

<b>Milky Way II LLC v Palaguachi</b>
2019 NY Slip Op 32350(U)
August 5, 2019
Supreme Court, New York County
Docket Number: 150299/2017
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES** PART IAS MOTION 59EFM

*Justice*

-----X

MILKY WAY II LLC,

Plaintiff,

- v -

OLMEDO PALAGUACHI,

Defendant.

-----X

INDEX NO. 150299/2017

MOTION DATE 07/09/2019

MOTION SEQ. NO. 002

**INTERIM DECISION + ORDER  
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for VACATE DEFAULT IN OPPOSING

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion to vacate its default (Motion Sequence Number 002) in opposing defendant's motion to vacate his default in answering the complaint (Motion Sequence Number 001) is GRANTED without opposition; and it is further

ORDERED that now considering the opposing affirmation of plaintiff, the motion of defendant to vacate its default is GRANTED on the merits to the extent that there shall be a traverse hearing on whether the plaintiff properly served process upon the defendant; and it is further

ORDERED that the defendant's motion to vacate his default in answering the complaint (Motion Sequence Number 001) is held in abeyance; and it is further

ORDERED that this matter having come on before this court on July 9, 2019, on the motion to vacate the default of plaintiff in opposing defendant's motion to vacate his default in answering the complaint, and the court having granted such motion and vacated such default in opposing the motion without opposition, and the court having now once again granted the defendant's default in vacating its default in answering the complaint, on the merits, to the extent that defendant has raised an issue of fact as to whether this court has personal jurisdiction over such defendant, and, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, and it appearing to the court that an appointment is appropriate, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of whether service upon defendant was proper, conferring personal jurisdiction over such defendant; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR, and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff, within 15 days from the date of entry of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be

authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the issues presented in any motion identified in third paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon, and it is further

ORDERED that the parties shall appear for oral argument on the motion to confirm or disaffirm the Report of the JHO/Special Referee, which motion shall be fully submitted by the parties prior thereto, on October 15, 2019, 2:30 PM in IAS Part 59, 60 Centre Street, Room 331, New York, New York.

DECISION

By affidavit, under oath on January 24, 2019, submitted in support of his motion to vacate his default (Motion Sequence Number 001), defendant raises an issue of fact whether

service was properly effectuated upon him. He states, "I do not live in 1RR apartment of the address 3504 92<sup>nd</sup> Street, Jackson Heights, New York 11372", the latter address of which is where the process server, by affidavit of service, states, under oath, that he delivered the process personally to defendant. Thus an issue of fact is raised whether the process server found defendant at 7:48 PM on Thursday, January 19, 2017, at a location where he asserts that he does not reside.

8/5/2019  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE