UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not For Publication

In re	Chapter 11
SCIENT, INC., *et al*.,	Case Nos. 02-13455 through 02-13458 (AJG)
Debtors.	(Jointly Administered)
SCIENT, INC.,	
Plaintiff,	
v.	Adv. Pro. No. 03-2377
AFCO,	
Defendant.	

OPINION GRANTING AFCO CREDIT CORPORATION'S MOTION TO VACATE DEFAULT JUDGMENT

APPEARANCES

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ARTHUR J. GONZALEZ
United States Bankruptcy Judge

Before the Court is a motion to vacate the default judgment entered against Afco Credit Corporation ("Afco Credit") on July 13, 2004. The issues before the Court are (1) whether Afco Credit was properly named as a defendant in the instant adversary proceeding, (2) whether Scient properly served Afco Credit the summons, complaint, and its Motion in Support of Entry of Judgment by Default ("Default Judgment Motion"), and (3) whether Afco Credit may set aside the default judgment entered against it based on "excusable neglect," dismiss the complaint, or in the alternative, interpose an answer for consideration on the merits.

Upon consideration of the pleadings and arguments advanced by the parties, the Court finds that Scient properly named Afco Credit as a party to the instant proceeding, served Afco Credit the summons, complaint and the Default Judgment Motion, and properly filed proof of service with the Court with respect to those documents. Further, the Court finds that Afco Credit's failure to timely respond to Scient's pleadings was not willful, Afco Credit presents a meritorious defense, and vacating the default judgment does not prejudice Scient. Accordingly, the default judgment entered against Afco Credit is vacated, and the same facts supporting that finding, support a finding vacating the entry of default entered against Afco Credit. Afco Credit's motion to dismiss is denied, and it may interpose its proposed answer for consideration on the merits. The Court also *sua sponte* grants Scient leave under Federal Rules of Civil Procedure 4(a) and 15(c)(3) to amend its summons and complaint to correct Afco Credit's name.

I. JURISDICTION

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157(a) and 1334 and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

II. BACKGROUND

A. Procedural History

On April 8, 2003, Scient, Inc. ("Plaintiff," "Debtor," or "Plaintiff/Debtor") commenced an adversary proceeding by filing a complaint ("Complaint") against AFCO[1] ("Named Defendant" or "Creditor") to avoid and to recover preferential transfers pursuant to sections 547 and 550 of title 11 of the United States Code (the "Bankruptcy Code"). In the Complaint, Plaintiff states on July 16, 2002 ("Petition Date"), Plaintiff filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Plaintiff asserts the Named Defendant received transfers from the Plaintiff/Debtor in the aggregate amount of $72,487.24 (collectively, the "Avoidable Transfers") within ninety (90) days prior to the Petition Date, and the Defendant is the "initial transferee" or an "immediate or mediate transferee" of the Avoidable Transfers.[2]

[1] The Court notes that Afco Credit ("Putative Defendant") declares that its correct legal name is "Afco Credit Corporation," not "AFCO." Thus, it argues that it was not properly named as a party to the instant adversary proceeding and the Court does not have personal jurisdiction over it — Putative Defendant also argues insufficient service of process. As discussed herein, the Court finds that the Named Defendant and Putative Defendant are synonymous and not two, separate distinct entities. The Court also finds that the Putative Defendant received sufficient notice regarding the adversary proceeding and that the Court has personal jurisdiction over the Putative Defendant.

[2] *See* Compl. ¶¶ 8-9.

Further, Plaintiff makes a claim for relief to recover the Avoidable Transfers under section 547, alleging the Avoidable Transfers were "made for or on account of an antecedent debt owed by the Plaintiff/Debtor before the [transfers] were made[;]" "made while the Plaintiff/Debtor was insolvent[;]" "on or within ninety days before the Petition Date[;]" and "while the Defendant was a creditor of the Plaintiff/Debtor."[3] Lastly, Plaintiff argues the Defendant received "more than it would have otherwise received: (a) in the Plaintiff's bankruptcy case; (b) if the Preferential Transfers had not been made; and (c) if the Defendant received payment to the extent provided by the provisions of the Bankruptcy code."[4]

On April 14, 2003, the Clerk's Office filed a summons and notice of pre-trial conference against the Named Defendant, with an answer due on May 14, 2003. The pre-trial conference was scheduled for May 28, 2003. On April 25, 2003, Plaintiff filed a certificate of service, noting the summons and notice of pre-trial conference were served upon the Named Defendant at 4501 College Boulevard, Leawood, Kansas, 66221, Attn.: Ms. Bonnie Hodges, Vice President.

On June 2, 2004, Plaintiff filed a Notice of Motion for the Entry of a Default Judgment ("Notice of Default Judgment Motion"), indicating that on June 30, 2004, Plaintiff will move the Court for an order directing the entry of a default judgment against the Named Defendant. On the same day, Plaintiff also filed the Default Judgment Motion. In these motions, Plaintiff asserts that opposition to entry of the order must be served upon Plaintiff no later than May 24, 2004 "or the motion may be granted." The following sentence below the signature line indicates Plaintiff served the motion papers

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[3] *See* Compl. ¶¶ 10-17.
[4] *See* Compl. ¶ 18.

upon the Named Defendant: "To: AFCO, 4501 College Boulevard, Leawood, Kansas 66221."[5] These documents were entered on the Electronic Case Filing system ("ECF") docket on June 2, 2004.

In addition, on June 2, 2004, Plaintiff filed an Affidavit in Support of Entry of Judgment by Default ("DV Affidavit"), sworn to by Gabriel Del Virginia, Esq. ("Del Virginia"), Plaintiff's counsel. In the DV Affidavit, Del Virginia asserts the Plaintiff's Complaint "seeks to set aside preferential transfers" made by Plaintiff to Named Defendant "as follows

Check No.	**Check Date**	**Amount**
107728	May 2, 2002	$36,243.62
107888	May 29, 2002	$36,243.62
Total---		$72,487.24[6]

Further, Del Virginia declares the Named Defendant's "time to answer, move or otherwise respond" to the Complaint "has long passed and the [Named] Defendant has not appeared, answered or otherwise moved with respect thereto."[7] He contends the Named Defendant did not request an extension nor did the Debtor grant an extension. Lastly, Del Virginia states the Debtor requests not to file a supporting memorandum of law "because the issues involved herein concern settled legal principles."[8] The Plaintiff also moved the Court for an order directing the entry of a default judgment setting aside the Avoidable Transfers, and awarding Plaintiff a money judgment in the amount of $72,487.24 plus interest, costs and disbursements of the adversary proceeding, and "such

[5] *See* Pl's Default Judgment Motion 4.
[6] *See* Del Virginia Aff. ¶ 4.
[7] *See* Del Virginia Aff. ¶ 6.
[8] *See* Del Virginia Aff. ¶ 7.

other and further relief as the Court deems appropriate." It is noted that the DV Affidavit was entered on the ECF docket on June 2, 2004.

On June 2, 2004, Plaintiff filed a certificate of service for the Default Judgment Motion and accompanying documents, noting it served the Default Judgment Motion upon AFCO at 4501 College Boulevard, Leawood, Kansas, 66221.

On July 13, 2004, the Clerk of the Court entered a default against the Named Defendant ("Default"). On the same day, the Court signed the Order for Default Judgment, decreeing that Plaintiff is awarded a default judgment against the Named Defendant in the amount of $72,487.24 ("Default Judgment"). The Clerk of the Court entered the Default Judgment against the Named Defendant with the Index Number BC 04.0403.

On July 22, 2004, the Clerk of the Court closed the Adversary Proceeding docket, subject to the filing of a notice of appeal within ten (10) days of the entry of the order terminating the Adversary Proceeding.

On May 1, 2006, Putative Defendant filed the Notice of Motion to Vacate the Default Judgment ("Motion to Vacate") with a hearing to be held on May 31, 2006 before the Court. The filing included a letter (marked as "Exhibit A"), two affidavits, and an answer ("Answer"). Plaintiff's counsel sent the Putative Defendant — at 110 William Street, 29th Floor, New York, New York 10038 — Exhibit A, dated April 6, 2006, with a receipt stamp of April 10, 2006, informing the Putative Defendant of the Default Judgment obtained by Plaintiff on July 13, 2004 due to the Named Defendant's failure to defend or to appear in the instant matter. The two affidavits and the Answer are discussed below.

The first affidavit is sworn to by Robert J. Ratner ("Ratner"), General Counsel and Senior Vice President of Afco Credit, on April 25, 2006. Ratner noted that he submitted his affidavit in support of the Putative Defendant's Motion to Vacate, to dismiss the Complaint, or, in the alternative, to interpose its Answer. Ratner states the Putative Defendant is a wholly-owned subsidiary of Mellon Bank N.A. Further, Ratner asserts "[e]very employee of Afco Credit has been and is instructed on a periodic basis, as to steps to take with respect to legal papers… The employees are directed to fax them immediately to your deponent and to contemporaneously make a telephone call."[9] Ratner contends prior to the receipt of Exhibit A, he was not apprised by Plaintiff, counsel for Plaintiff or any employee of the Putative Defendant regarding any claim or action by the Plaintiff.

Ratner alleges the Putative Defendant is a secured creditor regarding the loan it made to the Plaintiff. He asserts it is secured by "the unearned premiums payable by the insurer upon cancellation of the financed insurance."[10] Ratner confirms Debtor made two payments in the amount of $36,243.62 each, one on May 3, 2002 and the other one on June 3, 2002, but contends the payments are not Avoidable Transfers. First, he argues the payments were made in the ordinary course of business of both parties. Second, he argues the Putative Defendant received no more than it would have received in the event of a hypothetical liquidation at the time of the payments. He contends the debts were overcollateralized. Ratner explains that on May 3, 2002, the value of its collateral was $331,126.99 while the balance due prior to receipt of that payment was $144,974.48. Ratner also states on June 3, 2002, the value of its collateral was $276,176.00 while the

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[9] *See* Ratner Aff. ¶ 3.
[10] *See* Ratner Aff. ¶ 5.

balance due prior to receipt of that payment was $108,730.86. In sum, Ratner argues Defendant was overcollateralized in both instances and received no more than it would have in a hypothetical liquidation.

Ratner contends if he was aware of the interposition of the "claim," he would have advised Plaintiff's counsel of those defenses and if necessary referred the matter to outside counsel. He alleges he never received copies of the Complaint and Default Judgment Motion, and thus, he was unaware of the adversary proceeding; therefore, he did not answer.

Ratner further declares the alleged service "may have been made by mail" to the Putative Defendant's office in Leawood, Kansas, upon Vice President, Bonnie Hodges. Ratner asserts the Putative Defendant is a New York State corporation, with its main office in New York, New York; the same location where Plaintiff's counsel forwarded the Default Judgment it obtained against "AFCO," not Afco Credit.

Lastly, Ratner questions whether the Court ever obtained jurisdiction over Afco Credit, challenging the "propriety of the proof submitted with respect to [the] alleged service of the summons and [C]omplaint."[11] Ratner argues Plaintiff never filed proof of service because exhibit "B"[12] on the Court docket states the original certificate is available from Plaintiff's counsel. Ratner alleges proof of service has not been filed with the Court "as is required." Moreover, he argues the "other certificates of service filed by counsel indicat[ing] counsel 'caused to be served' the 'reference documents' is insufficient under Rule 7004."[13]

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[11] *See* Ratner Aff. ¶ 9.
[12] *See* Putative Def.'s Motion to Vacate Exhibit "B."
[13] *See* Ratner Aff. ¶ 9.

The second affidavit is sworn to by Bonnie Hodges ("Hodges") on April 19, 2006, and states in relevant part that she "has not received any papers, including a summons and [C]omplaint, or any other documents related, directly or indirectly thereto with respect to the [P]laintiff in this action."[14] She asserts the staff at the office in Leawood, Kansas is directed to forward all correspondences addressed to her as well as any correspondence "in the event that it is not clear to whom a matter should be referred within such office."[15]

Consistent with Ratner's April 25, 2006 affidavit, the Answer includes three affirmative defenses. First, the Putative Defendant asserts the Avoidable Transfers are not preferential because they were made in the ordinary course of business of both the Plaintiff and Putative Defendant. Second, the Putative Defendant argues it is a fully secured creditor of the Plaintiff, and at the time, it received no more than it would have received in the event of a hypothetical liquidation. Further, the Putative Defendant contends it is an oversecured creditor; thus, the Avoidable Transfers are not preferential. Lastly, the Putative Defendant argues service of process was insufficient; therefore, the Court lacks jurisdiction over the Putative Defendant. The Putative Defendant concludes with a request that the Court dismiss the Complaint with "costs and disbursements."

On May 24, 2006, Plaintiff filed an Affirmation and Incorporated Memorandum of Law ("Affirmation"), with four attachments, to support its answer to the Putative Defendant's Motion to Vacate. The Plaintiff argues the Putative Defendant demonstrated bad faith by "repeatedly willfully ignoring the instant matter" — Plaintiff's pre-lawsuit correspondence, the summons and Complaint, and the Default Judgment Motion.

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[14] *See* Hodges Aff. ¶ 3.
[15] *See id*.

Additionally, Plaintiff declares the Putative Defendant's conduct required Plaintiff to hire outside counsel/collection agent to collect the Default Judgment; the collection agent was unsuccessful. Plaintiff also argues the Putative Defendant failed to make the requisite showing for its default as well as the existence of a meritorious defense.

On May 25, 2006, Plaintiff filed a certificate of service in relation to the Default Judgment Motion, declaring Plaintiff's attorney served, on May 24, 2006, a copy of the Default Judgment Motion on the Putative Defendant, noted as "AFCO," at the address of "Carlucci & Legum, LLP, 170 Old Country Road, Mineola, New York 11501-4307, Attn.: Steven G. Legum, Esq.."

On May 30, 2006, Putative Defendant filed two additional affidavits. First, Steven G. Legum, Esq. ("Legum"), a member of the firm Carlucci & Legum, LLP, affirms that his firm represents the Putative Defendant and that he submitted the affidavit in response to the Affirmation. Legum counters both Plaintiff's assertion that the Putative Defendant's default was willful and that the Putative Defendant does not present a meritorious defense. He argues Plaintiff's counsel failed to address the issue of why some pre-judgment correspondence was sent to "AFCO" in Leawood, Kansas while the post-judgment correspondence was sent to "Afco Credit" to its main office in New York, New York. Additionally, Legum asserts Plaintiff's counsel failed to address his failure to file proper proof of service with the Court. Lastly, he declares Plaintiff's arguments are illogical because the Putative Defendant, a "multi-billion dollar corporation with two full[-]time attorneys on staff," would not allow the entry of judgment against it, "only to face the uphill battle of vacating the judgment."[16]

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[16] *See* Legum Aff. ¶ 5.

The second affidavit is sworn to by Ratner and is presented as a reply to the Affirmation. Ratner reiterates the same points he made in his prior affidavit, as discussed above.

B. Parties' Contentions

On May 31, 2006, a hearing was held before the Court. The parties' contentions are discussed below. The record was closed at the conclusion of the hearing.

a. Putative Defendant's Contentions

At the hearing, the Putative Defendant moved the Court to vacate the Default Judgment. Putative Defendant argues the affidavit of service was defective under Federal Rule of Bankruptcy Procedure 7004, which states the party affecting service shall leave proof with the court. Putative Defendant declares Plaintiff did not file an affidavit of service with the Court and argues Plaintiff's subsequent certification stating it "caused" the same to be served in its answering paper is jurisdictionally defective. Putative Defendant also contends there is "no room for default" because the wrong party's name was utilized. Lastly, Putative Defendant states there are twenty-three (23) corporate entities beginning with the name "AFCO" registered with the State of New York.

Furthermore, Putative Defendant argues that although Plaintiff alleges the demand letter and summons and Complaint were mailed to "AFCO" "to the attention of one of the employees in the Leawood, Kansas office," Putative Defendant never received those documents — as previously asserted in Ratner's and Hodges' affidavit — and further asserts that "she's [Hodges] under strict instructions, which she always complies, to turn over something like this to counsel." Putative Defendant notes it is a New York State credit corporation and when Plaintiff tried to enforce the Default Judgment by writing to

its headquarters located in New York, New York, it immediately retained counsel to resolve the matter. Putative Defendant also states it submitted an affidavit from the head of Afco Credit and an affidavit noting it never defaulted.

Putative Defendant declares it did not need to default because it is a solvent corporation and has two defenses on the merits that are "dispositive." First, Putative Defendant argues it received no more than it would have in a hypothetical liquidation, and it is a fully secured creditor; therefore, the transfers are not preferential payments. Second, Putative Defendant argues the payments were made on its due date in the ordinary course of business. In summary, Putative Defendant contends there was no reason for it to default given its defenses, and moves the Court to dismiss for lack of jurisdiction or to vacate the Default Judgment, and interpose the proposed Answer and to consider the matter on the merits.

Putative Defendant argues the standard to vacate a default judgment is comprised of three factors, also set forth in the Plaintiff's answering papers. Putative Defendant asserts the Court must consider (1) whether the default was willful, (2) whether vacating the default prejudices the non-defaulting party, and (3) whether any meritorious defenses exist. Moreover, Putative Defendant argues the three factors must be considered under a totality of the circumstances analysis.

In the instant case, Putative Defendant argues under this standard the Default Judgment should be vacated. First, Putative Defendant claims it did not willfully default; as soon as it was notified, it took immediate action. Putative Defendant concedes the pre-judgment correspondence and filings were served upon an office of the corporation and addressed to an officer of the corporation. Putative Defendant further concedes that none

of the three communications sent to its Leawood, Kansas office was returned to the Debtor "as undelivered." Although Putative Defendant concedes if an employee of its company failed to give the papers to the person named on the document, it bears the responsibility, Putative Defendant argues this failure should be considered in determining its willfulness and whether it had a valid excuse for default.

b. Plaintiff's Contentions

Plaintiff asserts over a period of two and half years, it attempted to communicate with the Named Defendant numerous times by sending it three letters on three separate occasions to its Leawood, Kansas address. First, Plaintiff sent the pre-lawsuit demand letter — which it sent to all defendants — to AFCO to the attention of Accounts Receivable in Leawood, Kansas.[17] Second, Plaintiff sent the original summons and Complaint to AFCO, to the attention of Bonnie Hodges, Vice President, to the same Leawood, Kansas address.[18] Third, Plaintiff sent the Default Judgment Motion to AFCO to the same Leawood, Kansas address.[19] Plaintiff contends the Named Defendant repeatedly ignored these letters. As a courtesy, Plaintiff states it sent a letter discussing the Default Judgment to another office of the Named Defendant and reached the general counsel's office.[20] Only after that, Plaintiff declares, did Putative Defendant realize Plaintiff was going to enforce the Default Judgment.

Further, Plaintiff argues even if the Putative Defendant's assertion that it did not receive the three letters were true, the Putative Defendant bears the burden of proving it

[17] Plaintiff mailed the Named Defendant the pre-lawsuit demand letter on April 1, 2003. (Pl's Affirmation ¶ 3).
[18] Plaintiff served the Named Defendant the summons and Complaint on April 23, 2003. (Pl's Affirmation ¶ 4).
[19] Plaintiff served the Named Defendant the Default Judgment Motion on June 2, 2004. (Pl's Affirmation ¶ 7).
[20] Plaintiff mailed the Putative Defendant a letter dated April 6, 2006 discussing the Default Judgment. (Vacature of Default Judgment Hr'g, May 31, 2006).

did not receive them, which the Putative Defendant does not meet by simply stating it did not receive the three letters. Plaintiff also argues the Putative Defendant pointed out its procedures for handling legal correspondence and documents, but failed to follow its procedures on three separate instances.

In addition, Plaintiff argues Putative Defendant is faced with a Default Judgment and not a simple default, noting the standard to vacate a default judgment is stricter than the standard to vacate a default. Plaintiff contends the standard to vacate the Default Judgment is that the Putative Defendant has to show it has a meritorious defense, and in the instant, that there is improper service or some other misconduct on the part of the Plaintiff. Plaintiff asserts it served the papers, including the Default Judgment Motion, on the office in which it does business. Moreover, Plaintiff argues that the Putative Defendant has not sustained its initial burden of proving that service of process is improper; therefore, Putative Defendant cannot move the Court to consider its meritorious defenses.

III. LEGAL STANDARDS

A. Personal Jurisdiction

In order for a federal court to obtain personal jurisdiction over a defendant, the defendant must be served in accordance with Federal Rule of Civil Procedure 4 ("Rule 4"), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7004.

a. Improper Name of Party on Summons

Under Rule 4, a summons must be directed to the defendant.[21] A failure to properly name the defendant does not automatically render the summons jurisdictionally defective. "Defects in the form of a summons are considered technical and a dismissal is not proper unless the party can demonstrate actual prejudice."[22] *Crane v. Battelle*, 127 F.R.D. 174, 177 (S.D.Cal. 1989). This means that the correct name of the defendant must appear on the summons, if not, the summons is technically not "directed to the defendant." However, the summons is not jurisdictionally defective unless the defendant demonstrates it was prejudiced by the defect. Rule 4 is liberally interpreted to uphold service of process provided the defendant receives adequate notice of the complaint. *Id*. Generally, a defect in the summons is cured by amending it under Federal Rule of Civil Procedure 4(a), and the court may order the amended summons to be served upon defendant's attorney. *Id*.

b. Service of Process

Under Federal Rule of Bankruptcy Procedure 7004(b)(3), service

> [U]pon a corporation may be made by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.[23]

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[21] Federal Rule of Civil Procedure 4(a) states in part, "[t]he summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff."

[22] The court also stated that the form of the summons is generally challenged under Federal Rule of Civil Procedure 12(b)(4) based on the fact that the summons does not properly contain the names of the parties.

[23] Federal Rule of Bankruptcy Procedure 7004(b) provides for service upon corporations by first class mail, in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., except as provided in Federal Rule Bankruptcy Procedure 7004(h).

The summons and complaint may be served anywhere in the United States by first class mail.[24] "If service is not waived, the person effecting service shall make proof thereof to the court."[25]

Under Federal Rule of Bankruptcy Procedure 9006(e), proof that an item was properly mailed provides *prima facie* evidence of the mailing and gives rise to a rebuttable presumption as to receipt. *See In re* Robert Gilbert, 115 B.R. 458, 460 (Bankr. S.D.N.Y. 1990).[26] In order to defeat the rebuttable presumption, there must be proof, in addition to denial of receipt. *See In re* Eagle Bus Mfg., Inc., 62 F.3d 730, 735 (5th Cir. 1995). A declaration merely stating one never received the summons and complaint is insufficient to controvert the fact of mailing. *See, e.g., Cossio v. Cate (In re Larry Cossio)*, 163 B.R. 150, 155 (9th Cir. B.A.P. 1994). After the party effectuating service demonstrates the notice was mailed, the burden of production rests with the party claiming insufficient service of process to prove the notice was not indeed mailed. *Id*. at 154-155. The standard of proof to rebut this presumption is by "strong and convincing evidence." *Id.* at 155.

B. Relief From Default Judgment

Under the Federal Rule of Civil Procedure 55(c), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7055, when a court has entered a default judgment, that court may set aside that judgment only in accordance with Federal Rule of Civil Procedure 60(b). *See State Bank of India v. Chalasani* (*In re Chalasani)*,

[24] Federal Rules of Bankruptcy Procedure 7004(b) and (d).
[25] Federal Rule of Bankruptcy Procedure 7004(l).
[26] In *Gilbert*, the court stated "[w]hen a notice which is properly addressed and stamped is mailed, there is a rebuttable presumption that the addressee received it."

92 F.3d 1300, 1307 (2d Cir. 1996); *Batt v. American Compressed Steel Corp.* (*In re Globe Metallurgical, Inc.)*, 237 B.R. 182, 185 (E.D.N.Y. 2005).

Federal Rule of Civil Procedure 60(b) provides that

> [O]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Federal Rule of Civil Procedure 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment….

Federal Rule of Civil Procedure 60(b); *see also INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 397 (6th Cir. 1987); *Artmatic USA Cosmetics v. Maybelline Co.*, 906 F.Supp. 850, 853-854 (E.D.N.Y. 1995).

In applying Federal Rule of Civil Procedure 60(b) to set aside a default judgment, a court must consider the equitable factors of Federal Rule of Civil Procedure 55(c). In the Second Circuit, Federal Rule of Civil Procedure 55(c) requires the Court to determine whether there is "good cause" to set aside the default and considers, (1) whether the default was willful, (2) whether the defendant has a meritorious defense, and (3) whether the non-defaulting party will be prejudiced. *See American Alliance Insurance Co., Ltd. v. Eagle Insurance Company*, 95 F.3d 57, 59 (2d Cir. 1996); *see also Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 96 (2d Cir. 1993); *Brien v. Kullman Industries, Inc.*, 71 F.3d 1073, 1077 (2d Cir. 1995); *Gucci America, Inc. and Guess?, Inc. v. Gold Center Jewelry*, 158 F.3d 631, 634 (2d Cir. 1998) *cert. denied*, 525 U.S. 1106, 119 S.Ct. 873, 142 L.Ed.2d

774 (1999); *Artmatic USA Cosmetics,* 906 F.Supp. at 854; *In re Globe Metallurgical, Inc.*, 237 B.R. at 185.

With respect to the willfulness factor, the defaulting party is willful if the defaulting party's conduct was intentional, *see Artmatic USA Cosmetics,* 906 F.Supp. at 855, deliberate, *see In re Globe Metallurgical, Inc.*, 237 B.R. at 185, or with reckless disregard for the effect of its conduct on the proceedings, *INVST Financial Group, Inc.,* 815 F.2d at 397. The term "willful," does not include negligent or careless conduct. *In re Globe Metallurgical, Inc.*, 237 B.R. at 185. Accordingly, "Fed.R.Civ.P. 60(b) expressly contemplates that some types of 'neglect' are 'excusable.'" *American Alliance Insurance Co.,* 95 F.3d at 61. Defaults resulting from deliberate conduct are not excusable, whereas, defaults resulting from negligent or careless conduct may be excusable. *Id.*; *see also Gucci America, Inc. and Guess?, Inc.,* 158 F.3d at 635. In addition, the degree of negligence giving rise to the default remains a relevant factor when assessing whether the defaulting party's conduct precludes it from relief. *See American Alliance Insurance Co.,* 95 F.3d at 61.[27] Furthermore, a finding of good faith is not necessarily determinative in concluding whether or not the defaulting party's conduct was willful. *See Gucci America, Inc. and Guess?, Inc.* 158 F.3d at 635.

In determining whether a meritorious defense has been asserted for purposes of setting aside a default judgment, some evidence beyond "conclusory denials" must be presented to support the defense. A meritorious defense provides the trier of fact with an opportunity to make a determination. *See American Alliance Insurance Co.,* 95 F.3d at 61. The test is not "whether there is a likelihood that [the meritorious defense] will carry

[27] In *American Alliance Insurance Co.*, the court stated "gross negligence can weigh against the party seeking relief from a default judgment, though it does not necessarily preclude relief."

the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." *Enron Oil Corp.,* 10 F.3d at 98; *see also Artmatic USA Cosmetics,* 906 F.Supp. at 855; *In re Globe Metallurgical, Inc.*, 237 B.R. at 185. Also, if the defense raises a significant issue, it may be deemed meritorious. *Artmatic USA Cosmetics,* 906 F.Supp. at 855.

With respect to prejudice, prejudice occurs when the non-defaulting party's ability to proceed with its case becomes impaired. Delay, by itself, is an insufficient basis for establishing prejudice, *Enron Oil Corp.*, 10 F.3d at 98; *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 109 F.R.D. 692, 697 (S.D.N.Y. 1986); *In re Globe Metallurgical, Inc.*, 237 B.R. at 186; rather, it must "result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." *In re Globe Metallurgical, Inc.*, 237 B.R. at 186. The non-defaulting party bears the burden of proving it will be "substantial[ly] prejudiced" if the default judgment is vacated. *Walpex Trading Co.*, 109 F.R.D. at 697.

The trial court has "sound discretion" in disposing of the motion, and the party in default has the burden of proof. Defaults are generally disfavored and when there is doubt as to whether a default should be granted or vacated, the doubt is resolved in favor of the defaulting party. *Enron Oil Corp.*, 10 F.3d at 96. Also, there is a strong policy in favor of "maintaining an orderly efficient judicial system in which default is a useful weapon for enforcing compliance with the rules of procedure." *In re Globe Metallurgical, Inc.*, 237 B.R. at 185.

IV. DISCUSSION

A. Whether the Court Has Personal Jurisdiction Over Putative Defendant

In order for the Court to have personal jurisdiction over the Putative Defendant, the summons and service of process with respect to the summons and Complaint must be sufficient to provide the Putative Defendant with notice of the instant adversary proceeding.

The Court will first examine whether the Putative Defendant was properly named as a party to the instant adversary proceeding.

a. Whether Putative Defendant Was Properly Named as a Party

Under Rule 4, the correct name of the defendant must appear on the summons, if not, the summons is technically not "directed at the defendant," however, it is not jurisdictionally defective if the defendant does not show it was prejudiced by the defect.[28] Here, the Putative Defendant contends its correct name is "Afco Credit Corporation" and not "AFCO." Consequentially, Putative Defendant argues it did not receive sufficient notice of the instant adversary proceedings and thus, it was prejudiced by the defect; therefore, the Court does not have personal jurisdiction over the Putative Defendant. In reply, Plaintiff contends it named "AFCO" as the Named Defendant because Debtor mailed its payments by check made payable to the Named Defendant to its Leawood, Kansas office, and the Named Defendant subsequently cashed both checks made payable to "AFCO." The Court finds that this defect is merely a technical flaw that does not prejudice the rights of Putative Defendant.

[28] *Crane*, 127 F.R.D. at 177.

Here, the Plaintiff did not select the wrong defendant, but technically mislabeled the correct defendant.[29] In fact, the Putative Defendant invited the use of this nomenclature and its subsequent use by the Plaintiff in commencing this adversary proceeding. Putative Defendant has chosen to do business with the Debtor using the name "AFCO," hence, creating confusion as to its correct corporate name. The Debtor through its course of dealings with the Putative Defendant mailed its checks to "4501 College Boulevard, Leawood, Kansas, addressed to 'AFCO, Accounts Receivable.'" With respect to the instant matter, the Debtor mailed two checks made payable to "AFCO" that the Putative Defendant cashed. In its pleadings and motion papers, the Putative Defendant does not dispute receiving and cashing these two checks nor asserts that it informed the Debtor to use its correct legal name on the checks when making payments or when addressing it in any other form of correspondence. The Putative Defendant's use of and its implied acceptance of the term "AFCO" improperly led the Plaintiff to believe that "AFCO" is the proper name for, an acceptable abbreviation for and synonymous with Afco Credit.

The correct defendant had been sued, the Putative Defendant was not prejudice by the improper naming, and the summons and Complaint sufficiently alerted the Putative Defendant that it was being sued; therefore, this case is characterized as one of mislabeling as oppose to naming the wrong defendant. Accordingly, the Court denies the Putative Defendant's motion to dismiss the Complaint on the basis of a defect in the

[29] The Court notes that the Putative Defendant does not argue that the Plaintiff served the wrong defendant, rather it asserts it was improperly named, and thus, it did not receive adequate notice. Also, there is no dispute that "4501 College Boulevard, Leawood, Kansas" is the address of one of its offices, and Hodges is the Vice President of that office. *See Datskow v. Teledyne, Inc., Continental Products Division*, 899 F.2d 1298 (2d Cir. 1990) ("[T]he line between naming the wrong defendant and mislabeling the right one must be drawn in light of the context of the nomenclature created by the defendant and the labeling undertaken by plaintiffs assessed against that context."), *rehearing denied* (May 2, 1990), *cert. denied*, 498 U.S. 854, 111 S.Ct. 149, 112 L.Ed.2d 116 (1990).

summons, and the Court *sua sponte* orders the Plaintiff leave to amend its pleadings to correct the name of the defendant and to re-serve the Putative Defendant and/or its counsel. Hereinafter, the Court will use the term "Defendant" to encompass both the Named Defendant and the Putative Defendant unless the distinction is necessary to clarify factually issues.

Next, the Court will examine whether the Defendant was properly served the summons and Complaint.

b. Whether Defendant Was Properly Served

In his sworn affidavit to support the Defendant's Motion to Vacate, Ratner — the General Counsel and Senior Vice President of Afco Credit — argues he never received the summons and Complaint, the Default Judgment Motion, or any other correspondence sent by Plaintiff or Plaintiff's counsel to AFCO and thus, he was not apprised of the instant matter prior to a letter dated April 6, 2006.[30] Ratner further argues service of process with respect to the summons and Complaint is improper due to Plaintiff's failure to provide proof of service to the Court in accordance with Federal Rule of Bankruptcy Procedure 7004 (l). In addition, Ratner declares Defendant maintains its headquarters in New York State, and its correct name is "Afco Credit Corporation," not "AFCO" as indicated on the summons.

Also included in the motion is a sworn affidavit from Hodges, Vice President of Afco Credit and Manager of its Leawood, Kansas office. Hodges also argues she never received the summons and Complaint or any other documents with

[30] Robert Ratner indicates in his affidavit sworn to on April 25, 2006, accompanying the Defendant's Motion to Vacate, that he received a letter dated April 6, 2006 from Plaintiff's counsel stating a Default Judgment has been entered against the Defendant in the amount of $72,487.24 on July 13, 2004 and Plaintiff intends to enforce the Default Judgment. (Ratner Aff. ¶ 4.)

respect to the instant matter, and that she and the staff at the Leawood, Kansas office are instructed to telephone and to fax immediately any legal document to Ratner.

In its reply memorandum of law, Plaintiff argues on or around April 1, 2003, it sent a pre-lawsuit correspondence to AFCO at 4501 College Boulevard, Leawood, Kansas, 66221, Attn: Accounts Receivables. On or around April 23, 2003, it properly served the summons and Complaint to AFCO at 4501 College Boulevard, Leawood, Kansas, 66221, Attn: Ms. Bonnie Hodges, Vice President and properly filed a certificate of service with the Court on April 25, 2003. And on or around June 2, 2004, Plaintiff argues it properly served the Plaintiff's Default Judgment Motion upon the Defendant at AFCO, 4501 College Boulevard, Leawood, Kansas 66221, and properly filed a certificate of service with the Court on the same day.

Defendant's contention that the Plaintiff failed to file proof with the Court is incorrect. Plaintiff filed a certificate of service for the summons and Complaint on April 23, 2003, and for the Default Judgment Motion on June 2, 2004. The Clerk of the Court entered both of these certificates of service on the ECF docket as numbers three (3) and five (5) respectively.

Under Federal Rule of Bankruptcy Procedure 9006(e), proof that an item was properly mailed provides *prima facie* evidence of the mailing and gives rise to a rebuttable presumption as to receipt. *See In re* Robert Gilbert, 115 B.R. at 460. As stated above, Plaintiff mailed its payments by check made payable to "AFCO"[31] to Defendant's Leawood, Kansas office. Defendant subsequently cashed both checks. If Afco Credit — the proper name for the corporation declared by Ratner — received and cashed checks made payable to "AFCO," mailed to its Leawood, Kansas office then, Afco Credit

[31] *See* Pl's Affirmation Ex. B.

presumably received Plaintiff's summons and Complaint and the Default Judgment Motion Plaintiff mailed to "AFCO" to the same Leawood, Kansas office.

In addition, Defendant's argument fails to take into consideration the overwhelming evidence demonstrating "AFCO" received the pre-lawsuit letter addressed to Accounts Receivable, the summons and Complaint addressed to Bonnie Hodges, and the Default Judgment Motion addressed to "AFCO" at its Leawood, Kansas location and that neither were returned to Plaintiff or Plaintiff's counsel "as undelivered." Defendant does not dispute the mailings were properly addressed — that the summons and Complaint were addressed to a corporate officer, Ms. Bonnie Hodges — and mailed, as evidenced by the proof of service filed with the Court.[32]

In order to defeat the rebuttable presumption, there must be proof, in addition to denial of receipt. *See In re* Eagle Bus Mfg., Inc., 62 F.3d at 735. In the instant matter, Defendant contends it did not receive the mailings by simply declaring, "[at] no point in time, prior to the April 6, 2006 letter was your deponent [Ratner] apprised…of any action by the [P]laintiff, Scient, Inc." (Ratner Aff. ¶ 4.) A declaration merely stating one never received the summons and complaint is insufficient to controvert the fact of mailing. *See In re Larry Cossio*, 163 B.R. at 155. Defendant fails to establish its burden by providing strong and convincing evidence[33] to dispute the presumption a notice properly mailed was received. Plaintiff properly served the Defendant and the Defendant has sufficient notice of the instant matter.

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[32] Plaintiff filed a certificate of service with the Court on April 25, 2003 indicating that it served the summons, Complaint and notice of pre-trial conference upon the Defendant. Also, at the hearing held before the Court, Defendant conceded the pre-lawsuit letter, summons and Complaint were served upon an office of the corporation and addressed to an officer of the corporation. (Vacature of Default Judgment Hr'g, May 31, 2006).
[33] *See In re Larry Cossio*, 163 B.R. at 155.

This Court has personal jurisdiction over the Defendant. Plaintiff properly named the Defendant as a party to the instant proceeding, served the Defendant, and filed proof of service with the Court.

Next, the Court will examine whether Defendant's conduct for defaulting constitutes "excusable neglect," under Federal Rule of Civil Procedure 60(b)(1).

B. Whether Default Judgment Should be Vacated

In order to determine whether Defendant may set aside the Default Judgment, the Court will examine whether Defendant's conduct for defaulting constitutes "excusable neglect," under Federal Rule of Civil Procedure 60(b)(1) in accordance with the "good cause" standard under Federal Rule of Civil Procedure 55(c) — whether Defendant's default was willful, whether Defendant has any meritorious defenses, and whether vacating of the Default Judgment prejudices the Plaintiff.[34]

First, the Court will analyze the willfulness factor.

a. Willfulness for Default

The defaulting party's conduct is willful if it was intentional, deliberate, or with reckless disregard for the effect of its conduct on the proceedings.[35] The evidence does not support a finding that Defendant's conduct was willful.

In their sworn affidavits, Ratner and Hodges assert neither was aware of or had seen any legal documents involving the Defendant that Plaintiff sent to its Leawood, Kansas office, even though its employees are required to forward all legal documents to Ratner. Further, Ratner contends he did not become apprised of the instant matter until Plaintiff mailed a letter on April 6, 2006 addressed to him (Ratner) to Defendant's New

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[34] *See Brien*, 71 F.3d at 1077.

[35] *See Artmatic USA Cosmetics*, 906 F.Supp. at 855; *In re Globe Metallurgical, Inc.*, 237 B.R. at 185; *INVST Financial Group, Inc.*, 815 F.2d at 397.

York, New York location.[36] Upon receiving the letter, Ratner declares he immediately contacted outside counsel. In reply, Plaintiff argues Defendant willfully and repeatedly ignored its pre-lawsuit demand letter, summons and Complaint and Default Judgment Motion until Plaintiff undertook post-judgment collection actions.

In determining whether Defendant's conduct was intentional or deliberate, it is appropriate to focus on what the Defendant actually knew as opposed to what it should have known taking into account the notices it received. Based on the submission of sworn affidavits from Ratner and Hodges, and the fact that Plaintiff did not proffer an objection to its submission and with respect to the credibility of the deponents, this Court declines to infer willfulness from Defendant's failure to timely respond to Plaintiff's summons and Complaint, and to the Default Judgment Motion served upon the Defendant at its Leawood, Kansas office as Plaintiff recommends. Neither Defendant nor its senior officers were aware of or had actual knowledge of the legal documents sent to its Leawood, Kansas office naming "AFCO" as a defendant in the instant matter. Further, Plaintiff does not assert that an employee of the Defendant acted willfully. Rather, Plaintiff argues that since it properly served the documents at issue upon the Defendant and the evidence supports a conclusion that the Defendant received those documents, Defendant's failure to respond timely is willful.

Moreover, there is no evidence, not even an assertion, suggesting Defendant delayed filing an answer as part of its strategy or plan to advance its interests, or it made a cognitive decision to permit a Default Judgment to be entered against it without its response. The evidence shows when Ratner became apprised of the instant matter from the letter sent by Plaintiff to its New York, New York office, it responded in a timely

[36] *See* n.30 *supra*.

fashion. Although a finding of good faith is not necessarily determinative of the willful factor, the same facts supporting a finding that the Defendant did not intentionally or deliberately "allow" the Default Judgment to be entered against it, support a finding of good faith. Defendant meets its burden with respect to proving its default was not willful.

Next, the Court will analyze whether the Defendant presents any meritorious defenses.

b. Meritorious Defenses

In determining whether a meritorious defense exits for purposes of setting aside a default, evidence beyond "conclusory denials" must be proffered to support the defense.[37] Defendant submits two defenses for this Court to consider. First, Defendant argues the two payments, totaling $72,487.24, were made on the due date of the installment — May 3, 2002 and June 3, 2002 — and during the ordinary course of business of both Plaintiff and Defendant. Defendant declares it is a secured creditor of the Plaintiff because the insurance loan it financed is secured by the unearned premiums payable by the insurer upon cancellation of the financed insurance. Second, at the time Defendant received the payments, it did not receive any more than it would have received in the event of a hypothetical liquidation. Defendant contends it was overcollateralized. On May 3, 2002, the value of the collateral was $331,126.00 and the balance due prior to receipt of that payment was $144,974.48. And on June 3, 2002, the value of the collateral was $276,176.00 and the balance due prior to the receipt of that payment was $108,730.86. In its reply, Plaintiff argues Defendant failed to set forth a meritorious defense.

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[37] *See Enron Oil Corp.*, 10 F.3d at 98; *Artmatic USA Cosmetics*, 906 F.Supp. at 855; *In re Globe Metallurgical, Inc.*, 237 B.R. at 185.

The Court does not have to determine whether Defendant would prevail at trial, but must determine whether any defense asserted by Defendant presents a good defense at law. Either of Defendant's contentions, if proven at trial, constitutes a complete defense to the instant matter. Defendant meets its burden by sufficiently establishing adequate defenses with respect to the meritorious defense inquiry.

Lastly, the Court will examine whether Plaintiff is prejudiced by the vacature of the Default Judgment.

c. Prejudice to Non-defaulting Party

Setting aside the Default Judgment does not prejudice Plaintiff. Although Plaintiff will experience some delay with respect to achieving a final resolution regarding the instant matter, and it may possibly have to litigate the case, vacating the Default Judgment does not substantially impair its ability to proceed with its case. Furthermore, delay by itself is not enough to establish prejudice.[38] *Enron Oil Corp.*, 10 F.3d at 98; *Walpex Trading Co.*, 109 F.R.D. at 697. It is noted that Plaintiff does not argue it would be prejudiced if the Court vacates the Default Judgment.

V. CONCLUSION

In view of the foregoing, the Court concludes that Plaintiff properly named the Defendant as a party to the instant proceeding, served Defendant the summons, Complaint, and the Default Judgment Motion, and that Plaintiff properly filed proof of service with the Court with respect to those documents. Accordingly, this Court has personal jurisdiction over Defendant.

[38] "The delay must result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." *In re Globe Metallurgical, Inc.*, 237 B.R. at 186.

Further, the Court concludes that the Defendant's conduct was not willful. The only evidence in the record is the unrefuted evidence of Ratner's and Hodges' sworn affidavits — declaring neither was aware of the instant matter until the April 6, 2006 correspondence. Defendant's conduct leading to the default was without knowledge of the instant adversary proceeding, and not deliberate in that it purposefully remained ignorant and allowed a Default Judgment to be entered against it. Defendant presents an adequate defense at law that if proven, constitutes a complete defense. Lastly, Plaintiff is not prejudiced by the inherent delay in vacating the Default Judgment. In balancing these three factors, which all weigh heavily in favor of Defendant, the Court finds that the Defendant has met its burden for setting aside the Default Judgment on the basis of "excusable neglect."

Accordingly, the Motion to Vacate is granted, and the same facts supporting that finding, support a finding to vacate the Default, which is a lesser standard, entered against Defendant. Defendant's motion to dismiss the Complaint is denied, and Defendant may interpose its proposed Answer for consideration on the merits. In addition, the Court *sua sponte* grants Plaintiff leave under Federal Rules of Civil Procedure 4(a) and 15(c)(3) to amend its summons and Complaint to include Defendant's correct legal name, Afco Credit.

Afco Credit is to settle an order consistent with this opinion.

Dated: New York, New York
February 22, 2007

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE