

Do Gooder Prods., Inc. v Chaim Co.

2007 NY Slip Op 30925(U)

April 23, 2007

Supreme Court, New York County

Docket Number: 0602584/2005

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 55

Index Number : 602584/2005
DO GOODER PRODUCTIONS INC
vs
CHAIM COMPANY
Sequence Number : 001
CONSOLIDATION/JOINT TRIAL

INDEX NO. _____
MOTION DATE 2-5-07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

s motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-6
7-12
13-18

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion
is decided in
accordance with the annexed memorandum decision
and order.

FILED
APR 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/23/07

J.S.
JANE S. SOLOMON c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DECEDEENCE

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

001SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

DO GOODER PRODUCTIONS, INC.,

Plaintiff,

-against-

INDEX NO. 602584/05

THE CHAIM COMPANY, LESLIE DEBEAUVAIS,
and DAVID BILLOTTI

DECISION AND ORDER

Defendants.

FILED

APR 25 2007

JANE S. SOLOMON, J.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Do Gooder Productions, Inc. ("Do Gooder")

moves to consolidate this action with an earlier one entitled Do Gooder Productions, Inc. v. The Chaim Company, Leslie Debeauvais and American Renegade Theater Company, Index No. 100977/03 (the "2003 Action"). Defendant Leslie Debeauvais ("Debauvais") cross-moves to dismiss the Complaint in its entirety. Defendant David Billotti ("Billotti") appears *pro se*, filing an affidavit opposing Do Gooder's motion and requesting dismissal of the Complaint as time-barred. For the reasons described herein, Do Gooder's motion is denied and Debauvais's cross-motion is granted.

Background

Do Gooder is a non-profit Off-Broadway theater company organized under the laws of New York with its principal office and place of business in Manhattan. Chaim is a limited partnership organized under the laws of California on June 28, 1998. At the time of formation, Chaim's general partners were

Debauvais, Billotti, American Renegade Theater Company ("ART") and Edmund Gaynes ("Gaynes"). According to Debauvais, Chaim was organized for the sole purpose of producing one New York show entitled "Chaim's Love Song".

On October 16, 1998, Do Gooder and Chaim entered into an agreement ("Letter Agreement") to share the performance space at the Raymond J. Greenwald Theater (the "Greenwald Theater") located at 307 West 26th Street in Manhattan. Debeauvais signed the Letter Agreement for Chaim. Pursuant to the Letter Agreement, Do Gooder's production of "2½ Jews" and Chaim's production of "Chaim's Love Song" ran in repertory. In addition to requiring the parties to amend their individual leases with the Greenwald Theater, the Letter Agreement set a schedule for payments Chaim was obligated to make to Do Gooder.

In her affidavit, Debauvais states that in mid-November, Chaim's production was losing money and when the other general partners refused to cease production, they agreed she would leave as a general partner (although it was not until January 24, 1999 that they executed a written agreement to that effect). Debauvais alleges that she so notified Do Gooder's executive director, Mark Robert Gordon ("Gordon"), and told him that she would no longer have authority to act on Chaim's behalf. She further claims that her only communication with Do Gooder after November 15, 1998 was in response to Gordon's phone calls about debts Chaim owed to Do Gooder, in which she directed him to

the remaining general partners. Gordon denies these allegations. An Amended Certificate of Partnership was filed with California Secretary of State in or about February 1999.

On December 11, 1998 Chaim and Do Gooder entered into a rider to the Letter Agreement ("Rider 1"), which Billotti signed on behalf of Chaim. When Chaim failed to make required payments, in January 1999, the parties executed another rider ("Rider 2"), which Gaynes signed on behalf of Chaim. Due to Chaim's past defaults, Paragraph 24 of Rider 2 provides that Chaim was obligated to pay Do Gooder all "interest, finance charge[s], late fees and the like assessed to Do Gooder Productions by third parties for all such payments due by Do Gooder Productions for the period up until remittance and resulting from The Chaim Company's past due payment" from January 26, 1999 until Chaim made payment.

Do Gooder contends that Chaim's failure to make scheduled payments disabled it from mounting an aggressive advertising campaign, which led to low box office revenues, and that this required Do Gooder to pay for much of its production expenses with borrowed money, often with credit cards. Interest, finance charges and late fees have accrued since January 25, 1999. As of October 30, 2006, Do Gooder seeks contractual arrears in the amount of \$5,483.54, plus interest, finance charges, and late fees under the Riders of \$67,846.25.

On January 21, 2003, Do Gooder commenced the 2003

Action, in which it states that on April 16, 2003, ART, one of the general partners of Chaim, was served. This is supported by the existence of an answer from ART in the County Clerk's file, although there is no affidavit of service on ART or of ART's answer.

Do Gooder's attorney, a single practitioner named Norman S. Goldsmith ("Goldsmith"), also brought other actions for Do Gooder, but apparently contemporaneously suffered a series of medical problems and was frequently in the hospital. On September 19, 2003, Goldsmith's motion to withdraw as Do Gooder's counsel in one of the other cases was granted. Do Gooder had difficulty finding another lawyer, in part because it was seeking *pro bono* counsel. Not until March 2005, did Hogan & Hartson agree to represent Do Gooder *pro bono*, and Gordon did not meet with the new counsel until mid-May.

On July 15, 2005, Do Gooder commenced this action (the "2005 Action"). The first cause of action seeks \$5,483.54 for breach of contract; the second seeks \$58,223.15 due to charges incurred on the borrowed funds; and the third seeks to hold Billotti and Debauvais personally liable. Debauvais and Billotti were served on October 5, 2005 and November 3, 2005, respectively, which Do Gooder claims effectuated service on the partnership.

Do Gooder now moves to consolidate the two actions because they seek the same relief. Although served with the

motion to consolidate, ART has not appeared. Debauvais cross-moves to dismiss the Complaint in its entirety on a number of grounds (including that she ceased to be a general partner before some of the transactions sued upon occurred), but most importantly because it is time-barred. Billotti has appeared *pro se*, opposing the motion to consolidate and also requesting dismissal of the Complaint as time-barred.

Discussion

The applicable Statute of Limitations for breach of contract actions is six years. CPLR § 213(2). The 2005 Action was filed on July 15, 2005. Any breach which is alleged to have occurred prior to July 15, 1999 is time-barred. The underlying events all occurred on or before February 7, 1999. Do Gooder argues, however, that all of its claims now asserted against Debauvais and Billotti relate back to the 2003 Action.

The relation back doctrine permits a new claim asserted against a new defendant that would otherwise be time-barred to "relate back" the date of service or filing of an earlier claim that was asserted against a different defendant within the appropriate Statute of Limitations period. Buran v. Coupal, 87 N.Y.2d 173 (1995).

The relation back doctrine applies when three conditions are satisfied:

"(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the

original defendant, and by reason of that relationship can be charged with such notice of the institution of the [earlier] action that the new party will not be prejudiced in maintaining its defense on the merits of the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against that party as well." Buran, 87 N.Y.2d at 178.

The first condition is satisfied because the breach of contract claims in the 2003 and 2005 Actions are virtually identical. Both arise out of the same set of facts and relate to the same contractual relationship between Chaim and Do Gooder. The second condition is also satisfied, because Chaim was arguably served in both the 2003 and 2005 Actions, and even as a limited partner, Debauvais might have interests united with the partnership.

The third condition, however, is not satisfied here. Do Gooder argues that courts consider the condition satisfied when there is no indication that a plaintiff made the decision not to name the new defendant in the previous action in bad faith or for the purposes of obtaining a tactical advantage in litigation, and when there is no indication that the new defendants have been prejudiced by the fact that they were not named as defendants in that action. See Austin v. Interfaith Medical Center, 264 A.D.2d 702, 704 (2nd Dep't 1999).

However, the "mistake" argued by Do Gooder is simply not the kind of circumstances for which the relation back

doctrine applies. The doctrine does not cover a circumstance when a party knows the identity of a potentially liable party and fails to take appropriate timely action. See Bertolino v. Town of N. Elba, 16 A.D.3d 805, (3rd Dep't 2005); Pappas v. 31-08 Cafe Concerto, Inc., 5 A.D.3d 452 (2nd Dep't 2004). Do Gooder knew the names and addresses of Billotti and Debauvais in 2003 and failed to serve them. Moreover, there is no admissible evidence regarding efforts at service in 2003, and the disability of counsel or difficulties in obtaining counsel do not toll the Statute of Limitations.

Nevertheless, Do Gooder argues that Rider 2 created a distinct contractual obligation on Chaim's part to pay Do Gooder all "interest, finance charge[s], late fees and the like assessed" to Do Gooder by third parties for money borrowed by Do Gooder related to Chaim's past due payments, and that this continuing obligation tolls the Statute. This argument is wholly unpersuasive. To hold otherwise would make the Statute of Limitations meaningless for all interest bearing instruments.

For this reason, Do Gooder's motion to consolidate must necessarily be denied and Debauvais's cross-motion to dismiss the 2005 Action is granted. If Do Gooder has a viable case in the 2003 Action, it need only file a Request for Judicial Intervention in order to proceed against Chaim.

Accordingly, it hereby is

ORDERED that Do Gooder's motion to consolidate is

denied; and it further is

ORDERED that Debauvais's cross-motion is granted, the Complaint is dismissed in its entirety, and the Clerk of the Court is directed to issue judgment accordingly, with costs and disbursements as taxed.

Dated: April 23, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
APR 25 2007
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