

DISTRICT COURT OF THE COUNTY OF SUFFOLK, FIRST DISTRICT

Present:

HON VINCENT MARTORANA
JUDGE

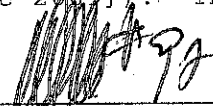
Date February 21, 2017

SLOMIN'S, INC.,
Plaintiff,
AGAINST
JOANN ISRAEL,
Defendant.

Upon the following papers numbered 1 to 3 read on this motion to vacate default judgment
Order to Show Cause and supporting papers 1, 2;
Notice of Cross-Motion and supporting papers _____;
Answering Affidavits and supporting papers 3;
Replying Affidavits and supporting papers _____;
Filed Papers _____; Other _____
(and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the defendant for an order vacating the default judgment entered against her in this action is denied. A defendant seeking to vacate a default judgment under CPLR 5015(a)(1) must establish both a reasonable excuse for the default and the existence of a meritorious defense (*Schiavetta v McKeon*, 190 AD2d 724 [2d Dept 1992]). The defendant's assertion that she was temporarily residing at her husband's residence at the time of service is not sufficient to constitute a reasonable excuse for her default, nor to warrant a traverse hearing, as she has offered no evidence that her residence there had a "degree of permanence and stability" (*Tribeca Lending Corp. v Crawford*, 79 AD3d 1018, 1020 [2d Dept 2010]) sufficient to rebut the process server's affidavit, which constitutes prima facie evidence of proper service in accordance with CPLR 308(4) (*Manhattan Savings Bank v Kohen*, 231 AD2d 499 [2d Dept 1996]; *Fairmount Funding Ltd. v Stefansky*, 235 AD2d 213 [1st Dept 1997]). Consequently, the Court need not consider whether the defendant has established the existence of a meritorious defense (*Levi v Levi*, 46 AD3d 519 [2d Dept 2007]; *National Loan Recoveries LLC v Smith*, 34 Misc3d 155[A] [App Term, 2d Dept 2012]). The defendant has also failed to rebut the presumption of proper service raised in the affirmation of mailing of the summons and complaint pursuant to CPLR 3215(g)(3) (*J. Kings Food Service Professionals Inc. v Ocean Garden Café Inc.*, 7 Misc3d 129[A], 2005 NY Slip Op 50523[U] [App Term, 2d Dept 2005]). Even if the motion were considered pursuant to CPLR 317, the defendant has failed to demonstrate that she did not receive actual notice of the summons in time to defend the action (*Capital One Bank v Bostinto*, 25 Misc3d 138[A] [App Term, 2d Dept 2009]). The motion is denied accordingly.

Dated: 4/20/17



J.D.C.
VINCENT J. MARTORANA

Decision to be published on line: yes no

APR 27 2017

MAILED