

**Destefano v Consensio Partners Intl. LLC**

2009 NY Slip Op 31060(U)

May 13, 2009

Supreme Court, New York County

Docket Number: 111858/08

Judge: Walter B. Tolub

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

PRESENT: TOLUB  
Justice

PART 10

CRIS DESIDERANO

- v -

CONSENSO PARVOLE DNT

INDEX NO: 11858/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
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

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**

MAY 14 2009

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 5/13/09

WALTER B. TOLUB s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X  
KRIS DESTEFANO

Plaintiff,

-against-

CONSENSIO PARTNERS INTERNATIONAL LLC &  
ALFRED GERRIETS

Defendants.  
-----X

Index No. 111858/08  
Mtn Seq. 001

WALTER B. TOLUB, J.:

This is Plaintiff's motion for an order to amend the caption to reflect the correct name of the principal of Consensio Partners International, LLC (Consensio) and to extend the time to serve the summons and complaint.

Facts

The underlying action sounds in breach of contract. Plaintiff claims that he entered into an agreement with Defendant Consensio<sup>1</sup> whereby he would loan Consensio \$125,000. The agreement was memorialized in a Promissory Note dated May 19<sup>th</sup> 2006, and signed by Plaintiff and "Defendant Alfred Gerriets" as Chairman of Consensio. Paragraph 7.7 of the Promissory Note states that "the obligations of Debtor under this Note shall be guaranteed by Alfred Gerriets pursuant to the Guaranty of even date herewith and annexed hereto." (Plaintiff's Ex. A).

**FILED**  
MAY 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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<sup>1</sup> Consensio is a Delaware Corporation authorized to do business in New York with its principle place of business is New York.

Plaintiff claims that on or about May 7, 2008, Consensio stopped making payments to the Plaintiff. Plaintiff claims that he made numerous unsuccessful attempts to collect the debt by letters and telephone calls and that the debt remains outstanding in the amount of \$102,000.

Plaintiff then commenced this action against Consensio and Mr. Gerriets for breach of contract, unjust enrichment, account stated and quantum meruit. Over 120 days have passed since the purchase of the index number and both Consensio and Alfred F. Gerriets II have not been served with the summons and complaint.

Plaintiff claims that Promissory Note refers to "Alfred Gerriets, an individual having an address c/o Consensio Partners International, LLC, 71 Hill Street, Southampton, New York 11968" (Plaintiff's Ex. A). In reliance on this information, Plaintiff claims that the complaint was drafted and served accordingly (Plaintiff's EX. B and D). After two failed attempts at serving Mr. Gerriets at his place of business, Plaintiff attempted to serve his residence at 9 Forest Lane, Great Neck, New York. Both attempts to serve Mr. Gerriets at his home were unsuccessful. Thereafter, Plaintiff mailed Mr. Gerriets the summons and complaint. Plaintiff then received letters stating that Alfred Gerriets dis not reside at said address (Plaintiff's Ex. H). Plaintiff claims that he only recently discovered that the correct name of Consensio's principal is "Alfred F. Gerriets II"

and not "Alfred Gerriets" (Plaintiff's Ex. K). A further investigation using the DMV Skip Trace search revealed that there was an individual by the name of Alfred Gerriets II residing at 11 Forest Lane, Great Neck, New York. The investigation also noted that there was a Alfred Gerriets Sr. and Alfred Gerriets II residing at 9 Forest Lane, Great Neck, New York. The three attempts to serve Alfred Gerriets at 11 forest Lane were unsuccessful (Plaintiff's Ex. H, I and J)

Additionally, Plaintiff attempted to serve Consensio by serving its registered agent, CT Corp. on April 16, 2009. However, Plaintiff received a letter from CT Corp on April 27, 2009 advising that they were returning all served documents because their statutory representation services were discontinued and because the documents sent to the last known address were returned to CT Corp as undeliverable.

Plaintiff brings this motion for an order to amend the caption, summons and complaint to reflect the correct name of Consensio's principal and for an extension of time to serve the summons and complaint by an alternative method.

#### Discussion

##### Amending Caption

CPLR 3025[b] provides that a party may amend his pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court. CPLR

305[c] provides that at any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced. "Such an amendment is justified where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that the plaintiff issued process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it." (Medina v. City of New York, 167 AD2d 268, 269-70 [1<sup>st</sup> Dept 1990] citing Connell v. Hayden, 83 AD2d 30).

Here, the Promissory Note and Guaranty entered into between Plaintiff and Defendant, was signed by "Alfred Gerriets" (Plaintiff's Ex. A). It was not until February 2009 that the Plaintiff realized that the actual name of Consensio's Chairman was "Alfred F. Gerriets, II".

Alfred F. Gerriets, II is therefore not prejudiced by an amendment to the caption as he chose to use his name interchangeable with "Alfred Gerriets". Moreover, Plaintiff should not be prejudiced by such interchangeable usage. As such, Plaintiff's motion to amend the caption to reflect the actual name of Defendant "Alfred Gerriets" to "Alfred F. Gerriets, II" is granted. Alfred F. Gerriets, II knew, or should have known of

the existence of litigation against him by virtue of him signing the Promissory Note, the outstanding debt Plaintiff claims remains unpaid and being twice served under the name "Alfred Gerriets" at the 9 Forest Lane address. (National Refund and Utility Services, Inc. d/b/a Metropolitan Refunds v. Plummer Realty Inc., 22 AD3d 430 [1<sup>st</sup> Dept 2005]; Fink v. Regent Hotel Ltd., 234 AD2d 30 [1<sup>st</sup> Dept 1996]).

#### Extension of Time to Serve

CPLR 306-[b] provides that upon good cause shown or in the interest of justice, the court may extend the time for service.

Here, prior to February 2009, Plaintiff operated upon the belief that service had been effectuated upon Alfred Gerriets as principal of Consensio by "nail and mail" (Plaintiff's Ex. G). It was not until February 2009 that Plaintiff became aware of the misnomer of Defendant (*see discussion supra*). Moreover, Plaintiff attempted to serve Defendant Gerriets at both his place of business and his home (*see discussion supra*).

Plaintiff was diligent in his efforts to serve the Defendants. Pursuant to CPLR 306-[b], since service was not made upon the Defendant within the time provided, the Court extends Plaintiff's time to properly serve the Defendants since good cause was shown and it is in the interest of justice.

Moreover, CPLR 311 [b] and 308 [5] provide that when service upon a corporation or person is not made within the 120 days

permitted and if service is impracticable, service may be made in such a manner, and proof of service may take such form, as the court directs. The facts of this case require an alternate form of service on both the corporation and Defendant Alfred F. Gerriets, II. As such, the Court directs that the Defendant Consensio be served by any manner permitted by Delaware law and that Alfred F. Gerriets, II be served at his last known address and the address listed in the Guaranty in accordance with CPLR 308[4].

Accordingly, it is

ORDERED that Plaintiff's motion to amend the caption to change the name "Alfred Gerriets" to reflect the correct name, "Alfred F. Gerriets, II", is granted; and it is further

ORDERED that Plaintiff's motion for leave to serve a late summons and complaint is granted; and it is further

ORDERED that Plaintiff shall serve Consensio in any manner permitted by Delaware law within 30 days; and it is further

ORDERED that Alfred F. Gerriets, II be served at his last known address and the address listed in the Guaranty in accordance with CPLR 308[4] within 30 days.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/13/09

**FILED**  
 MAY 14 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

*W*  
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 WALTER B. TOLUB, J.S.C.