

BT Ams., Inc. v FOISI Broadcasting

2010 NY Slip Op 31099(U)

May 4, 2010

Supreme Court, New York County

Docket Number: 603016/2008

Judge: Judith J. Gische

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

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

PART 10

Index Number : 603016/2008

BT AMERICAS

vs

FOISI BROADCASTING NETWORK

Sequence Number : 004

VACATE

• INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
MAY 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

NYS SUPREME COURT
RECEIVED
MAY 05 2010
MOTION SUPPORT OFFICE

Dated: MAY 04 2010

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

BT AMERICAS, INC.,

*Changes
Made*

-against-

FOISI BROADCASTING N

Defendant.

DECISION/ ORDER

Index No.: 603016/08

Seq. No.: 001, 002, 004, 005

Present:

Hon. Judith J. Gische

J.S.C.

-----X
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Motion Seq. 001 - Papers	Numbered
OSC (contempt), JKL affirm, exhs	1
Def's "Response", exhs	2
5/7/09 Transcript	3
 Motion Seq. 002 - Papers	 Numbered
OSC (vacate), AFN affid, exhs	1
JKL opp affirm, exhs	2
 Motion Seq. 004 - Papers	 Numbered
Pltf n/m (confirm), JKL affirm, exhs	1
JKL reply affirm, exhs	2
 Motion Seq. 005 - Papers	 Numbered
Def n/m (reject), UJU aff, UIU affirm, exhs	1
JKL affirm in opp, exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

In this action, plaintiff sought to recover damages based upon defendant's failure to pay for consultancy services plaintiff performed for defendant in connection with the design, production and ultimate distribution of a television channel within Nigeria, Africa.

Plaintiff moved, by order to show cause, for an order holding defendant in contempt for refusing or willfully neglecting to obey a subpoena dated December 17, 2008, seeking production of documents and appearance for deposition (motion sequence 001). In motion sequence number 002, defendant moved for an order: [1] vacating and setting aside a default judgment filed December 8, 2008 (the "Judgment") entered against the defendant in this action; [2] vacating the "Default Order issued by this Court"; and "Dismissing the Action and/or Allow the Defendant to Defend this Action." Each party opposed the respective motion.

By Decision and Order dated June 23, 2009, the court referred the issue of whether the defendant was properly served with the summons and complaint to a Special Referee to hear and report. The remaining aspects of each motion were held in abeyance pending the resolution of the aforementioned reference.

By Report and Recommendation dated December 2, 2009 (the "Report"), Special Referee Louis Crespo found that: [1] plaintiff had failed to establish that it had served the defendant with the summons and complaint on October 28, 2008 at 10 Sycamore Street, Miller Place, New York 11764 ("10 Sycamore"); and [2] plaintiff did serve the defendant on October 24, 2008 at the defendant's office located on the 20th Floor of 100 Park Avenue, New York, NY 10017 ("100 Park Ave." or the "office").

Plaintiff now moves to confirm the Report (motion sequence number 004) and the defendant moves to reject same (motion sequence number 005). In its reply papers on motion sequence number 004, plaintiff for the first time asks for sanctions against the defendant pursuant to 22 NYCRR § 130-1.1 (a). The request is denied outright since the plaintiff did not properly notice this request for relief in its motion papers.

Confirm/Reject the Report

The court will first address the motions to confirm and reject the Report. The referee's function is to determine the issues referred to him or her, as well as to resolve conflicting testimony and matters of credibility. Pursuant to CPLR § 4403 the court may confirm or reject in whole or in part any report made by the Special Referee. The court may also make new findings with or without the taking of additional testimony, provided it has the benefit of the transcripts and trial exhibits (which it has in this case). As a general rule, however, the court will not disturb the Referee's findings, and the report should be confirmed, if his or her findings are supported by the record and if s/he has clearly defined the issues, and fairly resolved matters of credibility (Kaplan v. Einy, 209 AD2d 248 [1st Dept 1994]; Freedman v. Freedman, 211 AD2d 580 [1st Dept 1995]; The Board of Managers of the Boro Park Village-Phase I v. Boro Park, 284 AD2d 237 [1st Dept 2001]). The Referee's recommendations are entitled to great weight since s/he was the trier of fact and had the opportunity to see and hear the witnesses, and observe them on the stand (Frater v. Lavine, 229 AD2d 564 [2d Dept 1996]).

Referee Crespo's findings with respect to the issue of service on the defendant at 10 Sycamore is not contested by either party. Therefore, the court does not need to address same. The only disputed issue concerns service on the defendant at 100 Park Ave.

At the hearing, plaintiff called Renuka Persaud, a licensed New York City process server, who testified that she served the defendant with the summons and complaint at its office on October 24, 2008. Ms Persaud testified that on that date, she went to the 20th floor of 100 Park Ave where she saw a sign with the defendant's name

on it. Ms. Persaud then approached the receptionist and stated that she intended to serve legal papers on the defendant. Ms. Persaud gave the receptionist the summons and complaint. The receptionist, who refused to give her name, stated she was not authorized to accept service on behalf of the defendant, but would bring the papers to someone who was. The receptionist then returned with a man who identified himself as "Dave." Dave stated that he was permitted to accept service on behalf of the defendant and instructed Ms. Persaud to leave the summons and complaint with the receptionist.

Referee Crespo found Ms. Persaud's testimony to be credible, and concluded that through this testimony and Ms. Persaud's affidavits of service, plaintiff had demonstrated *prima facie* proof of service of the summons and complaint on the defendant. Referee Crespo further found that the defendant had failed to rebut plaintiff's showing of proper service.

In support of its motion to reject the Referee's report, defendant claims that it never had an office at 100 Park Ave. However, Referee Crespo specifically made a credibility finding against the defendant on this issue, and this finding is supported by the record. Ms. Persaud noted that the defendant's name was listed on the doors of the office, that Dave stated he was authorized to accept service on behalf of the defendant, and the defendant indicated on its own website, on October 24, 2008, that its US Office was located at 100 Park Ave. The court will not disturb Referee Crespo's findings because his findings are supported by the record, he has clearly defined the issues, and fairly resolved the matter of credibility. Accordingly, the Report is hereby confirmed in its entirety.

[* 6]

Motions for Contempt and Vacatur

Since the court has obtained jurisdiction over the defendant, the prior motions for contempt and vacatur are hereby restored for the court's consideration in this decision/order.

In the underlying action, plaintiff alleged the following facts in its complaint. Plaintiff claims that on or about September 21, 2007, it entered into a contract with the defendant to perform consulting services. Under the contract, defendant agreed to pay the sum of \$792,000. Plaintiff began providing consulting services to defendant in September 2007. However, plaintiff claims because the defendant failed to make payments due thereunder, plaintiff terminated the contract on September 3, 2008. At termination, plaintiff delivered to defendant a statement of account indicating that \$203,690.44 was due, and remained unpaid. Plaintiff commenced this action on October 20, 2008 and asserted the following claims: [1] breach of contract; [2] unjust enrichment; and [3] account stated. On December 8, 2008, a judgment was entered in plaintiff's favor and against the defendant for \$203,690.44 plus costs, disbursements and interest, for a grand total of \$209,029.40 (the "Judgment").

On December 18, 2008, plaintiff served a subpoena on the defendant. The subpoena demanded that the defendant produce documents to plaintiff no later than December 29, 2008 and appear for a deposition on December 31, 2008 at 10:00 a.m. at the office of plaintiff's attorney. The subpoena sought documents and testimony concerning, *inter alia*, the nature, extent and location of the defendant's assets to aid in plaintiff's enforcement of the Judgment.

Plaintiff seeks an order holding the defendant in contempt for its refusal or willful

neglect to obey a subpoena (CPLR § 5251; Judiciary Law § 753). Defendant moves to vacate and set aside the Judgment pursuant to CPLR § 317, vacate any default orders by this court, and dismiss the action or allow the defendant to defend same.

The court will first address the defendant's challenge to the Judgment since the resolution of this issue may impact the underlying motion for contempt.

CPLR § 317 provides in pertinent part:

A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318 within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

In order to vacate the Judgment, the defendant must show that service of the summons and complaint were made in a manner other than by personal delivery, that the defendant did not receive actual notice of the summons and complaint in time to defend the action, and that it has a meritorious defense to the action (Perez v. Jordan, 37 AD3d [1st Dept 2007]).

Here, the defendant cannot avail itself of CPLR § 317. Plaintiff served the defendant personally at 100 Park Ave, the defendant's principal, Mr. Nmungwun admits that he found the summons and complaint taped to the front door of his home on November 13, 2008, which was before the defendant's time to answer had expired, and the defendant has failed to show that it has a meritorious defense to the claims against it.

In order to demonstrate a meritorious defense, a party must submit a sworn

affidavit from an individual with knowledge of the facts based upon sufficient factual allegations (Peacock v. Kalikow, 239 AD2d 188 [1st Dept 1997]). Mere conclusory statements or vagues assertions are insufficient to meet this burden (id.).

The defendant does not specifically dispute the amount plaintiff claims it owes for the services provided; defendant merely alludes to a counterclaim that it has against the plaintiff. Furthermore, Mr. Nmungwun only denies the allegations contained in the complaint and states in general terms that the defendant's defenses include lack of personal jurisdiction, failure to state a cause of action, statute of limitations, breach of contract, lack of subject matter jurisdiction, and improper/insufficient service of process. Without any facts based upon personal knowledge to support these defenses, the defendant has failed to demonstrate that it has a meritorious defense.

Accordingly, the defendant's motion to vacate the Judgment is denied and, therefore, its request to dismiss the action must be denied as moot.¹

Insofar as the defendant seeks vacatur of any order entered by the court against it on default, the defendant has failed to identify such orders, and therefore, this request for relief is denied.

Turning to the motion for contempt, the court finds as follows:

To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties (Judiciary Law § 753 (A) (5); see also McCormick v.

¹The court notes that the defendant has failed to advance any argument in support of dismissal of the underlying action, which further buttresses the court's determination that the defendant has failed to demonstrate a meritorious defense.

Axelrod, 59 NY2d 574, 583 *amended* 69 NY2d 652 [1983]; Puro v. Puro, 39 AD2d 873 [1st Dept 1990]). The actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side. County of Orange v. Rodriguez, 283 AD2d 494 (2d Dept 2001). A party seeking contempt must show that there are no alternative effective remedies available. Farkas v. Farkas, 201 AD2d 440 (1st Dept 1994).

Plaintiff has proven that the motion for contempt was properly served on the defendant, indeed, the defendant opposes the motion (Judiciary Law § 761; Minzer v. Heffner Agency Inc., 214 AD2d 547 [2d Dept 1994]; Hampton v. Annal Management Co. Ltd. 168 Misc2d 138 [Sup Ct NY Co 1996]). The notice provisions of the motion warn the defendant that it may be punished by the imposition of a fine, or imprisonment, or both, thus complying with the requirements of Judiciary Law § 756.

Plaintiff has also established that the information sought in the subpoena is to aid it in the recovery of the money it is due and its collection efforts (CPLR § 5251; Gabor v. Renaissance Associates, 170 AD2d 390 [1st Dept 1991]; *see also* Skylake State Bank v. Solar Heat and Insulation, 148 Misc2d 559 [Sup Ct NY Co 1990]). Although the defendant had actual knowledge of the subpoena and its terms, it disregarded it and failed to respond to the questionnaire that plaintiff served (Ottomanelli v. Ottomanelli, 17 AD3d 647 [2d Dept 2005]). The failure to comply with a subpoena issued by an officer of the court shall be punishable as a contempt of court (CPLR § 2308 [a]).

Plaintiff has established that the defendant's disobedience of the subpoena has defeated, impaired, impeded or prejudiced plaintiff's right to ascertain information about

the defendant's financial resources (Judiciary Law § 753 [a]; Farkas v. Farkas, 209 AD2d 316 [1st Dept 1994]; Great Neck Pennysaver v. Central Nassau Publications, 65 AD2d 616 [2d Dept 1978]). Finally, plaintiffs have shown that there are no alternative effective remedies available. Plaintiffs' motion to hold the defendant in contempt for failing to comply with the subpoena is granted.

The defendant is therefore in civil contempt. The court will, however, order the defendant to respond to the subpoena within TEN (10) DAYS from service of this order with notice of entry upon its attorneys and appear and testify on June 18, 2010 at the offices of plaintiff's attorney. This is a FINAL opportunity to PURGE the contempt. If the defendant fails to comply with this PURGE, the Clerk shall enter a money judgment against the defendant in the sum of FIVE HUNDRED DOLLARS (\$500) as punishment for its contempt of court upon plaintiff's attorney filing a sworn affidavit attesting to such compliance, without the need for further order from the court.

Conclusion

In accordance with the foregoing decision, it is hereby:

ORDERED that plaintiffs' motion to confirm the report of Special Referee Louis Crespo dated December 2, 2009 is hereby granted and the Report is confirmed in its entirety; and it is further

ORDERED that the defendant's motion to reject the same Report is denied; and it is further

ORDERED that the defendant's motion to vacate the Judgment, any default orders of the court and dismiss the underlying action is denied; and it is further

ORDERED that plaintiff's motion for an order adjudicating defendant Foisi

Broadcasting Net., Inc. in contempt is hereby GRANTED; plaintiff has proven that Foisi Broadcasting Net., Inc. was served with the subpoena requiring it to provide documents and appear and testify, but disregarded the subpoena; and it is further

ORDERED that Foisi Broadcasting Net., Inc.'s disobedience of the subpoena has defeated, impaired, impeded or prejudiced plaintiff's right to ascertain information about the defendant's financial resources and plaintiff has no alternative effective remedies available; and it is further

ORDERED that Foisi Broadcasting Net., Inc. is held in civil contempt. Foisi Broadcasting Net., Inc. must do the following in order to PURGE the contempt:

[1] respond to the subpoena within TEN (10) DAYS from the date of service upon its attorneys of this Decision/Order with notice of entry; and

[2] appear and testify before a notary public, who is not an attorney, or employee of an attorney, for any part or prospective party herein and is not a person who would be disqualified to act as a juror because of interest or consanguinity or affinity to any party herein at the offices of Trokie Landau LLP, 225 Broadway, Suite 613, New York, NY 10007 on June 18, 2010 with respect to evidence that is material and necessary to the collection of the Judgement, and continuing thereafter from day to day until completed.

This is a **FINAL** opportunity to PURGE the contempt.

ORDERED that if Foisi Broadcasting Net., Inc. fails to comply with this PURGE, as punishment, the Clerk shall enter a money judgment against the defendant Foisi Broadcasting Net., Inc. in the principle sum of FIVE HUNDRED DOLLARS (\$500) as punishment for its contempt of court upon plaintiff's attorney filing a sworn affidavit

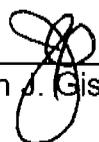
attesting to such compliance, without the need for further order from the court.

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

This constitutes the decision and order of the court.

Dated: New York, New York
May 4, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
MAY 05 2010
NEW YORK
COUNTY CLERK'S OFFICE