

David Werner Intl. Corp. v Gray
2009 NY Slip Op 33457(U)
October 19, 2009
Supreme Court, New York County
Docket Number: 102547/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

DAVID WERNER INTERNATIONAL CORPORATION
a New York Corporation, and DAVID WERNER,
an individual,

Plaintiff,

-against-

ALEXANDER GRAY, "JOHN DOE" 1-100 and
"JANE DOE" 1-100, also names being fictitious and
unknown to plaintiffs despite diligent inquiry, it being
intended to designate those individuals, entities and
others involved, individual and jointly, in posting and/or
advertising for sale confidential information belonging
to plaintiffs including, without limitation, client
agreements on the internet, *et al.*, 0

Defendants.

Decision/Order

Index No.: 102547/09

Seq. Nos. : 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
OCT. 29. 2009.
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Def's n/m (3211), EJG affirm, AG affid, exhs	1
DW affid, exhs	2
GIH affirm in opp, exhs	3
EJG reply affirm	4

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant Alexander Gray ("Gray") moves, pre-answer, to dismiss the complaint pursuant to CPLR § 3211. Plaintiff opposes the motion. For the reasons that follow, the motion is denied in its entirety.

Plaintiff David Werner International Corporation ("DWIC") is in the business of "providing personalized marketing services for senior executives, generally Presidents

and Vice Presidents, who desire to make a career transition." Plaintiff David Werner is the chief executive officer of DWIC.

On September 29, 2006, Gray and DWIC executed an agreement in which DWIC provided employment-related consulting services to Gray. Gray, however, became dissatisfied with DWIC's performance and posted a message on www.riporffreport.com. Plaintiffs commenced a lawsuit against Gray arising from that posting entitled David Werner and David Werner International v. Gray, in the Supreme Court, New York County, Index No. 112099/08, alleging, *inter alia*, claims for defamation. That action was ultimately settled between the parties pursuant to a Settlement Agreement. The Settlement Agreement provided in relevant part:

8. Confidentiality and Non-Disclosure: The Parties agree that the terms and conditions of this Settlement Agreement shall remain confidential and not be disclosed to any other person (other than their respective attorneys) except upon court order or in response to judicial process.

...

9. Non-Disparagement: The Parties agree that, beginning immediately and continuing in perpetuity, Gray shall not (a) make, post or publish any critical, negative, defamatory, libelous or disparaging remarks about [the defendants]. It is understood by the Parties that this provision is not meant to conflict with the obligation to provide truthful testimony under penalty of perjury.

Plaintiffs, in this action, claim they learned that the Settlement Agreement in its entirety had been posted for sale on Ebay. Plaintiffs have provided a copy of the Ebay posting, dated February 12, 2009, to the court. The Description section of the Ebay posting reads as follows:

Available for sale is a copy of a client agreement written and signed by David Werner International and one of their clients. This is the type of Agreement you should expect if you decide to pay for their services. If

you are not familiar with this outfit, you could education yourself by visiting their website at www.dwic.com.

...

You will receive a hard copy of the agreement, a complete copy of all the information I have been able to compile on the Internet about David Werner and his company David Werner International as well as a copy of the summons filed by David Werner International in the New York Supreme Court against one of their client(s).

The Ebay posting also contains links to other websites containing "clients comments and complaints."

David Werner, in his affidavit says that he asked a friend of his, Linda Wu, to purchase the Settlement Agreement from the seller "olitheoli." Ms. Wu wrote to the seller, who in turn gave Ms. Wu an email address, ag686@columbia.edu. Plaintiffs maintain that this email address belongs to Gray.

On February 22, 2009, the Settlement Agreement was posted for sale on Ebay again. This time, the selling price was \$5,000.

Plaintiffs commenced this action alleging that Gray breached the Settlement Agreement, misappropriated DWIC's trade secrets and made defamatory statements on various websites (along with other heretofore unnamed defendants).

Gray moves to dismiss the complaint for: [1] failure to obtain personal jurisdiction; [2] failure to properly serve Gray; and [3] failure to state a cause of action. CPLR § 3211.

The court will first address Gray's motion to dismiss based upon jurisdictional grounds. Gray argues that the court does not have personal jurisdiction over him because service was not properly effectuated. Gray has submitted his affidavit, as well

as the affidavit of his wife, Sandra E. Gray. The Grays claim that they never received a copy of the summons and complaint, either posted to their door or in the mail.

Although plaintiff's affidavit of service on its face meets plaintiff's burden, Gray has raised an issue of fact sufficient to controvert the affidavit and require a traverse hearing. The issue of whether the court has obtained personal jurisdiction over Gray must be resolved before Gray's motion can be addressed. Therefore, the court hereby refers the issue of whether the defendant was properly served with the summons and complaint to a Special Referee to hear and report. The remaining aspects of Gray's motion will be held in abeyance until the reference as identified herein is fully resolved.

Any requested relief not otherwise addressed herein has nonetheless been considered by the court and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 19, 2009

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

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