

Motion Imaging, Inc. v Speegle

2007 NY Slip Op 31239(U)

May 16, 2007

Supreme Court, Suffolk County

Docket Number: 0024685/2006

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : 04/17/07
Adj. Date : 05/09/07
Mot Seq # : 002 MADJ
FOR TRAVERSE HEARING
TO JUNE 27, 2007

MOTION IMAGING INC.,

Plaintiff(s),

- against -

BRUCE SPEEGLE,

Defendant(s).

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Upon the following papers numbered 1 to 7 read on this motion by the defendant for vacatur of a default judgment and dismissal of the complaint or leave to serve a late answer; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 4 to 5; Replying Affidavits and supporting papers 6 to 7; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the defendant for an order vacating the order of this court dated February 15, 2007, wherein the court fixed the default on the part of the defendant in answering or otherwise appearing in response to the plaintiff's service of the summons and complaint and scheduled an inquest on the issue of damages is decided as follows:

Plaintiff commenced this action to recover damages from the defendant by reason of said defendant's purported tortious acts including tortious interference with business relations, conversion, misrepresentation and fraudulent inducement. The plaintiff effected personal delivery of the summons and complaint upon the defendant in his home state of Colorado on September 7, 2006. The plaintiff received no answer or other appearance in this action from the defendant and moved, *ex parte* (#001), for an order fixing the defendant's default and for the scheduling of an inquest. The plaintiff's motion for such relief was granted by order of this court dated February 15, 2007 and an inquest was scheduled for April 25, 2007.

By order to show cause dated April 5, 2007 (Pines, J.), the defendant moved for an order vacating this court's prior order of February 15, 2007, pursuant to which, the defendant's default was fixed and said inquest was scheduled. The parties' joint request for an adjournment of said motion was granted by the court to May 9, 2007 on which day the motion was marked submitted. The inquest previously scheduled for April 25, 2007 was adjourned to June 27, 2007.

In support of his demands for an order vacating the February 15, 2007 order fixing his default in answering and scheduling an inquest on the amount of the plaintiff's damages, the defendant claims that he resides Aurora, Colorado and that "he never received any documents with regard to this litigation including the inquest order at that address." Neither this statement nor the other regarding the defendant's denial of being physically present in Edgewater, Colorado at any time during 2006 rebut the presumption of due service arising from the affidavit of plaintiff's process server who stated that he effected personal delivery of the summons and complaint upon the defendant on September 7, 2007 at 6547 S. Racine Cir. in Centennial, Colorado (*Chemical Bank v Darnley*, 300 AD2d 613, 752 NYS2d 397). Defendant's demands for a vacatur of this court's February 15, 2007 order of default and dismissal of the complaint to the extent that they are predicated upon a purported lack of service of process upon the defendant is denied.

Defendant's further application for an order vacating the February 15, 2007 default order and for dismissal of the plaintiff's complaint upon the grounds that the court lacks *in personam* jurisdiction over the defendant because the defendant is not amenable to suit in New York due to the absence of conduct on the part of the defendant within the contemplation of New York's Long-Arm Statute at CPLR 302(a)(2) and/or 302(a)(3)(ii) or (iii) is granted only to the extent that the court shall conduct a traverse hearing with respect to the issues raised under CPLR 302(a)(2). While the plaintiff charges the defendant with tortious conduct that purportedly occurred in New York, the defendant denies that he was present in New York on the dates on which the defendant purportedly engaged in the tortious conduct about which the plaintiff complains. Under the circumstances, the court shall inquire of the parties with respect to these disputed issues of fact at the hearing scheduled below.

The defendant is, however, entitled to dismissal of so much of the plaintiff's complaint that is premised upon the jurisdictional predicate embodied in CPLR 302(a)(3)(ii) or (iii). Each of these statutes provides a jurisdictional predicate over a defendant who engages in tortious conduct outside of New York, other than defamation, provided that such defendant: 1) regularly solicits business or engages in a persistent cause of conduct or derives substantive revenue from goods used or consumed or services rendered in this state; or 2) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. Here, the plaintiff's complaint contains no allegations that the defendant personally engaged in tortious conduct outside of the State of New York and neither the complaint nor the plaintiff's opposing papers sufficiently established that the defendant herein, who is sued only in his individual capacity, personally engaged in the other conduct required by either CPLR 302(a)(3)(ii) or CPLR 302(a)(3)(iii).

Defendant's further application for an order vacating this court's February 15, 2007 order of default and for leave to serve a late answer shall be held in abeyance pending determination of the jurisdictional issue under CPLR 302(a)(2) that are the subject of the traverse hearing scheduled below; and it is further

ORDERED that a traverse hearing on the jurisdictional issues raised under CPLR 302(a)(2) shall be held on June 27, 2007 at 10:00 a.m. in the courtroom of the undersigned located in the Supreme Court building at 1 Court Street, Riverhead, New York. The parties and their counsel are directed to appear on that date and at that time ready for the court's inquiry into the limited issues of jurisdiction under CPLR 302(a)(2).

The inquest presently scheduled for the date of May 23, 2007 is hereby cancelled, subject to its rescheduling by further order of this court if necessary.

Dated: May 16, 2007.


EDWARD D. BURKE, A.J.S.C.