UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-cv-80469-Marra/Johnson

JANE DOE II,
Plaintiff,

vs.

JEFFREY EPSTEIN,
and SARAH KELLEN,
Defendants.
_____/

SARAH KELLEN'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO KELLEN'S MOTION TO SET ASIDE DEFAULT

Defendant SARAH KELLEN, by and through undersigned counsel, and pursuant to the Federal Rules of Civil Procedure and Local Rule 7.1, replies to Plaintiff's Memorandum Of Law In Opposition to Defendant Kellen's Motion To Set Aside Default (DE 47) and states as follows:

Ms. Kellen asks the Court to set aside default in this case because service of process was legally deficient under New York law, and, the entry of default was premature. Moreover, Ms. Kellen asks the Court to set aside the default because she has a meritorious defense to the instant action which might affect the outcome, granting her motion to set aside the default would not result in prejudice to the non-defaulting party, and default in this action was not willful.

Service of Process Was Legally Deficient Under New York Law

It is undisputed by the parties that the purported service of process on Ms. Kellen in this action is pursuant to Federal Rule of Procedure 4(e)(1) which allows service "pursuant to the law of the state . . . in which effected." In this case, Plaintiff claims to have served Ms. Kellen in New York under section 308(4) of the New York Civil Practice Law and Rules ("CPLR"), which is

colloquially known as "nail and mail service." This type of service is disfavored in New York. In fact, New York's highest court has construed the statutory requirements of nail and mail service "strictly" stating that "the liberalization of the requirements of service would jeopardize the primary statutory purpose of ensuring that defendants receive actual notice of the pendency of litigation against them." *Feinstein v. Berger*, 397 N.E.2d 1161, 1164 (1979).

1. Plaintiff Failed to Exercise Due Diligence

"It is well settled that 'nail and mail' service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with 'due diligence.'" *Silber v. Stein*, 731 N.Y.S. 2d 227, 228 (N.Y. App. Div. 2001). Plaintiff has the burden of showing due diligence for the purposes of CPLR 308(4). *See State Higher Educ. Servs. Corp. V. Cacia*, 652 N.Y.S. 2d 883 (N.Y. App. Div. 1997). Courts strictly enforce the due diligence requirement "given the reduced likelihood that a summons served pursuant to the action will be received." *See Lemberger v. Khan*, 794 N.Y.S. 2d 416 (N.Y. App. Div. 2005). A plaintiff that resorts to using CPLR 308(4) should be prepared to make a detailed showing of the efforts constituting due diligence, inasmuch as rigid adherence to the requirement of due diligence is expected. There is no set fast rule as to what constitutes due diligence. Instead, courts consider the facts and circumstances of each case. *Hanover New England v. MacDougall*, 608 N.Y.S. 2d 561, 561-62 (N.Y. App. Div. 1994).

Here, Plaintiff fails to meet her burden of showing due diligence for the purposes of CPLR 308(4). In fact, the only reference Plaintiff makes to due diligence in her Response is the following phrase: "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." Importantly, all six attempts to serve Ms. Kellen

occurred between April 14 and April 25, 2009, a span of eleven days. The process server states that on April 14, 2009, April 21, 2009 and April 24, 2009 he was informed by the doorman at Ms. Kellen's apartment residence that Ms. Kellen was "out of town." Certainly, given the consistency of the statement that Ms. Kellen was out of town, the process server should have exercised due diligence and waited an appropriate period of time for Ms. Kellen to return to town. His repeated attempts to serve Ms Kellen when he possessed knowledge that she was not at the residence speaks to his failure to exercise due diligence.

Notably, the case law Plaintiff relies upon in her Response clearly supports Ms. Kellen's legal position. Plaintiff relies upon *Maines Paper & Food Service, Inc., v. Boulevard Burgers*, 52 A.D. 3d 1150, 1152 (N.Y.S. App. Div. 2008) to support her claim that the process servers efforts comply with New York Law. However, Plaintiff fails to point out that *Maines* states that "due diligence . . . refers to the quality of the efforts made to effect personal service . . . not to their quantity or frequency." *Id*. Unlike the efforts in this case, in *Maines* the process server not only made repeated attempts to serve at the residence, he also spoke to neighbors, and sought out persons who worked with the individual, and he had counsel investigate the individual and research databases, credit applications, verify home addresses, and check with the Secretary of State as to property ownership. *Id*. Here, Plaintiff's process server efforts are merely six visits to Kellen's residence when he knew she was out of town. Plaintiff also cites *Leviton v. Unger*, 868 N.Y.S. 2d 126 (N.Y.S. App. Div. 2008) in her Response. However, once again Plaintiff fails to point out to the Court that in *Leviton* the court found that service of process by "nail and mail" was insufficient as a matter of law because the process server repeatedly went to the person's residence on a day and time when the person was likely to be working or commuting, and statements by the process server

as to his efforts to determine where the person worked were conclusory and ambiguous. In this case, Plaintiff demonstrates significantly less due diligence that what was at issue in *Leviton* and *Maines*. Accordingly, Plaintiff's due diligence efforts fail as a matter of law.

2. The Entry of Default Was Premature

Once the due diligence burden is met, the plain language of the New York "nail and mail" statute, CPLR 308(4) requires three steps for service to be complete: (1) the summons must be affixed to the door; (2) a copy of the summons and complaint must be served upon the person by mail; and (3) plaintiff must file "proof of service" with the court. *See* N.Y.C.P.L.R. 308(4). The plain language of the New York statute states that plaintiff must fulfill each of these elements for service to be complete.

In this case, Plaintiff did not file her proof of service as required by the "nail and mail" statute until June 12, 2009, when she attached the proof of service to her motion for default against Ms. Kellen (DE 37). Only upon filing of this notice is service deemed complete by New York law. Once service is complete the time in which to answer, appear or move is set by the Federal Rules of Civil Procedure. Importantly, Plaintiff admits in her Response that the filing of the proof of service required under CPLR 308(4) "pertains solely to the time within which a defendant may answer." (Plaintiff's Response DE 47:2). It is well settled New York law that "the failure to file proof of service merely enlarge[s] the defendant's time to appear, answer or move." *Browning v. Nix*, 47 Misc. 2d 709, 711 (N.Y.Sup. 1965). Ms. Kellen acknowledges that Plaintiff's failure to file a proof of service, standing by itself, does not defeat the efficacy of otherwise valid service. The purpose of the filing of the proof of service under the nail and mail statute is to go an extra step so as to ensure that someone who has not been personally served has every opportunity to comply. *Id.*

Here, Ms. Kellen had 20 days from June 12, 2009, specifically until July 2, 2009, in which to file a responsive pleading. However, on June 17, 2009, the Court granted Plaintiff's motion and entered a default. Five days later, on June 23, 2009 Ms. Kellen moved to set aside the default (DE 42). Because the Order of Default was entered before the time in which Ms. Kellen had to file a responsive pleading expired the Order was premature, there was no default, and the Order should be vacated.

Importantly, soon after filing her Motion to Set Aside Default, Ms. Kellen, through counsel, commenced good faith efforts with Plaintiff to effect a waiver of service. Counsel for Plaintiff was contacted by the undersigned by certified letter, email, and telephone. Plaintiff never responded.

The Default Should Be Set Aside For Good Cause Shown

Federal Rule of Civil Procedure 55(c) provides the standard for setting aside an entry of default. The rule states that "[f]or good cause shown the court may set aside an entry of default. Fed. R. Civ. P. 55(c). The Eleventh Circuit holds that the standard for setting aside a default is different and less burdensome than the setting aside of a default judgment. *See E.E.O.C. v. Mike Smith Pontiac GMC, Inc*., 896 F.2d 524, 527-28 (11th Cir. 1990). Good cause is a liberal standard. *Coon v. Grenier*, 867 F.2d 73, 76 (1st Cir. 1989). The relevant factors courts consider under "good cause" include "whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." *See Compania Interamericana Export-Import, S.A. v. Compania Dominicana De Aviacion*, 88 F.3d 948, 951 (11 th Cir. 1996).

Here, even if the default was properly entered, all factors weigh in favor of setting it aside. First, Ms. Kellen's conduct was not willful. Willfulness is determined by considering whether the party intended to violate court rules and procedure and not merely whether the party failed to

answer. *Widmer-Baum v. Chandler-Halford*, 162 F.R.D. 545 (N.D. Iowa 1995). Situations where a party absconds to avoid liability have been found to be willful. Good faith or the inadvertent failure to answer are not willful. *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 27 Fed. R. Serv. 3d 1353 (2d Cir. 1994). Here, there is no evidence that, prior to the default being entered, Ms. Kellen or her counsel knew she had been properly served under the New York "nail and mail" statute[1], and that therefore a responsive pleading was due. As set forth above, Plaintiff's process server showed no due diligent efforts to provide actual notice to Ms. Kellen. Instead, the process server merely repeatedly showed up to serve Ms. Kellen when he knew she was not at that location.

Second, Plaintiff will not be prejudiced by setting aside the default because litigation in this case has just begun. Plaintiff filed this case in late March 2009. Litigation is in its early stages. *See Feliciano v. Reliant Tooling* Co., 691 F.2d 653, 656-57 (3rd Cir. 1982)(finding that plaintiff's expenses, or delay in realizing satisfaction do not constitute sufficient prejudice).

Third, Ms. Kellen has a meritorious defense to this action. Ms. Kellen did not personally commit any sexual battery on the Plaintiff, nor did she conspire with Mr. Epstein to do so. In fact, Plaintiff does not allege any physical contact with Ms. Kellen, nor does she allege that Ms. Kellen was present for any improper sexual touching. At best, she alleges that Ms. Kellen arranged for Plaintiff to massage Mr. Epstein. The evidence will show that Ms. Kellen was not aware of whatever happened (or would happen) privately between Mr. Epstein and Plaintiff. As such, Plaintiff will not be able to prove Ms. Kellen's knowledge or intent to commit any tortious conduct, nor her agreement to further such conduct.

---

[1]Florida law does not permit this kind of service.

Last, "[d]efaults are seen with disfavor because of the strong policy of determining cases on their merits." *Florida's Physician's Ins. Co. V. Ehlers*, 8 F.3d 780, 783(11th Cir. 1993)(internal citations omitted). Long-standing Eleventh Circuit precedent holds that "[e]ntry of judgment by default is a drastic remedy which should be used only in extreme circumstances."*Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1984). The facts and circumstances set forth in this case do not rise to an extreme circumstance. Even if the Court finds that service was proper, Ms. Kellen should be afforded the opportunity to have this dispute determined on its merits.

For the foregoing reasons, Ms. Kellen respectfully requests that her Motion To Set Aside Default be granted.

Dated: July 21, 2009

Respectfully submitted,

BRUCE E. REINHART, P.A.
By: /s/ Denise Kalland
DENISE KALLAND
Florida Bar No. 39025
250 S. Australian Avenue
Suite 1400
West Palm Beach, Florida 33401
Tel: (561) 202-6360
Fax: (561) 863-8691
Dkalland@BruceReinhartLaw.com

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on July 21, 2009, the undersigned served copies of Sarah KELLEN'S Reply to Plaintiff's Memorandum of Law in Opposition to Defendant Kellen's Motion to Set Aside Default by electronic CM/ECF filing to all counsel of record.

/s/Denise Kalland
DENISE KALLAND