

**R.K. Tex Inc. v Streit**

2008 NY Slip Op 32053(U)

July 17, 2008

Supreme Court, New York County

Docket Number: 0114454/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHÉ  
J.S.C.

PART \_\_\_\_\_

Index Number : 114454/2007

R.K. TEX INC.

vs.

STREIT, MICHAEL E.

SEQUENCE NUMBER : 002

RENEWAL

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

JUL 22 2008

NEW YORK COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

Dated: 7/17/08

  
HON. JUDITH J. GISCHÉ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
R.K. Tex Inc,

Plaintiff,

-against-

Streit, Michael E.,

Defendants.  
-----X

Decision/Order

Index No.: 114454/07

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 3215, of the papers considered in the review of this (these) motion(s):

**Papers**

**Numbered**

Pltf's motion [df/jg] w/K.R.S. affirm in support, affid of B.E.M., exhs ..... 1  
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Plaintiff, R.K. Tex Inc ("Tex") moves to renew its January 15, 2008 motion for an order directing the Court Clerk to enter a default judgment against defendant, Michael E. Streit ("Streit"). CPLR § 2221. The motion was denied due to Tex's failure to establish proper service on Streit. Since the dismissal was without prejudice, permission to renew is granted. CPLR § 2221.

This is an action against Streit, an individual defendant. To comply with CPLR § 308 (2), Tex obtained Streit's dwelling place using the address listed on checks Streit provided. Subsequently and in a manner not clear to the court, Tex learned that 215 East 68<sup>th</sup> Street, Apt. 28C, New York, New York 10021, the address on the checks, was incorrect because Streit moved within the same building to apartment A-2. However, on October 30, 2007, while attempting to serve Streit at 215 East 68<sup>th</sup> Street, Apt. A-2, New York, New York 10021, Bryan E. McElderry ("McElderry"), a professional process server, learned from the doorman that Streit's actual dwelling place was really apartment number 2-O.

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Once the address was definitively determined, the doorman refused to let McElderry enter the building to effect personal service. Instead, McElderry delivered the summons and complaint to the doorman. There is nothing in the record to suggest that the doorman had other duties besides those of a regular apartment doorman, making him a person of suitable age and discretion to receive service in Streit's stead. F.I. Du Pont, Glore Forgan & Co. v. Chen, 41 N.Y.2d 794 [1977]. Further, if the doorman does not allow the server to proceed to the apartment, then the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested. Id. Accordingly, service at Streit's actual dwelling place is satisfied.

Using the doorman's representation, and within 20 days of delivery service, McElderry then mailed the summons to Streit's last know address at 215 East 68<sup>th</sup> Street, Apt. 2-O, New York, New York 10021. CPLR § 308 (2). The summons was also properly filed with the clerk. CPLR § 308 (2). Therefore, Tex fulfilled the requirements of proper personal service under CPLR § 308.

On January 13, 2008 Tex mailed an additional copy of the Summons and Complaint to Streit's place of residence bearing the legend "Personal and Confidential," thereby complying with the additional notice requirements of CPLR § 3215 (g) (3) (i). Streit has not appeared or answered the complaint within the time provided under the CPLR and the time has not been extended.

Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 [1984]), Tex is entitled to a default

judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (Gagen v. Kipany Productions Ltd., 289 AD2d 844 [3d Dept 2001]).

Based on the affidavit of Imran Haider, the Assistant Vice President of Tex who has personal knowledge of the facts and circumstances in connection with this action, the court makes the following findings: Tex is a textile company who has conducted business with Hampton Industries, Inc. ("Hampton"). Tex sold and delivered goods to Hampton, who accepted but did not pay for them. To forgo the immediate commencement of a lawsuit, Streit, who Tex has information and believes to be an officer of Hampton, represented that he would pay part of the outstanding balance. On August 29, 2006, Streit drew, endorsed, and delivered a check to Tex dated August 29, 2006, in the amount of \$50,000.00. When the check was presented to Interchange Bank (the "Bank") on February 16, 2007, it refused to make the payment. In addition, on August 29, 2006, Streit drew, endorsed, and delivered a \$100,000.00 check dated September 6, 2006.<sup>1</sup> Upon presentment to the Bank on October 5, 2006, the Bank refused to make the payment. Tex seeks payments for these dishonored checks plus prejudgment interest.

A check is a negotiable instrument which is governed by Article 3 of the U.C.C. U.C.C. § 3-104. Under UCC § 3-507, the holder of a dishonored check, upon dishonor of the same, has an immediate right of recourse against the drawer of the check. U.C.C. § 3-507 (2). A check is dishonored when the "presentment is duly made and due... payment is

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<sup>1</sup>Paragraph 9 of the complaint states that the date the defendant drew and delivered the check to plaintiff was September 16, 2006. However, the face of the dishonored check, the affidavit, the affirmation in support, and the demand portion of the complaint states the date of drawing and delivery as September 6, 2006. The inconsistency is a clear typographical error and involves no change in the form of the action, or in the nature and substance of the claim.

It is hereby:

**Ordered** that the Clerk shall enter a money judgment in favor of R.K. Tex Inc, against Michael E. Streit, in the amount demanded in the complaint, to wit

1. \$50,000.00 as for the first cause of action; and
2. \$100,000.00 as for the second cause of action; and
3. Prejudgment interest from February 16, 2007 on the first cause of action; and
5. Prejudgment interest from October 5, 2006 on the second cause of action; and
6. Together with the costs and disbursements of this action

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
July 7, 2008

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.