UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-80119-Marra/Johnson

JANE DOE No. 2

Plaintiff,

vs.

SARAH KELLEN,

Defendant.
_____/

MOTION TO SET ASIDE ORDER OF DEFAULT

Defendant Sarah Kellen, pursuant to Federal Rule of Criminal Procedure 55(c), hereby moves to set aside the Order of Default entered on June 17, 2009 (DE 39). There is good cause to set aside the default, because plaintiff did not make proper service under New York law. Alternatively, even if proper service was made, the time for a responsive pleading has not expired.

Plaintiff did not execute proper service under New York law. Federal Rule of Civil Procedure 4 states in pertinent part that a party may be served "by following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." See Fed. R. Civ. P. 4 (e)(1). Here, plaintiff asserts that service was effected under the New York law for personal service upon a natural person, specifically N.Y.C.P.L.R. §308(4). That law states that where personal service cannot be made, despite due diligence, substituted service can be made "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."

It further requires "such affixing and a mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete 10 days after such filing, except in matrimonial actions." Plaintiff failed to comply with the requirements of the New York law.

The Affidavit of Service states that the summons was delivered on April 25, 2009, to the doorman at a building where plaintiff allegedly has an apartment. It further states that the summons was mailed to that same address on April 29, 2009. The Affidavit of Service also summarizes the efforts made to effect personal service. Defendant Kellen contests that the efforts described in the Affidavit of Service constitute due diligence as required by the New York law, and that service upon the doorman was sufficient to satisfy the requirement that the summons be affixed to a dwelling place or usual place of abode. This Court need not reach these issues, however, because under any circumstance, plaintiff did not make proper service because she did not file the Affidavit of Service in this Court within twenty days of the mailing on April 29, 2009. Instead, the Affidavit of Service was filed in this Court on June 12, 2009, which was approximately 44 days after the mailing. By waiting 44 days to file the Affidavit of Service, plaintiff did not comply with the New York requirement that the proof of service *"shall* be filed with the clerk of court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later." As such, service was not proper under New York law and therefore was not proper under Federal Rule of Civil Procedure 4(e).

In addition, even if service had been proper under New York law, the time for a responsive pleading had not expired prior to the Order of Default being entered. Under New York law, service is not complete until ten days after the Affidavit of Service is filed with the clerk of the court

designated in the summons. In this case that would be the clerk of the court for the Southern District of Florida. This filing occurred on June 12, 2009. Therefore, service is not completed until June 26, 2009. Fed. R. Civ. P. 6(a)(2).. Under Federal Rule of Civil Procedure 12(a), a responsive pleading would not be due until twenty days thereafter. The Order of Default entered on June 17, 2009, should be set aside because, as of that date no responsive pleading was due, so there was no default.

Undersigned counsel has attempted in good faith to confer with counsel for the Plaintiff, but has not been able to speak to him.

WHEREFORE, good cause having been shown under Fed. R. Civ. P. 55(c), the Order of Default should be set aside.

Respectfully submitted,

s/Bruce E. Reinhart
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Set Aside Order of Default was served on all counsel of record by CM/ECF on June 23, 2009.

s/Bruce E. Reinhart
BRUCE E. REINHART