CAL NO: 2012-2494 KC

*To Be Argued By:*
Evan Denerstein
*Time Requested:*
15 Minutes

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.*

# APPELLANT'S BRIEF

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Appellate Term – Second Department Docket. No. 2012-02494-KC
Kings County Civil Court, Clerk's Index No. 083391-05

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: SECOND DEPARTMENT
----------X
IONNA JIMENEZ,

*Defendant-Appellant,*

**STATEMENT PURSUANT TO CPLR § 5531**

-against-

PALISADES COLLECTION, LLC,

*Plaintiff-Respondent.*
----------X

1. The index number of the case is 083391-05.

2. The full names of the original parties are as stated above; there have been no changes.

3. The action was commenced in Civil Court, Kings County.

4. The action was commenced on or about August 26, 2005.

5. The nature and object of the action is a consumer credit action.

6. This appeal is from a decision of the Hon. Carolyn E. Wade, Civil Court Judge, County of Kings, entered and filed on July 24, 2012, whereby it was adjudged that Defendant-Appellant's Order to Show Cause to Reargue be granted, and upon reargument, denied.

7. The appeal is on the appendix method.

Dated: New York, N.Y.
May 15, 2013

_____

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## PRELIMINARY STATEMENT

Defendant-Appellant appeals from a decision by the Hon. Carolyn Wade, Civil Court Judge, County of Kings, entered and filed on July 24, 2012, granting Defendant-Appellant's Order to Show Cause requesting reargument and upholding her original decision dated May 10, 2012, which denied Defendant-Appellant's Order to Show Cause to Vacate the Default Judgment. In upholding its decision to deny vacatur of the default judgment, the court below committed errors of law and fact that warrant reversal.

## QUESTION PRESENTED

When a party moves to vacate a default judgment based on lack of personal jurisdiction due to never having been served the summons and complaint, does a court misapprehend or overlook relevant law when it imposes the requirements of a reasonable excuse, meritorious defense, and time limit upon the party, without first addressing the jurisdictional grounds for vacatur?

## SHORT ANSWER

Yes, a court commits an error of law when faced with a motion to vacate a default judgment based on lack of personal jurisdiction, it fails to evaluate whether it has personal jurisdiction over the party, and instead imposes the requirements of a reasonable excuse, meritorious defense, and time limit upon the party.

## STATEMENT OF FACTS

On on or around August 26, 2005, Plaintiff-Respondent Palisades Collection, LLC, a debt buyer, brought this action based on the alleged default in payment on an AT&T account. (A. 1-5.) In or around December 2006, Plaintiff submitted a proposed judgment, signed by Plaintiff's

counsel on December 5, 2006.[1] (A. 7.) The court's clerk signed the judgment on January 5, 2007. *Id.*

**Ms. Jimenez's Order to Show Cause to Vacate the Default Judgment**

After discovering the default judgment on her credit report, Defendant-Appellant (hereinafter Ms. Jimenez) went to the Kings County Civil Court clerk's office, where she was told that the file was in archives and that it would take months to retrieve it. The clerk advised Ms. Jimenez that, even without the file, she could still move to vacate the judgment using the court's "Do-It-Yourself" program.[2] Using the court's computer program, Ms. Jimenez checked the option, "I never received the court papers," as her "reasonable excuse." The program then

[1] CPLR § 3215(c) states, "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." Under such circumstances, to avoid dismissal of the complaint as abandoned, the plaintiff must offer a reasonable excuse for its delay and must demonstrate that its complaint is meritorious. *Ingenito v Grumman Corp*., 192 AD2d 509, 510, 596 NYS2d 83, 84 (App. Div. 2d Dep't 1993) (*citing Eaves v. Ocana*, 122 A.D.2d 18, 504 N.Y.S.2d 187 (App. Div. 2d Dep't 1986) and *Manago v. Giorlando*, 143 A.D.2d 646, 647, 533 N.Y.S.2d 106 (App. Div. 2d Dep't 1988)). When more than one year has passed, it is error for a court to enter a default judgment and not dismiss a complaint as abandoned. *Spadafora v Home Depot, Inc*., 287 AD2d 495, 496, 731 NYS2d 635 (App. Div. 2d Dep't 2001). In the case at bar, Plaintiff filed its Complaint on or around August 26, 2005. In or around December 2006, Plaintiff submitted a proposed judgment, signed by Plaintiff's counsel on December 5, 2006. The court's clerk signed the judgment on January 5, 2007. Upon information and belief, Plaintiff did not demonstrate a reasonable excuse for its delay or that its complaint is meritorious. Thus, it was error for the court to enter the default judgment and not to dismiss the Complaint as abandoned.

[2] The clerk was referring to the New York Unified Court System's (UCS) NYC Civil Consumer Debt Affidavit to Vacate Default program, which was developed by UCS and Lawhelp Interactive. This is a program for *pro se* defendants that asks a number of questions in plain English and produces an affidavit in support of an Order to Show Cause to Vacate a Default Judgment. At the time that Ms. Jimenez used the program, and until relatively recently, the program only asked the defendant for a reasonable excuse and a meritorious defense, essentially assuming that the court has jurisdiction.The UCS program has since been improved, so that when a litigant indicates that he or she has not been served papers in the proper way (or at all), the program now prompts the *pro se* litigant with the following instructions: "You must now tell the Judge what was wrong with the service of the papers. On the next screen you can write an explanation for the Judge." On the following screen, the litigant is asked to "[e]xplain what was wrong with plaintiff's service of the summons and complaint." After the litigant adds his or her explanation and continues to the next screen, the program says, "[t]his program will make court papers that ask the Judge to vacate (cancel) the judgment against you because you were not served with the papers the right way. The court papers will also ask the Judge to dismiss the case." *See* Affidavit to Vacate a Default Judgment in a Consumer Debt Case, *available at* http://www.nycourts.gov/courts/nyc/civil/int_affidavit2vacate.shtml.

asked her whether she had any defenses. Ms. Jimenez chose as one of her defenses, the option: "[t]he court lacks jurisdiction because I was never served properly."[3] In addition to her personal jurisdiction argument, Ms. Jimenez also raised the defenses of statute of limitations, lack of standing, and laches. (A. 8.) On May 1, 2012, Plaintiff served Ms. Jimenez with an Affirmation in Opposition to Defendant's Order to Show Cause and Exhibits. (A. 12-54.) Plaintiff argued that Ms. Jimenez failed to "establish an excusable reason for default required by CPLR § 5015 and the meritorious defense required by CPLR §§ 5015 and 317 to restore the case to the calendar." (A. 17, ¶ 22.) Plaintiff also argued that "Defendant's application is untimely pursuant to CPLR 5015(a) in that it is post one year since the judgment was entered." (A. 17, ¶ 21.) Last, Plaintiff argued that Ms. Jimenez failed to include specific facts to rebut the statements in the process server's affidavit. (A. 15, ¶ 7.)

Ms. Jimenez had the opportunity to review Plaintiff's affidavit of service for the first time when she was served with Plaintiff's Opposition because Plaintiff attached it as an exhibit. (A. 6; A. 15, ¶ 4.) According to the affidavit of service, Plaintiff claimed to have served Ms. Jimenez pursuant to CPLR § 308(2) by serving a person of suitable age and discretion (specifically, a fictitious family member of Ms. Jimenez, named Tameka Jimenez), at 640 E. 51st St., Brooklyn, NY 11203-5310, which Plaintiff claimed was Ms. Jimenez's dwelling place or usual place of abode. (A. 6.) Her actual dwelling place and usual place of abode at the time was 1552 Union St. Brooklyn, NY, and in fact she had never lived at the address at which service was allegedly effected. (A. 56.)

[3] Thus, the program did not allow Ms. Jimenez to make lack of personal jurisdiction a basis for vacating the default judgment, and did not prompt her to state specifically how she knew that she was not served. Despite these defects in the program, Ms. Jimenez raised the issue of personal jurisdiction as well as was possible given the limitations of the UCS program at the time.

Oral argument on the Order to Show Cause was heard on May 10, 2012;[4] there was no court reporter present. Because by then she had had the chance to review the affidavit of service, Ms. Jimenez repeated the fact that she had never been served and that Plaintiff had claimed to have served her at an address at which she had never lived. (A. 87.) ("Defendant *reiterates* [in her Order to Show Cause to Reargue] that she did not live at the address where service was effected.") (emphasis added)).

Despite the fact that Ms. Jimenez clearly raised the issue that the court lacked personal jurisdiction because she was never served, the court's decision did not mention Ms. Jimenez's assertion of improper service. The court simply ruled that "[t]he Defendant failed to raise any meritorious defense nor a reasonable excuse as to why she has failed to move to vacate this 5 year old Judgment until this time." (A. 55.)

**Order to Show Cause to Reargue**

On June 11, 2012, Defendant filed a *pro se* Order to Show Cause to Reargue the Decision/Order of Judge Wade of May 5, 2012. (A. 56.) Ms. Jimenez used the court's general "Affidavit in Support of an Order to Show Cause" form, which the courts provide to *pro se* litigants. The form asks the litigant to list a "good defense/claim," a "good excuse/reason," and whether the litigant has had a previous Order to Show Cause in this case. Ms. Jimenez listed several defenses, including, "Plaintiff lacks personal jurisdiction," as well as lack of standing,

[4] On April 26, 2012, Ms. Jimenez returned to court to file her proof of service. At that point, she realized that she had failed to serve Plaintiff within the time specified on the Order. When she notified the clerk that she had failed to serve Plaintiff within the time specified on the Order, the clerk gave her a new Order to Show Cause for ex parte presentation and signature by a judge in the self-represented consumer debt motions part. Ms. Jimenez was permitted to use the same affidavit as on her April 19, 2012 Order to Show Cause. Upon presentation to Hon. Wavny Toussaint, Defendant's second Order to Show Cause was signed, and Ms. Jimenez was given a new return date of May 10, 2012. (A. 11.) Because she had been given a new return date and allowed to use her original affidavit, she believed that she did not have to appear on the original return date of May 3, 2012. On May 3, 2012 Ms. Jimenez's first Order to Show Cause was denied by Hon. Reginald A. Boddie because she did not appear. (A. 66.)

disputes the amount of the debt, and that Plaintiff lacked a debt collection license at the time the action was commenced. *Id.*

As for her good excuse/reason, Ms. Jimenez reiterated that she was never served, and "[t]he address the Plaintiff serve [sic] was an address I never lived at. At the time, my address was 1552 Union St. Brooklyn, NY." *Id.* Thus, Ms. Jimenez, appearing *pro se* and using a generalized court form, made it clear that the court overlooked her jurisdictional claim in her original Order to Show Cause to Vacate the Judgment.

In Opposition, Plaintiff regurgitated much of the same arguments it made in its original opposition, including that "Defendant's application is untimely pursuant to CPLR 5015(a) in that it is post one year since the judgment was entered." (A. 63, ¶ 28.) Plaintiff then stated that "[t]he length of default should certainly be a factor in the court's decision of this Order to Show Cause," and then supported this proposition with citations to two cases that were decided based on CPLR § 317 and 5015(a)(1). *Id.* Plaintiff also addressed Ms. Jimenez's lack of service claim, proffering the unsupported statement that: "mere allegations of improper service of the summons and complaint are insufficient as a matter of law." (A. 61, ¶ 10.) Plaintiff ignored Ms. Jimenez's statement that she was served at an address *at which she had never lived*.

At the return date for the Order to Show Cause on June 11, 2012, Ms. Jimenez appeared at court ready to make her arguments. However, Judge Wade did not allow oral argument on the motion, instead taking the parties' papers on submission. In the Opinion, dated July 24, 2012, the court granted Ms. Jimenez's Order to Show Cause to Reargue, but denied the order upon reargument, adhering to its prior decision. In its written decision, the court found that:

> Defendant fails to substantiate her improper service claim defense with salient facts and documentary evidence. In addition, Defendant neither disputed using the AT&T account nor receiving the four debt notices. It should be further noted that the judgment

> was entered five years ago. Consequently, this Court determines that Defendant has failed to establish that the court overlooked or misapprehended an issue of law or fact.

(A. 88.)

**Appeal**

On August 29, 2012, Ms. Jimenez filed a timely Notice of Appeal from Judge Wade's Order denying her Order to Show Cause to Reargue upon reargument and adhering to her original decision. (A. 89.)

## ARGUMENT

### THE COURT ERRED IN FINDING THAT IT DID NOT OVERLOOK ISSUES OF LAW REGARDING THE PROPER STANDARD FOR VACATING A DEFAULT JUDGMENT BASED ON LACK OF PERSONAL JURISDICTION

In both its original decision, as well as on reargument, the court failed to evaluate the legitimate claim of improper service in this case, and thus failed to determine the critical threshold question of whether it had personal jurisdiction over Ms. Jimenez. Service of process is a constitutional requirement necessary for a court to have jurisdiction over a person. *Patrician Plastic Corp. v. Bernadel Realty Corp.*, 25 N.Y.2d 599, 607, 307 N.Y.S.2d 868, 875 (1970) ("The short of it is that process serves to subject a person to jurisdiction in an action pending in a particular court and to give notice of the proceedings." (citations omitted)). Moreover, the Court of Appeals has held that the statutory requirements for personal service mandate strict compliance. *Dorfman v. Leidner*, 76 N.Y.2d 956, 958, 563 N.Y.S.2d 723, 725 (2000) ("Service of process is carefully prescribed by the Legislature . . . . Regularity of process, certainty and reliability for all litigants and for the courts are highly desirable objectives to avoid generating collateral disputes. These objects are served by adherence to the statute . . . ."). When a party is not properly served, the court lacks jurisdiction over that party. *See, e.g., Keane v. Kamin*, 94

NY2d 263, 265, 701 N.Y.S.2d 698, 699 (1999) ("Typically, a defendant who is otherwise subject to a court's jurisdiction, may seek dismissal based on the claim that service was not properly effectuated."). And "therefore all further proceedings . . . [are] absolute nullities." *Mayers v. Cadman Towers*, 89 A.D.2d 844, 845, 453 N.Y.S.2d 25, 27 (App. Div. 2d Dep't 1982).

### A. The Lower Court Erred by Applying the Meritorious Defense and Reasonable Excuse Standard to Ms. Jimenez's Order to Show Cause to Vacate a Default Judgment on the Basis of the Court's Lack of Personal Jurisdiction Instead of Holding a Traverse Hearing

#### 1. The Lower Court Applied the Wrong Standard for Vacating a Default Judgment Based on Lack of Personal Jurisdiction

There are three sections of the CPLR that may apply when a defendant seeks to vacate a default judgment based on lack of notice: CPLR § 317, Rule 5015(a)(1), and Rule 5015(a)(4). Unlike CPLR Rule 5015(a)(4), both CPLR § 317 and Rule 5015(a)(1) assume that the court already has personal jurisdiction over the defaulting defendant, and thus the movant must demonstrate a reasonable excuse and meritorious defense.[5] *Caba v. Rai*, 63 A.D.3d 578, 580, 882 N.Y.S.2d 56, 58 (App. Div. 1st Dep't 2009). A motion or order to show cause taken pursuant to CPLR Rule 5015(a)(4), however, is brought specifically upon the ground of lack of jurisdiction to render the judgment or order. 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,

[5] CPLR § 317 applies in situations when the defendant was not served personally pursuant to CPLR § 308(1) and "did not personally receive notice of the summons in time to defend and has a meritorious defense." If a defendant seeks vacatur pursuant to CPLR § 317, he or she must move for vacatur "within one year after obtaining knowledge of the entry of the judgment, but in no event more than five years after such entry." *Id.* Under CPLR Rule 5015(a)(1), a judgment may be vacated on motion upon the ground of excusable default, as long as the motion is made within one year after service of a copy of the judgment or order along with written notice of its entry. In addition, the defendant must demonstrate the existence of a meritorious defense, a requirement imposed by case law. *See, e.g., Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 10 (1986).

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*, 71A.D.3d 1074, 1075, 899 N.Y.S.2d 269, 271 (App. Div. 2d Dep't 2010). This is because it is "axiomatic" that "the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void." *Hossain v. Fab Cab Corp*., 57 A.D.3d 484, 485, 868 N.Y.S.2d 746 (App. Div. 2d Dep't 2008). *See also Chase Manhattan Bank, N.A., v. Carlson*, 113 A.D.2d 734, 493 N.Y.S.2d 339 (App. Div. 2d Dep't 1985) ("Absent proper service of a summons, a default judgment is deemed a nullity and once it is shown that proper service was not effected the judgment must be unconditionally vacated.").

Further, unlike CPLR § 317 and Rule 5015(a)(1), which expressly impose time limits for the making of a motion to vacate a default judgment, there is no time limit when the motion to vacate is made upon the ground of lack of personal jurisdiction. CPLR Rule 5015(a)(4) simply says "[t]he court which rendered a judgment or order may relieve a party from it . . . upon the ground of lack of jurisdiction to render the order." The cases that have interpreted this issue have confirmed that there is no time limit for making a motion to vacate upon the ground of lack of jurisdiction. *See, e.g., First Eastern Bank, N.A. v. Lomar Contractors, Inc*., 237 A.D.2d 248, 249, 684 N.Y.S.2d 172, 173 (App. Div. 2d Dep't 1997) ("[A] motion to vacate based upon a lack of jurisdiction may be made at any time . . . ."); *Roseboro v. Roseboro*, 131 A.D.2d 557, 516 N.Y.S.2d 485, 486 (App. Div. 2d Dep't 1987) ("Absent proper service, a default judgment is subject to vacatur at any time.").

When CPLR § 317, Rule 5015(a)(1), and Rule 5015(a)(4), are all potentially at issue, a court must first decide the non-discretionary jurisdiction-based ground for vacatur under CPLR

Rule 5015(a)(4), before it addresses the discretionary grounds for vacatur under CPLR § 317 and Rule 5015(a)(1). *See Corchia v. Junik*, 158 A.D.2d 574, 575, 551 N.Y.S.2d 542, 544 (App. Div. 2d Dep't 1990) ("Assuming that it is ultimately held that the plaintiff has met her burden of establishing personal jurisdiction . . . , then the defendant also would be entitled to consideration of that branch of his motion which is premised on CPLR 5015 (a)(1) and 317"); *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 Matter of Anna M*., 93 A.D.3d 671, 940 N.Y.S.2d 121 (App. Div. 2d Dep't 2012); *Marable v. Williams*, 278 A.D.2d 459, 460, 718 N.Y.S.2d 400, 401 (App. Div. 2d Dep't 2000); M*ayers v. Cadman Towers, Inc*., 89 A.D.2d at 844, 453 N.Y.S.2d at 27.

In addition, 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. December 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."). The reason for this is:

> [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. For the same reason, the jurisdictional defect permits the vacatur motion without a time limit: the judgment in this instance is theoretically void and the order sought under CPLR 5015(a)(4) is not what makes it so; the order merely declares it to be so, cancelling of record a judgment

> that has had the presumption to stand on the books without a jurisdictional invitation.

Siegel, N.Y. Prac. § 430 (5th ed.).

Finally, it is well established 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.

The court below improperly treated Ms. Jimenez's order to show cause to vacate the default judgment as one made under CPLR § 317 and/or CPLR Rule 5015(a)(1). Ms. Jimenez, in her affidavit, 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 made its ruling under CPLR § 317 and/or CPLR Rule 5015(a)(1), finding that the "Defendant has failed to raise any meritorious defense in this action, nor a reasonable excuse as to why she failed to move to

vacate this 5 year old Judgment until this time." (A. 55.) By referring to the reasonable excuse and meritorious defense standard, the court subjected Ms. Jimenez's motion to the wrong criteria for vacatur, while also ignoring her non-discretionary grounds for vacatur based on lack of personal jurisdiction. Instead, the court should have decided the Order to Show Cause on the non-discretionary jurisdiction-based ground for vacatur under CPLR 5015 Rule (a)(4).

### 2. Because Ms. Jimenez Rebutted Plaintiff's Affidavit of Service, The Lower Court Should Have Held a Traverse Hearing to Determine Whether Service Was Proper

In addressing the issue of personal jurisdiction pursuant to CPLR Rule 5015(a)(4), a court must first determine whether the plaintiff properly effected service of process. *Marable v. Williams*, 278 A.D.2d at 459, 718 N.Y.S.2d at 401 ("Whether or not service was properly effectuated is a threshold issue to be determined before consideration of discretionary relief pursuant to C.P.L.R. 5015(a)(1)."); *Cipriano v. Hank*, 197 A.D.2d 295, 298, 610 N.Y.S.2d 523, 520 (App. Div. 1st Dep't 1994) ("Defendant's lack of a reasonable excuse . . . is obviated if the court is without personal jurisdiction over defendant, and all subsequent proceedings would be rendered null and void.") (citation omitted); *Anello v. Barry*, 149 A.D.2d 640, 641, 540 N.Y.S.2d 460, 461 (App. Div. 2d Dep't 1989) ("[T]he court erred in vacating the default as excusable pursuant to C.P.L.R. 5015(a)(1) without initially resolving the jurisdictional issue under C.P.L.R. 5015(a)(4).") (citation omitted).

A court determines whether Plaintiff effected service of process properly by reviewing the facial validity of the affidavit of service and other documents. *De Zego v. Bruhn*, 67 N.Y.2d 875, 877, 501 N.Y.S.2d 801, 801-802 (1986). "[I]t is well established that the affidavit of a process server constitutes prima facie evidence of proper service." *In re de Sanchez*, 57 A.D.3d 452, 454, 870 N.Y.S.2d 24, 26 (App. Div. 1st Dep't 2008). In order to rebut the presumption of

proper service the defendant must personally contest the service on motion. *Walkes v. Benoit*, 257 A.D.2d 508, 508, 684 N.Y.S.2d 533, 534 (1st Dep't 1999). In defendant's moving papers, he or she must either submit a sworn denial of service or swear to specific facts to rebut the process server's affidavit. *Puco v. DeFeo*, 296 A.D.2d 571, 571, 745 N.Y.S.2d 719, 719-20 (App. Div. 2d Dep't 2002); *see also Parker v. Top Homes, Inc.*, 58 A.D.3d 817, 873 N.Y.S.2d 112 (App. Div. 2d Dep't 2009) (finding that the defendant "failed to submit a sworn denial of service *or* specific statements to rebut the statements in the process servers' affidavits") (emphasis added); *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, where a defendant provides a sworn denial of service, he or she rebuts the process server's affidavit of service, and the defendant is entitled to a traverse hearing, at which the plaintiff must prove jurisdiction by a preponderance of evidence. *See, e.g., Elm Management Corp. v. Sprung*, 33 A.D.3d 753, 754-55, 823 N.Y.S.2d 187, 188-89 (App. Div. 2d Dep't 2006) (reversing the denial of the defendant's motion to dismiss for lack of personal jurisdiction by reason of improper service of process, and holding that the defendant's sworn denial of receipt of process was sufficient to rebut the plaintiff's affidavit of service and the plaintiff, therefore, was required to establish personal jurisdiction by a preponderance of the evidence at a hearing); *Dime Savings Bank v. Steinman*, 206 A.D.2d 404, 613 N.Y.S.2d 945 (App. Div. 2d Dep't 1994) (remanding for a traverse hearing, stating: "The sworn denials of the appellants that they had been served with process pursuant to CPLR 308(2), as alleged by the plaintiff's process server, requires a hearing to determine whether they were in fact properly served . . . ."). *See also, 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).

Despite the fact 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 properly prompt Ms. Jimenez, she still unequivocally rebutted Plaintiff's affidavit of service. Her sworn denial of receiving the Summons and Complaint and the salient facts that she raised in her affidavit were more than sufficient to rebut Plaintiff's affidavit of service. Furthermore, at oral argument, Ms. Jimenez informed Judge Wade that the Plaintiff claimed to have served her at an address at which she had never lived. (A. 87.) ("Defendant *reiterates* . . . that she did not live at the address where service was effected.") (emphasis added). Thus, because Ms. Jimenez provided the court with a sworn denial that she had received process and Plaintiff's affidavit of service was rebutted, the court should have required Plaintiff to show by a preponderance of the evidence that service was proper at a hearing.

### B. The Lower Court Erred in Finding that it Did Not Overlook or Misapprehend the Proper Standard for Vacatur of a Default Judgment Based on Lack of Personal Jurisdiction and Applied the Wrong Standard

CPLR Rule 2221(d) states that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." "A motion to reargue is addressed to the discretion of the court and may be granted upon a showing the court overlooked relevant facts or misapplied or misapprehended the applicable law or for

some reason improperly decided the prior motion." *FIA Card Services, N.A. v. Morgan*, 25 Misc.3d 1229(A), 906 N.Y.S.2d 772 (Dist. Ct Nassau Cty 2009) (*citing Singleton v. Lenox Hill Hosp.*, 61 A.D.3d 956, 876 N.Y.S.2d 909 (App. Div. 2d Dep't 2009) and *Mazzei v. Liccardi*, 47 A.D.3d 774, 849 N.Y.S.2d 180 (App. Div. 2d Dep't 2008)); *see also Loris v. S & W Realty Corp.*, 16 A.D.3d 729, 730, 790 N.Y.S.2d 579, 580-581 (App. Div. 3d Dep't 2005) (noting that a motion for leave to reargue is left to the sound discretion of the court, and may be granted even when "the criteria for granting a reconsideration motion are not technically met" ).

**1. The Court Overlooked or Misapprehended Relevant Law**

For all the reasons explained in section A, the court used the wrong standard in reviewing Ms. Jimenez's Order to Show Cause to Vacate the Default Judgment, and failed to recognize this error when faced with an Order to Show Cause to Reargue. In the Order to Show Cause to Reargue, Ms. Jimenez again clearly raised the issue of personal jurisdiction, stating that "Plaintiff lacks personal jurisdiction." (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.* Inexplicably, the court's decision on the Order to Show Cause to Reargue only addressed the reasonable excuse, meritorious defense, and timeliness standards of CPLR § 317 and Rule 5015(a)(1). The decision refered to the judgment having been entered "over five years ago," and the defendant not disputing using the "AT&T account." (A. 88.) These considerations were completely immaterial because the issue before the court was whether it had jurisdiction over Ms. Jimenez. The decision at no point addressed whether the court had jurisdiction over Ms. Jimenez, thereby misapprehending and overlooking the same relevant law as it did in its initial decision.

### 2. The Court Improperly Placed the Burden of Proof on Plaintiff

In its Decision on the Order to Show Cause to Reargue, the court said that "Defendant fails to substantiate her improper service claim defense with salient facts and documentary evidence." (A. 26.) This finding both ignored the salient facts raised by Ms. Jimenez's Order to Show Cause and improperly placed on Ms. Jimenez the burden of proof. As stated above, where there is a sworn denial of the factual allegations in an affidavit of service by the party allegedly served, the affidavit of service is rebutted. *Anton v. Amato*, 101 A.D.2d 819, 820, 475 N.Y.S.2d 298 (App. Div. 2d Dep't 1984). Once service is disputed with a sworn statement, the plaintiff has the burden of proving jurisdiction by a preponderance of credible evidence. *See, e.g., Matter of TNT Petroleum, Inc. v. Sea Petroleum, Inc*., 40 A.D.3d at 771-72, 833 N.Y.S.2d at 907; *Elm Management Corp. v. Sprung*, 33 A.D.3d at 754-55, 823 N.Y.S.2d at 188-89; *Dime Savings Bank v. Steinman*, 206 A.D.2d at 404, 613 N.Y.S.2d at 945.

Here, Ms. Jimenez provided two sworn denials of the factual allegations in the affidavit of service. At oral argument, and again in her Order to Show Cause to Reargue, she disputed service with the very specific factual allegation 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 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.[6]

### 3. The Court Improperly Examined Whether Defendant Owed the Debt

[6] 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.

The other bases for denying Ms. Jimenez's Order to Show were similarly unavailing given that personal jurisdiction was at issue. The court first noted that Ms. Jimenez did not dispute using "the AT&T account." (A. 88.) Leaving aside the fact that AT&T is not the plaintiff in this action, and that Plaintiff provided no proof that it had acquired the right to collect any AT&T accounts, let alone an account that Ms. Jimenez may have once had, the court improperly evaluated whether Ms. Jimenez had a meritorious defense because the motion to vacate was based on the lack of personal jurisdiction.

#### 4. The Court Improperly Examined Whether Defendant Received Notice

The decision also rested, in part, on the court's assertion that Ms. Jimenez did not dispute "receiving the four debt notices." (A. 88.) But when a defendant receives actual notice of the existence of an action by means other than the service of process in a manner authorized by law, receipt of the actual notice cannot cure the insufficient service of process. *See, e.g.*, *Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 583, 915 N.Y.S.2d 204 (2010) ("Defendant's actual receipt of the summons and complaint is not dispositive of the efficacy of service."); *Macchia v. Russo*, 67 N.Y.2d 592, 595, 505 N.Y.S.2d 591, 593 (1986) ("Notice [of the action] received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court . . . ."); *Krisilas v. Mount Sinai Hospital*, 63 A.D.3d 887, 889, 882 N.Y.S.2d 186,188 (App. Div. 2d Dep't 2009) ("Such a defect in [service of process] is not cured by the defendant's subsequent receipt of actual notice of the action, 'since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court'"). Therefore, the court once again misapplied or misapprehended the law by ignoring the issue of jurisdiction over the defendant, and instead focusing on whether Ms. Jimenez had a "reasonable excuse" for her default under CPLR § 317 or Rule 5015(a)(1).

### 5. The Court Improperly Examined How Much Time Had Elapsed

Finally, as part of its reasoning for adhering to its prior decision, the court cited to the fact that "the judgment was entered five years ago." (A. 88.) But, as stated above, there is no time limit to vacate a default judgment when the motion is made upon the ground that the court lacks personal jurisdiction over the defendant. *See, e.g., First Eastern Bank, N.A. v. Lomar Contractors, Inc.*, 237 A.D.2d at 249, 684 N.Y.S.2d at 173; *Roseboro v. Roseboro*, 131 A.D.2d at 557, 516 N.Y.S.2d at 486. In addition, it has been held that "a defense of laches could not be interposed to defeat the vacatur of a void default judgment obtained in the absence of jurisdiction." *Berlin v. Sordillo*, 179 A.D.2d 717, 720, 578 N.Y.S.2d 617 (App. Div. 2d Dept 1992).

It is apparent that the court failed to recognize that Ms. Jimenez's Order to Show Cause to Vacate the Judgment was based on a lack of personal jurisdiction, and improperly continued to apply the "reasonable excuse" and "meritorious defense" standard applicable to CPLR § 317 and Rule 5015(a)(1).

## CONCLUSION

The lower court overlooked or misapprehended the law that governed Ms. Jimenez's Order to Show Cause to Vacate the Default Judgment under CPLR Rule 5015(a)(4), based upon a lack of personal jurisdiction due to the fact that she was never served. Because the lower court treated Ms. Jimenez's Order to Show Cause to Vacate the Default Judgment as one made under CPLR § 317 or CPLR Rule 5015(a)(1), even when presented with the proper basis in Ms. Jimenez's Order to Show Cause to Reargue, it applied 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, which was the wrong legal standard. The lower court also

failed to consider the facts proffered by Ms. Jimenez to rebut Plaintiff's affidavit of service, thereby wrongly placing on her the burden of disproving jurisdiction and denying her the traverse hearing to which she was entitled. 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.

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Respectfully submitted,

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