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AMENDED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 22

Present: HON. WILLIAM R. LaMARCA
Justice

JPMORGAN CHASE BANK f/k/a THE CHASE MANHATTAN BANK f/k/a CHEMICAL BANK,

Plaintiff,

-against-

GPR GRAPHIC SERVICES, INC., and GILBERT RIVERA,

Defendants.

Motion Sequence # 001
Submitted April 26, 2006

INDEX NO: 1133/03

The following papers were read on this motion:

Notice of Motion/Order to Show Cause 1
Affirmation in Opposition.....2
Reply Affidavit.....3

The Court, *sua sponte*, recalls its order of July 5, 2006 to correct a typographical error regarding the date for a traverse hearing and substitutes the following order in its place, *nunc pro tunc*:

Defendant, GILBERT RIVERA (hereinafter referred to as "RIVERA"), moves pursuant to CPLR Rule 5015 for an order vacating and setting aside the default judgment entered herein, on May 30, 2003, in favor of the plaintiff, JPMORGAN CHASE BANK f/k/a THE CHASE MANHATTAN BANK f/k/a CHEMICAL BANK (hereinafter referred to as

"JPMORGAN CHASE") and against defendants GPR GRAPHIC SERVICES, INC. (hereinafter referred to as "GPR") and RIVERA, in the total sum of $51, 072.34, and for an order dismissing the action and/or transferring same to the State of Florida for further litigation. An interim order of the Court staying collection of the judgment was issued in the initiating Order to Show Cause, dated March 29, 2006. JPMORGAN CHASE opposes the motion, which is determined as follows:

In an affidavit, sworn to March 22, 2006, RIVERA relates that, in the year 2001, he was the President of co-defendant GPR, a corporation that was forced out of business after the events of September 11, 2001. He claims to have no recollection of agreeing to become personally liable for, or personally guaranteeing, the debts of GPR, the corporate defendant in this action. RIVERA claims that the first notice that he received of this action was in May 2005, when JPMORGAN CHASE sent him a notice in Florida that it would be collecting its judgment against him. RIVERA states that since that time, he has been defending himself against JPMORGAN CHASE's collection attempts in the State of Florida

RIVERA states that for ten (10) years leading up to and including 2001, when GPR was doing business in the State of New York, he lived at 4 Michael Court, Centereach, New York, which was the official business address for GPR. He claims that when GPR went out of business at the end of 2001, he sold his home at 4 Michael Court and relocated to his present address: 89 Lake Success Drive, Palm Coast, Florida. He states that both the sale of his New York home and his relocation to the State of Florida occurred in June 2002. RIVERA contends that the United States Postal Service forwarded any and all mail from his New York address to his Florida address for a period of six (6) months, through December 2002. He asserts that any notices mailed to his New York address after

December 2002 were not actually received by him.

In support of the motion to vacate the default judgment, RIVERA points out that the Summons and Verified Complaint in this action, dated January 14, 2003, were directed to GPR at 4 Michael Court and to RIVERA at 4 Michael Court. However, the Affidavit of Service, sworn to April 10, 2003, reflects "nail and mail" service pursuant to CPLR §308(4) on RIVERA at 30 Davenport Avenue, Apt. 3J in New Rochelle, New York. RIVERA states that neither he nor any member of his family has ever lived at said address in New Rochelle, New York and it appears that some individual with his name was served at that address. Additionally, he states that the followup mailings to GPR and to RIVERA at the Centereach address in February 2003, pursuant to CPLR §3215(g), were never received because the Post Office had stopped forwarding his mail at the end of December 2002. It is RIVERA's position that he has never been personally served and that the default judgment must be vacated. He suggests that JPMORGAN CHASE had reason to know of his whereabouts because he still owns a CHASE Bank Card which bears his Florida address, because all of his New York accounts were with CHASE which had access to his personal identification information and because CHASE knew how to find him when they sought to collect the money judgment in this action and pursued him at his home in Florida, not in New Rochelle, New York.

Counsel for RIVERA urges that the action be dismissed for lack of personal jurisdiction as service upon RIVERA was defective in New Rochelle, New York, which was not RIVERA's actual place of business, dwelling place or usual place of abode, as required by CPLR §308(4). Counsel argues that RIVERA has a reasonable excuse for the delay as he never knew about the action until collection proceedings began in the State of

Florida. Moreover, he claims to have a meritorious defense as he claims that he is not personally liable for the corporate debt. He urges that the action be transferred to the State of Florida on the grounds of *forum non conveniens* (CPLR §327), as JPMORGAN CHASE has a significant presence in Florida and the parties are already litigating in the State of Florida.

In opposition to the motion, JPMORGAN CHASE claims that the motion should be denied because RIVERA has failed to provide documentary evidence to support his allegation that he resided in Florida at the time of the Service of the Summons and Complaint. It argues that the process servers affidavit is *prima facie* evidence of proper service and challenges RIVERA's claim that he had no knowledge of the debt until the judgment was sought to be enforced in the State of Florida. In reply, RIVERA provides a copy of his driver license, issued in the State of Florida in July 2002, one month after his move to the State.

There are two sections within the CPLR that provide for the vacatur of a default judgment. CPLR § 317 provides as follows:

> A person served with a summons other than by personal delivery to him... who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment ... upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense ...

Additionally, pursuant to CPLR § 5015 (a) (1), the Court which rendered a judgment or order may relieve a party from it if the party demonstrates both a reasonable excuse for the default and a meritorious defense (see, CPLR §5015 [a][1]; see *Titan Realty v Schlem*, 283 AD2d 568, 724 NYS2d 908 [2nd Dept. 2001]; *Matter of Gambardella v Ortov Light*, 278

AD2d 491 [2nd Dept 2000]; *Parker v City of New York*, 272 AD2d 310, 707 NYS2d 199 [2nd Dept.2000]). What constitutes a reasonable excuse is within the sound discretion of the Court. (*Parker v City of New York, supra*).

However, the Court must first address the issue of personal jurisdiction. CPLR §308 (4) provides for personal service upon a natural person as follows:

> 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential: and not indicating ono the ouside thereof, by return address or otherwise, that the communication is from and attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; . . . (emphasis supplied).

It is well settled that nail and mail service pursuant to CPLR § 308(4) may only be used where service under CPLR § 308(1) and (2) cannot be made with "due diligence". The due diligence requirement of CPLR § 308(4) should be strictly construed given the reduced likelihood that a summons served pursuant to that section will be received. *Moran v Harting*, 212 AD2d 517, 622 NYS2d 121 (2nd Dept. 1995); *Gurevitch v Goodman*, 269 AD2d 355, 702 NYS2d 634 (2nd Dept. 2000); *Walker v Manning*, 209 AD2d 691, 619 NYS2d 137 (2nd Dept. 1994).

After a careful reading of the submissions herein, it appears to the Court that an evidentiary hearing is required to determine whether effective service of the Summons and Complaint has been obtained. Although the process server avers that he made four (4) attempts to personally serve the defendant prior to affixing the Summons and Complaint

to the New Rochelle, New York address, a question remains whether said address was the actual place of business, dwelling place or usual place of abode of the defendant and whether the process server did due diligence to ascertain the correct address for the defendant. It is the judgment of the Court that RIVERA has raised significant challenges to the presumption of proper service. Accordingly, it is hereby

ORDERED, that this matter is specifically referred to the Calendar Control Part for a traverse hearing and shall appear on the calendar of CCP on November 14, 2006 at 9:30 A.M., subject to the approval of the Justice there presiding; and it is further

ORDERED, that defendant, GILBERT RIVERA, shall file a Note of Issue within ninety (90) days from the date of the original order of July 5, 2006 and shall serve plaintiff's counsel a copy of same by certified mail, return receipt requested; and it is further

ORDERED, that the failure to file a Note of Issue as directed may be deemed an abandonment of the claims giving rise to the traverse hearing; and it is further

ORDERED, that in the event that jurisdiction over the defendant is found, the motion to vacate the default judgment is denied. RIVERA has failed to demonstrate a meritorious defense to the action as required by both CPLR §317 and §5015. His claim that he does not recall guaranteeing the corporate debts of GPR falls far short of demonstrating a meritorious defense on a Personal Guaranty given to JPMORGAN CHASE.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 28, 2006

WILLIAM R. LaMARCA, J.S.C.

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