

**Verizon Directories Corp. v Atlantic Off.
Equip. Co.**

2007 NY Slip Op 33371(U)

October 5, 2007

Supreme Court, New York County

Docket Number: 0600047/2006

Judge: Louis B. York

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: YORK

PART 2

Index Number : 600047/2006

VERIZON DIRECTORIES

vs

ATLANTIC OFFICE EQUIPMENT

Sequence Number : 001

AMEND CAPTION/PARTIES

INDEX NO.

600047/2006

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED
OCT 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/5/07

Luy
LOUIS B. YORK
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~

Check if appropriate: DO NOT POST REFERENCE

THIS MOTION IS HEREBY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

-----X
VERIZON DIRECTORIES CORP., formerly
known as VERIZON YELLOW PAGES
COMPANY,

Plaintiff,
-against-

Index No. 600047/06
Motion Date _____
Motion Seq. No. 001
Motion Cal. No. _____

ATLANTIC OFFICE EQUIPMENT CO.
Defendant.

-----X
The following papers, numbered 1 to _____ were read on this motion for Amend Caption

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

█ PAPERS
█ _____
█ _____

Cross-Motion: [] Yes [X] No

The complaint in this action asserts that plaintiff, a phone book directory, and defendant, a business, entered into an advertising contract. Pursuant to the contract, plaintiff would advertise defendant's business in the August 2002, August 2003 and September 2004 Manhattan Consumer Yellow Pages; in the September 2002, September 2003 and September 2004 New York Business to Business directory; and in the August 2002 and November 2003 Superpages.com. The contract provided, among other things, that if defendant failed to make timely payments plaintiff was entitled to collect an 18% per annum interest on the outstanding sum. According to plaintiff, \$30,205 remains due under the contract. Apparently, the due date was July 7, 2005, as plaintiff seeks interest

from that date and also bases its account stated claim on demands it allegedly made after July 7, 2005.

The 2-page complaint contains 10 explanatory paragraphs detailing the claim, and 3 paragraphs relating to the relief sought. Of the 10 explanatory paragraphs, paragraphs 1-5 appear on the first page of the complaint and paragraphs 6-10 are on the second page.

It appears that plaintiff served the complaint, dated September 27, 2005, through the Secretary of State on January 23, 2006. Defendant's answer is dated February 22, 2006. The answer responds to paragraphs 1-5 only – that is, to the paragraphs contained on the first page of the complaint. Moreover, in the answer defendant denies liability and seeks dismissal of the complaint.

The parties appeared in this Part on April 26, 2006 for a discovery conference, and apparently they have completed discovery. Plaintiff filed the Note of Issue on December 8, 2006. The case has been scheduled for mediation and adjourned on several occasions, apparently pending the filing and resolution of this motion.

Initially, this motion seeks to amend the complaint to change the name of plaintiff from formerly known as “Verizon Directories Corp., formerly known as Verizon Yellow Pages Company,” to “Idcarc “Media Corp., formerly known as Verizon Directories Corp.” This change reflects plaintiff's most recent name change. In support of the application, plaintiff has annexed proof of the name change.

Defendant opposes this prong of the motion – not because of the proposed change in caption itself, which defendant concedes is not prejudicial to it, but because defendant claims that it was not properly served with the complaint. Instead of receiving a 2-page complaint with a 10 paragraph description of the claims and a 3-paragraph ad damnum clause, defendant asserts that it received only

the first page, which included the caption and the first 5 paragraphs of the complaint. A review of defendant's answer lends some credence to this assertion, as the answer only responds specifically to the first 5 paragraphs of the complaint, which are based on breach of contract and contained on the first page of the complaint. Defendant argues that it only realized there was a second page, which sets forth an account stated claim on the same facts as the breach of contract claim on page 1, when it received the current motion.

Plaintiff makes several responses to this argument, some of which lack merit. One of plaintiff's arguments is dispositive of the issue, however. A defense that is based upon lack of personal jurisdiction, such as improper or incomplete service, is waived unless the defendant asserts it, with specificity, either in its answer or in connection with a pre-answer motion. Interlink Metals and Chemicals, Inc. v. Kazdan, 222 A.D.2d 55, 58, 644 N.Y.S.2d 704, 706 (1st Dept.1996). Here, defendant allegedly based its decision not to object to the service, but simply to answer the complaint and participate in the discovery process, on the good faith belief service was proper. Under those circumstances, its failure may be excusable. Now, however, the incomplete service is apparent, and defendant still has not lodged a proper objection to it. That is, defendant did not make a motion for affirmative relief; and, even now that it knows of plaintiff's error, defendant continues to participate in the litigation. By this continued participation, defendant has waived its objection. Therefore, as there is no other basis for defendant's opposition to the amendment, the court grants the prong of the motion seeking leave to amend.

Although this is not the basis for the decision above, the court notes that the actual prejudice to defendant resulting from the improper service is minimal. The gist of the dispute is clear based on the first page of the complaint; the second adds a claim for account stated, based on the same set

of facts, as an alternative basis for relief.

Second, plaintiff moves for summary judgment, arguing that there is no issue of fact regarding the unpaid bills and the amount due. In opposition, defendant submits copies of the ads, showing that plaintiff invariably ran inaccurate advertisements. Defendant's advertised address is different from one advertisement to the next, but every advertisement contains an incorrect address for defendant. Defendant further asserts, through its counsel, that it complained of these mistakes on numerous occasions.

Plaintiff asserts that defendant's counsel does not adequately oppose the substance of its motion, because counsel, who submitted the affirmation in opposition, lacks personal knowledge of the facts. As plaintiff notes, in opposing a motion for summary judgment the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Figueroa v. Luna, 281 A.D.2d 204, 206, 721 N.Y.S.2d 635, 637 (1st Dept. 2001). However, defendant's counsel's affirmation is sufficient "as a vehicle to introduce documentary evidence in support of a motion for summary judgment." Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324, 325, 786 N.Y.S.2d 146, 148 (1st Dept. 2004). The evidence showing that every relevant advertisement was inaccurate raises a triable issue. Plaintiff argues that defendant approved the advertisements, with the wrong addresses, and thus any inaccuracies are defendant's fault and responsibility. However, in support of this, plaintiff submits evidence only as to a 2002 advertisement. Therefore, plaintiff is entitled to prevail as to the 2002 advertisement but factual issues remain as to whether objections were lodged as to any of the other advertisements in question.

The Court notes, however, that to prove it does not owe money to plaintiff for the other

advertisements, defendant will have to submit persuasive evidence showing that it objected to them within a reasonable time. At this point, defendant's assertions to this effect – through its counsel – have no evidentiary weight. Defendant also submits a printout showing that it made partial payments on its bills, but this printout does not identify any party involved and no party with knowledge has submitted an affidavit identifying it. Thus, the printout has no evidentiary value and the Court does not consider it.

Based on the above, therefore, it is

ORDERED that the prong of plaintiff's motion that seeks leave to amend the complaint is granted, and plaintiff shall serve an amended complaint – which amends the caption to reflect plaintiff's name change but otherwise remains the same – within 30 days of entry of this order, along with a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiff also shall file a copy of the amended complaint, along with this order with notice of entry, with the Trial Support and County Clerk's offices, which are directed to ~~amend the caption~~ ^{mark their records} accordingly; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint within 20 days from the date of said service; and it further

ORDERED that the prong of the motion seeking summary judgment is denied.

Dated: 10/5/07

Enter:

FILED
OCT 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Luy

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~