

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE PLATINUM BEECHWOOD
LITIGATION.

No. 1:18-cv-06658-JSR

MARTIN TROTT and CHRISTOPHER
SMITH, as Joint Official Liquidators and
Foreign Representatives of PLATINUM
PARTNERS VALUE ARBITRAGE FUND
L.P. (in Official Liquidation) and PLATINUM
PARTNERS VALUE ARBITRAGE FUND
L.P. (in Official Liquidation),

No. 1:18-cv-10936-JSR

Plaintiffs

- against -

PLATINUM MANAGEMENT (NY) LLC, *et*
al.,

Defendants

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A DEFAULT
JUDGMENT AGAINST EZRA BEREN AND IN SUPPORT OF CROSS-MOTION TO VACATE
CLERK'S CERTIFICATE OF DEFAULT**

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Counsel for Defendant Ezra Beren

Defendant Ezra Beren respectfully submits this memorandum of law in opposition to Plaintiffs' application for a default judgment and moves the court, pursuant to Fed. R. Civ. P. 55(c), to vacate the Clerk's Certificate of Default filed July 25, 2019 (the "**Certificate**"). Clerk's Certificate of Default, July 25, 2019, ECF No. 441.

PRELIMINARY STATEMENT

Ezra Beren has never been served in this action. With each amendment of the complaint and at the very end of the 90-day period provided by Rule 4(m), process servers went to his parents' house to effect service. Each time, the process server was clearly and unambiguously told that Mr. Beren no longer resided there and that nobody at that address could or would accept service on his behalf. On one occasion, the process server even tampered with Mr. Beren's parents' mailbox before leaving.

Mr. Beren has not been hiding and has never tried to avoid service. Plaintiffs (and their agents) simply cannot be bothered to take appropriate care in serving him. Presumably they never even bothered to ask his father-in-law where he lives, though he also is a defendant in this action. This may be because Plaintiffs recognize that the claims against Mr. Beren are ridiculously weak and they prefer to devote their attention to other, more central defendants, but the reason is ultimately irrelevant; Mr. Beren has never been served.

Nonetheless, Plaintiffs applied for and received the Certificate from the Clerk of this Court. Now, on the basis of the Certificate, they have moved this Court for a default judgment against Mr. Beren. Mr. Beren opposes Plaintiffs' motion and moves to vacate the Certificate.

FACTS

On November 21, 2018, Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (“**Plaintiffs**”) commenced this action.

On December 27, 2018, Plaintiffs attempted to serve a copy of the summons and complaint on Mr. Beren at the home of his parents, Jonathan and Denise Beren, at 3 Deerwood Road, Spring Valley, NY, 10977.¹ Jonathan Beren, Mr. Beren’s father, informed the process server that Mr. Beren did not reside there. *See* Decl. of Jonathan Beren ¶ 3.

Plaintiffs filed an amended complaint (the “**First Amended Complaint**”) on January 25, 2019, and attempted service in the same manner. 1st Am. Compl., Jan. 25, 2019, ECF No. 159. On February 6, 2019, a process server went to the home of Mr. Beren’s parents, despite having been previously told that Mr. Beren did not reside there. This time, it was Mr. Beren’s sister, Tammy Beren, who was present and who reiterated to the process server that Mr. Beren did not live there. *See* Decl. of Tammy Beren ¶ 3.²

¹ On January 22, 2019, Plaintiffs filed an affidavit of service relating to the purported service on December 27, 2018. Aff. of Service, Jan. 22, 2019, ECF No. 121.

² On February 20, 2019, Plaintiffs filed an affidavit of service relating to the attempted service on the First Amended Complaint. Aff. of Service, Feb. 20, 2019, ECF No. 250.

On March 29, 2019, Plaintiffs filed a second amended complaint (the “**Second Amended Complaint**”) and, on June 6, 2019, attempted to serve the Second Amended Complaint on Mr. Beren. 2nd Am. Compl., Mar. 29, 2019, ECF No. 285. This time, when the process server arrived at 11:00 at night, once more at Mr. Beren’s parents’ home in Spring Valley, NY, both Tammy Beren and Denise Beren, Mr. Beren’s mother, informed the process server, yet again, that Mr. Beren did not reside there. *See* Decl. of Tammy Beren ¶ 5; Decl. of Denise Beren ¶ 3.³

On July 25, 2019, in reliance on the affidavits of service filed by Plaintiffs, the Deputy Clerk entered the Certificate.

On September 30, 2019, Plaintiffs filed a motion for entry of a default judgment against Mr. Beren. Mot. for Default J., Sept. 30, 2019, ECF No. 462. Once more, Plaintiffs attempted to serve Mr. Beren at his parents’ address. On October 1, 2019, upon returning home, his parents discovered that a packet of documents addressed to Ezra Beren had been left at their house. *See* Decl. of Denise Beren ¶ 4; Decl. of Ezra Beren ¶ 7. On October 2, 2019, a process server again went to his parents’ house and, after being told that Mr. Beren did not reside there, departed without leaving any documents. *See* Decl. of Denise Beren ¶ 5; Decl. of Ezra Beren ¶ 8.

³ On July 15, 2019, Plaintiffs filed an affidavit of service relating to this purported service. Aff. of Service, July 15, 2019, ECF No. 434. This affidavit of service puts the date at June 25, 2019, but there was no attempt at service on that date. The date is irrelevant, however, as Mr. Beren does not reside at that address.

In fact, Mr. Beren has not resided at the address where service was attempted since January 2012. *See* Decl. of Ezra Beren ¶ 3. Mr. Beren currently resides at 23 Martin Lane, Lawrence, NY 11559, and has lived there since August 2018. *See id.* ¶ 1. From January 2012, when he moved out of his parents' home in Spring Valley, until August 2018, Mr. Beren resided at 420 West End Avenue, Apartment 6B, New York, NY 10024. *See id.* ¶ 2.

At no time has Mr. Beren attempted to conceal his current address or evade service of process. (Indeed, in a recent Google search for "Ezra Beren address," Mr. Beren's current address appeared on the first page of results. *See* Decl. of S. Christopher Provenzano & Ex. A) Plaintiffs have not bothered to exercise any reasonable degree of diligence, but instead simply purported to serve him at his parents' address, despite being repeatedly told that he does not reside there.

DISCUSSION

Plaintiffs' Motion for a Default Judgment Must Be Denied and the Certificate Vacated Because Mr. Beren Was Never Properly Served

Mr. Beren has never been properly served. The facts laid out in the affidavits filed herewith show that Plaintiffs' process servers were repeatedly informed that Mr. Beren did not reside at the address where they purported to serve him. Nonetheless, Plaintiffs made no apparent effort to correct their defective service. Only on the most recent attempt does it appear that Plaintiffs' agent took even the slightest notice that they had been told by Mr. Beren's parents and sister that he did not reside there. With a reasonable degree of care, Plaintiffs could have confirmed Mr. Beren's actual address with a single interrogatory to any number of other parties. They could likely have solved this without even that formality had they bothered to make a few phone calls. They could have Googled him and turned up

his current address. But they did none of these things and, as a consequence, Mr. Beren was never properly served.

Whether pursuant to the Federal Rules or the closely analogous New York rule, the summons must be delivered to a person of appropriate age at the defendant's *actual* dwelling.⁴ Serving the defendant at an improper residence is fatal. And it is not sufficient to serve a defendant at his parents' address if that is not his actual place of residence (as Plaintiffs did in this case). *See S. Bay Sailing Ctr., Inc. v. Standard Fire Ins. Co.*, 15-CV-6183 (JMA)(SIL), 2017 U.S. Dist. LEXIS 7116, at *21-23 (E.D.N.Y. Jan. 17, 2017) (service on defendant's mother at her residence was deficient where defendant had not resided at that address for many years); *Feinstein v. Bergner*, 397 N.E.2d 1161 (N.Y. Ct. of App. 1979) (parents' residence, where defendant had previously resided, was not "usual place of abode"); *see also Grammenos v. Lemos*, 457 F.2d 1067, 1071 (2d Cir. 1972) (service at defendant's sister's apartment was improper). The requirement of proper service at the proper address is so strictly enforced that it is improper to serve a defendant by means of a family member who lives in a different apartment **in the same building**. *See Di Leo v. Shin Shu*, 30 F.R.D. 56 (S.D.N.Y. 1961) (service on the defendant's adult daughter at her separate apartment in the same building was not effective as service on the defendant).

⁴ *See* Fed. R. Civ. P. 4(e)(2) (an individual may be served by "leaving a copy [of the summons and complaint] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there") and NY CPLR 308(2) (a natural person may be served "by delivering the summons within the state to a person of suitable age and discretion at the actual . . . dwelling place or usual place of abode of the person to be served").

Effective service is an indispensable prerequisite for the entry of a default judgment or any other exercise of jurisdiction by the Court. *See Murphy Bros., Inc. v Michetti Pipe Stringing, Inc.*, 526 US 344, 350-51 (1999). “In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. . . . Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.” *Id.* (citations omitted). As a result, in the absence of proper service, the Court must deny the Plaintiffs’ motion for a default judgment.

It is also irrelevant that Mr. Beren may have had actual notice of the pendency of the lawsuit, through his family or otherwise. “[I]t is well-established that defendant's actual notice of the litigation is not sufficient to satisfy the requirements of Rule 4.” *Mopex, Inc. v. AMEX, LLC*, No. 02 CV 1656 (SAS), 2002 U.S. Dist. LEXIS 3532, at *32-33 (S.D.N.Y. Mar. 5, 2002); *see also Feinstein*, 397 N.E.2d at 1163; *Raschel v. Rish*, 504 N.E.2d 389, 390 (N.Y. Ct. of App. 1986) (“When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents”); *Rotblut v. John Hancock Life Ins. Co.*, 1:04-cv-05563-KMK-KNF, 2005 U.S. Dist. LEXIS 7166, at *3 (S.D.N.Y. Apr. 25, 2005) (“[A]ctual notice alone will not sustain service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service.”) (quoting *Markoff v. S. Nassau Cmty. Hosp.*, 61 N.Y.2d 283, 288

(N.Y. Ct. of App. 1984)). Because proper service was never made upon Mr. Beren, Plaintiffs' Motion must be denied and the Certificate vacated.⁵

CONCLUSION

Plaintiffs have four times failed correctly to serve process on Mr. Beren, even though the process server was clearly informed each time that they had an old and invalid address for him. They have had ample opportunity to locate and serve him properly, but have neglected to do so. As a result of Plaintiffs' failures, this Court has never obtained jurisdiction over him and the Certificate of Default issued against him is void. Moreover, Plaintiffs have vastly exceeded the allotted time to serve Mr. Beren. Mr. Beren respectfully requests that the Court deny the Plaintiffs' motion for a default judgment and vacate the Certificate of Default

Dated: October 4, 2019

New York, NY

⁵ For most defaults, the Court would have discretion as to whether to vacate the default based on whether the defendant had established good cause. *See* Fed. R. Civ. P. Rule 55(c); *Powerserve Int'l, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir. 2001). However, without proper service and the jurisdiction it supplies, any default **must** be vacated as to that defendant. *See, e.g., S. Bay Sailing*, 2017 U.S. Dist. LEXIS 7116, at *24 (“[D]ue to improper service, personal jurisdiction was lacking at the time the Clerk’s Certificate of Default was issued, and it is therefore invalid”) (citations omitted). In such a situation, the court lacks the discretion it would normally have in ruling on a motion to vacate; it simply must grant the motion because the default was void.

/s/ S. Christopher Provenzano

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