SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **5M**

Justice

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AMMY VENTURA,

Plaintiff,

- v -

CITY OF NEW YORK, WIDLER LUCAS

Defendant.

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INDEX NO. 153283/2023

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

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

Defendant Widler Lucas ("Defendant") moves by Order to Show Cause to vacate the Default Order entered March 4, 2024 (docketed March 6, 2024) and to vacate the Notes of Issue filed on February 21, 2025 (NYSECF Docs. 47 & 48). Defendant also asks that (a) his proposed answer (with counterclaims) be deemed filed *nunc pro tunc*, (b) the matter be restored to the active calendar, and (c) a preliminary conference be scheduled so the action may proceed on the merits. The motion is supported by the affirmation of Michael Lumer and the affidavit of Widler Lucas. Plaintiff Ammy Ventura ("Plaintiff") opposes. The parties' principal submissions appear on the record before the court.

BACKGROUND AND PROCEDURAL HISTORY

The chronology of events, as reflected in the record, is as follows. Plaintiff commenced this action by filing the original Complaint on April 11, 2023 (NYSCEF Doc. 1). An affidavit of service was thereafter filed, attesting to alleged service on April 14, 2023 at One Police Plaza.

On May 22, 2023, Plaintiff filed a first amended complaint ("FAC") (NYSCEF Doc. 5). Three days later, on May 25, 2023, Plaintiff moved for a default judgment against defendant Lucas. That application was denied by the court on August 3, 2023, on the ground that the original complaint had been superseded and thus could not serve as a valid basis for default.

Subsequently, on August 1, 2023, Plaintiff filed a second amended complaint ("SAC") (NYSCEF Doc. 16). Plaintiff's counsel submitted an affirmation of service averring that the SAC had been mailed to "Widler Lucas, One Police Plaza, New York, New York 10038." The record, however, contains no affidavit of personal service of the SAC, nor any proof that an authorized individual at defendant's actual place of business or residence accepted service.

Plaintiff thereafter renewed her default application. On March 4, 2024, the court entered an order granting default as to defendant Lucas (the "Default Order"), which was docketed on March 6, 2024 (NYSCEF Doc. 41). The Default Order recited service of the original complaint on April 14, 2023 and defendant's failure to appear. It further directed Plaintiff to serve a copy of the order on defendant within twenty days of its upload to NYSCEF. The record, however, contains no contemporaneous proof that such service was effected within the prescribed period.

Meanwhile, Plaintiff and the City of New York reached a settlement on December 21, 2023 in the amount of $1,200,000. The stipulation of discontinuance dismissing the City was filed on February 27, 2024. On February 21, 2025, Plaintiff filed two Notes of Issue (NYSCEF Docs. 47 & 48).

Defendant now moves to vacate both the Default Order and the Notes of Issue, arguing that the operative pleading—the SAC—was never personally served upon him; that the Default Order rests upon a superseded complaint and is therefore a nullity; and that he possesses meritorious defenses, as reflected in his proposed answer and counterclaims. In support, defendant submits the sworn affirmation of his counsel and his own sworn affidavit. Plaintiff opposes, contending that the affidavit of service constitutes prima facie proof of proper service; that defendant had actual notice of the action through disciplinary proceedings and media coverage; that his nearly two-year delay was willful; and that vacatur would cause prejudice, as she has already secured a substantial settlement with the City and the matter now stands at inquest against Lucas.

ARGUMENTS

Defendant contends he was never personally served with the operative pleadings (FAC or SAC) while they were operative. The only service attempted after the complaint was mailing the SAC to One Police Plaza without identifying rank, shield number, command, tax number, certified mail, or proof of personal delivery; no attempt at personal service at his actual place of business (11 Front Street, Brooklyn) or residence was made. Defendant avers that he did not receive any papers until after the pleadings had been amended and that he did not authorize anyone (criminal counsel assigned by his union) to accept service in this civil action. Defendant further observes that the court previously denied Plaintiff's first default motion on the ground that the complaint had been superseded. Defendant argues the Default Order therefore rested on a superseded pleading and is a legal nullity; he asks the court to vacate the default and the Notes of Issue, deem his answer filed *nunc pro tunc*, and restore the action to the active calendar.

Plaintiff relies on the affidavit of service filed on the docket as prima facie proof of service of the original complaint (and contends Defendant therefore was in default). Plaintiff also argues that Defendant had actual notice of the litigation through NYPD disciplinary proceedings, press coverage and other events; that Defendant's failure to appear (for nearly two years) was willful; that Defendant cannot show a meritorious defense because he admitted misconduct in administrative/disciplinary proceedings; and that vacating the default now would prejudice Plaintiff — who has already settled with the City and is awaiting an inquest to determine damages against Lucas. Plaintiff asks the court to deny the instant motion and proceed to damages inquest.

DISCUSSION

This court must determine whether vacatur of the Default Order is warranted. In deciding a motion to vacate a default judgment or an order of default, New York courts consider (1) whether the defendant can demonstrate a reasonable excuse for the default, (2) whether the defendant can demonstrate a meritorious defense, and (3) whether vacatur would prejudice the plaintiff (*see Matter of Jones*, 128 AD2d 403 [1st Dept 1987]; *Justus v. Justus*, 92 AD2d 858 [2d Dept 1983]; *Small v. Applebaum*, 79 AD2d 572 [1st Dept 1980]). The proponent of vacatur need not conclusively prevail on the merits at this stage; the showing of a meritorious defense is necessarily at a threshold level — the defendant must show facts that, if proven, would constitute a defense (*see Mitchell v. Mid–Hudson Med. Assocs*., 213 AD2d 932 [3d Dept 1995]).

The court's analysis proceeds in three parts: (I) service and jurisdiction; (II) reasonable excuse and meritorious defense; and (III) prejudice and the equities.

I. Service and personal jurisdiction: strict compliance with CPLR § 308

It is black-letter law that service of process must be made in strict compliance with the statutory methods set forth in CPLR § 308 (*see Estate of Waterman v. Jones*, 46 AD3d 63, 65–66 [2d Dept 2007][*citing Macchia v. Russo*, 67 NY2d 592 [1986]; *Dorfman v. Leidner*, 76 NY2d 956 [1990]). Service by mail alone, without personal delivery or an authorized agent, does not establish personal jurisdiction in most circumstances; the "nail-and-mail" method under CPLR § 308(4) is expressly limited to situations where service under paragraphs (1) and (2) cannot be made with due diligence and then requires both affixing and mailing. The statutory scheme contemplates personal delivery to the person to be served (CPLR § 308[1]) or delivery to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode (CPLR § 308[2]), or personal delivery to a designated agent (CPLR § 308[3]). CPLR §308(4) and §308(5) provide narrowly circumscribed alternatives, but those alternatives require a showing of due diligence or specific court permission.

Here, the record shows the following undisputed facts (or facts found credible by the court): (1) Plaintiff filed the FAC on May 22, 2023 and later the SAC on August 1, 2023; (2) Plaintiff's proof on the docket relating to the SAC shows only mailing to One Police Plaza without identifying information (rank, shield/tax number, assignment/command) and without proof of personal delivery, certified mail receipt, or leave of court authorizing mail service; and (3) Defendant asserts—and credibly avers by sworn affidavit—that he worked at 11 Front Street, Brooklyn (the Property Division) at the time the pleadings were filed and was not personally served at that location (or elsewhere) with any operative pleading while it was operative. Defendant's affidavit is specific, detailed and is accompanied by corroborating particulars in counsel's affirmation (the timing of the SAC, the manner of attempted service reflected in Plaintiff's own affirmation, the docket entries reflecting the prior denial of the first default motion).

Plaintiff correctly notes that an affidavit of service is prima facie proof of service (*see, e.g., Krebs v. Raborg*, 30 AD2d 520 [1st Dept 1968]). But a prima facie showing can be overcome by credible, specific proof that service was not in fact effected in accordance with CPLR § 308. Where the defendant submits a sworn affidavit contradicting the affidavit of service and the affidavit is supported by details showing the infirmity of the claimed service method (for example, mailing to

an institutional address without any effort at personal delivery or without leave for mail service), courts have found the affidavit of service rebutted and have vacated defaults on that basis (*see Est. of Waterman v. Jones*, *supra*; *Macchia v. Russo*, *supra*. The record here shows precisely such a deficiency: the SAC—which was the operative pleading when default practice continued—was not shown to have been personally delivered to Defendant or to a person of suitable age and discretion at his place of business or abode, nor was leave obtained under CPLR § 308(5) to effect service by mail to a police headquarters address. Under the circumstances, the court concludes that Plaintiff's proof of service is insufficient to establish personal jurisdiction over Defendant as to the SAC.

It is well settled that an amended complaint supersedes the original complaint, thereby rendering the superseded pleading without legal effect as a basis for further default practice (*Nimkoff Rosenfeld & Schechter v. O'Flaherty*, 71 AD3d 533 [1st Dept 2010]; *Chalasani v. Neuman*, 64 NY2d 879 [1985]; *Matter of Maddock E. (Luis E.)*, 138 AD3d 559 [2d Dept 2016]). The court's earlier ruling denying Plaintiff's first default motion (Aug. 3, 2023) rests on precisely that principle: once the FAC was filed the original complaint was no longer a viable basis for default. The subsequent Default Order (Mar. 4, 2024), insofar as it relied on the original complaint and on alleged April 2023 service of that complaint, failed to account for (and did not adequately address) the superseding amended pleadings and the absence of proof of personal service of the operative SAC. That omission is material. Because the SAC superseded the original pleading, the court cannot treat alleged service of the superseded complaint as a sufficient basis for an enforceable default as to the currently operative pleading unless the plaintiff also shows proper service of the operative pleading — which she has not done. Under controlling authority, the default entered on the record in these circumstances is legally infirm (*see Nimkoff Rosenfeld & Schechter*, *supra*; *Chalasani*, *supra*).

II. Reasonable excuse and meritorious defense

Even were the court to consider the three-factor vacatur framework, the balance of factors favors vacatur. Defendant's affidavit explains (with specificity) that (a) he did not receive the operative pleadings while they were operative, (b) the attempted "service" of the SAC consisted only of a mailing to One Police Plaza lacking identifying information and without any attempt to effect personal delivery, (c) he was arrested/suspended in August 2023 and was involved in criminal/disciplinary proceedings that occupied the same period, and (d) the docket and Plaintiff's own filings reflect procedural irregularities (including the court's earlier denial of the first default motion and the delayed filing of Note(s) of Issue and Notice of Entry). Taken together, those circumstances provide a reasonable excuse for his nonappearance in this civil litigation prior to the institution of the present motion. New York doctrine recognizes that defaults caused by confusion over service, by serious personal/administrative impediments, or by credible mistakes not amounting to deliberate evasion may furnish a reasonable excuse for failure to answer (*see, e.g., Matter of Jones*, *supra*. The court credits Defendant's sworn account and finds that a reasonable excuse has been shown.

Plaintiff contends defendant's delay was willful and that press coverage or administrative admissions preclude a finding of reasonable excuse. But press coverage or public knowledge of allegations is not the same as proof that defendant received the operative civil pleadings. The

record does not show personal delivery of the SAC or of subsequent motion papers to defendant or to an authorized agent. Where, as here, the asserted service rests on a mailing to a police headquarters address without identification and without leave, Defendant's specific sworn denial of receipt is entitled to weight (*see Estate of Waterman v. Jones, supra*; *Macchia v. Russo, supra*). Defendant has offered a non-frivolous, fact-based explanation for his failure to appear that the Court finds credible.

To obtain vacatur the defendant must also demonstrate a meritorious defense; the standard at this stage is not proof of the defense at trial but a showing that the proposed defense is colorable and, if established, would bar plaintiff's recovery (*see Mitchell v. Mid–Hudson Med. Assocs., supra*; *Hunter v. Enquirer/Star, Inc.*, 210 AD2d 32 [1st Dept 1994]). Defendant's proposed answer (submitted as Exhibit N) contains specific denials of Plaintiff's allegations and asserts counterclaims (including for malicious use and abuse of process) that, if supported by admissible evidence, could bar or reduce Plaintiff's recovery. The criminal/disciplinary disposition documents in the record (including a Certificate of Disposition attached to Defendant's papers) further bear on witness credibility and the factual context of Plaintiff's claims. At the threshold level required on this motion, the court finds that Defendant has proffered a colorable and legally cognizable defense. The showing satisfies the "meritorious defense" prong.

Plaintiff argues that Defendant's administrative or disciplinary admissions (or an asserted guilty plea) are conclusive and defeat any meritorious defense. The court has examined the documentary materials submitted by the parties and finds that the record on that discrete point is not sufficiently developed to preclude vacatur. Administrative determinations have evidentiary weight but are not an absolute bar to setting aside a civil default where jurisdictional flaws or defective service are shown and where a colorable defense has been proffered. The present record shows unresolved factual issues (including the nature and timing of any administrative plea or finding and the circumstances surrounding alleged service) that are better addressed on a restored calendar rather than in a preclusive default posture.

III. Prejudice and the equities

Plaintiff contends that vacatur would unduly prejudice her because she recovered $1.2 million from the City and the matter is at inquest as to Defendant. Undoubtedly, vacatur will require additional litigation and will postpone finality. But prejudice is measured by whether vacatur would unfairly impair Plaintiff's ability to present her case (loss of witnesses, lost evidence, or other particularized harm), not simply by inconvenience or the added burden of further proceedings. The record does not identify an irreparable loss of evidence or other prejudice sufficient to outweigh the strong public policy favoring the resolution of disputes on the merits and the protection of a party's basic right to defend. Plaintiff's settlement with the City does not foreclose her ability to litigate against a non-settling individual defendant; while the settlement is relevant to practical considerations, it is not the kind of prejudice that must preclude relief from default where defective service and the prospect of meritorious defenses are shown. The equities therefore favor vacatur.

For the foregoing reasons—(i) strict compliance with CPLR § 308 was not demonstrated with respect to the operative SAC; (ii) the Default Order rested in material part on a superseded

pleading and therefore is legally infirm; (iii) Defendant has proffered a reasonable excuse and a colorable meritorious defense; and (iv) Plaintiff has not shown prejudice sufficient to defeat vacatur—the motion to vacate will be granted in its entirety.

Accordingly, it is hereby

ORDERED that the Order of Default dated March 4, 2024 and docketed March 6, 2024 (NYSECF Doc. 41) is vacated; and it is further

ORDERED that the Notes of Issue filed on February 21, 2025 (NYSECF Docs. 47 & 48) are vacated and stricken from the calendar; and it is further

ORDERED that Defendant's proposed answer with counterclaims (Exhibit N to the moving papers) is deemed filed, *nunc pro tunc*, as of the date of this Decision and Order. The Clerk is directed to accept and file the proposed answer (or, if the proposed answer requires ministerial formatting, counsel shall file a conforming pleading within five (5) days of the date of this Decision and Order); and it is further

ORDERED that the matter is resorted to the active civil calendar, and the parties shall contact the Hon. Mary Rosado's Clerk to schedule a preliminary conference on a date that is mutually agreeable to both the parties and the court; and it is further

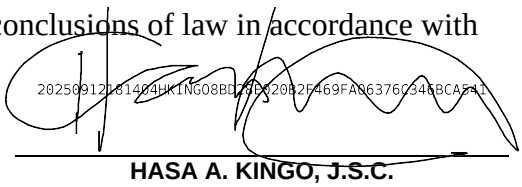
ORDERED that counsel for the parties shall appear at said preliminary conference prepared to discuss a discovery schedule, any outstanding discovery disputes, and a timetable for disposition; and it is further

ORDERED that Plaintiff shall serve a copy of this Decision and Order, together with notice of entry, upon Defendant personally (or upon his counsel) forthwith and shall file proof of such service on the docket within five (5) days; and it is further

ORDERED that any previously scheduled inquest is vacated; the Clerk shall cancel any inquest dates associated with this matter; and it is further

ORDERED that the parties shall comply with the Hon. Mary Rosado's Part rules regarding the submission of joint preliminary conference statements and proposed discovery plans in advance of the conference.

This constitutes the court's findings of fact and conclusions of law in accordance with CPLR § 2219(a).



9/12/2025
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		**CASE DISPOSED**		**X**	**NON-FINAL DISPOSITION**		
	X	**GRANTED**	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**