

Stilwell v Leahy

2015 NY Slip Op 30273(U)

February 27, 2015

Supreme Court, Putnam County

Docket Number: 986-2012

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

PLC 4/13/15 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF PUTNAM

-----X JOSEPH STILWELL,

Plaintiff,

-against -

DECISION & ORDER

Index No. 986-2012

Sequence Nos. 9 & 10

BETTE FRANK LEAHY a/k/a DEFENSE AGAINST EVIL, a/k/a ESOTERIC FREEDOM a/k/a HENRY W. a/k/a ROBIN HOOD; KIMBERLY CIERELLO a/k/a GREATERGOOD2011 a/k/a ANONYMOUS; AJAX; FOLLOW THE MONEY, PT. 4; CANDYMAN and "JOHN DOE #1" THROUGH "JOHN DOE #25", the last twenty-five names being fictitious and unknown to Plaintiff, being persons who have made anonymous defamatory and/or unauthorized statements regarding Plaintiff on the internet,

Motion Date 1/12/15

Defendants.

-----X LUBELL, J.

The following papers were considered in connection with Motion Sequence #9 by defendant for an Order pursuant to CPLR 2221 granting defendant Bette Frank Leahy leave to reargue that portion of the Decision and Order of the Court dated October 7, 2014, whereby a default judgment was entered against said defendant; alternatively, an Order pursuant to CPLR 2001, 2005 and 2015 vacating the default judgment entered against the defendant Bette Frank Leahy; and a further Order pursuant to CPLR 2201 and 2221 staying all proceedings in this action pending a determination by this Court of the defendant's instant application; and Motion Sequence #10 by plaintiff for an Order assessing (i) costs against defendant Bette Frank Leahy pursuant to 22 NYCRR 130-1.1 in the form of actual expenses reasonably incurred and reasonable attorneys' fees resulting from defendant's frivolous conduct

equivalent to 100% of all plaintiff's counsel fees and expenses incurred on this motion, and (ii) sanctions against defendant to be paid in accordance with 22 NYCRR 130-1.3 to the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance, which should be in a sum no less than \$10,000 by reason of defendant's frivolous conduct; and granting such other and further relief as this Court deems just, proper and equitable:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE/AFFIRMATION/EXHIBITS A-F	1
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS A-I	2
MEMORANDUM OF LAW	3
AFFIRMATION/EXHIBIT A-B	4
REPLY AFFIRMATION	5

This action for libel and breach of duty of confidentiality brought by plaintiff against the defendants relates to, among other things, various alleged defamatory statements anonymously posted on the internet.

A multitude of Decisions & Orders have followed including the Court's Decision & Order of April 18, 2013, in which, among other things, the Court referred to a court conference plaintiff's motion for a default judgment against defendant Bette Frank Leahy ("Leahy") and the cross-motion of Leahy for dismissal of the complaint for defective service of the summons and amended complaint (CPLR §§306-b) and for lack of personal jurisdiction (CPLR §3211[a][8]).

Following oral argument on June 28, 2013, the Court rendered a written Decision & Order dated July 30, 2013, denying that aspect of plaintiff's motion (Motion Sequence 5) seeking a default judgment against Leahy without prejudice, however, to re-application following the Court's determination as to whether plaintiff had established personal jurisdiction over Leahy, an out-of-state defendant, under CPLR 302(a)(1), New York's long-arm statute, such as to warrant the denial of Leahy's cross-motion to dismiss or, at the very least, such as to direct discovery limited to the jurisdictional issue.

While finding that plaintiff had not established the Court's jurisdiction over defendant Leahy, the Court, nonetheless determined that he did demonstrate a "sufficient start" such as to warrant discovery on the issue. In that regard, the Court noted that plaintiff alleged

. . . that Leahy, under the guise of Defenseagainstevil and Esotericfreedom blogs, specifically targeted a New York audience with

libelous comments, used these alleged interactive blogs to solicit and encourage postings by New York residents, solicited donations from New Yorkers to maintain the blogs and even demanded money from plaintiff to remove an asserted libelous posting. Furthermore, plaintiff alleges that certain libelous comments attributed to Leahy emanated from a residence located in Queens, New York.

Based thereon, the Court denied "plaintiff's motion for a default judgment against defendant Leahy . . . , without prejudice to reapplication following a determination of the jurisdictional issue" (long-arm). The Court also granted Leahy's motion to dismiss for want of personal jurisdiction to the extent of granting jurisdictional discovery.

Following jurisdictional discovery, the Court issued its Decision & Order of September 30, 2014, wherein it ruled in plaintiff's favor on the personal/long-arm jurisdiction issue (CPLR 302[a][1]), correspondingly denied Leahy's cross-motion for an Order dismissing the action for want of personal/long-arm jurisdiction and granted plaintiff's motion for a default judgment against Leahy while noting that "there [were] no questions raised [by Leahy] as to the propriety of service of the Summons and Verified Complaint and/or the Supplemental Summons and Amended Verified Complaint upon Leahy, her default and/or the timeliness of th[e] application."

A re-examination of Leahy's opposition papers to the plaintiff's default judgment motion shows that Leahy only opposed the default judgment aspect of plaintiff's motion on the procedural ground that a motion for a default judgment was premature since the Court had not yet ruled on the personal jurisdiction (long-arm) issue. While prudence would dictate that defendant would have addressed, in the alternative, the motion on the merits and/or would have crossed-moved to dismiss for want of personal jurisdiction (given the nature of plaintiff's motion), defendant thought otherwise. No matter how couched, re-argument or otherwise, the question now is whether defendant should be given the opportunity to address the fundamental issue of personal service to the extent that it relates to service of process of the pleadings.

Taking into account the Court's authority to reconsider its own prior decisions and orders "regardless of statutory time limits concerning motions to reargue" (Itzkowitz v. King Kullen Grocery Co., Inc., 22 AD3d 636, 638 [2d Dept 2005] citing Liss v. Trans

Auto Sys., 68 NY2d 15, 20 [1986]; see Aridas v. Caserta, 41 NY2d 1059 [1977]) and upon consideration of the fact that issues of service of the pleadings were earlier raised by the defendant and were set aside and/or denied pending the long-arm jurisdiction issue, the Court hereby grants defendant leave to reargue and, upon re-argument, hereby vacates that portion of its Decision & Order of October 7, 2014 granting plaintiff a default judgment against defendant.

Upon vacatur of the default judgment and in order not to prejudice either party, the Court deems it appropriate to rewind the clock to the point where the long-arm/personal jurisdiction issue has been determined in favor of plaintiff and issues relating to the proper effectuation of service of the Summons and Complaint and/or Supplemental Summons and Amended Complaint have yet to be resolved.

Based thereon, it is hereby

ORDERED, that the Court hereby vacates that portion of the Court's October 7, 2014 Decision & Order granting default judgment in favor of plaintiff and against defendant; and, it is further

ORDERED, that plaintiff may reapply for a default judgment against defendant if said motion is served and filed so as to be received by March 16, 2015; and, it is further

ORDERED, that, defendant shall timely respond to said motion and may cross-move for whatever relief she may deem appropriate including dismissal on any personal jurisdiction issue not already addressed on the merits; and, it is further

ORDERED, that, absent plaintiff's motion, defendant shall move by March 23, 2015 and, absent, either motion, the parties are directed to appear before the Court at 9:30 A.M. on April 13, 2015 for a Preliminary Conference; and, it is further

ORDERED, that, the cross-motion is denied in all respects.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: Carmel, New York
February 27, 2015

S/

HON. LEWIS J. LUBELL, J.S.C.

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