

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 08-80381-CIV-MARRA/JOHNSON

JANE DOE NO. 5,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.

ORDER VACATING ENTRY OF DEFAULT

THIS CAUSE comes before the Court *sua sponte*.

On July 16, 2008, the Court issued an Order (DE 26) denying without prejudice Defendant's motion to set aside the Clerk's entry of default.¹ The Court reasoned that Defendant had let more than twenty days elapse after service of process before attempting to respond to the Complaint. As the Court explained, under New York law, personal service may be made on an individual by

delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or *usual place of abode* of the person to be served *and by either mailing the summons to the person to be served at his or her last known residence* or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other.

¹The Court presumes familiarity with the contents of this Order.

N.Y. C.P.L.R. § 308(2) (McKinney 2008) (emphasis added). Based on the Court's reading of the Affidavit of Service (DE 4), it appeared that Plaintiff's process server had mailed a copy of the Summons and Complaint to Defendant on May 12, 2008. What appeared to be a distortion in the document due to its electronic upload into the Court's CM/ECF system, however, was apparently a line striking the language from the affidavit regarding the mailing of the Summons and Complaint. (See DE 30.) Plaintiff brought this error to the Court's attention after the Court issued its Order to Show Cause.

Because the Summons and Complaint were not mailed to Defendant, service was not accomplished under New York law.² See N.Y. C.P.L.R. § 308(2). Further, as the Court has already explained, service was not effective under either the Federal Rules of Civil Procedure or Florida law.³ Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Court's Order (DE 26) of July 16, 2008, is **VACATED**.
2. Defendant's Motion to Set Aside Default (DE 9) is **GRANTED**. The Clerk's Entry of Default (DE 6) is **VACATED**.
3. Plaintiff shall have forty-five (45) days from the date of entry of this Order to serve a copy of the Summons and Complaint on Defendant. Failure to serve Defendant within forty-five days shall result in dismissal of the above-styled action pursuant to Fed. R. Civ. P. 4(m).

²Interestingly, Plaintiff did not bring this issue to the Court's attention in its response brief. Defendant's Motion (DE 9) made clear that he assumed all the steps were taken to serve Defendant in accordance with New York law, including that copies were sent through the mail.

³The Court again declines to allow discovery on whether Richard Barnett resides at Defendant's New York home. Mr. Barnett submitted an affidavit sworn under penalty of perjury that he does not reside at that address. (See Barnett Aff.) Plaintiff has not submitted any evidence to suggest that Mr. Barnett is not credible, so allowing discovery on this point would simply be a waste of resources.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County,

Florida, this 25th day of July, 2008.



KENNETH A. MARRA
United States District Judge

Copies furnished to:
all counsel of record