At an IAS Term, DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of May, 2019.

PRESENT:

LAWRENCE KNIPEL,
Justice.

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CLARENCE HARGROVE,

Plaintiff,

- against -

SHARON HARGROVE-BOYNTON,

Defendant.

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DECISION AND ORDER

Index No. 512519/16

Mot. Seq. No. 5

The following e-filed papers read herein:	NYSCEF No.:
Order to Show Cause, Affirmations (Affidavits), and Exhibits Annexed	235, 227, 229, 234, 236, 132-177
Affirmations (Affidavits) in Opposition, Memoranda of Law, and Exhibits Annexed	237-241, 242, 243-270, 271-286, 293-297

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By order to show cause, dated March 11, 2019, defendant Sharon Hargrove-Boynton (defendant) moves for an order: (1) restoring the action to the active calendar; (2) pursuant to CPLR 1015 and 1021, substituting Gladys Wesley, as Executor of the Estate of Clarence Hargrove, Deceased, in place of Clarence Hargrove as plaintiff; (3) pursuant to CPLR 5015 (a) (4), vacating defendant's default, as established by the order, dated October 13, 2016 (Bayne, J.) (NYSCEF #20) (the default), and, thereupon, dismissing the action for lack of personal jurisdiction; (4) dismissing the action on the ground that defendant, a member of a religious sect known as the Hebrew Israelites, was served with process on a Saturday in violation of General Business Law § 13; (5) pursuant to CPLR 5015 (a) (1), vacating the default; (6) vacating, canceling, and expunging certain conveyances and encumbrances pertaining to a two-family residential real property located at 1653 Lincoln

Place in Brooklyn, New York; (7) pursuant to CPLR 3012 (d) and 2004, enlarging her time to answer the complaint; (8) - (11) pursuant to CPLR 1001 and RPAPL 1511, joining each of Abraham Veizman, 1653 Lincoln Place LLC, Federal National Mortgage Association as successor to Federal Savings Bank, and Mortgage Electronic Registration Systems, Inc. as party defendants; (12) - (13) pursuant to CPLR 1001, joining each of Brenda Hargrove and Glenn Hargrove as party defendants; and (14) amending the caption accordingly.

Defendant's order to show cause is *granted to the extent* that: (1) the matter is restored to the active calendar; (2) Gladys Wesley, as Executor of the Estate of Clarence Hargrove, Deceased, is substituted as plaintiff and the caption is amended accordingly; and (3) *the remainder* of defendant's order to show cause is *denied* for the reasons stated below as to the branches numbered 3 through 5, and is further *denied as moot* to the remaining branches numbered 6 through 14.

First. It is well established that "[a] party is precluded from moving to vacate its default on grounds asserted in a prior motion to vacate the default that had been previously denied in an order from which it took no appeal as well as on grounds that were apparent at the time that the party made the prior motion but were not asserted therein" (*A.G. Parker, Inc. v 246 Rochester Partners, LLC*, 165 AD3d 743, 744 [2d Dept 2018]). Here, the Court, by order, dated Nov. 17, 2016 (NYSCEF #22), rejected defendant's prior request for vacating the default (hereafter, the first order to show cause). The branch of defendant's instant order to show cause which is pursuant to CPLR 5015 (a) (4) to vacate the default for lack of personal jurisdiction must be denied, since that branch is premised on grounds that were apparent at the time defendant moved to vacate the default, but she did not assert any of them in the first order to show cause (NYSCEF #23).

Second. An independent reason for denying defendant relief in vacating the default is her persistent waiver of the defense of personal jurisdiction. "A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss" (*Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 628 [2d Dept 2014]). Here, defendant failed to raise any jurisdictional objections in any of the following: (1) the first order to show cause, (2) her pro se verified answer, dated November 10, 2016 (NYSCEF #21), and (3) her proposed answer, dated January 17, 2018, prepared by her counsel and also verified by defendant (NYSCEF #41).

Third. Contrary to defendant's contention, she is not entitled to a hearing on whether service of process violated General Business Law (GBL) § 13. That statute provides, in relevant part, that:

> "Whoever *maliciously* procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, . . . is guilty of a misdemeanor" (emphasis added).

Service of process in violation of GBL 13 is void, and personal jurisdiction is not obtained over the party so served (*see JPMorgan Chase Bank, N.A. v Lilker*, 153 AD3d 1243, 1245 [2d Dept 2017]). To establish a violation of GBL 13, malicious intent must be shown (*id.*; *Chase Manhattan Bank, N.A. v Powell*, 111 Misc 2d 1011, 1013 [Sup Ct, Nassau County 1981]).

Here, defendant has not met her burden under GBL 13 by failing to submit any evidence to demonstrate malicious intent by plaintiff or his counsel in serving her on a Saturday. Unlike *Lilker*, defendant has submitted no evidence that plaintiff or his counsel was aware that she

observed a Saturday as holy time and did not labor on that day. Rather, defendant merely avers in her affidavit that:

> "Brenda Hargrove, my mother, is also a Hebrew Israelite and knows our tradition well. My attorney tells me that Brenda purportedly has a power of attorney from Mr. Hargrove and engineered the commencement of this action. Given that Ms. Hargrove knows of our religious tradition, it was inappropriate to serve us process . . . on a Sabbath."

(NYSCEF #132, ¶ 60).

This statement, without any evidence to demonstrate malicious intent by plaintiff or his counsel, is insufficient to establish a prima facie violation of GBL 13, necessitating a hearing (*see Hudson City Savings Bank, FSB v Schoenfeld*, ___ AD3d ___, 2019 NY Slip Op 03324 [2d Dept 2019], *affg* Sup Ct, Westchester County, Nov. 29, 2017, Giacomo, J., index No. 62742/15).[1]

The caption of the action is amended to read as follows:

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GLADYS WESLEY, as Executor of Estate
of CLARENCE HARGROVE, Deceased,

Plaintiff,

- against - Index No. 512519/16

SHARON HARGROVE-BOYNTON,

Defendant.
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This constitutes the decision and order of the Court.

ENTER FORTHWITH

J. S. C.
Justice Lawrence Knipel

KINGS COUNTY CLERK
FILED
2019 JUN -5 AM 9:36

[1] Justice Giacomo's Decision & Order is available at NY St Cts Electronic Filing Doc No. 32, https://iapps.courts.state.ny.us/nyscef/CaseSearch (complete CAPTCHA, search by case index No. 62742/2015, click on index No. hyperlink).