Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

MABLE TILLMAN WASHINGTON and MARTELLY ETHERIDGE,

Plaintiffs,

-against-

LOUISE HARRIS, LINDA T. HARRIS, ANNETTE GONZALEZ and PHYLLIS CLARK,

Defendants.

Index No: 11645/12

Motion Date: 10/17/12

Motion Cal. No.: 16

Motion Seq. No.: 1

The following papers numbered 1 to 11 read on this motion by plaintiffs for a default judgment

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 8
Replying Affidavits.....	9 - 11

Upon the foregoing papers it is ordered that this motion is denied.

The defendant's answer in the form annexed to the opposition is deemed served.

The plaintiffs commenced this action by filing the summons and verified complaint on June 2, 2012 seeking, inter alia, a judgment declaring that the plaintiffs are the owners of the real property located at 111-22 143rd Street, Jamaica, N.Y. by adverse possession. Plaintiffs now move for leave to enter a default judgment.

A plaintiff moving for a default judgment pursuant to CPLR 3215 must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (CPLR 3215 [f]; Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc., 89 AD3d

649, 651 [2011];; see George v. Yoma Dev. Group, Inc., 83 AD3d 776 [2011]).

The plaintiffs' evidence is insufficient to demonstrate, prima facie, personal jurisdiction over the defendants, Louise Harris, Linda T. Harris and Annette Gonzalez by showing that these defendants were properly served with process by any method authorised in Article 3 of the CPLR. Generally, to obtain personal jurisdiction over a natural person, service of the summons and complaint must be made in accordance with one of the aphorized methods contained Article 3 of the CPLR (see 86 NY Jur. 2d Process and Papers § 59).

In the absence of personal jurisdiction, all subsequent proceedings are rendered null and void (see Feinstein v. Bergner, 48 NY2d 234, 241 [1979]; Muslusky v. Lehigh Val. Coal Co., 225 NY 584, 587 [1919]) and subject to vacature at any time without any conditions (see McMullen v. Arnone, 79 AD2d 496, 499 [1981] and cases cited therein). It is, at all times, the plaintiff's burden to prove that jurisdiction over the defendant was obtained by proper service of process (see Pearson v. 1296 Pacific Street Associates, Inc., 67 AD3d 659, 660 [2009] lv denied 14 NY3d 705 [2010]; Munoz v. Reyes, 40 AD3d 1059 [2007]). A process server's affidavit of service ordinarily constitutes prima facie evidence of the facts contained therein and proper service (see Deutsche Bank Nat. Trust Co. v. Pestano, 71 AD3d 1074 [2010]; Frankel v. Schilling, 149 AD2d 657, 659 [1989]).

The affidavit of service with respect to defendant Annette Gonzales avers, inter alia, that a copy of the summons and complaint was delivered to Mr. Gonzalez, Annette Gonzalez' husband, at defendant's residence on June 7, 2012. The affidavits of service with respect to the defendants, Louise Harris and Linda T. Harris, aver, inter alia, that on July 3, 2012 service upon these defendants was made by delivery of the summons and complaint to Yolanda Henrey, a person of suitable age and discretion at the defendants' residence. It appears that service upon Gonzales was attempted pursuant to CPLR 308(2) and upon Louise Harris and Linda T. Harris pursuant to CPLR 313 and 308(2). However, these affidavits of service do not assert that an additional copy of the summons and complaint was mailed to the defendants within 20 days of the delivery. Jurisdiction is not acquired pursuant to CPLR 308(2) unless there has been strict compliance with both the delivery and mailing requirements (see Gray-Joseph v. Shuhai Liu, 90 AD3d 988 [2011]; Ludmer v. Hasan, 33 AD3d 594 [2006]; Citibank, N.A. v. Harris, 264 AD2d 377 [1999]).

In addition to the defective service upon the defendants, Louise Harris and Linda T. Harris, the plaintiffs have failed to

establish that these defendants are in default. Pursuant to CPLR 308(2) service is complete and the defendants' 30 days to answer begins 10 days after filing proof of service. Proof of service was filed on August 3, 2012 and these defendants' time to answer expired on September 3, 2012. The plaintiffs moved for a default judgment on August 17, 2012 before the defendants' time to answer had expired.

Defendant Gonzalez, however, has not raised a jurisdictional objection, rather, she opposes entry of a default judgment on substantive grounds and seeks to vacate her alleged default and leave to serve an answer pursuant to CPLR 5015(a)(1). Although CPLR 2215 requires a non-moving party seeking affirmative relief to serve a notice of cross-motion, the defendant's opposition containing her attorney's affirmation and the defendant's affidavit clearly set forth the relief defendant seeks and the factual basis for such relief. In addition, plaintiffs addressed the defendant's prayer for relief and are not prejudiced by the lack of a formal cross-motion. Thus, the defendant's opposition is deemed a cross-motion (see Fugazy v. Fugazy, 44 AD3d 613 [2007]; cf Kurtz v American Export Indus., 49 AD2d 557 [1975], aff'd 39 NY2d 738 [1976]).

The defendant's cross-motion to vacate her default pursuant to CPLR 5015(a)(1) and for leave to serve an answer is granted. The proposed answer annexed to the defendant's opposition as Exhibit F is deemed served and timely interposed.

As a reasonable excuse, defendant asserts that she faxed a copy of the summons and complaint to her attorney, Fred Way, who failed to interpose an answer on her behalf. Upon receiving the instant motion, defendant promptly retained new counsel, her present attorneys. Contrary to plaintiff's counsel's claim, defendant's reliance upon Way, her attorney, to appear and answer the complaint was reasonable under the circumstances (see Muir v. Coleman, 98 AD3d 569 [2012]; Belesi v. Gifford, 269 AD2d 552 [2000]).

Defendant has also demonstrated a she has a potentially meritorious defense. In this regard defendant asserts that Washington entered into the premises and remained with the permission of Tom Harris, her father and owner of the premises, in exchange for Washington paying all of the expenses for maintenance and upkeep of the premises (see Dickerson Pond Sewage Works Corp. v. Valeria Associates, L.P., 231 AD2d 488 [1996]; Susquehanna Realty Corp. v. Barth, 108 AD2d 909 [1985]).

Accordingly, the defendant's sross-miton is granted.

In addition, the plaintiffs have also failed to sustain their prima facie burden of establishing by clear and convincing evidence their entitlement to a judgment even on default.

To establish a claim of adverse possession, the possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period (Walling v. Przybylo, 7 NY3d 228, 232 [2006]). Since New York law disfavors the acquisition of title by adverse possession (Belotti v. Bickhardt, 228 NY 296 [1920]), these elements must be proven by clear and convincing evidence (Ray v. Beacon Hudson Mtn. Corp., 88 NY2d 154, 159 [1996]).

The mere occupancy for an extended period of years, even when coupled with conduct that may be consistent with ownership, does not ripen into ownership by adverse possession absent an initial claim of right (see Keena v. Hudmor Corp., 37 AD3d 172, 174 [2007]; All the Way E. Fourth St. Block Assn. v Ryan-NENA Community Health Ctr., 30 AD3d 182, 182 [2006], lv denied 7 NY3d 713 [2006]). Moreover, when permission to occupy can be implied from the beginning, adverse possession will not arise until there is a distinct assertion of a claim of right hostile to the owner (see Dickerson Pond Sewage Works Corp. v. Valeria Associates, L.P., 231 AD2d 488 [1996]; Susquehanna Realty Corp. v. Barth, 108 AD2d 909 [1985]).

In support of their motion the plaintiffs submitted the affirmation of their attorney, a complaint verified by plaintiff, Etheridge, an affidavit of Maryanna Bradley, allegedly the niece of the plaintiff, Washington, copies of two expired driver's licenses issued to Washington, a copy of a driver's license issued to a Martelly Etheridge, a copy of an expired card issued by the MTA Bridges and Tunnels to a Marelly Washington, and various bills, invoices and cancelled checks.

Although an attorney's affirmation may be used to submit competent evidence, such as documents, in support of a default judgment (see Gaeta v. New York News, 62 NY2d 340, 350 [1984]), the attorney's affirmations submitted in support and reply contains allegations of fact which are unsupported by documentary evidence and, thus, have no probative value (see US Nat. Bank Ass'n as Trustee v. Melton, 90 AD3d 742, 743 [2011]).

While a verified pleading may stand in place of an affidavit (see CPLR 105[u]), the complaint in this case is verified by the plaintiff, Etheridge, who was not yet born when Washington moved into the premises, cannot stand in the place of an affidavit in this case. His knowledge regarding the circumstances under which Washington moved into the premises appears to be based upon hearsay and insufficient to demonstrate, prima facie, that

Washington's possession was hostile, under a claim of right and not by permission of the owner, Tom Harris. In addition, it is noted that Etheridge's documentary evidence regarding his identity contains two different dates as his alleged date of birth and are in different names. Peculiarly absent from the plaintiffs' submission is an affidavit from the plaintiff, Washington, who would be the person most likely to have accurate, first hand knowledge of the essential facts.

The affidavit of Maryanna Bradley, allegedly the niece of the plaintiff, Washington, is also insufficient as it consists of hearsay and unsubstantiated conclusions. There is no competent evidence to support her claim that Tom Harris abandoned the premises.

Accordingly the plaintiffs' motion for leave to enter a default judgment as to all defendants is denied.

Dated: October 22, 2012
D# 47

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J.S.C.