

**Kingdom of Sweden v von der Burg**

2023 NY Slip Op 30597(U)

February 28, 2023

Supreme Court, New York County

Docket Number: Index No. 652296/2022

Judge: Louis L. Nock

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

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KINGDOM OF SWEDEN ON BEHALF OF THE SWEDISH  
BOARD OF STUDENT FINANCE (CSN),

Plaintiff/Judgment-Creditor,

- v -

PATRICIA VON DER BURG,

Defendant/Judgment-Debtor.

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**INDEX NO.** 652296/2022

**MOTION DATE** 01/10/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

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

were read on this motion to

VACATE JUDGMENT

LOUIS L. NOCK, J.

Upon the foregoing documents, and after argument, it is ordered that the motion by defendant *pro se* to vacate a default judgment (NYSCEF Doc. No. 21) is granted to the extent set forth in the following memorandum.

This matter was commenced on July 1, 2022, as a motion for summary judgment in lieu of complaint (CPLR 3213) (motion seq. no. 001), seeking recognition, pursuant to CPLR article 53, of a Swedish court judgment issued against the defendant in a principal amount of 619,951 Swedish kronor, relating to defendant's defaults in payment of her student loan obligations to the plaintiff, Kingdom of Sweden on behalf of The Swedish Board of Student Finance (CSN). This court granted that motion – on default and without opposition – by decision and order filed November 10, 2022 (NYSCEF Doc. No. 14), and a judgment ensued thereafter pursuant to that decision and order, issued by the Clerk of the County of New York, in the currency-converted principal amount of 77,356.41 U.S. dollars (NYSCEF Doc. No. 21).

Presently before the court is a motion by the defendant *pro se* (seq. no. 002) to vacate the New York judgment on grounds of lack of service of process in this proceeding. The record contains an affidavit of service of process, regular on its face, attesting to service of the initiatory papers at defendant's Manhattan residence pursuant to CPLR 308 (2) ("delivery . . . to a person of suitable age and discretion at the . . . dwelling place or usual place of abode of the person to be served") on August 3, 2022 (NYSCEF Doc. No. 13). Defendant *pro se* submits an affidavit attesting that she was out of this country during the time of said service, corroborated by copies of airline tickets to and from Sweden spanning the period June 1, 2022, to August 31, 2022 (*see*, NYSCEF Doc. Nos. 23, 31). Defendant further submits an affidavit challenging the facts stated in the affidavit of service of process and attesting that no one of the description set forth in the affidavit of service of process as the pertinent "person of suitable age and discretion" has ever been at her residence (*see*, NYSCEF Doc. No. 32).

The defendant's sworn statements contradicting the process server's allegations of service render it impossible for this court to resolve the issue of service of process without the benefit of a traverse hearing (*e.g.*, *Ananda Capital Partners, Inc. v Stav Electrical Sys. Ltd.*, 301 AD2d 430 [1<sup>st</sup> Dept 2003]). Consequently, a traverse hearing will be convened before this court at which the process server, the defendant, and any other relevant witness may come forward and testify as to the incidents of service of process in this matter, subject to subpoena process.<sup>1</sup>

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<sup>1</sup> Should the court find, at the conclusion of traverse, that personal jurisdiction *has* been obtained, the defendant's motion transforms, in effect, to one for vacatur of default judgment on grounds of reasonable excuse and meritorious defense. The court now finds that, while reasonable excuse for defendant's default in this proceeding *does* exist by virtue of her demonstrated non-presence in the United States during the period of service, no meritorious defense has been presented. The main gist of defendant's affidavit testimony, apart from the portion contesting service of process, occupies itself with her economic difficulties and her practical inability to pay the judgment amount (*see*, NYSCEF Doc. Nos. 23, 24). At one point, defendant essentially concedes her obligation to pay, but explains that she ceased having the ability to pay as of August 2020 (*see*, NYSCEF Doc. No. 23 ¶ 2). It is elementary that an inability to pay an obligation is not a defense to a proceeding seeking to enforce the obligee's rights.

A remaining point raised by defendant directs itself to the nine percent interest rate set forth in the judgment (*see*, NYSCEF Doc. No. 21). Defendant posits that a two percent rate ought to apply pursuant to CPLR 5004 (a), which provides that:

The annual rate of interest to be paid in an action arising out of a consumer debt where a natural person is a defendant shall be two per centum per annum (i) on a judgment . . . entered on or after the effective date . . . which amended this section . . . .<sup>[2]</sup>

Defendant posits that her student loan obligation to plaintiff falls into the category of “a consumer debt” that is the subject of the above-quoted two-percent interest rate provision, and not subject to the ordinary nine percent statutory rate of interest on judgments (CPLR 5004 [a]). Defendant’s thesis is incorrect:

CPLR 5004’s definition of “consumer debt” makes explicit reference to “a consumer credit transaction, as defined in subdivision (f) of section one hundred-five of this chapter” (CPLR 5004 [b]). CPLR 105, in turn, defines “consumer credit transaction” as “a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes” (CPLR 105 [f]). As a corollary to this, 22 NYCRR § 202.27-a (Uniform Civil Rules for Supreme and County Courts) expressly excludes student loans from the definition of “a consumer credit transaction.” Therefore, the interest rate of nine percent set forth in the judgment (NYSCEF Doc. No. 21), applicable to judgments generally, is correct in this matter.

Seeing as the only issue to be determined is the sufficiency of service of process, the court will engage further proceedings in the nature of a traverse hearing as hereinafter decreed.

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<sup>2</sup> The amended section’s effective date was April 30, 2022; the commencement of this proceeding was July 1, 2022.

By virtue of the foregoing, it is

ORDERED that defendant’s motion to vacate the default judgment in this matter is granted to the extent that a traverse hearing will be conducted on March 21, 2023, at 11:30 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York; and it is further

ORDERED that any efforts to enforce the default judgment in this matter (NYSCEF Doc. No. 21) are hereby enjoined pending the hearing and determination of the aforesaid traverse hearing, and that said judgment is, accordingly, stayed pending same.

This will constitute the decision and order of the court.

ENTER:

<u>2/28/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER