

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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BRADCO SUPPLY CO. On behalf of itself and as Assignee
QUALITY ROOFING & SIDING SUPPLIES OF ALBANY,
LLC.,

Plaintiffs,

-against-

DON OAKLEY AND COMPANY, INC., DAWN STEVENS
a/k/a DAWN E. STEVENS and DONALD V. OAKLEY a/k/a
DONALD VINCENT OAKLEY,
Defendants.

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 12921/09
Motion Seq. No.: 01

DECISION AND ORDER

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Papers Read on this Motion:

Defendant's Notice of Motion	01
Defendant's Memorandum of Law	xx
Plaintiff's Opposition	xx

Defendant Donald V. Oakley moves by Notice of Motion for an order pursuant to CPLR §5010 vacating the judgment signed by Nassau County Clerk, Maureen O'CONNELL and filed on December 15, 2009 in the offices of the Ulster County Clerk.

The Plaintiff served the Summons and Complaint in this matter on Defendant Oakley by "nail and mail" service on August 13, 2009 at 65 Prince Street, Kingston, New York 12401. The defendant states that he has not lived at the aforementioned residence since April 2006. The Defendant further argues that the process server referred to the Prince Street address as a private residence, which it was not at the time, as it has been a place of business since 1998. However, the defendant states that the dwelling was owned by D & D Development Company, LLC. He further states that he moved to North Carolina after selling all of his corporate stock in the Defendant Don Oakley and Company, Inc. The defendant states that he first learned of the judgment when he applied for credit and was denied because of the \$75,329.00 Default Judgment.

Plaintiff opposes the Defendant's application claiming that every effort was made to ensure that Defendant Oakley was served properly. Plaintiff claims that a diligent search of the records made maintained by the New York State Division of Corporations and Accurint, and both indicated that Defendant Oakley's current address was the address that was set forth on the Credit Application originally submitted to Plaintiff and that the Secretary of State record indicated that Defendant Oakley is still the President of Defendant Oakley, Inc.

If service was not properly effected pursuant to CPLR §311(a)(1) then the Court has no jurisdiction over the defendant, hence all proceedings including the Default Judgment entered against it would be nullities. Where lack of personal jurisdiction is established the vacatur of a Default Judgment must be unconditional, *see Anello v Barry*, 149 AD2d 640 (2d Dept 1989). Before the Court can address the issue of "excusable default" the jurisdictional issue under CPLR §5015(a)(4) must be resolved.

The burden of proving jurisdiction is upon the party asserting it and when challenged that party must sustain that burden by a preponderance of the credible evidence. An Affidavit of Service is not conclusive once there is a sworn denial. The defendant denies that he had any notice regarding the proceedings.. Since the defendant has raised an issue of fact with respect to the service of the Summons and Complaint, a Hearing on the issue of service is required, *see Citibank, N.A. v Keller*, 133 AD2d 63 (2d Dept 1987); *Chase Manhattan Bank, N.A. v Carlson*, 113 AD2d 734 (2d Dept 1985); *OCI Mortgage Corp. v Omar*, 232 AD2d 462 (2d Dept 1996).

This matter is respectfully referred to the Calendar Control Part for a Traverse Hearing and shall appear on the calendar of CCP on the February 1, 2011 at 9:30 A.M. subject to the approval of the Justice there presiding.

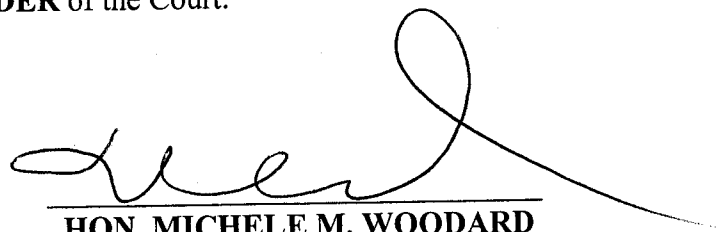
The plaintiff shall serve a copy of a Note of Issue together with a copy of this Order on the attorney for defendants and the Calendar Clerk of this Court, no later than ten (10) days prior to the date of Hearing.

The directive with respect to a Traverse Hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee as he or she deems appropriate.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: December 14, 2010
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

DEC 20 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**