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### 1027 Wallco, L.L.C. v. Shoop

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[\*1]

<b>1027 Wallco, L.L.C. v Shoop</b>
2023 NY Slip Op 50926(U)
Decided on July 14, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 14, 2023

Civil Court of the City of New York, Bronx County

<p><b>1027 Wallco, L.L.C., Petitioner,</b></p> <p><b>against</b></p> <p><b>Adam N. Shoop, Respondent.</b></p>
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Index No. L&T 331897-2022

For Petitioner:

Novick Edelstein Pomerantz, P.C.

733 Yonkers Avenue

Yonkers, New York 10704

Respondent Pro Se

Shorab Ibrahim, J.

The court reviewed the following NYSCEF Documents in reaching its decision on the respondent's motion to vacate the judgment and warrant entered on default: No. 14 (Respondents Notice of Motion); 8 (Affirmation in Support); 9-13 (Supporting Exhibits); 15 (Affirmation in Opposition); 16-17 (Petitioner's Exhibits); and 19 (Reply Affirmation).

## DISCUSSION

This is a non-payment proceeding commenced by petition filed on October 20, 2022. (see petition at NYSCEF Doc. 1). Respondent did not answer, and on or about December 12, 2022 petitioner applied for entry of a default final judgment and for issuance of a warrant of eviction. (see warrant requisition at NYSCEF Doc. 5). A Judge of this court granted petitioner a final judgment of possession on or about April 21, 2023, (see NYSCEF Doc. 6), and a warrant of eviction issued on or about April 24, 2023. A marshal's notice was served on the respondent in mid-May. (see NYSCEF Doc. 9).

Respondent, relying on CPLR 5015(a), moves to vacate the judgment and warrant of eviction and for leave to file an answer. The motion is fully briefed and was argued on June 16, 2023.

CPLR 5015(a) requires a movant to establish both a reasonable excuse for their failure to answer and a meritorious defense to the proceeding. (see *East 168th Street Associates v Castillo*, 60 Misc 3d 774, 777 [Civ Ct, Bronx County 2018]; [Soffer v Montanez](#), 198 AD3d 606, 606 [1st Dept. 2021]). What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court. (see [Chevalier v. 368 E. 148th Street Associates, LLC](#), 80 AD3d 411 [1st Dept. 2011]).

As to excusable default, respondent offers that he was not properly served. Specifically, respondent's affidavit states,

At the time the petition was allegedly affixed to the door on October 31, 2022, I was out of the state on a family matter in Tennessee. When I returned on November 5, 2022, there were no documents affixed to the door. Similarly, I never received the Notice of [\*2]Petition and Petition by regular and certified mail as alleged in the affidavit of service. Notably, I monitor my mail daily with USPS "Informed Delivery" a free service that gives residential consumers the ability to digitally preview their letter-sized mail and manage their packages scheduled to arrive soon. No previewed mail indicated I would receive these documents via regular or certified mail. When I returned to New York on November 5, 2022, I retrieved my mail and did not receive the Notice of Petition and Petition in my mailbox. (see Affirmation in Support at NYSCEF Doc. 8, par. 9-11).

A facially sufficient affidavit of service is *prima facie* proof of proper service. (see [2301 7th Ave. HDFC v Escoffier](#), 41 Misc 3d 138(A), \*1 [App Term, 1st Dept 2013]; *Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *In re de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). Consequently, a proper challenge to service requires specific, detailed facts that contradict

the affidavit. (see *American Sav. & Loan Ass'n v Twin Eagles Bruce, Inc.*, 208 AD2d 446, 447 [1st Dept 1994]; [Northern v Hernandez, 17 AD3d 285](#), 286 [1st Dept 2005]; [Grinshpun v Borokhovich, 100 AD3d 551](#), 552 [1st Dept 2012], *lv denied*, 21 NY3d 857 [2013]).

Here, respondent does not directly challenge whether the process server went to the premises to deliver the petition and notice of petition on October 29, 2022 and October 31, 2022, [\[FN1\]](#) as respondent freely admits he was *not* home on those dates. Respondent, however, infers that the papers were not affixed to his door because the papers were not there when he returned home five (5) days after the alleged affixing. Respondent's affidavit does not rebut the process server's affidavit.

When service of process is calculated to apprise a respondent of the proceeding, there is no requirement that the party served actually receives the papers. (see *City of New York v Chemical Bank*, 122 Misc 2d 104, 106 [Sup Ct, New York County 1983], *citing Dobkin v Chapman*, 21 NY2d 490 [1968]; *Bossuk v Steinberg*, 58 NY2d 916, 918-919, 447 NE2d 56 [1983] *BHNJ Realty Corp. v Rivera*, 144 Misc 2d 241, 243 [Civ Ct, New York County 1989]); Thus, whether the papers were still affixed to the subject premises' door (5) days later does not rebut the affidavit's claim that the affixing was done.

Although in *dicta*, the court in *650 Fifth Ave. Co. v Travers Jewelry Corp.* framed the issue as follows: the process server could have done a proper "nail and mail" yet the wind or a passerby could have knocked the papers off the door and the mailing could have been refused or thrown away. Under such facts, service would be proper even if the target may not have received it. In other words, when both affidavits may be true, there is no need for a hearing. (29 Misc 3d 1215(A) at 3).

Here, it can be true that the papers were affixed to the door on October 31, 2022, as alleged in the affidavit of service, and were also not there (5) days later when respondent returned from his trip. [\[FN2\]](#) Thus, respondent's affidavit does not specifically contradict the affidavit of service. (see *Simonds v. Grobman*, 277 AD2d 369 [2nd Dept. 2000]).

Respondent also alleges he never received the petition and notice of petition by regular or certified mail. He alleges that he monitors his mail with the USPS "Informed Delivery" service. [\[\\*3\]](#) This service, according to respondent, allows him to digitally monitor mail scheduled to arrive and "no previewed mail indicated" that he "would receive these documents via regular or certified mail." (see affirmation in support at NYSCEF Doc. 8, par. 10).

Service by mail is complete, regardless of delivery, when the mailing itself is proper. (*European American Bank v Abramoff*, 201 AD2d 611, 612 [2nd Dept. 1994], *citing 14 Second Ave Realty Corp v Szalay*, 16 AD2d 919 [1st Dept. 1962]). Conclusory denials that a respondent did not receive mailed papers are insufficient to overcome the presumption of proper mailing arising from a process server's affidavit. ([see \*TBF Financial, LLC v Eagle Tours, LLC\*, 172 AD3d 1269](#), 1270 [2nd Dept 2019]). However, "[t]he presumption of receipt from mailing does not bar the acceptance of competent evidence to establish that there was not, in fact, proper mailing." (*Engel v Lichterman*, 95 AD2d 536, 544 [2nd Dept. 1983] (citations omitted); *see also Silverstein v Diaz*, 124 Misc 2d 597, 600 [Civ Ct, Queens County 1984] *citing Leland House v Wigfall*, 98 Misc 2d 355 [App Term, 1st Dept. 1979])).

Here, respondent raises issues of fact of whether the mailings were done or done properly. The certified mailing receipt that the petitioner attaches to its opposition [\[EN3\]](#) is presumably offered as evidence of proper certified mailing, but respondent correctly points out that the information is not in the process server's affidavit and no further foundation is laid to establish the document's credibility. (*see* reply affirmation at NYSCEF Doc. 19, par. 8). Furthermore, respondent's own search of the tracking numbers found that "[t]he tracking number may be incorrect or the status update is not yet available. Please verify your tracking number and try again later." (*id.*). This statement was unrefuted at oral argument. This, together with the sworn allegation that the "Informed Delivery" system did not alert him of the mailing, and along with his sworn denial of receipt of the alleged mailings, amounts to more than a mere denial of receipt. (*see Andersen v Mazza*, 193 AD2d 898, 899 [3rd Dept. 1993]; [Carlhart Realty Corp. v Parks](#), 65 Misc 3d 1231(A), 3 [Civ Ct, Queens County 2019] (denial of receipt does not rebut proper mailing); [Grinshpun v Borokhovich](#), 100 AD3d 551, 552 [1st Dept 2012], *lv denied*, 21 NY3d 857 [2013]; *IndyMac Federal Bank FSB v Quattrochi*, 99 AD3d 763, 764 [2nd Dept 2012] (no hearing is required where there is a failure to swear to *specific* facts to rebut the process server's affidavit)).

Proper mailing is required for a petitioner to obtain personal jurisdiction over a respondent when service is through the "conspicuous place" method, also known as "nail and mail." (*see* RPAPL §735(1)). Consequently, a traverse hearing must be held to determine the propriety of the required mailings (regular first-class and certified). ([see NYCTL 1998-1 Trust v Rabinowitz](#), 7 AD3d 459, 460 [1st Dept. 2004]).

If petitioner cannot sustain its burden at the hearing, ([see Harbor Tech, LLC v Correa](#), 69 Misc 3d 969, 976 [Civ Ct, Kings County 2020 [it is petitioner's burden to establish proper service by a preponderance of the evidence]), the case will be dismissed. Should petitioner

prevail, the court must still determine whether respondent has stated an excusable reason for his non-appearance and a meritorious defense to this case. That branch of respondent's motion is held in abeyance pending the traverse hearing. ([see Wells Fargo Bank, NA v Spaulding, 177 AD3d 817](#), 818 [2nd Dept. 2019] ("A court may not rule on the excusable nature of a defendant's [\*4] default under CPLR 5015(a)(1) without first determining the jurisdictional question ")).

The court notes that a finding of proper service of process does not foreclose finding that a tenant has a reasonable excuse for their default. ([see e.g. Fang Realty Corp. v Prime Six, Inc., 77 Misc 3d 129\(A\)](#), 1 [App Term, 2nd Dept, 1, 11, 13 Jud. Dist. 2022])

This case is adjourned to August 1, 2023 at 10:30 AM for a traverse hearing in Part F, Room 460. This constitutes the decision of the court. It will be posted on NYSCEF.

Dated: July 14, 2023  
Bronx, NY  
SO ORDERED,  
SHORAB IBRAHIM, JHC

### Footnotes

**Footnote 1:** See affidavit of service of the petition and notice of petition at NYSCEF Doc. 3.

**Footnote 2:** See affirmation in opposition at NYSCEF Doc. 15, par. 9 ("The fact that he [respondent] did not see papers does not mean he was not served. Anyone could have removed this notice from his door or after several days it might have fallen off the door.").

**Footnote 3:** see NYSCEF Doc. 16. There are no tracking numbers in the affidavit of service nor are mailing receipts attached to it.

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