| **County of Suffolk v Distefano** |
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| 2019 NY Slip Op 30799(U) |
| March 25, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: 8239/2016 |
| Judge: William G. Ford |
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**SHORT FORM ORDER** **INDEX NO.: 8239/2016**

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

***PRESENT:***

**HON. WILLIAM G. FORD**
**JUSTICE OF THE SUPREME COURT**

**Motion Submit Date: 02/14/19**
**Mot Seq #: 002 - MG; RTC**

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**COUNTY OF SUFFOLK,**

**Plaintiff,**

**-against-**

**MERRIN DISTEFANO,**

**Defendant.**

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**PLAINTIFF'S COUNSEL:**
**Dennis M. Brown, Esq.**
**Suffolk County Attorney**
**By: Drew W. Schirmer, Esq.**
100 Veterans Memorial Highway, POB 6100
Hauppauge, New York 11788

**DEFENDANT - *Pro Se*:**
**Merrin Distefano - DIN # 16G0471**
Albion Correctional Facility
3595 State School Road
Albion, New York 14411

**UPON** the reading and filing the supporting affidavit of defendant Merrin Distefano, sworn to on January 23, 2019, and it appearing that defendant is entitled to proceed as a poor person, as well as on *pro se* defendant's unopposed notice of motion to vacate default judgment & affidavit in support and supporting papers; and upon due deliberation and full consideration of the same;

**NOW**, on defendant's motion for an order pursuant to CPLR 1101 granting *her* permission to proceed as a poor person to defend plaintiff's *in rem* forfeiture action, and further for an Order waiving litigation costs and fees and in further prosecution of an application to vacate a previously judgment on default; and it is

**ORDERED** that defendant Merrin Distefano be and hereby is permitted to defend plaintiff County of Suffolk's *in rem* forfeiture action action as a poor person; and it is further

**ORDERED** that the Clerk of this Court is directed to make no charge for costs or fees in connection with the prosecution of this action, including one (1) certified copy of the judgment; and it is further

**ORDERED** that defendant *pro se*'s unopposed motion to vacate a prior judgment entered against her in the underlying *in rem* forfeiture pursuant to CPLR 5015(a) is **granted** as follows; and it is further

**ORDERED** that plaintiff serve a copy of this decision and order on plaintiff by certified first class mail, return receipt requested forthwith; and it is further

**ORDERED** that, if applicable, within 30 days of the entry of this decision and order, that movant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required;

Plaintiff, Dennis M. Brown, the Suffolk County Attorney, in his capacity as the "claiming authority" on behalf of the County of Suffolk, commenced this *in rem* forfeiture action filing summons with notice on August 31, 2016 against movant-defendant seeking forfeiture of her motor vehicle, a black Hyundai, Florida registration #PD692D, allegedly used in connection with or the instrumentality of the commission of a drug-related offense, namely a violation of Pen. L. § 220.03, criminal possession of a controlled substance in the seventh degree, which occurred on March 6, 2015, to which defendant entered a plea of guilty on May 12, 2016.

Pursuant to Suffolk County Code, Article III, Chapter 420, defendant's offense subjected her vehicle to seizure and forfeiture by plaintiff, as well as the recovery of a civil penalty. Thus, plaintiff moved this Court by motion pursuant to CPLR 3215 for entry of default judgment premised upon defendant's failure to answer, appear or otherwise defend the action. This Court granted that motion unopposed rendering default judgment against defendant in plaintiff's favor on October 17, 2018, entered by the Suffolk County Clerk on December 4, 2018.

Presently, in addition to moving for poor person relief, granted above by this Court, defendant also seeks to vacate her default in this action. Defendant bases her request upon her claim that at the time plaintiff served a copy of the pleadings under CPLR 308(4) by a Suffolk County Sheriff's deputy at her premises, she was in custody of the State of New York as an inmate in Albion County Correctional Facility. Upon review of the moving papers, the Court finds that defendant is correct, and for that reason alone the default cannot stand.

Defendant originally was arrested for possession of a controlled substance by Suffolk County Police on March 6, 2015, the offense which lead to plaintiff to seek seizure and forfeiture of defendant's property. A Suffolk County Sheriff's deputy served defendant with a copy of the pleadings in plaintiff's action, making attempts at personal service on the defendant at addresses in Lake Grove, Shirley and Brookhaven, New York on September 10, October 10, October 13, October 13, November 5, and November 30, 2016. The last three attempts were based on addresses obtained from the New York State Department of Motor Vehicles. Ultimately, plaintiff's process server affixed a copy of the pleadings at defendant's premises in Lake Grove and mailed a copy as well. The affidavit of service was then filed with the Suffolk County Clerk on December 7, 2016.

In light of this, the Court granted the prior unopposed default action. However, unbeknownst to the Court at the time, as indicated in defendant's unopposed application, defendant was incarcerated at the time of plaintiff's service attempts, having been in custody as an inmate since May 24, 2016 following her guilty plea. Thus, plaintiff's attempted service was a nullity.

At the outset, the Court pauses to note that it is well settled that public policy favors the

resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373)

A defendant seeking to vacate a default in appearing or answering the complaint in an action on the ground of excusable default must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (***Codoner v Bobby's Bus Co., Inc.,*** 85 AD3d 843, 844, 925 NYS2d 352 [2d Dept 2011], *citing* CPLR 5015 [a] [1]; ***Citimortgage, Inc. v Brown,*** 83 AD3d 644, 919 NYS2d 894 [2011]; ***US Consults v APG, Inc.,*** 82 AD3d 753, 917 NYS2d 911 [2011]; ***Hageman v Home Depot U.S.A., Inc.,*** 25 AD3d 760, 761, 808 NYS2d 763 [2006]; ***Fekete v Camp Skwere,*** 16 AD3d 544, 545, 792 NYS2d 127 [2005]). A process server's affidavit constitutes *prima facie* evidence of proper service (***Reich v Redley,*** 96 AD3d 1038, 2012 NY Slip Op 5160 [2d Dept 2012]).

Whether or not service was properly effectuated is a threshold issue to be determined before consideration of discretionary relief pursuant to CPLR 5015(a)(1) (***Marable ex rel. Ralph v Williams***, 278 AD2d 459, 459–60, 718 NYS2d 400, 401 [2d Dept 2000]). "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]).

Put somewhat differently, "[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]).

It is settled that a process server's affidavit of service constitutes prima facie evidence of proper service on a corporation pursuant to CPLR 311(a)(1) (*see* ***Indymac Fed. Bank FSB v. Quattrochi,*** 99 AD3d 763, 764, 952 NYS2d 239; ***C & H Import & Export, Inc. v. MNA Global, Inc.,*** 79 AD3d 784, 784, 912 NYS2d 428; ***McIntyre v. Emanuel Church of God in Christ, Inc.,*** 37 AD3d 562, 562, 830 NY2d 261). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server affidavits" (*see* ***Countrywide Home Loans Servicing, LP v. Albert,*** 78 AD3d 983, 984–985, 912 NYS2d 96; ***Scarano v. Scarano,*** 63 AD3d 716, 716, 880 NYS2d 682; ***Rosario v. NES Med. Servs. of N.Y., P.C.***, 105 AD3d 831, 832, 963 NYS2d 295, 296–97 [2d Dept 2013]).

Thus, a defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid

the entering of a default judgment or to extend the time to answer (***Cummings v Rosoff***, 101 AD3d 713, 714, 955 NYS2d 193, 194 [2d Dept 2012]; ***Ennis v. Lema***, 305 AD2d 632, 633, 760 NYS2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

Furthermore, as applicable here, it is settled that the mere denial of receipt of the summons and the complaint is insufficient to rebut the presumption of proper service created by the affidavit of service (***Bank of New York v Samuels***, 107 AD3d 653, 654, 968 NYS2d 93, 95 [2d Dept 2013][[t]he mere denial of receipt of the summons and complaint is ... insufficient 'to establish lack of actual notice]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 753–54, 941 NYS2d 679, 680 [2d Dept 2012][" mere denial by corporate defendant of service of the summons and the complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service"]).

Having reviewed defendant's arguments and the motion record, the Court determines that defendant has met her *prima facie* burden of establishing a reasonable excuse for failing to answer or appear in the underlying forfeiture action. Further, by raising a triable question of whether defendant was properly served at all, as a meritorious defense to the entire matter, defendant raises a jurisdictional objection that this Court lacks power over her *in personam* premised upon plaintiff's failure to properly serve her with process. This is because at least one New York court has previously determined that under similar circumstances, the provision of legal process or service of notices or pleadings on an inmate at his usual dwelling place or abode constitutes deficient service (*see* ***JP Morgan Chase Bank, N.A. v Peters***, 55 Misc3d 849, 852, 53 NYS3d 460, 463 [Sup Ct, New York Co. 2017][finding that prison is not defendant's usual place of abode because "[a] degree of permanence and stability cannot be ascribed to a location to which the sovereign involuntarily places a person in cases not involving long term imprisonment"]).

This Court is aware that on occasion the Appellate Division has denied an incarcerated defendant's application to vacate default based on a failure to appear due to incarceration (*see e.g.* ***In re Deyquan M.B.***, 124 AD3d 644, 645, 1 NYS3d 345, 346 [2d Dept 2015][affirming Family Court's denial of defendant's motion to vacate her default for lack of reasonable excuse, premised upon movant's failure to adequately explain her absence to the court or counsel]); ***In re Fa'Shon S.***, 40 AD3d 863, 836 NYS2d 636, 637 [2d Dept 2007][affirming denial of motion to vacate default on movant's failure to offer a reasonable excuse based upon movant's failure to explain lack of notice to counsel or the court of his imprisonment]; *accord* ***Womack v Rosario***, 50 AD3d 1212, 1213, 855 NYS2d 698, 699–700 [3d Dept 2008][affirming denial of movant's application to vacate default for failure to present reasonable excuse where movant failed to refute motion court's finding that movant refused to be transported from jail to the courtroom to attend court proceedings]).

This body of law is however distinguishable from these facts, where, as here, defendant was arrested by the County's own police department, prosecuted by prosecutors in its courts, and then sentenced to incarceration in an upstate correctional facility. As between the two parties, the County certainly had the wherewithal and resources to render a simple factual investigation

to determine defendant's whereabouts at the time of the commencement of this action. Reliance on the NYS DMV records in all other instances may prove reasonable as a general proposition. However, under the particular facts and circumstances presented, the Court determines that the County, had it done a cursory investigation, particularly given it was already aware of the defendant's underlying criminal offenses leading it to seek seizure and forfeiture, was well positioned to do further digging. Had it done so, proper service may have been rendered obviating defendant's motion practice. More telling is the County's lack of opposition to defendant's application.

Given all of the foregoing, the Court **grants** defendant's application and **vacates** the judgment entered on default rendered October 17, 2018, and entered by the Clerk of the Court on December 4, 2018; thus, accordingly it is

**ORDERED** that the Suffolk County Clerk **vacate and recall** the default judgment previously entered accordingly as consistent with this Court's decision and order; and it is further

**ORDERED** that plaintiff shall have 45 days from service of this decision and order with notice of entry to effectuate proper service of process on the defendant or discontinue this action, as the case may be; and it is further

**ORDERED** that defendant shall join issue and answer the pleadings **no later than** 30 days from service on her; and it is further

**ORDERED** that the parties and their counsel, if any, are directed to appear before this Court for a status conference on **July 16, 2019 at 10:00 am** in Courtroom 230-A at 1 Court Street, Riverhead, New York.

The foregoing constitutes the decision and order of this Court.

Dated: March 25, 2019
Riverhead, New York

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

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**