

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-81223-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN,

Plaintiff,

v.

SHOWCASE INVESTMENT
GROUP, INC.,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO VACATE ENTRY OF DEFAULT
AND DISMISS COMPLAINT FOR INSUFFICIENT SERVICE OF PROCESS**

THIS CAUSE comes before the court upon defendant's motion to vacate default and dismiss complaint for insufficient service of process [DE # 24]. The Receiver has not responded to the motion, and the time for filing a response has expired.

Defendant challenges the sufficiency of service of process under Fed. R. Civ. P. 12(b)(5). "Once a defendant challenges service of process, plaintiff has the burden to demonstrate sufficient service of process by making a prima facie case of proper service." *See Hollander v. Wolf*, 2009 WL 3336012, * 3 (S.D. Fla. 2009 Oct. 14, 2009). Here, the Receiver has not responded to defendant's motion, much less carried his burden of establishing a prima facie case of proper service.

In any event, a review of the docket reveals that the Receiver would not be able to show that service was proper. The Receiver attempted to serve defendant via substituted service on Florida's Secretary of State pursuant to Fla. Stat. § 48.181. However, "in order to support substituted service of process on a defendant through the Secretary of State, the complaint must allege the jurisdictional requirements prescribed by the applicable long-arm statute." *Mecca Multimedia, Inc. v. Kurzbard*,

954 So.2d 1179, 1182 (Fla. 3d DCA 2007); see *Taverna Opa Trademark Corp. v. Ismail*, 2009 WL 1220513, *1 (S.D. Fla. Apr. 30, 1999). “The jurisdictional requirements of § 48.181 are that the defendant conducts business in Florida and is either: (1) a nonresident, (2) a resident of Florida who subsequently became a nonresident, or (3) a resident of Florida concealing her whereabouts.” *Ismail*, 2009 WL 1220513 at *1. Florida’s “long-arm statutes are strictly construed and require the plaintiffs to clearly bring themselves within the ambit of the statutes.” *Labbee v. Harrington*, 913 So.2d 679, 682-83 (Fla. 3d DCA 2005).

Here, the Receiver’s complaint does not allege facts that support substituted service. The Receiver has not alleged that defendant is concealing its whereabouts. Nor has he alleged that defendant is a nonresident. On the contrary, the complaint states that defendant is “a Florida corporation.” See *Compl.* ¶ 9. Thus, because the complaint does not allege the jurisdictional requirements of § 48.181, the Receiver did not properly serve defendant with substituted service.

Furthermore, it appears that the Receiver failed to satisfy the statutory notice requirements for substituted service. Pursuant to Fla. Stat. § 48.161, the plaintiff “must serve the Secretary of State and mail a copy of the summons and complaint to defendant by registered or certified mail.” *Hernandez v. State Farm Mut. Auto Ins. Co.*, 32 So.2d 695, 699 (Fla. 4th DCA 2010). Here, there is no evidence that the Receiver mailed a copy of the complaint to defendant. Thus, “the statutory requirements [of § 48.161] have not been met and service of process is insufficient.” *Id.*

Where, as here, “a court lacks jurisdiction over the parties because of insufficient service of process, the [default] judgment is void and the district court must set it aside.” *Carimi v. Royal Caribbean Cruise Line, Inc.*, 959 F.2d 1344, 1345 (5th Cir.1992).

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's motion to vacate default and dismiss complaint for insufficient service of process [DE # 24] is **GRANTED**.
2. The default entered by the Clerk on August 11, 2010 [DE # 17] is **VACATED**.
3. Plaintiff **SHALL** perfect service upon defendant within **twenty (20) days** of the date of entry of this order and file proof of service in the court file. Failure to follow this directive will result in dismissal of this action without prejudice without further notice.
4. Defendant **SHALL** file its answer to the complaint within **twenty (20) days** of service. No extensions will be given absent exceptional circumstances.
5. Plaintiff's motion for final default judgment [DE # 22] is **DENIED**.
6. This case is **RE-SET** for trial on the **April 2011 Trial Calendar** which commences on **Monday, April 4, 2011**. Counsel for all parties shall appear at a calendar call commencing at **8:30 a.m.** on **Thursday, March 24, 2011**, in courtroom five at the federal courthouse, 701 Clematis Street, West Palm Beach, Florida.
7. Pretrial discovery shall be conducted in accordance with Local Rule 16 .1 and Rule 26(a) of the Federal Rules of Civil Procedure. In light of the extension of trial date, pretrial discovery deadlines will be adjusted to comport with the new calendar call date for this case. Unless amended by subsequent order, the following deadlines shall apply:

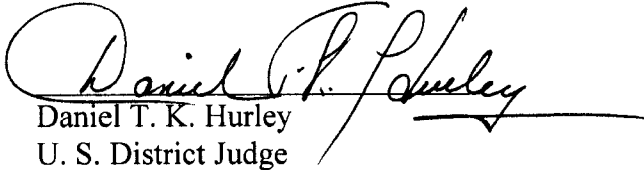
<u>Mediation Conference</u>	60 days before calendar call
<u>Rule 26(a)(3) Witness and Exhibit Disclosures</u>	30 days before calendar call
<u>Discovery Cutoff</u>	10 days before calendar call

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<u>Motions in Limine</u>	5 days before calendar call
<u>Pretrial Stipulation</u>	5 days before calendar call
<u>Voir Dire Questions</u>	First day of jury trial
<u>Jury Instructions</u>	First day of jury trial
<u>Proposed Findings of Fact & Conclusions of Law</u>	First day of non jury trial

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this th~~17~~ day of

November, 2010.


Daniel T. K. Hurley
U. S. District Judge

Copies provided to counsel of record and all pro se litigants