NORTH CAROLINA GUILFORD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 8163
STEVEN MCRAE Plaintiff, v. KYLE RUSSELL CURTIS, Defendant.	**RESPONSE IN OPPOSITION TO DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT**

Plaintiff Steven McRae, through his undersigned counsel, submits this Response in Opposition to Defendant's Amended Motion to Set Aside Default Judgment.

I. OBJECTION AND MOTION TO STRIKE

As an initial matter, Plaintiff objects to Defendant's Amended Motion and Brief as being procedurally improper. The Business Court Rules do not contemplate amended motions. Moreover, Defendant's Amended Motion and Brief in Support do not state any new grounds for the requested relief that would require an amendment. Rather, Defendants Amended Motion is more accurately described as a late reply brief in support of his original motion. As such, the Amended Motion and Brief should be disregarded. At a minimum, Plaintiff requests that no further reply brief be permitted, and that a hearing be held at the Court's earliest convenience.

II. MATTER BEFORE THE COURT

The matter before the Court remains largely as it was when Plaintiff filed his initial response brief (ECF No. 21), which is incorporated herein by reference. To the extent there was any question, Defendant's brief and affidavits confirm the relevant facts of service. None of the following are disputed:

- The Summons and Complaint were served by certified mail on August 30, 2019. (Kyle Curtis Aff., ECF No. 31.1 at ¶ 6; Susan Curtis Aff., ECF No. 31.2 ¶¶ 3-4.)
- The certified mail receipt was signed by Defendant's mother, Susan Curtis. (Id.)
- Defendant had lived at that address with his mother at least through July 16, 2019. (Kyle Curtis Aff., ECF No. 31.1 at ¶ 2; Susan Curtis Aff., ECF No. 31.2 ¶ 4.)
- Defendant does not deny that he actually received the summons and complaint. (Kyle Curtis Aff., ECF. No. 31.1; Susan Curtis Aff., ECF No. 31.2; Steven McRae Aff., ECF No. 22 ¶ 7.)

III. LEGAL STANDARD

The legal standard for service by certified mail pursuant to Rule 4(j)(1)(c) and challenging that service is established in Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 568 S.E.2d 791 (2003).

- The plaintiff must file an affidavit of service (1) stating that a copy of the summons and complaint were sent by certified mail, return receipt requested; (2) stating that the copy of the summons and complaint were actually received as evidenced by the registry receipt; and (3) attaching a genuine copy of the receipt. Id. at 490.
- The affidavit "raises a presumption that the person who received the mail . . . and signed the receipt as an agent of the addressee authorized by appointment or by law to be served or to accept service of process." Id. (quoting Rule 4(j2)(2)); see also Fender v. Deaton, 130 N.C. App. 657, 662-63, 503 S.E.2d 707 (1998).
- The presumption arises regardless of whether the defendant signs the return of service. "The presumption of arises upon proof of delivery, regardless of the identity of the signer." Id. at 491.

- To rebut the presumption, the defendant "must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons." Id. at 493.

III. ARGUMENT

A. Defendant has failed to rebut the presumption of service.

Defendant makes no attempt and does not contest that the presumption of service is proper. Rather, Defendant attempts to rebut the presumption based solely on the fact that he claims he no longer lived with his mother at the time service was made. That contention, even if true, is insufficient to rebut the presumption of proper service.

First, as stated in Granville, Defendant must show that the service "failed to accomplish its goal of providing [him] with notice of the suit." Id. Defendant never claims that he did not receive notice. None of the affidavits he has submitted claim that he did not receive notice. As in Granville, the allegation that he failed to receive the summons or notice of the suit is "conspicuously absent." Id. 493-94. Moreover, Defendant has acknowledged that he had notice in various internet forums, including those identified in Plaintiff's initial affidavit. (McRae Aff., ECF No. 22 at ¶7.)

Second, it is insufficient to simply argue that Defendant's mother was not authorized to accept service for him. Defendant apparently contends that, because he no longer lived with her, his mother was not authorized to accept service. But as stated in Granville, it is insufficient to rebut the presumption of proper service simply by "questioning the identity, role, or authority of the person who signed for delivery of the summons." Id. at 493. Conspicuously absent from Defendant's affidavits is any allegation that Defendant's mother was not authorized to sign for the

certified mail addressed to the Defendant.

Third, assuming it is true that Defendant did not live with his mother on August 30, 2019 when service was made, that is not enough to rebut the presumption. Defendant apparently contends that service by certified mail must be made at an address where he pays rent, receives mail, or has reported to an employer to be his residence. (Kyle Curtis Aff., ECF No. 31.1 ¶¶ 3-4.) Plaintiff cites no case law or statute supporting this alleged requirement. And even assuming Defendant's affidavit is true and that he can receive mail at the Charlotte address, that does not preclude him from be served elsewhere. In a different Rule 4 context, courts have found that a defendant may have more than one location where he or she can be served. "It is unrealistic to interpret Rule 4 so that the person to be served only has one dwelling house or usual place of abode at which process may be left." In re George, 825 S.E. 2d 19, 27 (N.C. App. 2019) (quoting Van Buren v. Glasco, 27 N.C. App. 1, 5, 217 S.E.2d 579 (1975).

Here, because Defendant had previously lived with his mother and had apparently done nothing to change his address with the post office, he could still receive mail at his mother's house. She was therefore authorized to accept service of process. If Defendant no longer wanted to receive mail at his mother's house, he could have simply changed his address with the post office, which would in turn have provided notice to Plaintiff so that service could be sent to the forwarding address. Or Ms. Curtis could have refused to sign for the certified mail when it arrived, which also would also have served to notify Plaintiff. Instead, Defendant did nothing, boasted about doing nothing publicly on YouTube, and filed nothing until February 6, 2020 – five months after he had received the summons and complaint served at his mother's residence.

B. Caselaw addressing service by certified mail on an individual defendant that provides actual notice to the defendant clearly favors holding that service was proper.

Most of the cases cited by Defendant concern service in manners other that by certified mail pursuant to Rule 4(j)(1)(c). Defendant cites no cases where an individual defendant was served by certified mail, the presumption of service arose under Rule 4(j2)(2), and the defendant was able to rebut the presumption because he or she no longer lived at the service address.

By contrast, North Carolina courts have held service to be proper when the defendant was served by certified mail, the presumption of service is established by the filing of an affidavit of service, and the defendant had actual knowledge of the pending lawsuit. For example, in the Granville case discussed extensively above, the defendant was served by certified mail, the affidavit of service was filed, and the court found that the presumption of service was raised. 160 N.C. App. at 492. The defendant attempted to rebut service by saying that (1) he did not sign the receipt personally, (2) the receipt was signed by someone with the name "Hedgepeth," and (3) defendant had never employed anyone named "Hedgepeth" agent, officer, employee, or principal. Id. at 493. The court found that this did not matter because the crucial issue was "whether or not defendant in fact received the summons." Id. at 493-94. Just as in this case, the defendant did not dispute that he received actual notice. Id. Therefore, the defendant failed to rebut the presumption of service, and the motion was denied.

Similarly, in Fender v. Deaton, the defendant was served by certified mail at his law firm, and the return receipt was signed by his wife, who was an employee of the law firm. 130 N.C. App. at 658. Defendant did not deny that he received the summons and complaint but attempted to rebut the presumption of service by saying that his wife was not authorized to accept service. Id. at 663. The court found that defendant had failed to rebut the presumption of proper service.

In Steffey v. Mazza Construction Group, which involved service under Rule 4(j)(5)(a), the court found that service on the City of Burlington was proper even though the certified mail receipt had not been signed for by the mayor, city manager, or clerk. 113 N.C. App. 538, 539-40, 439 S.E.2d 241 (1994). Rather, because the affidavit of service raised the presumption pursuant to Rule 4(j2)(2) that the signer was authorized to accept service, and because the city actually received notice, service was proper. Id. at 540. In Hocke v. Hanyane, which involved service in a foreign country under Rule 4(j3), the defendant was served by certified mail addressed to the defendant, care of his mother, and delivered to his brother's address in South Africa. 118 N.C. App. 630, 631, 456 S.E.2d 858 (1995). The court, noting that there was no doubt that the defendant had actual knowledge of the case, held that the service was proper. Id. at 635.

The clear weight of the case law concerning service by certified mail on an individual, when the presumption of service arises and the service achieves the purpose of Rule 4 of providing actual notice, favors the conclusion that service on Defendant was proper.

C. Defendant has treated and continues to treat this lawsuit as a children's game.

It is indisputable that Defendant had notice of the lawsuit and simply chose not to respond. He was receiving correspondence about this matter, at least by email, before the case was even filed and before he was served. (ECF. No. 21, Exs. B and C.) The summons and complaint were served and signed for Defendant's mother, and defendant does not dispute that he received actual notice. (ECF Nos. 31.1 and 31.2.) Defendant publicly acknowledged on YouTube and on Discord that he had been served and that he failed to respond by the deadline. (McRae Aff., ECF No. 22 ¶ 7.) As noted in Plaintiff's original brief, the Court need not put itself "in the position of failing to recognize what is apparent to everyone else." Granville, 160 N.C. App. at 493 (internal quotation omitted). Here, it is apparent that Defendant knew about the lawsuit, ignored his obligations, and

flaunted his default.

Moreover, Defendant has used this matter, and the delays brought about by the pandemic, to play games. Defendant has not complied with the judgment, as he was obligated to do even with his Rule 60(b) motion pending because his motion did "not affect the finality of [the] judgment or suspend its operation." The Court reminded Defendant of his obligations in its order entered April 13, 2020. (ECF No. 26.) Disregarding the Court's order, Defendant continued his refusal to comply and took it a step farther, by using his continued control of NonSequitur assets to falsely accuse Plaintiff of copyright infringement. (McRae 2nd Supp. Aff., ECF. No. 27.) While that matter is ripe for determination at another time, it demonstrates Defendant's attitude toward these proceedings. "A lawsuit is not a children's game, but a serious effort on the part of adult human beings to administer justice." Granville, 160 N.C. App. at 493 (internal quotation omitted).

Finally, setting aside the judgment would reward Defendant for his behavior, while severely prejudicing Plaintiff. The provisions of Rule 4 allowing service by certified mail and the presumption of service are designed to give plaintiffs the ability to initiate legal matters. And while it may be true that courts favor disposition on the merits, it is also true that "statutory provisions designed to protect plaintiffs from defendants who do not give reasonable attention to important business affairs such as lawsuits cannot be ignored." Estate of Teel ex rel. Naddeo v. Darby, 129 N.C. App. 604, 607, 500 S.E.2d 759 (1998). Compliance with Rule 4 protects Plaintiff from Defendant's willful delay and default, which cannot be ignored.

III. CONCLUSION

Defendant has failed to rebut the presumption of service. Therefore, Defendant's motion to set aside the judgment should be denied.

Respectfully submitted, this the 11th day of August, 2020.

REVOLUTION LAW GROUP

/s/ C. Scott Meyers
C. Scott Meyers
N.C. State Bar No. 30651
1175 Revolution Mill Dr., Suite 8
Greensboro, North Carolina 27405
Phone: (336) 333-7907
Fax: (336) 333-7909
Attorney for Plaintiff

BCR 7.8 Certificate of Compliance

I certify that the forgoing brief meets the requirements of BCR 7.8 and does not exceed 7,500 words.

/s/ C. Scott Meyers
C. Scott Meyers

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the North Carolina Business Court through its electronic filing system, which will cause a copy to be served electronically on all counsel of record listed below:

Scottie Forbes Lee
ELLIS & WINTERS LLP
PO Box 2752
Greensboro, NC 27402
Attorney for Defendant

This the 11th day of August, 2020.

REVOLUTION LAW GROUP

/s/ C. Scott Meyers
C. Scott Meyers
N.C. State Bar No. 30651
1175 Revolution Mill Dr., Suite 8
Greensboro, North Carolina 27405
Phone: (336) 333-7907
Fax: (336) 333-7909
Attorney for Plaintiff