STATE OF NORTH CAROLINA GUILFORD COUNTY STEVEN MCRAE, Plaintiff, v. KYLE RUSSELL CURTIS, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 8163 **ORDER ON AMENDED MOTION TO SET ASIDE**

1. THIS MATTER is before the Court on Kyle Russell Curtis's ("Curtis") Amended Motion to Set Aside Entry of Default and Partial Default Judgment (the "Motion"). (ECF No. 30.)

2. Having considered the briefs, affidavits, depositions, and other evidence submitted in support of and in opposition to the Motion; arguments of counsel at a hearing held on September 16, 2020; and relevant authorities the Court DENIES the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. Plaintiff served the Civil Summons and Complaint in this action on August 30, 2019 by certified mail addressed to Kyle R. Curtis at 1532 Providence Church Rd., Pleasant Garden, NC 27313 (the "Pleasant Garden address"). (*See* Aff. Service of Process, ECF No. 7.) Defendant's mother, Susan Curtis, who resides at the Pleasant Garden address, signed a certified mail return receipt documenting delivery of those materials to her at that address.

4. The case was designated as a mandatory complex business case on August 23, 2019, (ECF No. 1), and assigned to the undersigned on August 26, 2019, (ECF No. 2).

5. As a result, all proceedings in this matter have been publicly available through the Court's website at www.ncbusinesscourt.net.

6. On October 3, 2019, this Court made an entry of default upon Plaintiff's proof of service and Curtis having not timely responded. (ECF No. 9.) On October 9, 2020, Plaintiff' filed his Motion for Default Judgment. (ECF No. 10.)

7. On November 19, 2019, in addition to the posting of Plaintiff's Motion for Default Judgment on the Court's electronic docket, the Court mailed a copy of it to Curtis at his last known address. (ECF No. 16.) While that letter was not certified, Curtis has not denied receiving it and the Court's letter has not been returned by the Postal Service as undeliverable.

8. Curtis has maintained that he had not received the complaint prior to the Motion for Default Judgment being filed. He has not, however, testified that he had not been advised of the lawsuit having been filed against him. To the contrary, he testified that he was made aware of the summons and complaint against him through a link shared with him online in August or September of 2019. (Dep. Kyle Curtis 14:22–15:23, ECF No. 47.2.)

9. On January 23, 2020, having received no filing by Curtis challenging either service, the entry of default, or Plaintiff's Motion for Default Judgment, the Court entered a Partial Judgment by Default. (ECF No. 17.)

10. On February 6, 2020, Curtis filed his initial Motion to Set Aside Default Judgment. (ECF No. 19.) Curtis thereafter amended his Motion and filed multiple affidavits and documents to support his contention that he was no longer residing with his mother at the Pleasant Garden address at the time of service but was rather living in Charlotte, North Carolina with Benjamin Potts ("Potts"). On July 28, 2020, among other materials, Curtis filed his own affidavit, a document purporting to be an affidavit from Potts affirming that Curtis lived with him at the time the summons and complaint were served, a lease bearing purported signatures of both Curtis and Potts by which Curtis was to pay Potts rent, and Discover bank statements from August and November 2019 purportedly mailed to Curtis at Potts's home address. (Aff. Kyle Russell Curtis, ECF No. 31.1.)

11. On September 9, 2020, Plaintiff filed an affidavit by Potts testifying that Curtis had forged Potts' signature on both the affidavit and lease Curtis had filed in support of his Motion, and testified that, in fact, Curtis did not live with Potts in Charlotte at the time of service and had not paid Potts rent. (ECF No. 38.) Plaintiff also challenged the authenticity of the Discover bank statements Curtis submitted, in part by providing evidence that the address label had been falsified on the document Curtis submitted to the Court and the correct mailing address was Curtis's Pleasant Garden address at which service of the complaint and summons had been made. (*See* Decl. Megan Joyce ¶¶ 3–13, ECF No. 39; Decl. Megan Joyce at Ex. A, ECF No. 39.1; Decl. Megan Joyce at Ex. B, ECF No. 39.2.)

12. Curtis has contended and Potts has denied that Curtis made rental payments to Potts in July and August of 2019 through the Discover account. Plaintiff subpoenaed evidence from Discover. (*See* DFS Subpoena Response, ECF No. 47.40.) In correspondence responding to Plaintiff's counsel's inquiry as to why Discover's subpoena response included no statements prior to October 2019, Discover stated that "[t]he earliest statement information [they] could locate began on October 1st, 2019. The '10.31.2019 Statement' shows a beginning balance of $0.00, which indicates there was no activity prior, and so no statements were generated prior to October 1st, 2019." (DFS Subpoena Correspondence, ECF No. 47.39.)

13. Having reviewed the contradicting sworn statements, the Court advised counsel that it believed depositions of both Curtis and Potts should be taken.

14. On October 22, 2020, transcripts of the deposition of Curtis (ECF No. 47.2), and of Potts (ECF No. 47.1), together with multiple exhibits were filed (*See* Notice of Filing, ECF No. 47). Each continues to challenge the testimony of the other in material respects.

15. At his deposition, Curtis repeatedly claimed that he could access his monthly statements through Discover's online portal and that he would produce statements documenting his rent payments to Potts. (*See* Dep. Kyle Curtis 31:7–16, 36:7–25, 39:1–10, 44:10–45:23.) Curtis further testified that he had or would soon have additional materials to support his position, but that he would not identify or produce them at his deposition and would only provide them through his counsel. He

also committed to provide the original electronic copies of his earlier affidavits to address inconsistencies between them.

16. To assure a complete record before ruling on the Motion, the Court, ordered that Curtis could on or before 5:00 p.m. November 5, 2020 file the additional items he identified in his deposition. (*See* Order ¶¶ 12–13, ECF No. 49.) However, he has not filed any such material.

17. Curtis's attorney defended Curtis at his deposition and conducted a complete examination of Potts at his deposition. Curtis's counsel filed a Motion for Leave to Withdraw after the depositions were completed. (ECF No. 45.) The record does not reflect that Curtis provided his counsel any of the documents referenced at his deposition.

18. The record is now complete, and the Motion is ripe for resolution.

II. STANDARD OF REVIEW

19. Rule 55(d) of the North Carolina Rules of Civil Procedure ("Rules") provides that "for good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." While the entry of a default judgment is subject to the discretion of the Court, North Carolina law disfavors default judgments, and advises that "any doubt should be resolved in favor of allowing resolution on the merits of the case." *London Leasing LLC v. Arcus*, 2015 NCBC LEXIS 69, at *7 (N.C. Super Ct. June 29, 2015); *Emick v. Sunset Beach & Twin Lakes, Inc.*, 180 N.C. App. 582, 590–91, 638 S.E.2d 490, 496 (2006) ("A motion to set aside an entry of default is addressed to the

sound discretion of the trial judge.") "Default judgment is a drastic remedy which should be reserved for those cases . . . in which one party refuses or fails to attend to his or her legal business." *Beard v. Pembaur*, 68 N.C. App. 52, 58, 313 S.E.2d 853, 856 (1984).

20. What constitutes "good cause" for setting aside an entry of default judgment "depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant." *Peebles v. Moore,* 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980) (citation and quotation omitted).

21. An entry of default is more easily set aside than a default judgment under Rule 60(b), which "generally involves a showing of excusable neglect and a meritorious defense." *Id.* (citations omitted).

> When the trial court exercises its discretion in considering a motion to set aside an entry of default, it is entirely proper for the court to give consideration to the fact that default judgments are not favored in the law. At the same time, however, it is also true that rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity.

Howell v. Haliburton, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974).

III. ANALYSIS

22. Defendant's Motion rests on his contention that he was not living at the Pleasant Garden address at the time the summons and complaint were signed for by and delivered to his mother, Susan Curtis, as a result of which he was not served as

required by Rule 4, defeating any claim that the Court has personal jurisdiction over him. Plaintiff contends that valid Rule 4 service was effectuated.

23. "[W]here a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service." *S. Lowman v. Ballard & Co.*, 168 N.C. 16, 18, 84 S.E. 21, 22 (1915); *see Williams v. Hartis*, 18 N.C. App. 89, 195 S.E. 2d 806 (1973); *Guthrie v. Ray*, 293 N.C. 67, 69–70, 235 S.E.2d 146, 148 (1977).

24. Rule 4(j)(1)(a) provides that service upon a natural person can be completed "[b]y delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

25. "[W]here service of process is had by leaving the summons and complaint with a person other than the named defendant the substitute person must be a 'person of suitable age and discretion,' who lives with defendant in his 'dwelling house or usual place of abode,' and the summons must be left with the substitute person at their usual place of abode." *Guthrie*, 293 N.C. at 70, 235 S.E.2d at 148.

26. If the summons and complaint were not served upon Curtis as prescribed by Rule 4(j)(1)(a), the entry of default and the partial default judgment entered in this case against him are void and must be set aside. *North State Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E.2d 356 (1964); *see also Guthrie*, 293 N.C. at 71, 235 S.E.2d at 149. However, when the plaintiff demonstrates legal service was made

by an authorized manner, the law presumes service. *See Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1957).

27. The return receipt demonstrating proof of service by certified mail raises a presumption of valid service, which can be rebutted, but is conclusive absent evidence in rebuttal. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("Although a return of service showing service on its face constitutes *prima facie* evidence of service, such showing can be rebutted by the affidavits of more than one person showing unequivocally that proper service was not made upon the person of the defendant."). "The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based." *Harrington*, 245 N.C. at 642, 97 S.E.2d at 241. "The burden is on Defendant to rebut this presumption by clear and unequivocal evidence that consists of more than a single contradictory affidavit or the contradictory testimony of one witness." *Gibby v. Lindsey*, 149 N.C. App. 470, 473, 560 S.E.2d 589, 592 (2002) (citing *Guthrie*, 293 N.C. 71, 235 S.E.2d at 149); *see also Harrington*, 245 N.C. at 642, 97 S.E.2d at 241 (noting that service of process should not "be lightly set aside" and that overturning the presumption of service is not possible without clear and unequivocal evidence consisting "of more than a single contradictory affidavit").

28. Accordingly, Plaintiff's service of the summons and complaint to Defendant by certified mail to the Pleasant Garden address, and delivery to Defendants' mother, Susan Curtis, at that address constitute *prima facie* evidence of personal service. Thus, Curtis has the burden of presenting evidence in support of

his challenge to personal jurisdiction. *See Gibby*, 149 N.C. App. at 473–74, 560 S.E.2d at 592 (holding that the defendant failed to rebut the presumption of service because the evidence he presented "fail[ed] to establish clearly and unequivocally that Defendant had assumed a new dwelling house or usual place of abode by [the date of service]").

29. Curtis's contention is that the Pleasant Garden address was not his "dwelling house or usual place of abode" on the date of service—August 30, 2019. There is no dispute that Susan Curtis is of suitable age or discretion residing at the Pleasant Garden address or that her signature on the return receipt is valid.

30. North Carolina law provides no hard-and-fast definition of what is or is not a defendant's "dwelling house or usual place of abode," but rather that it is "a question to be determined on the facts of the particular case." *Van Buren v. Glasco*, 27 N.C. App. 1, 5, 217 S.E.2d 579, 582 (1975) (citation omitted).

31. The Court finds upon the current record that the greater weight of the evidence is that Curtis was residing with his mother at the Pleasant Garden address at the time she signed for the delivery of the summons and complaint, and that Curtis's testimony and evidence is not adequate or competent to support a contrary conclusion.

32. Notwithstanding that Susan Curtis filed an affidavit that stated when she signed the certified mail slip on August 30, 2019, Curtis had resided in Charlotte since July 16, 2019, (ECF No. 31.2), there is significant evidence to the contrary. Further, there is substantial evidence challenging Curtis's credibility. In fact, there

is strong evidence suggesting that Curtis may have knowingly and intentionally submitted false testimony to the Court. The Court need not resolve that issue for purposes of ruling on this Motion. The Court need only determine whether Curtis has failed to provide sufficient credible evidence to overcome the presumption of valid service of the summons and complaint pursuant to Rule 4.

33. The Court will separately consider whether a criminal reference or a further proceeding in the nature of criminal contempt may be appropriate.

34. The Court concludes that Curtis has not shown credible evidence adequate to overcome the presumption of valid service.

35. First, Curtis does not rebut that he had at least until June 2019 resided with his mother at her home at 1532 Providence Church Road, Pleasant Garden, North Carolina. Curtis has neither suggested nor offered evidence of any potential change of address other than establishing residency at the home of Benjamin Potts in Charlotte, North Carolina.

36. Curtis's credibility when offering proof of establishing residency with Potts is in substantial question. Reasons include: (a) Potts has denied Curtis's assertion under oath, with no apparent personal gain from having done so; (b) Curtis admitted to altering an affidavit he filed with the Court after it had been notarized to change the date of service through the use of Adobe software, (*See* Dep. Kyle Curtis 28:22–30:3); (c) Plaintiff submitted evidence that suggests Curtis may also have modified Discover statements from their true original form before submitting them to the Court, including that the addresses shown on the documents provided by Curtis

vary from the addresses shown on the same documents as produced by Discover in its subpoena response (*See* DFS Subpoena Correspondence; DFS Subpoena Response; Decl. Megan Joyce, ¶¶ 3–13, Ex. A, Ex. B); and (d) Curtis testified that he had in his possession other documents consistent with his position but has failed to provide them to Plaintiff or file them with the Court after being given opportunity to do so.

37. There is further evidence that would allow an inference that Curtis, in fact, knew of and/or received the summons and complaint before default was entered. Service was made on Susan Curtis on August 30, 2019. Potts testified and Curtis did not deny that Curtis was at the Pleasant Garden address the following day—August 31, 2019. (Dep. Benjamin Potts 54:1–56:4; Dep. Kyle Curtis 53:6–54:1; Text Message Timeline, ECF No. 47.14.) The evidence further suggests that the nature and pendency of the litigation was regularly and freely discussed by Curtis and others on forums connected to the YouTube channel that is the subject of the litigation. (*See e.g.,* Aff. Steven McRae ¶¶ 7a–7b, ECF No. 22; Dep. Kyle Curtis 45:25–47:8.) Curtis admits that he was given a link to the Court's electronic docket in this case, which would have provided him access to all filings, including the summons, complaint, and affidavit submitting the return receipt confirming the delivery of the materials by certified mail to his mother at the Pleasant Garden address. (Dep. Kyle Curtis 14:22–15:23.)

38. There is testimony that while Curtis spent significant periods of time at Potts' house in Charlotte during July, August, and September 2019, he spent just as much, if not more time at the Pleasant Garden address during that same period,

including from August 31 through September 5. (Dep. Benjamin Potts 55:2–6; Text Message Timeline.)

39. The court's observation in *Van Buren v. Glasco* is apt:

> Indeed, because of his family's continued occupancy of the North Carolina home and because of his regular and frequent return thereto, it would appear that appellant had a closer and more enduring connection with his North Carolina residence than he had with the South Carolina house. Certainly, when all of the circumstances are considered, his relationship and connection with the North Carolina dwelling were such that there was a reasonable probability that substitute service of process at that dwelling would, as it in fact here did, inform him of the proceedings against him in apt time to permit him to assert in timely fashion such defenses as he might have.

27 N.C. App. at 6, 217 S.E.2d at 582, *overruled on other grounds* in *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

40. The Court finds that the evidence presented supports the conclusion that the Pleasant Garden address where the summons and complaint were served was Curtis's "dwelling house or usual place of abode" for purpose of Rule 4 at the time of service on August 30, 2019.

41. The Court finds abundant evidence that Curtis was aware of the lawsuit and the nature of the allegations against him significantly before Default was entered and certainly before the Partial Judgment by Default was entered.

42. Our Court of Appeals commented that the drastic remedy of default might be best reserved for cases where a defendant "refuses or fails to attend to his or her legal business." *Beard*, 68 N.C. App. at 58, 313 S.E.2d at 856. But this appears to be precisely such a case.

43. The Court concludes that Curtis has not demonstrated an adequate basis to overcome the presumption of valid service of the summons and complaint upon him by leaving them with his mother Susan Curtis who signed for their receipt.

44. The Court concludes that both the Entry of Default and the Partial Judgment by Default were properly entered against Curtis over whom the Court had obtained personal jurisdiction through valid service.

IV. CONCLUSION

45. For these reasons, Defendant Kyle Russell Curtis's Amended Motion to Set Aside Entry of Default and Partial Default Judgment is DENIED.

IT IS SO ORDERED, this the 20th day of November, 2020.

/s/ James L. Gale

James L. Gale
Senior Business Court Judge