

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-██████-02T2

CITICAPITAL TRAILER RENTAL
SYSTEMS, INC., formerly known as
ASSOCIATES RENTAL SYSTEMS, INC.,

Plaintiff-Respondent,

v.

P██████████,

Defendant-Appellant.

Submitted March 9, 2004 - Decided **AUG 18 2004**

Before Judges Alley and R. B. Coleman.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County,
Docket No. L-4496-02.

Peter M. Agulnick, attorney for appellant.

Lario & Saldutti, attorneys for respondent
(Robert L. Saldutti of counsel; Jason N.
Sunkett on the brief).

PER CURIAM

Defendant P██████████ appeals from an order of the Law
Division in Camden County, dated February 10, 2003, denying an
order to show cause why a default judgment entered in favor of
plaintiff Citicapital Trailer Rental Systems, Inc., formerly
Associates Rental Systems, Inc., should not be vacated pursuant
to R. 4:50-1 and R. 4:43-3. We reverse and remand solely for

purpose of a factual determination as to whether service was made as attested in the affidavit of service of process.

Starting in September 2000, defendant, a moving company, rented trailers from plaintiff on a monthly basis pursuant to an agreement which was subject to termination by either party at any time. After a dispute arose over insurance charges which defendant claimed were improper, defendant exercised its right to terminate and returned the trailers to plaintiff; however, defendant also withheld rental payments for the last few months of the relationship, claiming a right of set off. On June 27, 2002, plaintiff filed its complaint in this civil action seeking damages under the parties' trailer rental agreement. Defendant failed to answer or otherwise move with respect to the complaint, and on October 18, 2002, a default judgment was entered. Thereafter, plaintiff initiated discovery in aid of execution, which included a November 11, 2002 notice of an ex parte order for discovery scheduling the deposition of R [REDACTED] C [REDACTED], Manager, for December 3, 2002.

On December 3, 2002, rather than appear for the scheduled deposition, defendant filed an order to show cause pursuant to which it sought to stay execution and to vacate the default judgment. In support of the application to vacate the default judgment, Ms. C [REDACTED] filed a certification in which she stated

that she is a manager of defendant P██████████, and that as of November 29, 2002, the date of her certification, she had never received either a copy of the summons and complaint in the matter or a copy of the judgment. Further, upon information and belief, she stated that no one else at P██████████ had received such documents. She claimed the first time she had notice that an action was pending against P██████████ was when she received papers after the default judgment had been entered.

In contradiction of those assertions, plaintiff submitted the affidavit of its process server from Guaranteed Subpoena, sworn before a notary public on July 11, 2002, which avers that service of the summons and complaint was accepted at 3:00 p.m. on July 10, 2002 by a R██████████ D██████████, identified in the return of service as managing agent of defendant, at defendant's place of business at ██████████ Street, ██████████, New York. A description of the person identified as R██████████ D██████████ is included in the affidavit. In addition, counsel for plaintiff disclosed in his certification to the court that the results of his investigation of R██████████ D██████████ and R██████████ C██████████ showed both individuals have the same social security number and the same date of birth. At the time of the oral arguments on the order to show cause, counsel for defendant was not able to verify whether R██████████ D██████████ and R██████████ C██████████ were the same

person, but the court so found. The propriety of such a factual determination is now moot because, on this appeal, defendant acknowledges that "'D [REDACTED]' is the maiden name of Mrs. C [REDACTED]."

Although there is no question that R [REDACTED] C [REDACTED] is R [REDACTED] D [REDACTED], because she denies she ever received the summons and complaint, defendant contends that a hearing should have been conducted so that the judge could assess her credibility. We are satisfied that the judge's refusal to schedule a hearing was a mistaken exercise of judicial discretion. Unlike in Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 99 (App. Div. 1998), certif. denied, 158 N.J. 686 (1999), where we noted that a managing agent's certification that she could not recall telling a sheriff's officer that she was a managing agent was not a denial of the contrary report in the return of service, the managing agent here specifically disputes service.

Defendant further contends that even if R [REDACTED] C [REDACTED] was served with a copy of the summons and complaint, as the Law Division judge found, the court, nevertheless, lacked personal jurisdiction over it based on the insufficiency of service of process under R. 4:4-4(a) and R. 4:4-4(b)(1)(A). We reject that contention. Rule 4:4-4(a) prescribes the primary method of service of summonses and complaints within this State, and R.

4:4-4(b) authorizes service of process outside the State under the following relevant circumstance:

If it appears by affidavit satisfying the requirements of R. 4:4-5(c)(2) that despite diligent effort and inquiry personal service cannot be made in accordance with paragraph (a) of this rule, then, consistent with due process of law, in personam jurisdiction may be obtained over any defendant as follows:

(A) personal service in a state of the United States or the District of Columbia, in the same manner as if service were made within this State or by a public official having authority to serve civil process in the jurisdiction in which the service is made or by a person qualified to practice law in this State or in the jurisdiction in which service is made;

Plaintiff concedes it did not file an affidavit of diligent effort and inquiry prior to the purported personal service upon Ms. Cremin at defendant's principal place of business in the [REDACTED], New York. Therefore, it did not comply with the requirements of R. 4:4-4(b)(1)(A).

"Generally, when a default judgment is taken in the face of defective personal service, the judgment is void. However, not every defect in the manner in which process is served renders the judgment upon which the action is brought void and unenforceable." Rosa v. Araujo, 260 N.J. Super. 458, 462 (App. Div. 1992), certif. denied, 133 N.J. 434 (1993) (internal citations omitted). "Where due process has been afforded a

litigant, technical violations of the rule concerning service of process do not defeat the court's jurisdiction." Id. at 463. As we observed in our opinion in Citibank, N.A. v. Russo, 334 N.J. Super. 346, 352 (App. Div. 2000), "even if there had been a technical defect in the method of service of process, defendant would not be automatically entitled to vacate the default judgment against him." See also Sobel v. Long Island Entertainment Prods., Inc., 329 N.J. Super. 285, 291-92 (App. Div. 2000) (minor flaws in the service of process do not necessarily mandate the vacatur of a default judgment). "Even substantial deviations from the prescribed procedures may be insufficient to require vacating a default judgment based upon flawed service if the rights of an innocent third party have intervened." Id. at 293. While no claim of prejudice to a third party is asserted here, neither is there any tenable claim that plaintiff's deviation from the rules of service was more than technical.

Indeed, the trial judge recognized there was a technical non-compliance with the rule of service, but found that non-compliance did not in any way prejudice the defendant. We agree. According to the affidavit of service, service was accomplished by delivering the summons and complaint to a managing agent of defendant at its principal place of business.

R. 4:4-7. That affidavit gives rise to a presumption of the truth of the facts recited in the return. See, e.g., Jameson v. Great Atlantic & Pacific Tea Co., 363 N.J. Super. 419, 426 (App. Div. 2003), certif. denied, 179 N.J. 309 (2004). Although no affidavit of diligent effort and inquiry was filed, such service, if made, provided actual notice of the lawsuit to defendant with ample time for the defendant to answer or otherwise move with respect to the action. In other words, defendant would have received what the rules related to service of process are meant to achieve: the constitutionally required notice that was reasonably calculated to apprise it of the pendency of the action and to afford it an opportunity to present its objection. That is the essence of due process of law. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 2d 865, 873 (1950).

Defendant asserts in its brief that it has a New Jersey presence but no where does it certify the nature of that presence nor does it contend that it is or was amenable to service of process within the State of New Jersey. By comparison, plaintiff asserts that, though it did not file the required affidavit, it communicated to defendant in writing its intent to "proceed with the immediate civil remedies" if payment was not forthcoming. It then followed by commencing this civil

action and effecting service by personal service upon a managing agent, albeit in New York.

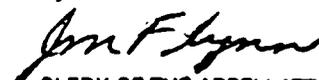
"An affidavit of diligent inquiry is required to disclose the efforts made to ascertain the defendant's whereabouts before seeking an order [for substituted or constructive service]." Modan v. Modan, 327 N.J. Super. 44, 47 (App. Div. 2000) (reversing the denial of defendant's motion to vacate final judgment of divorce where plaintiff's affidavit of diligent inquiry in support of an order for publication implied that defendant resided in New York when it was obvious from e-mails from defendant to plaintiff that plaintiff knew defendant had returned to Pakistan). We have noted "the showing of diligence in a given case must rest on its own facts and no single formula nor mode of search can be said to constitute due diligence in every case." Id. at 48 (quoting Kott v. Superior Ct. of Los Angeles County, 53 Cal. Rptr. 2d 215, 221 (1996)). Certainly, service by publication or by other means less likely to convey actual notice of the pendency of the action require careful scrutiny. Under the circumstances of this case, we are satisfied that due process and fundamental fairness have not been offended. Id.; Sobel v. Long Island Entertainment, supra, 329 N.J. Super. at 292. But see Jameson v. Great Atlantic & Pacific Tea Co., supra, 363 N.J. Super. at 428, where service

upon an employee of a supermarket in a county that had no connection with the accident that was the subject of the complaint was held not to have been proper.

We, of course, recognize that a motion to vacate a default judgment "should be viewed with great liberality and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div.) aff'd, 43 N.J. 508 (1964). Generally, that decision is left to the sound discretion of the trial court, who is to resolve all doubts in favor of the party seeking relief. Mancini v. New Jersey Auto Full Ins. Underwriting Ass'n., 132 N.J. 330, 334 (1993). Here, actual service at defendant's place of business is disputed. If service was made as reflected in the return of service, the default judgment may stand. If, however, the trial judge finds as she asserts, that Ms. Cremin was never served, the default judgment should be vacated.

Reversed and remanded for a hearing to determine whether the summons and complaint were served on Ms. C██████ as managing agent of defendant.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.


CLERK OF THE APPELLATE DIVISION