

Hansen v Geisler

2008 NY Slip Op 33266(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 112306/07

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 112306/2007
HANSEN, RON
vs.
GEISLER, ROBERT M.
SEQUENCE NUMBER : 002
VACATE DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

is decided per

attached

FILED

NOV 08 2008

COURT CLERK'S OFFICE
NEW YORK

Dated: 12/4/08

EG

EMILY JANE GOODMAN 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: I.A.S. PART 17

-----X
RON HANSEN,

Plaintiff,

against-

Index No.: 112306/07

ROBERT GEISLER,

Defendant:

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CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

Defendant moves to vacate a default judgment entered on December 3, 2007 pursuant to CLPR 5015 and CPLR 2005. The judgment "ADJUDGED that plaintiff shall have a declaratory judgment as against defendant Robert M. Geisler, that defendant has no present or future interest in the intellectual property named in plaintiff's Complaint, known as Desperadoes." Defendant also seeks permission to serve the proposed Answer and Third-Party Complaint. Plaintiff opposes the motion. Defendant's motion is denied in its entirety.

Defendant is a stage play and movie producer. He was employed by a company Night Hawk Limited, which had a literary rights agreement with Plaintiff, an author, regarding the book Desperadoes. It is undisputed that the agreement expired. However, Defendant alleges that Plaintiff agreed to an extension of the agreement, as embodied in the "Deal Memo from Jody Hotchkiss" dated July 13, 2004, and sent to Defendant by email (hereafter the "Deal Memo"). Plaintiff states that he never agreed to the Deal Memo, that Ms. Hotchkiss (his former literary agent) did not have the authority to enter into it, that Defendant failed to make any payments thereunder, that any period thereunder already expired, and that in any event, the Deal Memo was merely a non-binding memorandum of discussions. Ms. Hotchkiss also submits an affidavit

stating the same.

The Deal Memo provides in relevant part:

Dear Bobby:

We have agreed to the following dramatic rights deal fro DESPERADOES by Ron Hansen.

Option commences June 21, 2004

25,000 for 12 months, applied

100,000\$ for 12 months, ½ applied

750,000\$ purchase price.

5% of net

Furthermore, as agreed, a flat producer commission of 50,000\$ plus 5% of profits with a favored-nations definition same as your producing deal, would be payable to HAA.

The commission deal with be sent in a side letter to HAA.

We have agreed that you will send the first 25,000\$ option, which HAA will deposit in the agency account.

At the time there is an agreement signed by you and Hanson, the money will be released to Hanson.

Where a default judgment has already been entered, a meritorious defense must be demonstrated, whether the motion is made under CPLR 5015 (see M-Dean Realty Corp. v General Security Ins. Co., 6 AD3d 169 [1st Dept 2004]) or CPLR 2005 (see Sanchez v Javind Apt. Corp., 246 AD2d 353 [1st Dept 1998]).¹ Accordingly, the Court asked for further briefs on the issue of meritorious defenses, but only Plaintiff has submitted an additional brief. Because the Court finds that no meritorious defense has been alleged, it need not determine whether Defendant's failure to oppose the motion for a default judgment was excusable.²

¹Where no default judgment exists, a meritorious defense need not be proved in the First Department, though may be accepted by the court. "While technically there was no need for defendants to set forth a meritorious defense in support of their motion to compel acceptance of their answer, since no default order or judgment had been obtained by plaintiff, we note that defendants have adequately set forth such a defense" Nason v Fisher, 309 AD2d 526 [1st Dept 2003], citing DeMarco v Wyndham Intl., Inc., 299 AD2d 209 [1st Dept 2002]).

²Defendant's attorney states that when the motion for a default judgment was served on his office, he was on vacation and subsequently was very busy with other cases. Because

The only issue that is relevant to this action is whether Defendant has any present or future interest in the intellectual property known as Desperadoes under the Deal Memo. Whether JAMMEE Rose Productions agreed to employ Defendant as a producer of a Desperadoes film under a partnership agreement with Joyce Wethington (apparently the new wife of one of Defendant's attorneys) does not raise a defense to this action. Nor is Defendant's contention that Plaintiff aided and abetted Wethington in breaching her fiduciary duties to Defendant relevant to the judgment issued in this case. As Plaintiff notes, Defendant is free to commence a separate action against Plaintiff and/or Wethington and/or JAMMEE Rose Productions raising these contentions, and the Court makes no finding as to their merit. Moreover, the judgment would not bar a future determination (to the extent proven) that Defendant has rights as a partner in JAMMEE Rose Productions, which in turn has rights in Desperadoes.

Defendant claims that he has a "latent right" (whatever that means) in Desperadoes based on the Deal Memo. However, Defendant does not dispute Plaintiff's statement that he did not pay for the option, admitting that he was having trouble financing the deal. In paragraph 3 of his Reply Affidavit in Further Support, Defendant states that JAMMEE Rose Productions paid for the license to the rights to Desperadoes. Apparently, payment was made pursuant to a separate agreement, dated March 18, 2005 between JAMMEE Rose Productions and Plaintiff. Therefore, as Defendant fails to allege payment of any consideration in connection with the Deal Memo, he cannot claim rights thereunder (see, e.g., Computer Possibilities Unlimited, Inc. v

Plaintiff's attorney denied him an extension, Defendant's attorney states that he prepared an affidavit for client to sign the day before the motion was to be submitted. However, at that point his client was ill and thereafter, could not be located (until January, 2008). Defendant states that he could not sign the affidavit because he was assaulted, and subsequently moved to his friend's apartment, without informing his attorney.

Mobile Oil Corp., 301 AD2d 70 [1st Dept 2002] [where one party repudiates material contractual obligations, the other party may treat the contract as terminated]; No. 1 Funding Ctr., Inc. v H&G Operating Corp., 48 AD3d 908 [3d Dept 2008] [to maintain an action for damages or specific performance, that party must demonstrate tender of his or her own performance under the contract]).³ The Court need not reach any of Plaintiff's other arguments, some of which raise issues of fact.

For the foregoing reasons, it is hereby

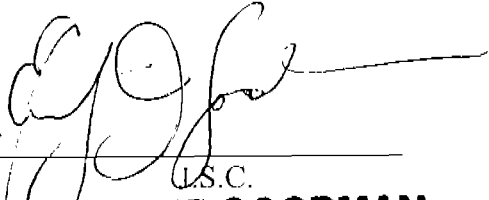
ORDERED that Defendant's motion to vacate a default judgment entered on December 3, 2007 and for permission to serve the proposed Answer and Third-Party Complaint is denied.

This Constitutes the Decision and Order of the Court.

Dated: December 4, 2008

ENTER:

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NEW YORK



U.S.C.
EMILY JANE GOODMAN

³ Defendant maintains that an email authored by Plaintiff, dated March 11, 2008, is evidence that Plaintiff recognized that he had rights in Desperadoes. In that email, written by Plaintiff to Defendant, Plaintiff refers to a "Quit Claim on suing Joyce since that seems one of her motivations for the suit against me and there's not much point in pursuing that for you as it just clouds the possibilities of freeing up "Desperadoes." However, whether a party is interested in settling a dispute is not necessarily an admission against that party's interest. Furthermore, this email does nothing to alter the fact that Plaintiff has failed to allege payment of any consideration.