UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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| JANE DOE II<br><br>Plaintiff,<br><br>vs.<br><br>JEFFREY EPSTEIN,<br>and SARAH KELLEN,<br><br>Defendants. | CASE NO.: 09-80469-CIV-MARRA/JOHNSON |

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT KELLEN'S MOTION TO SET ASIDE DEFAULT**

Plaintiff, JANE DOE II, through counsel, opposes the Defendant SARAH KELLEN'S Motion to Set Aside Default. Defendant KELLEN offers no proof that she did not actually receive the service of process; she says she "contests" the efforts but offers no evidence to contest the Affidavit of the process server, who made six (6) attempts to serve before being forced to resort to "nail and mail" service, valid under New York law. *Maines Paper & Food Service, Inc. v. Boulevard Burgers Corporation*, 52 A.D. 3d 1150, 861 N.Y.S. 2d 808 (N.Y.S.C., Appellate Division, June 26, 2008).

Defendant KELLEN first argues that Plaintiff's Motion is defective because the Plaintiff did not timely file the Affidavit of Service. However, a delay in filing proof of service under CPLR 308 is merely a procedural irregularity, not jurisdictional, and may be corrected *nunc pro tunc* by the court. *Haegeland v Massa*, 75 A.D. 2d 864; *Hudela v Posner*, 70 Misc 2d 726. If anything, the delay in filing the Affidavit of Service provided Defendant KELLEN additional time to avoid being defaulted. An action is commenced with the delivery of a

summons, and cannot thereafter be defeated simply by reason of a belated filing of proof of service. *Lopez v Quickset Printers*, 70 Misc 2d 732, particularly in the absence of a statement by defendant categorically denying that she ever received the papers. *Empire Nat. Bank v Judal Constr.,* 61 A.D. 2d 789. Defendant KELLEN serves no Affidavit contesting that she was served and received the Summons and Complaint.

Defendant makes a half hearted attempt to question the sufficiency of service. Conspicuously absent is any statement or inference that the defendant did *not* receive the papers served upon her or that, under New York State law, due diligence was not made. *Schwarz v Margie*, 2009 NY Slip Op 03890, 62 A.D.3d 780 (May 12, 2009); *Leviton v Unger,* 2008 NY Slip Op 09363, 56 A.D. 3d 731 (November 25, 2008). Here, the Defendant was given notice through proper service that a law suit was being instituted against her and she deliberately chose to ignore the claim, not moving for relief until after a default was entered. Even if the Defendant where to deny that she received service, which she has failed to do, the presumption of receipt of properly mailed materials renders ineffective defendant's denial of receipt. *Guccione v. Flynt*, 618 F.Supp. (S.D. N.Y. 1985). Defendant ultimately does not challenge the sufficiency of service with any evidence that might require an evidentiary hearing.

The second argument made by Defendant KELLEN, that the Court prematurely defaulted her without waiting 10 days from Plaintiff's filing proof of service, is equally unavailing. New York State law requirements of filing an affidavit of service within 20 days of completion under CPLR 308(4), along with the 10 grace period , pertains solely to the time within which a defendant must answer, and does not relate to the jurisdiction acquired by service of the summons. *Browning v Nix*, 47 Misc 2d 709; *William Iser, Inc. v. Garnett*, 46 Misc 2d 450. The "additional notice" of 10 days is intended to give the defendant notice

that a default judgment is imminent so that she may take remedial action is she desires. (See 4 Weinstein-Korn-Miller, NY Civ Prac, par 3215:29) as cited in *Mobil Oil Corp. v. Christian Oil & Gas Distributors*, 95 A.D. 2d 722; 463 N.Y.S. 2d 253 (N.Y. App. Div. 1983). Defendant has been on notice for almost three months that a default was imminent, and took no action; she then, through counsel, served a Motion to Set Aside Default, on June 23, 2009, and has still failed to file a responsive pleading of any kind, despite admitting that such a pleading would have been due, under her reading of the Rule, on or before June 26, 2009. Hence under the facts of the instant case, service is proper, the defendant was on notice of default and, even to date, has not responded to the allegations of the Complaint sh was served with on April 23, 2009, almost three (3) months ago.

In addition, under New York law, the moving party seeking to set aside a default, must demonstrate a meritorious defense. *Maines Paper, supra,* 52 A.D. 3d at 1152. No such argument is made here, no proposed Answer and Affirmative Defenses has been filed, in fact there is nothing in the Motion to suggest that Defendant KELLEN even has a defense to the claims made against her. Accordingly, denial of a Motion to Vacate Default would not be an abuse of discretion. “Given defendant’s failure to present proof of a meritorious defense, [the] Supreme Court did not abuse its discretion in denying the motion to vacate the default judgment,” *Maines Paper, supra,* 52 A.D. 3d at 1152 (citation omitted).

In this case, Defendant KELLEN chose to ignore service of a summons for several months, and sought relief after the Court had defaulted her. Defendant KELLEN is not entitled to relief because her Motion is not supported by any case law interpreting New York’s “nail and mail” statute and because she has not come forth with a meritorious, or any defense. The Default should stand and the issue of damages reserved for trial or summary

judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished **VIA ECM TRANSMISSION** to: Robert D. Critton, Esq. and Michael Pike, Esq., BURMAN CRITTON LUTTIER & COLEMAN, Counsel for Defendant EPSTEIN, 515 N. Drive, Suite 400, West Palm Beach, Florida 33401 and to Bruce Reinhart, Esq., BRUCE REINHART, P.A., Counsel for Defendant KELLEN, 250 S. Australian Avenue, Suite 1400, West Palm Beach, Florida 33401 this 14th day of July, 2009.

BY:s/ Isidro M. Garcia
ISIDRO M. GARCIA