STATE OF NEW YORK : COUNTY OF ERIE
CITY OF BUFFALO : CITY COURT

VELOCITY INVESTMENTS, LLC,

Plaintiff, **DECISION**

vs. **Index No. G12790**

[redacted]

Defendant.

Defendant, [redacted] brings this motion by Order to Show Cause requesting an order pursuant to CPLR 5015(a) and/or CPLR 317 to vacate and set aside the judgment against her on several grounds. This Court finds the defendant's proffered ground -- lack of jurisdiction to be most meritorious.

> **The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of lack of jurisdiction to render the judgment or order [**CPLR Rule 5015(a)(4)**].**

The plaintiff bears the ultimate burden of proving that personal jurisdiction has been acquired over the defendant (*Cato Show Printing Co., Inc. v. Lee*, 84 AD2d 947 [4 Dept 1981]; *Siebtechnik v. G.M.B.H.*, 172 AD2d 1056 [4 Dept 1991]).

As disclosed by Diana Lentz's affidavit of service, she attempted to serve the defendant at her residence on three separate occasions before resorting to "nail and mail." These attempts occurred on Friday, November 24, 2006 at 7:41 A.M., Saturday, November 25, 2006 at 5:58 P.M. (Thanksgiving Day weekend), and Monday, November 27, 2006 at 11:27 A.M. Lentz made no further attempts to

effectuate personal service. On Thursday November 30, 2006, Lentz resorted to substituted service by nail and mail.

The sworn affidavits of defendant, [redacted] and her husband, [redacted], affirm that they spent the entire holiday weekend at home and did not do any entertaining. They also believe that the defendant was at home the Monday following the holiday. The defendant was on disability, was not at work, and would ordinarily be home at during working hours. They also attest that they have no knowledge of any persons who reside at [redacted], West Seneca. As such, the [redacted] would be unable to give any information as to their personal movements and similarly, the people at [redacted] would be in the same position. They both attest that a summons and complaint was never affixed to their door.

"Ordinarily, a proper affidavit of a process server attesting to personal delivery of a summons to a defendant is sufficient to support a finding of jurisdiction" (*Miller v. Roach*, 227 AD2d 998 [4 Dept 1996] quoting *Skyline Agency v. Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2 Dept 1986]). Once there is a sworn denial of service by the defendant, the affidavit of service is rebutted. The affidavit is no longer conclusive evidence, the burden shifts back to the plaintiff, and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing" (*Skyline Agency v. Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139; *Frankel v. Schilling,* 149 A.D.2d 657,659 [2 Dept 1989]).

Defendant contends: one, that plaintiff did not use due diligence before

resorting to the alleged substituted service; two, that plaintiff failed to affix a copy of the summons and complaint to the door of her residence, as required by CPLR 308(4); and three, plaintiff failed to mail summons and complaint within requisite statutory time frame. The sworn denial of the defendant with respect to these three issues requires a hearing to determine whether this Court has personal jurisdiction over the defendant (*Wiley v. Lipset*, 140 AD2d 336 [2 Dept 1988]; *Federal National Mortgage Assoc. v. Rick Mar Construction Corp.*, 138 Misc2d 316 [Sup Ct 1988]; *Dzembo v. Goran, et.al*, 163 AD2d 723 [3 Dept 1990]).

This shall constitute the Decision and Order of this Court.

DATED: Buffalo, New York
May 31, 2011

KEVIN J. KEANE
Buffalo City Court Judge

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