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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

CACH, LLC,

Plaintiff,

- against -

JAY HARRIS,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 19693/07

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's . . . . . _____
Defendant's / Respondent's . . . . . _____

The *pro se* defendant moves to vacate a June 30, 2008 default judgment upon the grounds of lack of service, and no contractual relationship with the plaintiff. The defendant states, in a June 2, 2010 affidavit, he was not properly served in this matter. The defendant asserts he does not owe money to the plaintiff. The defendant requests to see proof of the debt to the plaintiff.

The plaintiff opposes the motion. The plaintiff's attorney states, in a June 17, 2010 affirmation, the plaintiff is the owner and holder of all rights associated with a debt

incurred by the defendant under a credit card agreement issued to the defendant. The plaintiff's attorney presents a bill of sale of accounts by Bank of America, N.A. to the plaintiff on December 19, 2006. The plaintiff's attorney points to an April 18, 2008 affidavit by Bobby Dunker, a representative and authorized signer for the plaintiff. Dunker states the plaintiff is due $15,119.00 from the defendant as a result of a Visa revolving charge account, specifically identified as account number 4800113993066815. Dunker states the defendant has not paid $15,119.00 although payment was duly demanded by the plaintiff from the defendant. Dunker also states the defendant owes the plaintiff pre-judgment interest at 9.00% from January 16, 2007, on that $15,119.00, together with statutory costs, costs for service of the summons and complaint, costs for filing the summons and complaint as stated in the Visa credit agreement with Bank of America, N.A. The plaintiff's attorney contends the defendant fails to allege an excusable default, and to provide a meritorious defense to the plaintiff's claims.

The plaintiff's attorney points to a November 12, 2007 affidavit by Issam Omar, who states he was over the age of 18 years, residing in the State of New York, and not a party to the underlying action. Omar states he served the summons and complaint with the index number and date of filing, and addressed to the defendant on November 7, 2007, at 1:09 P.M., at 5 Iris Court, Hickville, New York 11801, a private house. Omar indicates he was not able to serve the defendant in person at that address, but encountered Thomas Harris, a relative, and a person of suitable age and discretion there at the

defendant's residence. Omar describes Harris as 29 years old male, approximately 180 pounds, approximate 6 feet 0 inches in height, brown skin, and black hair. Omar asserts he gave a copy of the summons and complaint to Harris. Omar adds he complete service on November 9, 2009, by depositing a copy of the summons and complaint addressed to the defendant at 5 Iris Court, Hickville, New York 11801 in a postpaid first class mail, properly addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service in the State of New York. Omar state that mailing was made to that address bearing 'PERSONAL & CONFIDENTIAL,' and not indicating legal action.

Moreover, the defendant lists twice on the moving papers his address as 5 Iris Court, Hickville, New York 11801, to wit the blueback of this motion and the reply affidavit. It is also noted the opposition papers were served upon the defendant at 5 Iris Court, Hickville, New York 11801 by Michelle Farino, who is not a party to this action, over the age of 18 years, and resides in the State of New York, and states the same in a June 17, 2010 affidavit. Farino states she delivered one copy of the opposition papers by regular United States mail on June 17, 2010.

The defendant opposes the plaintiff's contentions in a June 21, 2010 reply affidavit. The defendant states the plaintiff is not the owner of the debt for a Bank of America credit card. The defendant claims he does not believe Thomas Harris, a relative, was served with the summons and complaint on November 7, 2007, and adds that is a

fiction because he does not have a relative with that name . The defendant reiterates the request to see proof of the debt to the plaintiff, and adds the plaintiff has not provided such proof to him.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The Second Department holds: "A party attempting to vacate a default judgment on the ground of excusable default (CPLR 5015 [a] [1]) must establish both that there is a reasonable excuse for the default and that there exists a meritorious defense (***see, Schultz v. Ruggiero***, 129 AD2d 573; Siegel, NY Prac § 108)" (***Brownsville Associates v. Mathis***, 137 A.D.2d 743, 525 N.Y.S.2d 58 [2nd Dept, 1988]; ***see also Katz v. Marra***, --- N.Y.S.2d ----, 2010 WL 2308435 [2nd Dept,2010]). The Second Department also holds: "A default judgment may be vacated pursuant to CPLR 317 where the defendant was served by a method other than personal delivery and did not actually receive notice of the summons in time to defend, provided that the defendant has a meritorious defense (***see Thakurdyal v. 341 Scholes St., LLC***, 50 A.D.3d 889, 855 N.Y.S.2d 641)" (***Kalamadeen v. Singh***, 63 A.D.3d 1007, 1009, 882 N.Y.S.2d 437 [2nd Dept, 2009]).

The Second Department further holds:

> Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by a process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits (***see Scarano v Scarano***, 63 AD3d at 716; ***Simonds v Grobman***, 277 AD2d at 370). Here, the defendants' bare denial

> of service was insufficient to rebut the prima facie proof of proper service pursuant to CPLR 308 (4) created by the process servers' affidavits and to necessitate a traverse hearing (***see Scarano v Scarano***, 63 AD3d at 716; ***Mortgage Elec. Registration Sys., Inc. v Schotter***, 50 AD3d at 983; ***425 E. 26th St. Owners Corp. v Beaton***, 50 AD3d at 846; ***Simonds v Grobman***, 277 AD2d at 370)

City of New York v. Miller, 72 A.D.3d 726, 727, 898 N.Y.S.2d 643 [2nd Dept, 2010].

The method claimed to have been utilized here by Omar to effect service was substituted delivery to Harris. Omar's affidavit of a process server attesting to substituted delivery of a copy of the summons and complaint to Harris is frequently sufficient to support a finding of jurisdiction. But, this defendant denies service by Omar to Harris, and thus attempts to rebut the affidavit of service by Omar by stating in the reply affidavit "Thomas Harris is a fictious [sic] name I don't have a relative by that name..." The defendant also states in the order to show cause "I am requesting to vacate this judgement due to I was never served papers to appear..." The defendant also states in his June 2, 2010 affidavit "I Jay Harris was not properly served...I Jay Harris believe my motion to vacate should be granted being I was not properly served I was not able to show up to dispute this judgement by default..." So, the initial issue is whether the plaintiff must now establish jurisdiction by a preponderance of the evidence at a traverse. This Court holds a traverse is unnecessary here because this defendant's bare denial of service is insufficient to rebut the *prima facie* proof of proper service pursuant to CPLR 308 created by the Omar's affidavit, and to necessitate a traverse (***see City of New York v. Miller***, ***supra***).

However, even assuming the defendant could show a reasonable excuse for his failure to appear, the defendant has not established he has a meritorious defense (***see generally Matone v. Sycamore Realty Corp.***, 50 A.D.3d 978, 858 N.Y.S.2d 202 [2nd Dept, 2008]). The defendant's allegation he has a meritorious defense to this action is belied by documentary proof presented by the plaintiff. The defendant has failed to produce any documentation to support his allegation the plaintiff, an assignee of Bank of America, N.A. is not owed the money granted in the default judgment.

Accordingly, the motion is denied.

So ordered.

Dated: **July 20, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION XXX NON FINAL DISPOSITION