No. 24-808

IN THE

Supreme Court of the United States

CONEY ISLAND AUTO
PARTS UNLIMITED INC.,

Petitioner,

v.

JEANNE ANN BURTON,
CHAPTER 7 TRUSTEE FOR VISTA-PRO
AUTOMOTIVE, LLC

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

DANIEL GINZBURG
THE GINZBURG LAW FIRM, P.C.
200 Village Center Drive,
Unit 7045
Freehold, NJ 07728
(732) 284-3841
daniel@ginzburglawfirm.com
Counsel for Petitioner

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I. Service of Process Was Not Proper, and the Judgment is Void

Respondent insists that this Court should not grant certiorari because service of process in the Tennessee bankruptcy court was proper, the judgment is not void, and reversing the holdings below would be futile. (Resp. Br. 4, 9, 16-17).

As an initial matter, no court below held that service was proper, and Respondent does not cite to any part of the record in support of her assertion. To the contrary, the New York bankruptcy court – the only court to examine the issue of service of process – observed, albeit via *obiter dicta*, that "it seems to appear that Coney Island was not served attention to the officer" in violation of Bankruptcy Rule of Procedure 7004(b)(3). (Pet. App. 147a). The Tennessee bankruptcy court assumed for purposes of resolving the motion to vacate that service was deficient. (Pet. App. 83a).

Further, Respondent misconstrues the New York Department of State record. New York is unique in that it permits any domestic or registered foreign corporation to be served with any process whatsoever by way of the Secretary of State. N.Y. Bus. Corp. Law § 304(a). Such service is valid and complete when the papers are

delivered to the Department of State. *Id.* § 306(b). Upon delivery of the papers, the Secretary of State sends them via "certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose." *Id.* Thus, Respondent incorrectly asserts that the address on file was valid service upon an "agent" as envisioned by Rule 7004(b)(3). Rather, that was the address to which the Secretary of State would mail papers pursuant to the Business Corporation Law. Indeed, the space for "Registered Agent" in the Department of State record for Petitioner is blank. Exhibit 1, Bankr. M.D. Tenn., No. 3:15-ap-90079, Dkt. 52-1.

Lastly, Respondent cites no case law for its paradoxical proposition that a principal can act as its own agent.

II. The Circuit Courts' Lack of Uniformity In Applying Rule 60(b)(4) Supports Granting Certiorari

Petitioner argues that there is no split among the Circuit Courts as to whether Rule 60(b)(4) motions based upon void judgments may be made at any time. (Resp. Br. 10-11). The Sixth Circuit majority in this case disagrees. (Pet. App. 24a ("We acknowledge that our circuit appears to be out of step with the majority view, which holds that Rule 60(b)(4) motions may be brought at any

time.")).

Further, the case law Respondent cites does not support her argument. For instance, she points to *Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998) (cited at Resp. Br. 11), and suggests that "delay" can "lend support" to rejecting a Rule 60(b)(4) motion as untimely. But the delay referred to in *Sea-Land* dealt with the defendant failing to make an argument in an earlier Rule 60(b)(4) motion, not the timing of either motion. *Id.* at 852-53. Otherwise, the First Circuit reaffirmed that "Rule 60(b)(4) motions cannot be denied on the procedural ground that they were not brought within a 'reasonable time' as required under Rule 60(b)." *Id.* at 852.

Respondent also argues that the Second Circuit does not subscribe to the position that a motion to vacate a default judgment for lack of personal jurisdiction may be made at any time. (Resp. Br. 12). In support, she cites *Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180 (2d Cir. 2006). But nowhere in that case did the Second Circuit conclude that there is a time limitation on Rule 60(b)(4) motions seeking to vacate a void judgment. To the contrary, the court held that such a motion would be procedurally untimely if "a party has previously filed a motion to vacate a default judgment that failed to raise a voidness argument and subsequently advances such an

argument[.]" *Id.* at 190. In fact, Respondent acknowledges that the Second Circuit denies motions to vacate as untimely only where the movant seeks a second bite at the apple. (Resp. Br. 12).

Separately, Respondent attempts to muddy the water by citing a number of unpublished or unreported cases and arguing that some Circuit Courts themselves do not "consistently" abide by reported decisions permitting Rule 60(b)(4) motions to be made at any time. (Resp. Br. 11-15). She then segues into arguing that the Court should deny certiorari so that the issue may further "percolate" in the lower courts. (Resp. Br. 18). But the question presented to this Court has been percolating for decades. *See, e.g., Crosby v. Bradstreet Co.*, 312 F.2d 483, 485-86 (2d Cir. 1963) (vacating 30-year old unenforceable judgment pursuant to Rule 60(b)(4)); *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971) (holding that a motion under Rule 60(b) need not be "filed within any particular time limit if the judgment is indeed a nullity due to a complete lack of personal jurisdiction over the defendant"); *Recreational Props., Inc. v. S.W. Mortg. Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986) ("When, however, the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion – the judgment is either void or it is not.").

The fundamental issue before the Court has not changed since then: assuming a judgment is void *ab initio* by virtue of lack of personal jurisdiction, does it nevertheless, through passage of time alone, become effective? Appellate courts going back to the 1960s have answered in the negative, the Sixth Circuit majority in the case at bar disagrees, and this Court has not had an opportunity to answer the question. Thus, waiting for the issue to re-re-percolate and all panels of all the Circuit Courts to align is an exercise in futility. This Court should grant certiorari and provide clear guidance on the question presented.

III. Petitioner Did Not Engage In Gamesmanship

At various points in her brief, Respondent accuses Petitioner of sleeping on its rights and engaging in gamesmanship. (Resp. Br. 21-22). Petitioner did no such thing. In *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982), this Court held that a "defendant is *always* free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding" (emphasis added). Five years later, in *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987), then-Judge Ginsburg wrote: "Alternatively, the defendant may refrain from

appearing, thereby exposing himself to the risk of a default judgment. *When enforcement of the default judgment is attempted*, however, he may assert his jurisdictional objection." *Id.* at 1547 (emphasis added); *see also Bank Leumi*, 443 F.3d at 191 (finding that a motion to vacate 15 years after entry of judgment was timely because it was filed shortly after the commencement of suit to enforce the judgment).

Similarly, here, Petitioner moved to vacate the default judgment against it after Respondent commenced collection efforts. (Pet. App. 84a). There was no gamesmanship.

IV. This Court's Prior Decisions Do Not Resolve the Question Presented

Respondent contends that this Court has recently spoken on the question presented in *Kemp v. United States*, 596 U.S. 528 (2022). (Resp. Br. 1-2, 7, 19-20). There, the Court stated that "Rule 60(c) imposes deadlines on Rule 60(b) motions. All must be filed 'within a reasonable time.'" *Kemp*, 596 U.S. at 533. But the narrow issue in *Kemp* was "whether the term 'mistake' includes a judge's error of law," *id.* at 530, not the question presented here. And, fortuitously, the Court observed in *Kemp* that "we have no cause to define the 'reasonable time' standard here." *Id.* at 538. So the question remains open.

Lastly, relying on Justice Gorsuch's dissent in *Kemp*, Respondent argues that the substance of the question presented is a "policy question" best left for the Advisory Committee On Civil Rules. (Resp. Br. 19). Respondent is incorrect. The question here raises constitutional due process ramifications – can a judgment void due to the absence of personal jurisdiction ever become valid? By contrast, in *Kemp* the issue was whether a judge's mistake of law ought to be rectified using Rule 59(e) or 60(b). *Id.* at 541 (Gorsuch, J., dissenting). The two are not analogous in terms of importance.

In addition, Justice Gorsuch's dissenting opinion in *Kemp* was based at least in part on the "rare circumstances" presented there – a party foregoing a motion pursuant to Rule 59(e) and then seeking relief under Rule 60(b) more than a year after entry of judgment. *Id.* at 540-41. And while Respondent quibbles with the methodology Petitioner employed to underscore the frequency with which litigants move for relief from a default judgment (Resp. Br. 17-18), the point is that the circumstances found in this case are quite common across the country. Therefore, this Court's guidance is vital to settling the divergent approaches to the question presented.

CONCLUSION

It is fundamentally at odds with the structured order established by the Rules of Civil Procedure for relief to turn on the mere geographical location of the adjudicating court. Accordingly, Petitioner respectfully requests that the Court issue a writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

DANIEL GINZBURG
THE GINZBURG LAW FIRM, P.C.
200 Village Center Drive,
Unit 7045
Freehold, NJ 07728
(732) 284-3841
daniel@ginzburglawfirm.com
Counsel for Petitioner