SHORT ORDER FORM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
**JUSTICE** TRIAL/IAS PART 10

_____X

CHASE COLLEGIATE SCHOOL INC.,

Plaintiff,

-against-

Index No.: 600907/14
Motion Seq…02
Motion Date…07/14/16

NICHOLAS MONIODES,

Defendant.

_____X

Papers Submitted:
Order to Show Cause.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Memorandum of Law.....x
Reply Affirmation.....x

Upon the foregoing papers, the Defendant, NICHOLAS MONIODES' motion, brought by Order to Show Cause, seeking an order vacating a judgment granted on default, is determined as provided herein.

Sometime in 2012, the Plaintiff, a private school, commenced an action in the Superior Court of Connecticut seeking to recover damages from a breach of contract against the Defendant, a parent of one of the school's students. The Superior Court entered a default judgment against the Defendant for failing to pay the school's tuition.

On February 28, 2014, having not recovered on the Connecticut Judgment,

commenced this action by electronically filing a Summons and Complaint with the Nassau County Clerk. In its Complaint, the Plaintiff sought judgment against the Defendant in an effort to collect the debt in the amount of $89,889.85. A copy of the Summons and Complaint is attached to Anthony J. Centone's Affirmation in Support, marked as Exhibit "C". On June 5, 2014, a default judgment was entered in favor of the Plaintiff and against the Defendant in the amount of $90,397.35.

On May 26, 2016, the Defendant filed an Order to Show Cause, requesting the default judgment be vacated on the grounds that the Nassau County Supreme Court lacked personal jurisdiction in this matter, or, in the alternative, allowing the Defendant to file an answer to the Plaintiff's Complaint.

Both parties agree that Paul Moniodes, the father of the Defendant, was served with a Summons and Complaint at 1704 Camp Avenue, Merrick, NY 11566. (*See* a copy of the Affidavit of Service of Harry Torres annexed to Anthony J. Centone's Affirmation in Support, marked as Exhibit "D") However, counsel for the Defendant contends that service on the Defendant was improper and therefore the default judgment should be vacated. If the Summons and Complaint were not properly served, the Court would not have had jurisdiction to render a default judgment. As such, the Court must first determine whether the Defendant was properly served with the Summons and Complaint and given an opportunity to answer the claims against him. Upon rendering its decision, the Court will also determine whether the default against the Defendant should be vacated. Should the Court find that service was improper, the Complaint against the Defendant will be dismissed.

Should service be deemed proper, the Court will then go on to decide whether the default judgment shall stand.

In Anthony J. Centone's Affirmation in Support attached to the Order to Show Cause, he alleges that the Defendant, NICHOLAS MONIODES, never resided at the address the Summons and Complaint were served. Counsel submits that 1704 Camp Avenue, Merrick, NY 11566 is the address of the Defendant's parents, and that on March 5, 2014, the Defendant resided at 60 Bear Run, Woodbury, CT 06978. To support these allegations, the Defendant, NICHOLAS MONIODES, and the Defendant's mother, Sophia Moniodes, submitted affidavits.

In his affidavit, the Defendant claims that on March 5, 2014, he was living with his fiancé at 60 Bear Run, Woodbury, CT 06978 and had never resided at 1704 Camp Avenue, Merrick, NY 11566. In his Reply Affirmation, counsel annexed invoices and statements from various entities to serve as proof that the Defendant was residing in the Connecticut home. The Defendant's mother attests to the Defendant's claim in her affidavit, adding that the Defendant had never used that address for "any purpose." Ms. Moniodes also stated that she is certain her husband would "never accept anything on behalf" of the Defendant at that address. (See Affidavit of Sophia Moniodes annexed to the Order to Show Cause)

In her Affirmation in Opposition, the Plaintiff's counsel contends that 1704 Camp Avenue, Merrick, NY 11566 is in fact the Defendant's "actual place of business, dwelling place or usual place of abode", reasoning that the Defendant owns a 20% interest

in that property according to the deed. Counsel alleges her claim is confirmed by the Defendant's Lexis/Nexis report, which lists 1704 Camp Avenue, Merrick, NY 11566 as his address.

In the Plaintiff's Memorandum of Law, counsel asserts that the sworn affidavits of the Defendant and his mother do not offer any specific statements, or documentary evidence, sufficient to rebut the process server's affidavit of substitute service upon the Defendant's father. Moreover, counsel declares that no traverse hearing is required because of the inappropriate rebuttal.

To determine whether service was proper, the it must be determined whether 1704 Camp Avenue, Merrick, NY 11566 was the Defendant's "actual place of business, dwelling place or usual place of abode" on March 5, 2014. *See* CPLR § 308 (2). The evidence the Plaintiff offered is unsubstantiated and does not serve as proof that the Defendant ever resided at 1704 Camp Avenue, Merrick, NY 11566.

The facts in the multiple cases presented by the Plaintiff's counsel are easily distinguishable from the facts of the case at hand and thereby such decisions do will not serve as models for how this court should rule.

In *Krechmer v. Boulakh,* 277 A.D.2d 288, 289 (2d Dept. 2000), the court found that the defendant, a resident of Moscow, was served properly at his vacation home in New York. Although the "uncontroverted" evidence suggested the defendant was a resident of Moscow, he "sporadically" stayed at his New York home and thereby the New York home was "properly found to be his dwelling place or usual place of abode...".

In *National Dev. Co v. Triad Holding Corp.*, 930 F. 2d 253. 257 (2nd Cir. 1991), the Second Circuit found that a person can have "two or more 'dwelling houses or usual abodes'" and that service is proper where a defendant maintained one residence for "certain days of the week or certain months of the year and another residence for the balance of his time".

In *Cohen v. Levy*, 50 A.D.2d 1039, 1040 (3rd Dept. 1975), the Appellate Division found there was "ample evidence" to support the lower court's finding that the defendant resided at the home of his parents, where the defendant's mother was served.

The case at hand differs considerably from the abovementioned cases. The Plaintiff's counsel has not set forth any evidence indicating the Defendant "sporadically" lived at 1704 Camp Avenue, Merrick, NY 11566. The Plaintiff's counsel has not set forth any evidence indicating that the Defendant maintained 1704 Camp Avenue, Merrick, NY 11566 for "certain days of the week or certain months of the year…". And lastly, there is not "ample evidence" to support the allegation that Defendant resided with his parents at 1704 Camp Avenue, Merrick, NY 11566.

The only evidence set forth by the Plaintiff proving the Defendant's actual place of business, dwelling place or usual place of abode is 1704 Camp Avenue, Merrick, NY 11566, is the conceded point that the Defendant has a 20% interest in such property and that a Lexis/Nexis report lists said property as an address of the Defendant. In regard to the former, the Plaintiff cites no case law to support her argument that possessing an ownership interest in property creates an inference that such property is also that person's dwelling

place or usual place of abode. That logic is false. It is certainly possible for a person to have partial ownership in real property without actually residing at that property; this rationale can be exemplified through the examination of a real estate investor. Real estate investors invest capital into buildings, and in doing so, inevitably become partial owners of those buildings. Yet, investing capital into a building does not verify the conclusion that that building is the investor's dwelling place or usual place of abode. In fact, many investors may never even step foot into some of their buildings. The deed that the Plaintiff's counsel is presenting as evidence to support her claim of proper service actually states "NICHOLAS JOHN MONIODES, residing at *60 Bear Run, Woodbury, CT, 06798,"* contradicting her argument. Thereby, without more information, the Court concludes that having an interest in a property does not necessarily mean that property is the dwelling place or usual place of abode of that owner.

The Lexis/Nexis report indicating that 1704 Camp Avenue, Merrick, NY 11566 is or was a property of the Defendant does not suffice as evidence that endorses the idea that such property is his actual dwelling place or usual place of abode. This unofficial document only indicates that the Defendant is or once was associated with the property. Also, the Plaintiff's counsel did not conduct the Lexis/Nexis research until 7/5/16, more than two years after service of the Summons and Complaint, which indicates that at the time of service the only information counsel retained surrounding the aforementioned property is that the Defendant owned a 20% interest in said property.

While the papers presented by the Defendant is not entirely persuasive that he

was not properly served by substituted service, there are sufficient allegations made to raise the question as to whether the place of service was the Defendant's usual place of abode, to determine that service was effectuated pursuant to subdivision 2 of CPLR § 308. The Defendant provides no other proof such as a driver's license or any other indicia of residency except his denial and his mother's denial of residency. The record is otherwise inadequate to resolve the issue and the Plaintiff's reliance only on the deed to have determined that 1704 Camp Avenue, Merrick, NY 11566 was the Defendant's usual place of abode is insufficient to determine that there was due diligence. Therefore, in view of the contested critical facts, this case is remitted for further proceedings to determine the sufficiency of the Plaintiff's service on the Defendant as required by the CPLR. All the other contentions raised by the Defendant are without merit as his proof is insufficient for the Court to consider them.

Accordingly, it is hereby

**ORDERED**, that this matter shall be the subject of a traverse hearing subject to the approval of the Justice there presiding and provided a Note of Issue has been filed by the Defendant at least ten (10) days prior thereto, in the Calendar Control Part on the **20th day of September, 2016 at 9:30 a.m.** to determine whether the Defendant was served with the summons and complaint in accordance with the CPLR; and it is further

**ORDERED**, that the Defendant, NICHOLAS MONIODES, shall serve a copy of this Order on the attorney for the Plaintiff by Certified Mail Return Receipt Requested **AND** by Ordinary Mail within ten (10) days of the date of this Order. **PROOF OF SERVICE MUST BE FILED WITH THE COURT PRIOR TO SEPTEMBER 20, 2016.**

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate; and it is further

**ORDERED**, that a copy of this order shall be served on the Calendar Clerk along with the Note of Issue. The failure to file a Note of Issue as directed or appear as directed may be deemed an abandonment of the claims giving rise to the hearing; and it is further

**ORDERED**, that if, after the hearing, it is determined that service was not properly effectuated, the subject action shall be dismissed as against the Defendant; and it is further

**ORDERED**, that if, after the hearing, service is found to have been proper, the Defendants' motion to vacate the default, as requested in Motion Sequence 02, shall be denied.

All matters not decided herein are hereby **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
August 4, 2016

ENTERED

AUG 08 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

**Hon. Randy Sue Marber, J.S.C.**

HON. RANDY SUE MARBER