plaintiff shall continue and remain in full force and effect, pending the determination of this litigation, in that plaintiff shall be preliminarily enjoined and restrained from executing against and collecting restrained funds from Chase Bank, furthermore, plaintiff shall not be able to restrain any additional assets of defendants any enforcement procedure or device arising from the Judgment, and it is further

ORDERED, that defendants are directed to serve a copy of this order with Notice of Entry upon the Clerk, and upon defendants, forthwith, and the Clerk shall mark his records accordingly.

The court has considered the remainder of the factual and legal contentions of the parties, and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: **July 31, 2014**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: Rocco F. D'Agostino, Esq.
Attorney for Plaintiff
445 Hamilton Avenue
Suite 607
White Plains, New York 10601

Howard M. Lefkowitz, Esq.
Attorney for Defendant
32 Flag Hill Road
Chappaqua, New York 10514