CAL NO: 2012-2494 KC

To Be Argued By:
Evan Denerstein

Kings County Civil Court Index No. 083391-05

New York Supreme Court
Appellate Term—Second Department

PALISADES COLLECTION, LLC

Plaintiff-Respondent,

—against—

IONNA JIMENEZ,

Defendant-Appellant.

REPLY BRIEF

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I. PLAINTIFF CONTINUES NOT TO RECOGNIZE THAT THIS CASE IS ABOUT WHETHER MS. JIMENEZ WAS SERVED AND THEREFORE THE LOWER COURT HAD PERSONAL JURISDICTION OVER HER

Plaintiff's Brief in Opposition fails to address the subject matter of this appeal and conflates two very separate provisions of the CPLR. The first sentence in Plaintiff's argument states that, "[c]ourts in New York apply the standard that a Defendant seeking to vacate a default judgment must demonstrate a reasonable excuse for the default and the existence of a meritorious defense." Pl.'s Br. 4. This is true when a defendant seeks to vacate a default based on reasonable excuse under CPLR § 5015(a)(1). However, there are a number of bases for vacating default judgments, including newly discovered evidence, fraud, reversal or modification of a prior order, and, relevant here, lack of jurisdiction. CPLR § 5015(a)(2)-(5). Plaintiff supports its overbroad proposition with a citation to CPLR § 5015(a)(1) and several cases decided under that provision, most of which have nothing to do with lack of service and personal jurisdiction. *See, e.g., Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., Inc.*, 67 N.Y.2d 138, 139, 501 N.Y.S.2d 8 (1986) ("When a person knows the business address or whereabouts of a corporate defendant which has neglected to update its address with the Secretary of State, but chooses to serve the Secretary of State anyway, a default caused by lack of actual notice is excusable under CPLR 5015 (a)(1)."); *Schiavetta v. McKeon*, 190 A.D.2d 724, 725, 593 N.Y.S.2d 303 (App. Div. 2d Dep't 1993) (denying defendant's motion to vacate a default judgment under CPLR § 5015 (a)(1) where the defendants' only explanation for their failure to defend the action consisted of the defendant's unsupported claim that he was "motivated by personal fear" for himself and his family); *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573, 773 N.Y.S2d 126 (App. Div. 2d Dep't 2004) (deciding the case under CPLR § 5015(a)(1) and stating the defendants' default "resulted

from their failure to appear at single court conference for which their excuse was reasonable and delay that resulted caused no prejudice"); *Ray Realty Fulton, Inc. v. Kwang Hee Lee*, 7 A.D.3d 772, 776 N.Y.S.2d 864 (App. Div. 2d Dep't 2004) ("Contrary to the plaintiffs' contention, the Supreme Court providently exercised its discretion in accepting the defendant's excuses for his failure to comply with the self-executing conditional order of preclusion and appear at the inquest."); *Quis v. Bolden*, 298 A.D.2d 375, 751 N.Y.S.2d 388 (App. Div. 2d Dep't 2002) (citing to CPLR 5015(a)(1) and applying the reasonable excuse and meritorious defense standard); *Mena v. Choon-Ket Kong*, 269 A.D.2d 575, 576, 703 N.Y.S.2d 923 (App. Div. 2d Dept 2000) (same); *Dominguez v. Carioscia*, 1 A.D.3d 396, 397, 766 NYS2d 685 (App. Div. 2d Dep't 2003) (same).

Plaintiff protests that Ms. Jimenez's "Order to Show Cause does not request relief under any specific section of the CPLR." Pl.'s Br. 12-13. However, it is well settled law that "[i]f the court lacked jurisdiction to render the judgment or order, the motion to vacate is based on paragraph 4 of CPLR 5015(a)." Siegel, N.Y. Prac. § 430 (5th ed.). A litigant need not refer specifically to CPLR Rule 5015(a)(4) in his or her papers when moving for vacatur based on lack of personal jurisdiction. *See Unifund CCR Partners v. Ahmed,* 2009 N.Y. Misc. LEXIS 6404 (Sup. Ct. Nassau Cty. Dec. 16, 2009) (recognizing that although the *pro se* defendant " . . . [did] not specifically invoke CPLR § 5015(a)(4) as grounds for relief, his sworn statement to the effect that he never received the Summons and Complaint raises the question of whether or not there was jurisdiction to render a default judgment in the first instance."). Siegel notes that CPLR § 5015(a)(4) is seldom cited because "[L]ack of jurisdiction is so deep a defect, and so obviously a basis for vacatur, that a statute authorizing the vacatur on this ground is like the proverbial fifth wheel." Siegel, N.Y. Prac. § 430 (5th ed.).

Ms. Jimenez, despite her *pro se* status and flaws in the UCS program (*see*, Def.'s Br. 2-3, FNs 2, 3), made it abundantly clear that her Order to Show Cause to Vacate the Default Judgment was based on the fact that she was never served and that the court lacked jurisdiction. In her affidavit, Ms. Jimenez stated that she ". . . never received the court papers," and that "[t]he court lacks personal jurisdiction because the court papers were not served properly." (A. 8.) Despite these explicit references to the court's lack of personal jurisdiction, the lower court still based its ruling under CPLR § 317 and/or CPLR Rule 5015(a)(1), which was error as a matter of law.

A court must first decide the non-discretionary jurisdiction-based ground for vacatur under CPLR Rule 5015(a)(4), before it addresses discretionary grounds for vacatur under CPLR § 317 and Rule 5015(a)(1). *See Brent-Grand v. Megavolt Corp.,* 97 A.D.2d 783, 468 N.Y.S.2d 412, 413 (App. Div. 2d Dep't 1983) ("Special Term erred in denying defendants' motion, based on the failure to show a nonwillful default and a meritorious defense, without first addressing the question of proper service"); *see also* CPLR 5015(a)(4) (Prac. Cmt. C5015:9) (McKinney's) ("[T]he court must always rule first on the paragraph 4 jurisdictional point, which involves no discretion. Only if jurisdiction is sustained need the court go on to the paragraph 1 discretionary ground."). Siegel notes that this sequence "was and remains well established," and this is because of "the obvious reason that if jurisdiction is lacking the court has no jurisdiction to do anything but vacate the judgment and dismiss the action." CPLR Rule 5015(a)(4) (Prac. Cmt. C5015:9) (McKinney's).

It is also well established that where vacatur is based upon the court's lack of personal jurisdiction due to improper service of process, the movant need not show either a reasonable excuse for the default or a meritorious defense. *Prudence v. Wright*, 94 A.D.3d 1073, 943

N.Y.S.2d 185, 186 (App. Div. 2d Dep't 2012); *Toyota Motor Credit Corp. v. Lam*, 93 A.D.3d 713, 713-14, 939 N.Y.S.2d 869, 870 (App. Div. 2d Dep't 2012); *Deutsche Bank Nat'l Trust Co. v. Pestano*, 71 A.D.3d 1074, 1075, 899 N.Y.S.2d 269, 271 (App. Div. 2d Dep't 2010). As Siegel notes, while the discretionary ground "requires an affidavit of merits from the defendant. The jurisdictional objection does not." CPLR Rule 5015(a)(4) (Prac. Cmt. C5015:9) (McKinney's). In addition, Siegel adds, "there's no time limit on such a motion based on lack of jurisdiction." *Id.*

Despite the clarity of the law on all these points, Plaintiff continues to fixate (possibly in an attempt to cast Ms. Jimenez in a negative light) on whether Ms. Jimenez owed the alleged underlying debt, and whether she received actual notice of the lawsuit, years after the entry of the default judgment. For example, in Plaintiff's Brief, which at no point cites to the record, Plaintiff posits that Ms. Jimenez never disputed opening or using the AT&T Wireless account in question. *See* Pl.'s Br. 13. Besides the immateriality of this statement to the matter at hand, it is also untrue. Ms. Jimenez did dispute these facts when she denied Plaintiff's allegations in her Proposed Answer. (A. 10.) Nowhere in this proceeding did Ms. Jimenez ever admit to opening or using the AT&T Wireless account in question. Nonetheless Plaintiff attempts to invent this admission out of thin air by asserting that "[d]efendant conceded that she opened the account in question and that she was in talks to settle the matter, but she lost her job and could not afford to make payments." Pl.'s Br. 3. This statement is wholly unsupported by anything in the record.[1]

[1] In fact, it is highly likely that Ms. Jimenez does not owe this debt at all. In the recently filed case, *Bernhart et al v. Asta Funding, Inc., et al*, 1:13-cv-02935 (S.D.N.Y. 2013), Plaintiffs allege that Palisades Collection, Inc., Pressler & Pressler, LLP, and Palisades' parent corporation, Asta Funding, Inc., conspired to fraudulently obtain and enforce default judgments based on telecommunication debt allegedly purchased from AT&T Wireless. Specifically, the complaint alleges that Asta Funding, Inc., Palisades Collection, LLC and Pressler & Plressler, LLP conspired to sue "thousands of individuals in the New York City Civil Courts – many of whom never owed any debt to AT&T Wireless in the first place – on the basis of mass-generated and baseless verified complaints, retained process serving agencies known

Furthermore, Plaintiff also alleged, but never provided any proof in support, that its counsel spoke with Ms. Jimenez in 2008 and confirmed that she resided at 1191 Lincoln Pl., Brooklyn, NY 11213. Pl.'s Br. 2. Plaintiff failed to mention, however, that this is not the address at which Plaintiff alleged to have served Ms. Jimenez. (A. 6.)

In sum, Plaintiff attempts to obfuscate the fact that it never served Ms. Jimenez in this case by referring to, or inventing, facts that are immaterial to the issue presented. By insisting that New York courts apply the reasonable default and meritorious defense standard in all cases involving the vacatur of defaults (Pl.'s Br. 4), arguing that the length of default should be a factor in determining whether the court has jurisdiction (Pl.'s Br. 13), and alleging inaccurate facts regarding whether Ms. Jimenez owes the underlying debt (*Id*.), Plaintiff is making it evident that it does not understand the body of law underlying this appeal, or why the underlying decision was wrong and should be reversed.

II. MS. JIMENEZ REBUTTED THE PROCESS SERVER'S AFFIDAVIT OF SERVICE

A. Ms. Jimenez's Sworn Denial of Service Was Sufficient to Rebut the Process Server's Affidavit of Service

At various points in its Brief, Plaintiff makes the claim that Ms. Jimenez failed to rebut the process server's affidavit of service because she failed to "swear specific facts to rebut the statements in the process server's affidavit," or attach any admissible evidence to support her claim. *See, e.g*., Pl.'s Br. 7-8. Plaintiff even refers to statements in Ms. Jimenez's Affidavit as "self-serving" and "bald allegations." *Id*. at 8. Plaintiff also attacks the credibility of Ms. Jimenez by absurdly accusing Ms. Jimenez of making "a contradictory statement and chang[ing] her position from improper service of the summons and complaint, to she was not served with

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to engage in "sewer service" to avoid notifying consumers of the lawsuits filed against them, and obtained entry of default judgments based on fraudulent affidavits." Complaint at ¶ 4, *Bernhart et al v. Asta Funding,Inc., et al*, 1:13-cv-02935 (S.D.N.Y. 2013).

the summons and complaint." *Id*. Plaintiff also inaccurately stated that "Defendant did not deny receipt of the summons and complaint." *Id*.

A simple review of the record demonstrates that Ms. Jimenez swore in her affidavit in support of her Order to Show Cause to Vacate a Judgment for Failure to Answer, that she "did not file an answer to the Complaint because . . . [she] never received the court papers." (A. 8.). In her Proposed Answer submitted with the Order to Show Cause, Ms. Jimenez raised the defense, "[t]he court lacks personal jurisdiction because the Summons and Complaint were not served properly." (A. 10.) Besides the fact that, as Plaintiff well knows, the precise language in the affidavit is generated by the UCS program, this statement is in no way inconsistent with the language used in Ms. Jimenez's affidavit in support. Not serving an individual at all is improper service under the CPLR.

Plaintiff also ignores that Ms. Jimenez did submit admissible evidence in support of her claim of improper service – the same evidence Plaintiff submitted in support of its claim of proper service – a sworn statement from a party with personal knowledge.[2] Plaintiff's assertion that more is required to rebut a process server's affidavit is without merit.

It has long been held that while an affidavit of service constitutes *prima facie* evidence of proper service, the affidavit of service is rebutted where a party submits "a sworn denial of

[2] Plaintiff attacks Ms. Jimenez's credibility in rebutting Plaintiff's Affidavit of Service. In contrast, the Court may take judicial notice that Plaintiff's process server, Trevor Mitchell, has been forced to enter into Consent Decrees with the Department of Consumer Affairs twice, once in 2009 and again in 2010, after receiving Notices of Hearings charging him with violating provisions of Title 20 of the Administrative Code of the City of New York, specifically the Department of Consumer Affairs rules with regard to process servers. As part of these consent decrees, Mr. Mitchell has been required to pay fines of $300 and $1,000 for past violations of the Department of Consumer Affairs' process server regulations. *See Dept. of Consumer Affairs. v. Trevor Mitchell*, Violation No: LL 5084155, Assurance of Discontinuance (2009), *available at* http://www.nyc.gov/html/dca/downloads/pdf/sa_Trevor_Mitchell_0955137_2009.pdf; *Dept. of Conumer Affairs. v. Trevor Mitchell*, Violation No: LL 5130952, Assurance of Discontinuance (October 15, 2010), *available at* http://www.nyc.gov/html/dca/downloads/pdf/sa_Trevor_Mitchell_0955137_2010.pdf.

service *or* specific statements to rebut the process servers' affidavits." *Parker v Top Homes, Inc*., 58 A.D.3d 817, 818, 873 N.Y.S.2d 112 (App. Div. 2d Dep't 2009) (emphasis added). In fact, courts have held in a long line of cases that a defendant's sworn denial of receipt of process rebuts a process server's affidavit of service, which necessitates a traverse hearing, at which the plaintiff must prove jurisdiction by a preponderance of evidence. *See, e.g.*, *Matter of TNT Petroleum, Inc. v. Sea Petroleum, Inc*., 40 A.D.3d 771, 771-72, 833 N.Y.S.2d 906, 907 (App. Div. 2d Dep't 2007); *Schwerner v. Sagonas*, 28 A.D.3d 468, 811 N.Y.S.2d 595 (App. Div. 2d Dep't 2006); *Kingsland Group, Inc. v. Pose*, 296 A.D.2d 440, 440-41, 744 N.Y.S.2d 715, 716 (App. Div. 2d Dep't 2002); *Balancio v. Santorelli*, 267 A.D.2d 189, 699 N.Y.S.2d 312 (App. Div. 2d Dep't 1999); *Long Island Savings Bank v. Meliso*, 229 A.D.2d 478, 645 N.Y.S.2d 519, 520 (App. Div. 2d Dep't 1996); and *Micalizzi v. Gomes*, 204 A.D.2d 284, 614 N.Y.S.2d 155 (App. Div. 2d Dep't 1994).

Plaintiff incorrectly argues that "[n]o hearing is required where the Defendant fails to swear to specific facts to rebut the statements in the process server's affidavit." Pl.'s Br. 7. In support of this proposition, Plaintiff cites to two cases: *Simonds v. Grobman*, 277 A.D.2d 369, 716 N.Y.S.2d 692, 693 (App. Div. 2d Dep't 2000) and *Scarano v. Scarano*, 63 A.D.3d 716, 880 N.Y.S.2d 682 (App. Div. 2d Dep't 2009). *Id.*

The holding in *Simonds v. Grobman* does not support Plaintiff's contention. In *Grobman*, this Court held that the Supreme Court properly granted the plaintiffs' cross motion to strike the defense of lack of personal jurisdiction without a hearing primarily because the defendants themselves failed to submit sworn denials of service, relying instead on the affidavit of a nonparty. 277 A.D.2d at 369, 16 N.Y.S.2d at 693. Although the court noted that "[m]oreover, [the defendants] did not swear to specific facts to rebut the statements in the

process server's affidavits," it is clear from the cases the court cites that the lack of sworn denials from the parties was what was fatal to their defense, and that swearing to specific facts to rebut statements in the process server's affidavits would have been an alternative means of rebutting the affidavit of service. For example, in *Walkes v. Benoit*, 257 A.D.2d 508, 684 N.Y.S.2d 533, 534 (App. Div. 1st Dep't 1999), the court noted that denial of service was offered only in the form of an affirmation by the defendant's attorney and an affidavit from his employer's insurer, neither of whom had personal knowledge as to whether or not the defendant had been personally served. The court held this was insufficient because "[i]n order to rebut an affidavit of service and test the process at a traverse hearing, a defendant must personally contest the service on motion."). In the second case cited by *Grobman, Eur. Am. Bank v. Abramoff*, 201 A.D.2d 611, 608 N.Y.S.2d 233, 234 (App. Div. 2d Dep't 1994), the court held that no traverse hearing was required where the only denial of service came from the defendant's brother, who did not live with the defendant, and who admitted that two copies of the complaint were slipped under the door, but claimed that no copy was sent via mail. The court noted that "[t]he bald denial of receipt of process served *by mail* is insufficient to rebut the inference of *proper mailing* which may be drawn from a duly executed affidavit of service" (emphasis added).

The other case relied on by Plaintiff, *Scarano v. Scarano*, cites two cases, neither of which support the propositions put forth in the decision. In *Scarano*, the court cites to *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D.2d 135, 139, 502 N.Y.S.2d 479, 483-84 (App. Div. 2d Dep't 1986) for the proposition that "a defendant's sworn denial of receipt of service *generally* rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing." 63 A.D.3d at 716, 880 N.Y.S.2d at 683 (emphasis added). However, in *Skyline*, the court actually writes:

> Ordinarily, a proper affidavit of a process server attesting to personal delivery of a summons to a defendant is sufficient to support a finding of jurisdiction. *Where, however, as here, there is a sworn denial of service by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing*.

117 AD2d at 139, 502 NYS2d at 483-84 (emphasis added). The *Skyline* court did not qualify its holding in the way the *Scarano* court suggests; instead, its holding is squarely in line with the above-cited cases that state that a sworn denial of service is sufficient to rebut an affidavit of service.

The *Scarano* decision goes on to cite to *Grobman* for the proposition that "no hearing is required where the defendant fails to swear to "specific facts to rebut the statements in the process server's affidavits." 63 A.D.3d at 716, 880 N.Y.S.2d at 683 (*citing Simonds v. Grobman*, 277 A.D.2d 369, 370, 716 N.Y.S.2d 692)). As demonstrated above, the *Grobman* decision actually stands for the proposition that a defendant can rebut an affidavit of service either through a sworn denial of service, *or* by attesting to specific facts that rebut the process server's affidavit of service. 277 A.D.2d at 369, 16 N.Y.S.2d at 693. *See also, Johnson v. Deas*, 32 A.D.3d 253, 819 N.Y.S.2d 751 (App. Div. 1st Dep't 2006) (remanding to hold a traverse hearing, stating that "the absence of defendant's sworn denial of service is not fatal.").

Thus, Plaintiff is incorrect in its assertion that no traverse hearing is required if a defendant fails to swear to specific facts to rebut the statements in the process server's affidavit. Such a rule would be unfair to the many unrepresented defendants, including Ms. Jimenez, who only learn of a default judgment years after it is entered and after the case file has been placed in the court's archives. Requests for retrieving case files from the court's archives can take anywhere from two to three months, which leaves improperly served defendants with the unenviable task of having to specifically rebut an affidavit of service that they have not yet had

the opportunity to review. In this case, Plaintiff attached its Affidavit of Service to its Opposition to Ms. Jimenez's Order to Show Cause to Vacate, which allowed her only then to review the Affidavit, and to rebut it with specificity.

B. Even Assuming That It Is Necessary To Both Provide A Sworn Denial Of Service And To Swear To Specific Facts, Ms. Jimenez Satisfied That Standard

Despite the facts that Ms. Jimenez was acting *pro se*, that she had not yet had the opportunity to review the affidavit of service, and that the UCS computer program did not prompt her to include specific facts in her Affidavit in Support, Ms. Jimenez still unequivocally rebutted Plaintiff's affidavit of service. In her Affidavit of Support, Ms. Jimenez provided a sworn denial of receiving the Summons and Complaint. (A. 8.). Furthermore, at oral argument, after seeing the affidavit of service, which was included with Plaintiff's Affirmation in Opposition to Defendant's Order to Show Cause (A. 15, ¶ 4.; A. 19), the record demonstrates that Ms. Jimenez informed the lower court that the Plaintiff claimed to have served her at an address at which she had never lived.

In its Brief, Plaintiff alleged that the undersigned "repeatedly refer[ed] to what Defendant allegedly did or said before the lower court." Pl.'s Br. 6. However, Plaintiff provided no examples to support this proposition or any references to the record.[3] In fact, the only instance where Ms. Jimenez did refer to a statement said before the lower court was in the context of a fact that was preserved in Hon. Wade's Decision/Order on the Order to Show Cause to Reargue. In that decision, Judge Wade made reference to Ms. Jimenez's claims in support of her Order to Show to Vacate:

[3] Plaintiff also submitted that "[i]t should be noted counsel does not submit a transcript of oral argument or from any of the proceedings that were held on May 10, 2012 or June 25, 2012." However, as Plaintiff's counsel is well aware, oral argument on motions in New York City Civil Court are rarely, if ever, on the record. Therefore, no such transcripts were available. Furthermore, the lower court did not allow oral argument on the Order to Show Cause to Reargue.

> [In Defendant's Order to Show Cause to Vacate the Default Judgment], she raised several defenses such as improper service of the pleadings, lack of a business relationship and expiration of the statute of limitations. On May 10, 2012, this Court, after oral argument, denied Defendant's application . . . . The instant Order to Show Cause ensued.
>
> In support, Defendant *reiterates* several of the above arguments, *including* that she did not have a business relationship with Plaintiff, and *that she did not live at the address where service was effected*.

(A. 86-87 (emphasis added).) Given that Judge Wade acknowledges that Ms. Jimenez "reiterate[ed]" her argument that service was improper because she did not live at the address where service was effected," it is clear from the record that this fact was raised at oral argument and not for the first time in the Order to Show Cause to Reargue. Further evidence of this fact is that Plaintiff argued in its Opposition to Defendant's Third Order to Show Cause that Ms. Jimenez was improperly raising a new fact in her Order to Show Cause to Reargue. (A. 60, ¶ 7.) Judge Wade obviously did not agree with this argument. Instead of refusing to consider this "new fact," she cites to the fact as one that was being reiterated from the original Order to Show Cause to Vacate. Thus, it is apparent that this is not a new fact, proffered for the first time, but instead one that was raised in oral argument in support of Ms. Jimenez's Order to Show Cause to Vacate the Default Judgment.

Because serving a defendant at the wrong address is an important fact with respect to whether the court obtained jurisdiction over the defendant, the record demonstrates that Ms. Jimenez both provided a sworn denial of service and salient facts that rebutted the process server's affidavit of service. Plaintiff's assertion that Ms. Jimenez's statement that she was served at the wrong address is insufficient to warrant a traverse hearing without further documentary proof is completely without merit. *See* Pl.'s Br. 9. In support of its proposition,

Plaintiff cites to *Guerre v. Trustees of Columbia Univ. in the City of New York*, 300 A.D.2d 29, 750 N.Y.S.2d 612 (App. Div. 1st Dep't 2002). However, that case is inapposite. In that case, the plaintiff failed to appear in opposition to the defendant's motion for summary judgment. Given that the case did not involve jurisdiction, it was decided under the CPLR Rule 5015(a)(1) standard of reasonable excuse and meritorious defense, and the court found that the plaintiff's proffered excuse that illness prevented her from appearing on the court date was unsupported by any medical documentation. 300 A.D.2d at 29, 750 N.Y.S.2d at 612. The case clearly does not stand for Plaintiff's otherwise unsupported contention that a defendant must corroborate a sworn denial of service with documentation. The reason for this is that such a holding would hold the party opposing jurisdiction to a higher burden of proof than the party claiming jurisdiction, when in fact, the case law is clear that the burden of proving that personal jurisdiction was acquired rests at all times upon the plaintiff in the action. *Skyline Agency, Inc.*, 117 A.D.2d at 139, 502 N.Y.S.2d at 479 ("It is well established that the burden of proving that personal jurisdiction was acquired rests at all times upon the plaintiff in the action.").

III. IN HER ORDER TO SHOW CAUSE TO REARGUE, MS. JIMENEZ RAISED THE FACT THAT THE COURT OVERLOOKED OR MISAPPREHENDED HER JURISDICTIONAL DEFENSE, WHICH THE COURT OVERLOOKED AND MISAPPREHENDED AGAIN

Plaintiff argues that Ms. Jimenez provided "no explanation whatsoever as to what the Court purportedly overlooked or misapprehended" in its earlier decision. Pl.'s Br. 10. In fact, in Ms. Jimenez's *pro se* Affidavit in Support of her Order to Show Cause to Reargue, Ms. Jimenez made it clear that the lower court overlooked her jurisdictional defense, among other defenses. In the affidavit, Ms. Jimenez stated that "Plaintiff lacks personal jurisdiction" and that she "was never served." (A. 56.) She also restated salient facts in support of this point, specifically that "[t]he address the Plaintiff served was an address I never lived at. At the time, my address was

1552 Union St. Brooklyn, NY." *Id*. She also addressed what the lower court overlooked, stating, "I have a meritorious defense that was not recognized in my original argument."

Ms. Jimenez clearly raised the issue of personal jurisdiction and restated salient facts in support of this point, yet the lower court still based its decision on the reasonable excuse, meritorious defense, and timeliness standards of CPLR § 317 and Rule 5015(a)(1). The decision referred to the judgment having been entered "over five years ago," and the defendant not disputing using the "AT&T account." (A. 88.) As discussed further in Defendant's main brief, these considerations were completely immaterial because the issue before the court was whether it had jurisdiction over Ms. Jimenez. *See* Def.'s Br. 14-17.

Nonetheless, Plaintiff argues that the lower court "gave ample consideration to the issue of personal jurisdiction in finding that Defendant failed to substantiate her improper service claim defense with salient facts and documentary evidence." Pl.'s Br. 13. However, this argument ignores the salient facts raised by Ms. Jimenez's Order to Show Cause and improperly places on Ms. Jimenez the burden of disproving jurisdiction. As stated above, the burden of proving that personal jurisdiction was acquired rests at all times upon the plaintiff in the action. *Skyline Agency, Inc.*, 117 AD2d at 139, 502 NYS2d at 479. Furthermore, serving an individual at the wrong address is a salient fact because serving a party at the wrong address is not proper service. *See, e.g., Merchants Ins. Group v. Coutrie*r, 59 A.D.3d 602, 873 N.Y.S.2d 223 (App. Div. 2d Dep't 2009) ("Since the summons and complaint were never affixed to the defendant's actual "dwelling place" or "usual place of abode" and were never mailed to his last known residence, service upon the defendant was defective."); *Community State Bank v Haakonson*, 94 A.D.2d 838, 839, 463 N.Y.S.2d 105, 106 (App. Div. 3d Dep't 1983) ("Special Term concluded, and we agree, that service was ineffective because the place where "nail and mail" service

occurred was not defendant's "usual place of abode."); *MRC Receivables Corp. v. Sanon*, 24 Misc. 3d 1245(A), 901 NYS2d 900 (Civ. Ct. N.Y. Cty. 2009) ("In this case, this court takes judicial notice of defendant's contention that the address on the affidavit of service is materially different from defendant's actual address . . . . Accordingly, defendant has properly rebutted the presumption of valid service." (citations omitted)).

Here, Ms. Jimenez provided two sworn denials of the factual allegations in the affidavit of service. In addition, she disputed service with the very specific fact that she never lived at the address where service was allegedly effected. Further, Ms. Jimenez provided the actual address where she did reside at the time service was allegedly attempted. The only proper response to Ms. Jimenez's factually specific rebuttal of the process server's affidavit of service was to order a traverse hearing, so the Court could have determined whether it had jurisdiction over Ms. Jimenez.[4]

IV. IF MS. JIMENEZ DID RAISE THE FACT THAT SHE WAS SERVED AT AN ADDRESS AT WHICH SHE NEVER LIVED FOR THE FIRST TIME IN THE ORDER TO SHOW CAUSE TO REARGUE, THE LOWER COURT SHOULD HAVE TREATED THE MOTION AS ONE TO RENEW AND REARGUE

Plaintiff is incorrect in arguing that Ms. Jimenez raised the fact that Plaintiff alleged attempted to serve her at an address at which she never lived for the first time in her Order to Show Cause to Reargue. Pl.'s Br. 10. Judge Wade's decision makes clear that this was raised at oral argument for the Order to Show Cause to Vacate the Default Judgment. (A. 86-87.) However, even if Ms. Jimenez actually did raise the fact that she was served at an address at which she had never lived for the first time in her Order to Show Cause to Reargue, the lower court should have considered this newly proffered fact. Although motions to reargue and motions to renew are to be labeled as such (*see* CPLR Rule 2221(d)(1) and e(1)), "[i]f a motion

[4] Alternatively, the Court could have asked Ms. Jimenez for documentary proof as to her address at the time of the alleged service or questioned her under oath to obtain more information.

is based on new proof but is erroneously termed a "reargument" motion, the mislabel will be ignored and the motion will be treated as one to renew. And vice versa." Siegel, N.Y. Prac. § 254 (5th ed.) (*citing Turkel v I.M.I. Warp Knits, Inc.*, 50 A.D.2d 543, 375 N.Y.S.2d 333 (App. Div. 1st Dep't 1975)).

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR Rule 2221(e)(2)-(3). In this case, if the lower court believed that Ms. Jimenez had raised the fact that Plaintiff claimed service at an address at which she never lived, it still should have considered this fact and treated the Order to Show Cause as one to Renew and Reargue. Ms. Jimenez would have had a reasonable justification to present such facts at that time because she not did have an opportunity to review Plaintiff's Affidavit of Service until *after* she had already filed her Order to Show Cause to Vacate the Default Judgment.

Therefore, even assuming that a sworn denial of service is not sufficient to rebut an affidavit of service, and that Ms. Jimenez did not raise the issue of being served at the wrong address at oral argument (despite what the record demonstrates), the lower court still should have considered Ms. Jimenez's contention as "a new fact not offered on the prior motion that would have changed the prior determination" and found that Ms. Jimenez had a "reasonable justification for the failure to present such facts on the prior motion." CPLR Rule 2221(e)(2)-(3).

V. PLAINTIFF MISSTATES THE LAW WITH REGARD TO PRO SE LITIGANTS

Plaintiff erroneously argues that "proceeding *pro se* is not a legitimate reason for failing to specifically, clearly, and accurately lay out each alleged "meritorious defense" or "excusable default" or what relevant facts or law were allegedly overlooked by the court."[5] Pl.'s Br. 9. In making this assertion, Plaintiff incorrectly relies on three cases -- *Running v. Fifth and Bergen Hous. Dev. Fund Corp*., 10 Misc. 3d 1055(A), 809 N.Y.S.2d 484 (Sup. Ct. Kings Cty. 2005); *Davis v. Mutual of Omaha Ins. Co*., 167 A.D.2d 714, 562 N.Y.S.2d 883 (App. Div. 3d Dep't. 1990); *Roundtree v. Singh* , 143 A.D.2d 995, 533 N.Y.S.2d 609 (App. Div. 2d Dep't. 1988) -- none of which involves a liberal reading of a *pro se* litigant's papers. In *Running*, the trial court held that granting the oral request of the president of the defendant corporation, who was appearing *pro se*, for affirmative relief *absent a notice of cross motion* would deprive plaintiff of rights enjoyed by opposing parties. Also, the *pro se* litigant in that case was the president of the defendant corporation in a shareholder derivative action, not a low-income consumer. 10 Misc. 3d 1055(A), 809 N.Y.S.2d 484484 (Sup. Ct. Kings Cty. 2005). In both *Davis* and *Roundtree*, *pro se* litigants appealed post-trial judgments and sought new trials because, after conducting entire trials, they decided that they should be given a second chance on account of their *pro se* status. 143 A.D.2d 995, 533 N.Y.S.2d 609 (App. Div. 2d Dep't. 1988); 167 A.D.2d 714, 562 NYS2d 883 (App. Div. 3d Dep't. 1990). This is in stark contrast to the modest relief that Ms. Jimenez seeks, which is simply that the court apply a little latitude in construing what might be considered inartfully drafted motion papers.

[5] Plaintiff further lambasts Ms. Jimenez for "choosing" to appear *pro se*: "Defendant had every opportunity to retain counsel prior to that date, but she chose not to do so." Pl.'s Br. 9. As a debt collection law firm, Plaintiff's counsel is surely aware of the fact that defendants in debt collection cases can rarely afford attorneys to defend them. In fact, a recent study conducted by the New Economy Project, found that by analyzing statistics released by the Office of Court Administration, only 2% of defendants in consumer credit transaction cases are represented by counsel. New Economy Project, *Debt Collection Racket in New York* 2 (June 2013), *available at* http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf.

Plaintiff's misleading interpretation of these cases ignores the long-standing and well established precedent that procedural rules and papers are to be liberally construed in favor of *pro se* litigants. *See, e.g.*, *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) ("It is settled law that the allegations of [a pro se] complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers . . . .'"); *Stephen W. v. Christina X.*, 80 A.D.3d 1083, 1084, 916 N.Y.S.2d 260, 262 (App. Div. 3d Dep't 2011) (affording a liberal and broad interpretation to papers submitted by *pro se* litigants); *Zelodius C. v. Danny L.*, 39 A.D.3d 320, 833 N.Y.S.2d 470 (App. Div. 1st Dep't 2007) (construing a *pro se* petition liberally). In light of Ms. Jimenez's *pro se* status at the time she initially moved to vacate the default judgment that was entered against her, and the fact that decisions on motions to reargue and reconsider are well within the discretion of the court, it would have been perfectly reasonable for the court to take Ms. Jimenez's previously *pro se* status into consideration. As a *pro se* litigant with no legal training or experience, she was entitled to have her Order to Show Cause papers be broadly and liberally construed, with as favorable an interpretation as could be drawn from them.

CONCLUSION

Plaintiff's Brief misapprehends the law governing Ms. Jimenez's Order to Show Cause to Vacate the Default Judgment based upon a lack of personal jurisdiction due to the fact that she was never served. Like the lower court, Plaintiff insists on applying the wrong legal standard, erroneously imposing a time limit on vacatur, and requiring Ms. Jimenez to show both a reasonable excuse for her default and a meritorious defense. Plaintiff also attempts to place the burden of *disproving* jurisdiction on Ms. Jimenez by requiring her to produce more evidence than Plaintiff has produced in support of jurisdiction. This Court should reverse the order

appealed from to the extent of remitting the action to the Civil Court, Kings County, for a traverse hearing on the sufficiency of service of process upon Ms. Jimenez.

Date: June 18, 2013
New York, New York

Respectfully submitted,

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