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SHORT FORM ORDER **INDEX NO. 22316/2013**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38- SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
Supreme Court Justice

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MOTION DATE: 06/17/16
ADJOURN DATE: 06/23/16
MOTION SEQ # 001: MG
MOTION SEQ # 002: MG

FIA CARD SERVICES, N.A.,

Plaintiff,

-against-

JOHN P. GEOGHAN,

Defendant.

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PLAINTIFF'S ATTORNEY:
RUBIN & ROTHMAN, LLC.
By: Eric S. Pillischer, Esq.
1787 Veterans Memorial Highway
P.O. Box 9003
Islandia, NY 11749-9003

DEFENDANT'S ATTORNEY:
ANDREW M. DOKTOFSKY, P.C.
52 Elm Street, Suite 6
Huntington, NY 11743

The Court has considered the following papers in connection with the following determination of the pending motions:

1. Order to Show Cause, Affirmation in Support of Motion to Vacate Default Judgment pursuant to CPLR 5015(a)(4) by Andrew Doktofsky, Esq. dated May 23, 2016, Exhibits A – E and supporting papers;

2. Notice of Cross-Motion, Affirmation in Support & Opposition by Eric Pillischer, Esq. dated June 6, 2016; Exhibits A – J and supporting papers;

3. Defendant's Reply Affirmation dated June 15, 2016;

4. Plaintiff's Reply Affirmation dated June 18, 2016; and it is

ORDERED that motion sequence #001 by defendant seeking an order vacating his default judgment pursuant to CPLR 5015(a)(4) is **GRANTED** and motion sequence # 002 by plaintiff seeking an order extending its time to serve plaintiff with process is **GRANTED** as is thoroughly discussed below.

Plaintiff FIA Card Services, N.A. brought this consumer credit card transaction seeking money damages for breach of contract and account stated action against defendant James P. Geoghan. Specifically stated, in a summons and complaint filed on August 19, 2013, plaintiff alleged that defendant breached his credit card customer agreement by defaulting on his monthly credit card payments and sought recovery of $ 15,782.32. Defendant defaulted after service was personal service was rendered by plaintiff pursuant to CPLR 308(2) upon a person of suitable age and discretion at his address listed at 245 S. Snedecor Avenue, Bayport, New York. On defendant's default, plaintiff obtained a money judgment which was entered by the Suffolk County Clerk on October 23, 2013.

Defendant moved this Court by Order to Show Cause on June 17, 2016 seeking to vacate his default pursuant to CPLR 5015(a)(4) on the grounds of lack of personal jurisdiction based on improper service of process. In those papers, defendant argues that he never received service of process because he has not resided at the Snedecor Avenue address since 1979, but rather has resided at 24 Bergen Avenue, Blue Point, New York since 1999. Furthermore, defendant submits an affidavit sworn to by defendant's sister-in-law stating that she and her husband have resided at the Snedecor address since 2001 and she informed plaintiff's process server that defendant did not reside at that premises when service was attempted. Thus the sum total of defendant's argues is that since defendant did not receive the summons and complaint, he argues that his default must be vacated as a money judgment since the court lacked jurisdiction over him in the first instance and therefore is a nullity.

Plaintiff has both opposed defendant's motion and separately noticed its own application for an order of extension of time to properly render service of process on defendant pursuant to CPLR 306-b. Opposing the motion for vacatur, plaintiff sets forth two points. First, plaintiff elaborates that defendant's billing address for his credit card statements was a P.O. Box kept and maintained by the U.S. Postal Service. Plaintiff inquired of the Postal Service as to the holder's address for that P.O. Box and was informed in writing of the Snedecor Avenue address. Thus plaintiff argues reasonable and justifiable, if not detrimental, reliance in serving process at that address.

Secondly, plaintiff argues that defendant's own dilatory conduct has caused or created its current dilemma to its prejudice. Defendant was notified of plaintiff's money judgment in writing pursuant to CPLR 5222 on October 29, 2013. Defendant responded through counsel in written correspondence dated November 27, 2013, acknowledging receipt and knowledge of the money judgment. Lastly, plaintiff by restraining notice froze plaintiff's 1/3 interest in a joint bank account located at JP Morgan Chase, held with relatives on December 3, 2013. In view of all of this, plaintiff argues that defendant had actual or constructive knowledge, and gave outward manifestations of an intent to accede to the money judgment. Given that along with defendant's delay of waiting almost three years to raise a jurisdictional defense, plaintiff argues that defendant's motion to vacate should be denied due to waiver.

Failing that plaintiff argues that good cause exists or that in the interests of justice, this Court should issue an order granting plaintiff an extension of time to properly serve defendant, since the appropriate statute of limitations governing its claims has or is about to expire.

Plaintiff claims that since it is a Delaware corporation and its claims are governed by Delaware law, its three year limitations period has run, and this has occurred completely attributable to defendant's intentional and calculated efforts to run out the clock on its claim.

Given the parties' respective positions, the motions are decided as follows.

"The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" and New York's appellate courts have clearly cautioned that the absence of proper service of process, renders a resulting default judgment was a nullity (***Pearson v. 1296 Pac. St. Associates, Inc.***, 67 AD3d 659, 660, 886 NYS2d 898 [2d Dept. 2009]). Stated another way "[i]t is 'axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void' " and thus on an application falling under CPLR 5015(a)(4), a default judgment must be vacated once a movant demonstrates lack of personal jurisdiction (***Hossain v. Fab Cab Corp.***, 57 AD3d 484, 485, 868 NYS2d 746, 746 [2d Dept. 2008][internal citations omitted]). Where the defendant's only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived (***Cadlerock Joint Venture, L.P. v. Kierstedt***, 119 AD3d 627, 628, 990 NYS2d 522, 524 [2d Dept. 2014]).

CPLR 308(2) dictates that personal service shall be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business."

A defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1) and although a party moving to vacate a default must normally demonstrate a reasonable excuse and a meritorious defense (*see* CPLR 5015) ... the movant is relieved of that obligation when lack of personal jurisdiction is asserted as the ground for vacatur" (***In re Qadeera Tonezia D.***, 55 AD3d 606, 606–07, 866 NYS2d 223, 224 [2d Dept. 2008]; ***Thakurdyal v. 341 Scholes St., LLC***, 50 AD3d 889, 890, 855 NYS2d 641, 642 [2d Dept. 2008][Unlike a motion to vacate under CPLR 5015(a)(1), it is unnecessary for a defendant seeking relief under CPLR 317 to demonstrate a reasonable excuse for its default]).

Under the circumstances presented, the Court finds plaintiff's arguments persuasive that service was improper in this matter as the parties' submissions have described. Since plaintiff was never properly served with process, no personal jurisdiction existed to support a binding or proper money judgment against him based on a default. Therefore the portion of defendant's motion to vacate his default is **GRANTED** to the extent that the money judgment is hereby rendered a nullity (*see e.g.* ***In Ja Kim v. Dong Hee Han***, 37 AD3d 662, 830 NYS2d 345, 346 [2d Dept. 2007][Supreme Court erred in denying the defendant's motion pursuant to CPLR 5015(a)(4) to vacate the judgment upon his default in answering or appearing, and to dismiss the complaint pursuant to CPLR 3211(a)(8) since the purported service of process under CPLR 308(4) was defective and personal jurisdiction was not acquired over the defendant since the

plaintiffs attempted to serve the defendant at an address that was never the defendant's dwelling place or usual place of abode]).

CPLR 306–b permits the courts to extend a plaintiff's time to serve a summons and complaint upon good cause shown or in the interest of justice. "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" (***Leader v. Maroney, Ponzini & Spencer***, 97 NY2d 95, 105, 736 NYS2d 291 [2001]; ***Robles v. Mirzakhmedov***, 34 AD3d 554, 554–55, 824 NYS2d 406, 407 [2d Dept. 2006]).

The trials courts are thus instructed that when considering whether to grant an extension of time to effect service beyond the 120–day statutory period in the interest of justice, the court may consider the plaintiff's diligence, or lack thereof, along with other relevant factors, including the expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiff's request for the extension of time, and any prejudice to the defendant, noting that this determination of whether to grant the extension in the interest of justice is generally within the discretion of the motion court (***Siragusa v. D'Esposito***, 116 AD3d 837, 837, 983 NYS2d 624, 625 [2d Dept. 2014]).

An extension of time pursuant to CPLR 306–b may be granted in the interest of justice without a showing of "reasonably diligent efforts at service as a threshold matter" (***Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d 95, 105, 736 N.Y.S.2d 291, 761 N.E.2d 1018); ***Valentin v. Zaltsman***, 39 A.D.3d 852, 835 N.Y.S.2d 298, 299 (2007). The statute clearly gives the court the discretion to grant an extension of time to serve "upon good cause shown *or* in the interest of justice" (emphasis supplied). ***Scarabaggio v. Olympia & York Estates Co.***, 278 A.D.2d 476, 476, 718 N.Y.S.2d 392, 393 (2000); *certified question answered, order aff'd sub nom.* ***Leader***, 97 N.Y.2d 95, 761 N.E.2d 1018 (2001).

Accordingly, in order to establish that plaintiff was entitled to an extension of time to effect such service, the plaintiff was required to show either good cause for failing to timely serve the appellants or that an extension of time should be granted in the interest of justice. ***Riccio v. Ghulam***, 29 A.D.3d 558, 560, 815 N.Y.S.2d 125, 127 (2006).

On the proper standard and showing, New York appellate courts have cautioned that "[t]he phrase 'interest of justice' implies conditions 'which assist, or are in aid of or in the furtherance of, justice [and] bring about the type of justice which results when law is correctly applied and administered' after consideration of the interests of both the litigants and society (***United States v. National City Lines***, 7 F.R.D. 393, 397 [internal quotations omitted]; *see* ***Bernstein v. Strammiello***, 202 Misc. 823, 120 N.Y.S.2d 490). ***Hafkin v. N. Shore Univ. Hosp.***, 279 A.D.2d 86, 90, 718 N.Y.S.2d 379, 382 (2000); *aff'd sub nom.* ***Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d 95, 761 N.E.2d 1018 (2001).

Notwithstanding this, the Court is also cognizant that "the interest of justice" standard, being boarder than the "good cause" standard, allow the Court according to its inherent discretion to acknowledge the following factors: the expiration of the applicable statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of plaintiff's request for an extension, and the prejudice suffered by defendant in granting the

application for extension. ***Bumpus v. New York City Tr. Auth.***, 66 A.D.3d 26, 32, 883 N.Y.S.2d 99, 100 (2d Dep't 2009); *see also* ***Rosenzweig v. 600 North Street, LLC.***, 35 A.D.3d 705, 826 N.Y.S.2d 680 (2d Dep't 2006).

The Second Department has approved similar applications noting that plaintiff's time to serve process should be extended, when, as here, "[the] statute of limitations had expired, service which was timely made within the 120–day period was subsequently found to have been defective and there was no prejudice to [the defendant] who had actual notice of action" (***Chiaro v. D'Angelo***, 7 A.D.3d 746, 776 N.Y.S.2d 898 [2d Dept. 2004]).

Here, at first blush plaintiff's arguments concerning its ineffectual attempt at service on defendant appear sympathetic. However, it is equally clear that plaintiff did not exercise due diligence or employ all the reasonable methods at its disposal, which if completed, would have been reasonably calculated to provide defendant with adequate notice of this action. While true that defendant did evidence knowledge or awareness of the pendency of this action, he did not intervene in the matter or formally appear until his motion in 2016, and as a corollary, a mere three year delay in the view of this Court does not constitute such a lengthy delay or dilatory conduct to constitute laches to severely prejudice plaintiff's substantive rights. Thus the Court does not find that good cause supports defendant's application under CPLR 306-b.

On the other hand however, despite the fact that plaintiff has not shown sufficient diligence in its efforts to ascertain plaintiff's proper address or whereabouts for service purposes, the interests of justice applied here required a different analysis. Given that plaintiff's claim as a Delaware corporation must be timely under both its forum state and New York law, and that this motion comes three years after commencement of the original claim in 2013, the viability of its claims may be in jeopardy, absent granting of service extension request (*see e.g.* ***Portfolio Recovery Assocs. v King***, 14 NY3d 410 [2010][holding *inter alia* that under New York's borrowing statute CPLR 202, a Delaware domiciliary credit card company's breach of contract action accrued there and was governed by a three year and not six year statute of limitations]).

Accordingly, defendant's application pursuant to CPLR 306-b for an extension of time to properly serve plaintiff with process is **GRANTED** provided Plaintiff shall personally serve defendant with process no later than within 90 days entry of this decision.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 19, 2016

HON. WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**