

**Commonwealth Land Title Ins. Co. v  
Sky Abstract, LLC**

2024 NY Slip Op 32694(U)

August 2, 2024

Supreme Court, New York County

Docket Number: Index No. 159204/2015

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. DAVID B. COHEN **PART** **58**

*Justice*

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COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Plaintiff,

- v -

SKY ABSTRACT, LLC, FAY FARKAS, GEORGE  
ARCHAKIS, KYRIAKI STYLIANOU,

Defendant.

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**INDEX NO.** 159204/2015

**MOTION DATE** 05/08/2024

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this breach of contract action, nonparty Yoel Weisshaus (movant) moves, pursuant to CPLR 5015, to vacate this Court’s decision and order dated October 21, 2016.

I. Factual and Procedural Background

Plaintiff, a title insurance company, commenced this action against defendants in 2015 alleging causes of action for, among other things, breach of contract, fraud, breach of fiduciary duty, and breach of the duty of good faith and fair dealing (Doc No. 1). After defendants failed to answer the complaint or otherwise appear in this action, plaintiff moved for a default judgment against them (Doc No. 6). By decision and order dated November 22, 2016, plaintiff’s motion was granted on default (Doc No. 28), and a judgment was entered against defendants shortly thereafter (Doc No. 34).

In December 2023, movant obtained a default judgment against defendant Fay Farkas in a separate action bearing index number 036092/2023 in Supreme Court, Rockland County (Doc No.

55). Movant then proceeded to move by order to show cause (Seq. 002) in this Court seeking to vacate the default judgment as against Farkas obtained by plaintiff, arguing that this Court lacked jurisdiction over Farkas (Doc Nos. 40-41). By decision and order dated January 22, 2024, this Court declined to sign the order to show cause and concluded that movant's jurisdictional arguments were meritless (Doc No. 50). In support of its conclusion, this Court cited, among other authority, *Khan v Hernandez*, 122 AD3d 802 (2d Dept 2014), for the proposition that plaintiff's failure to timely file proof of service upon Farkas within 20 days of service was not a jurisdictional defect preventing Farkas from being found in default.

Movant now moves (Seq. 003) to vacate the default judgment against Farkas because the Court lacked jurisdiction over Farkas, reiterating the contentions he raised in support of his prior motion by order to show cause (Doc No. 53). Plaintiff opposes the motion and cross-moves for an extension of time to file its proof of service (Doc Nos. 59 and 62).

## II. Legal Analysis and Conclusions

### A. Movant's Motion to Vacate

Movant contends that the default judgment against Farkas should be vacated because this Court lacked jurisdiction over Farkas. He contends further that although it was proper to conclude that plaintiff's failure to timely file a proof of service was not a jurisdictional defect, this Court erred by not issuing an order curing the irregularity and allowing Farkas time to answer. Movant also contends that he has standing to challenge the default judgment based on his status as a judgment creditor of Farkas, and that the Court should use its inherent authority to vacate prior orders. Plaintiff maintains in opposition that vacating the prior order would be "inequitable."

Movant's contentions center around this Court's citation to *Khan v Hernandez* in the January 2024 order. That case was cited to support the proposition that the failure to timely file

proof of service “does not constitute a jurisdictional defect” (Doc No. 50 at 1), which movant does not dispute. Instead, he argues that *Khan* prohibits a court from retroactively finding Farkas in default. According to movant, *Khan* required this Court to issue an order curing the irregularity caused by the untimely proof of service and then provide Farkas thirty days to answer after being served with a copy of the curing order.

Movant is correct that in *Khan*, the Second Department held that a court cannot retroactively place a defendant in default when it cures a procedural irregularity caused by a failure to timely file proof of service (*Khan*, 122 AD3d at 803). However, *Khan* is not binding precedent on this Court where there is contrary authority in the First Department (*see generally Matter of Goffredo v City of New York*, 33 AD3d 346, 348-349 [1st Dept 2006] [holding that Second Department precedent is not binding on First Department]).

Despite contrary rulings in the other three Judicial Departments of the Appellate Division (*see e.g. First Fed. Sav. & Loan Assn. of Charleston v Tezzi*, 164 AD3d 758, 760 [2d Dept 2018]; *Miller Greenberg Mgt. Group, LLC v Couture*, 193 AD3d 1273, 1275 [3d Dept 2021]; *Discover Bank v Eschwege*, 71 AD3d 1413, 1414 [4th Dept 2010]), the First Department does not require a court to issue an order curing the irregularity caused by an untimely filed proof of service. According to First Department precedent, the failure to file proof of service within 20 days “is a mere irregularity rather than a jurisdictional defect and does not render the service of process a nullity,” and service is deemed complete ten days after proof of service is filed (*General Ins. v Leandre*, 224 AD3d 427, 428 [1st Dept 2024]; *see Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]).

Here, plaintiff filed the affidavit of service upon Farkas on January 21, 2016, meaning service upon Farkas was deemed complete ten days later on January 31, 2016. Thus, this Court

obtained jurisdiction over him at that time and deciding plaintiff’s default judgment motion was not improper (see *General Ins.*, 224 AD3d at 427-428 [concluding motion court should have granted default judgment motion against certain defendants because service was deemed complete 10 days after motion for default judgment filed with late proof of service included]; *Reem Contr.*, 117 AD3d at 584 [finding service deemed complete ten days after filing of late proof of service]).

B. Plaintiff’s Cross-Motion to Extend the Filing Time

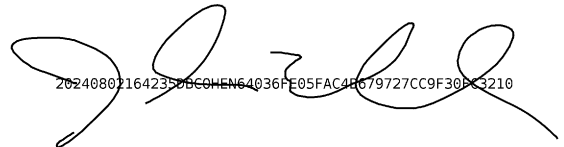
Based on the findings above that movant is not entitled to vacatur of the default judgment as against Farkas, it is unnecessary to address plaintiff’s cross-motion for an extension of time to file proof of service.

The parties remaining arguments are either without merit or do not need to be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that the motion by nonparty Yoel Weisshaus to vacate the default judgment as against defendant Fay Farkas is denied; and it is further

ORDERED that plaintiff’s cross-motion is denied as academic.



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DAVID B. COHEN, J.S.C.

8/2/2024  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: