

To commence the statutory time 101' appeals as of right (CPLR 5513(a)) you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

.....X
MIDLAND FUNDING, LLC.,

Plaintiff,

- against -

FILED
AND
ENTERED

ON 3-11-2010

WESTCHESTER
COUNTY CLERK

BLANCHE MANCE, A/K/A MANCE F. BLANCHE
A/K/A MANCE F. BLANCHE A/KA/ BLANCA F
MARCE A/K/A BLANCHE MANA,

Defendants.

.....X
LIEBOWITZ, J.

DECISION AND ORDER

Sequence No. I

Index No. 21642/06

The following documents numbered I to 20 were read in connection with defendant's motion for an Order pursuant to CPLR §§5015(a) and 3211(a)(8) vacating the default judgment entered against her and dismissing the complaint, and for an Order pursuant to CPLR §5015(d) directing plaintiff to make restitution to plaintiff for the property upon which execution has been levied, and all amounts withheld from her wages pursuant to an income execution, predicated on the default judgment.

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Plaintiff obtained a default judgment against defendant in January of 2007. Plaintiff alleges that she did not know of this judgment until September of 2009 when she

received a letter from her credit union informing her that her account had been restrained. Defendant's wages were also garnished pursuant to an income execution dated October 12, 2009.

Plaintiff brings the within motion to dismiss on the grounds that since she was never personally served with the summons and complaint herein, this Court never obtained jurisdiction over her. In support of her application, plaintiff has submitted an affidavit swearing to the fact that she was never served with the summons and complaint. Furthermore, plaintiff avers that the affidavit of service filed in this action contains material discrepancies between the process server's description of plaintiff, who he claims to have personally served with process, and defendant's actual identifying features at the time of the alleged service. The most significant of these discrepancies is the weight of plaintiff, which was listed on the affidavit of service as being between 131-160 pounds, when plaintiff states that she actually weighed 265 pounds on the date of the purported service.

Normally, given plaintiff's disavowal of service, this Court would set the matter down for a traverse hearing to see if plaintiff properly effectuated service upon defendant. However, given the evidence presented in this matter, this Court grants defendant's motion in its entirety, vacates the judgment plaintiff obtained against her and orders plaintiff to make restitution for the property upon which execution has been levied, and the wages that have been garnished by reason of the income execution.

The Court reaches the above conclusion based on the fact that plaintiff lacked standing to bring the instant action. Despite the fact that it was clearly doing business in New York State prior thereto, plaintiff was not registered as a foreign limited liability company with the New York State Department of Corporations until January of 2008, which was fifteen (15)

months after plaintiff initiated the within action. Therefore, in the exercise of its "inherent discretionary power in situations that [warrant] vacatur...", the Court vacates the default judgment entered herein.

On the basis of the foregoing, it is hereby

ORDERED that defendant's motion for an Order pursuant to CPLR §§5015(a) and 3211(a)(8) dismissing the complaint, and for an Order pursuant to CPLR §5015(d) directing plaintiff to make restitution to plaintiff for the property upon which the execution has been levied, and all amounts withheld from her wages pursuant to an income execution, predicated on the default judgment, is granted; and it is further

ORDERED that the default judgment dated January 9, 2007, and filed and entered in the Office of the County Clerk on January 19, 2007, is vacated; and it is further

ORDERED that the County Clerk is directed so note the vacatur of the judgment upon the service upon it of a copy of this Decision and Order, with Notice of Entry; and it is further

ORDERED that plaintiff is directed to make restitution to defendant for all of the property upon which execution has been levied, and all amounts withheld from her wages by reason of a wage garnishment, obtained under the default judgment herein, within thirty (30) days of today's date.

Woodson v. Mention Leasing Corp., 100 N.Y.2d 62, 68 (2003).

This constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 10, 2010

a.

RICHARD B. LIEBOWITZ
SUPREME COURT JUSTICE

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