

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

MOHAMMED MUGHAL and GHAZALA MUGHAL

Plaintiff,

-against-

GOHER YAQOOB

Defendant

Index No: 25585/03

Motion Date: 9/1/04

Motion Cal. No.: 30

The following papers numbered 1 to 7 read on this motion by defendant for an Order dismissing this action pursuant to CPLR 3215(a)(8) lack of personal jurisdiction and vacating the *lis pendens* pursuant to CPLR 6514(a).

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	

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

The plaintiff commenced this action for specific performance of a contract for the sale of real property by filing the summons and complaint on October 30, 2003. The summons and complaint was served upon the defendant pursuant to CPLR 308(4) on November 22, 2004 and the affidavit of service was filed on December 3, 2003. The attorneys for the parties conferred and attempted to stipulate to extending the defendant's time to answer to March 15, 2004, however, no such stipulation resulted.

Thereafter, the plaintiffs moved for summary disposition and sought summary judgment or, in the alternative, a default judgment on February 26, 2004. The defendant opposed the plaintiffs' motion submitting his own affidavit and his attorney's affidavit asserting that summary judgment was inappropriate; the defendant was not in default because the

plaintiffs extended his time to answer; the answer was not served due to settlement negotiations; and he has a meritorious defense based on fraud, duress and rescission. The defendant did not affirmatively move to vacate his default or request leave to serve a late answer or to compel plaintiffs to accept the answer he had already served but did not yet file with the court. Also, the defendant did not raise a personal jurisdictional defense in opposition to the motion or in his verified answer nor affirmatively move for dismissal on this ground pursuant to CPLR 3211(a)(8). The plaintiffs' motion was submitted to the court on June 2, 2004. After due consideration of the plaintiffs' and the defendant's evidence, arguments, objections and defenses, including the merits of the action, the court, by memorandum decision dated July 6, 2004, granted the plaintiffs' motion for a default judgment. The judgment, dated August 9, 2004 was entered on August 10, 2004.

The defendant now moves pursuant to CPLR 5015(a)(4) and CPLR 3211(a)(8) for an order vacating the default judgment and dismissing the complaint on personal jurisdictional grounds. Plaintiff asserts that service of the summons and complaint upon him pursuant to CPLR 308(4), was improperly made and thus insufficient to confer personal jurisdiction in that the nailing was not made at defendant's actual dwelling place or usual place of abode. The defendant's argument is unavailing. The defendant had the ability to raise a jurisdictional defense and did not do so. The defendant waived any jurisdictional objection he may have had. Defendant also moves to vacate the *lis pendens* pursuant to CPLR 6514.

The branch of the motion to vacate the *lis pendens* pursuant to CPLR 6514 for failure to serve the summons and complaint within 30 days after filing is denied. Service was made timely.

A person who participates in an action by filing with the court any writing which discusses the merits of the action, asks or consents to relief from the court and fails to assert the jurisdictional defense, appears informally and consents to the jurisdiction of the court. (CPLR 320[b]; USF&G v. Maggiore, 299 AD2d 341 [2002]; Yihye v. Blumenberg, 260 AD2d 371 [1999], lv denied 93 NY2d 813 [1999]; Matter of Roslyn B. v. Alfred G., 222 AD2d 581, 582 [1995]; Matter of Katz, 81 AD2d at 147 [1981], aff'd 55 NY2d 904 [1982].) In this case, the defendant interposed papers in opposition to the plaintiffs' motion, opposed and requested the court to deny the plaintiffs' motion based upon, inter alia, the merits of the action. The defendant did not, however, oppose or raise a personal jurisdiction defense for improper service in opposition to the motion. Such appearance by

the defendant "is equivalent to personal service of the summons upon him" (CPLR 320[b]). Thus it is irrelevant whether the defendant was properly served since jurisdiction was conferred by his informal appearance. (see, Skyline Agency v. Ambrose Coppotelli, Inc., 117 AD2d 135, 147-148 [1986]).

Moreover, the defendant waived any objections to personal jurisdiction he might have otherwise asserted by failing to move to dismiss the action for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) prior to serving an answer and by failing to interpose any relevant jurisdictional defense in his answer. (CPLR 3211[e]; Colbert v. International Security Bur., 79 AD2d 448, 460-462 [1981], lv. denied 49 NY2d 988[1981]; see, also, Matter of Fry v. Village of Tarrytown, supra.) The Court of Appeals in Addesso v. Shemtob, 70 NY2d 689 [1987] strictly applied the procedural course provided by CPLR 320(b) and 3211(e) which a defendant must follow so as to avoid a waiver of a jurisdictional defense. (see, also Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR320:3.) The defendant's tactical maneuvering and gamesmanship demonstrates an intention to delay, defeat and prejudice the plaintiffs' action, causing needless motion practice and a waste of the court's time and resources.

Dated: September 14, 2004
D# 17

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J.S.C.