UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 09-80469-CIV-MARRA/JOHNSON

JANE DOE II,

Plaintiff,
v.

JEFFREY EPSTEIN and
SARAH KELLEN,

Defendants.
_____/

ORDER SETTING ASIDE DEFAULT AGAINST DEFENDANT SARAH KELLEN AND REQUIRING KELLEN TO RESPOND TO COMPLAINT ON OR BEFORE AUGUST 3, 2009

THIS CAUSE is before the Court on Defendant Sarah Kellen's ("Defendant" or "Kellen") Motion to Set Aside Order of Default (DE 42), filed June 23, 2009. The motion is fully briefed and ripe for review. The Court has reviewed the motion, response, reply, and the record and is otherwise fully advised in the premises.

On June 17, 2009, the Court entered an Order of Default Against Defendant Sarah Kellen (DE 39). In that Order, the Court stated that it "has reviewed the affidavit of service accompanying Plaintiff's motion for default against Kellen and concludes that Plaintiff effected service on Defendant Kellen in a manner authorized by New York state law." See DE 39, citing N.Y.C.P.L.R. § 308(4). The Court concluded that, because Defendant Kellen failed to timely answer the complaint or otherwise respond thereto, Plaintiff was entitled to an Order of Default

against Kellen. Id.

In her motion to set aside default, Kellen argues that (1) the process server failed to exercise "due diligence" before resorting to New York "nail and mail" service; (2) the entry of default was premature because Plaintiff did not file her proof of service until she filed her motion for default against Kellen; (3) Kellen has shown good cause for setting aside the default because her conduct was not willful, litigation is in its early stages, and Kellen has a meritorious defense to this action.

Upon review of the process server's affidavit, the Court concludes that the server exercised "due diligence" by making six attempts to serve Plaintiff over a twelve-day period, at varying times of morning and evening, before resorting to New York "nail and mail" service. However, Defendant correctly notes that pursuant to N.Y.C.P.L.R. § 308(4), the time for her to respond to the complaint did not begin to run until Plaintiff filed "proof of service" with the Court. Accordingly, Defendant should have been afforded twenty days to respond to the complaint from the June 12, 2009 filing of the proof of service before Plaintiff could obtain an entry of default against her. Because the default was entered prematurely, the Court will set aside the Order of Default Against Sarah Kellen (DE 39), without prejudice, for Plaintiff to move for default against Kellen if she does not respond to the complaint on or before August 3, 2009.

Additionally, even assuming Defendant's interpretation of New York law is incorrect, she had a good faith basis to believe that the time for her to answer the complaint had not expired. Thus, at the very least, she has shown excusable neglect. Defendant also asserts meritorious defenses and Plaintiff will not be prejudiced by the setting aside of the default. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant Sarah Kellen's Motion to Set Aside Order of Default (DE 42) is **GRANTED**.

2. The Order of Default against Kellen (DE 39) is set aside, without prejudice for Plaintiff to move for an entry of default against Kellen if she does not respond to the complaint on or before August 3, 2009.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 22nd day of July, 2009.

KENNETH A. MARRA
United States District Judge

Copies furnished to:
All counsel of record