

**Fova Inc. v Latino Films Inc.**

2010 NY Slip Op 32276(U)

August 11, 2010

Sup Ct, NY County

Docket Number: 603728/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.C.  
Justice

PART 2  
603728/109  
~~01683128/10~~

FOVA INC.  
  
LATINO FILMS, INC.

INDEX NO. \_\_\_\_\_  
MOTION DATE 6/16/10  
MOTION SEQ. NO. 01  
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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying memorandum decision.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 8/13/10

Luy  
LOUIS B. YORK J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: LAS PART 2

603728/09

-----X  
FOVA INC., TRADING AS WING LATINO NEW YORK,

Index No. 09683728/09

Plaintiff,

-against-

LATINO FILMS INC. AND CHRIS CARBALLO

Defendants,  
-----X

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Louis B. York, J.:

In an action for breach of contract, fraud, unjust enrichment, and conversion, Defendant Chris Carballo ("Defendant") moves to dismiss pursuant to CPLR 3211, based on (A) lack of personal jurisdiction over the Defendants due to improper service of process, B) lack of personal jurisdiction due to an absence of minimum contacts with New York State, and C) Forum Non Conveniens, as well as D) such other relief that this Court might deem just and proper. For the reasons stated below, the Court grants Defendant's motion to dismiss.

Statement of Facts

In January of 2006, Latino Films, a Florida based corporation, entered into a vendor agreement with Plaintiff Fova Inc ("Plaintiff"), trading as Wing Latino New York ("Fova"), a Delaware corporation with its principle place of business in New York. Under the agreement, Latino Films would serve as a vendor of services for Plaintiff's clients. At the time, Defendant, a Florida resident, served as the sole shareholder and officer of Defendant Latino Films, holding title of president and treasurer. From January 2006 through June 2008, Defendant and Latino Films engaged in work on production projects for Plaintiff's clients. Plaintiff obtained its

services from Defendant Latino Films by submitting Purchase Orders, each of which state the following:

“This Purchase Order is given by Wing Latino NY Fova Inc...upon the express condition that the order is subject to all terms and conditions set forth on the following website : <http://vendorterms.grey.com>. By signing or fulfilling this order, supplier expressly confirms supplier has read the referenced terms and conditions and supplier agrees to be bound by such Terms and Conditions.”

The Terms and Conditions on the <http://vendorterms.grey.com> website consist of six pages, with the following provision in the final paragraph:

“This Order shall be construed pursuant to the laws of the state of New York regardless of its conflict of laws provisions. The parties hereto agree that the state and federal courts sitting in New York, New York shall be the exclusive forum and situs for the resolution of any and all disputes, controversies or matters arising herefrom or related hereto.”

Latino Films would routinely send invoices to Plaintiff's office for the services that it performed.

Defendant dissolved Latino Films in April 2009. Plaintiff commenced an action against Latino Films and Defendant on December 11, 2009, alleging fraud, breach of contract, unjust enrichment, and conversion, all arising through the submission of falsified and/or fictitious charges. Plaintiff attempted to execute service of process on Defendant Carballo and Latino Films on January 4, 2010 by having a process server deliver the summons and complaint to Defendant at his Florida home. Defendant was not at home when the process server arrived. The process server handed Defendant's fiancée a copy of the Summons and the Complaint that was presumably intended to be served on Carballo in his individual capacity, as well as a copy of the Summons and Complaint that was presumably intended to be served on Latino Films. The process server then allegedly mailed a copy of each to Defendant's home address and filled out an affidavit of service. Latino Films and Defendant moved to dismiss on April 15, 2010, based

on lack of personal jurisdiction and forum non conveniens. Plaintiff submitted its opposition papers on April 28, 2010, through which it agreed to withdraw the action against Latino Films after having obtained Latino Films' dissolution papers. However, it opposed the motion as applied to Defendant, arguing that Defendant had consented to jurisdiction through the purchase order agreements, and, further, that he had waived all jurisdictional defenses when his former counsel obtained a 30-day extension to respond to the summons and complaint.

For the reasons that follow, the motion to dismiss is granted.

### Analysis

#### *Alleged Waiver of Jurisdictional Defense by Former Counsel*

As an initial matter, this Court finds that Defendant did not waive his jurisdictional defense through the correspondences between his former counsel, David Bercuson, and Plaintiff's counsel. CPLR 2104 provides:

“An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.”

Plaintiff directs this Court's attention to communications between Plaintiff's counsel and Defendant's former counsel, David Bercuson, as proof of the alleged waiver. The first of these consists of an alleged January 13, 2010 verbal agreement, in which Bercuson allegedly orally agreed to waive jurisdictional defenses in exchange for a 30-day extension with which to respond to the complaint. The second is a January 13, 2010 written correspondence from Bercuson to Plaintiff's counsel, acknowledging receipt of the extension, without any mention of a waiver. The third is a January 19, 2010 facsimile correspondence by Plaintiff's counsel to

Bercuson, stating that the 30-day extension was conditioned upon the waiver. Bercuson disputes the existence of the initial oral agreement.

Even when viewing the facts in a light most favorable to the Plaintiff, these exchanges do not satisfy the requirements set out by CPLR 2104. The record does not contain any written agreement, signed by Defendant or Bercuson, to waive a jurisdictional defense. Furthermore, Plaintiff has failed to show any detrimental reliance that would favor disregarding the formalities that CPLR 2104 require. *Leemilt's Petroleum v. Public Storage*, 193 AD2d 650, 597 NYS2d 463 (2d Dept. 1993) (citations omitted). Therefore, this Court finds that Defendant did not waive his jurisdictional defense.

#### *Alleged Agreement to Jurisdiction*

Plaintiff argues that the agreement incorporated by the purchase orders confer personal jurisdiction over Defendant. As quoted above, the language clearly indicates a mutual understanding that disputes arising from the purchase orders were to be construed pursuant to New York law and resolved in the state and federal courts of New York. Defendant contends that he cannot be held to the terms of the agreement because it lacks his personal signature as well as plaintiff's signature. Even assuming that Defendant could be bound by this agreement, the Plaintiff must still satisfy the service of process requirements provided for in the CPLR if it wishes New York courts to have jurisdiction over the matter. Thus, this Court next examines whether the Plaintiff has met the burden of showing that service of process was properly carried out.

#### *Service of Process*

CPLR 308(2) permits completion of substituted service of process by

[\* 6]

“mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served...proof of...service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing.”

New York courts have observed that, “the mailing requirement of CPLR 308(2) is to be strictly construed.” *Booth v Lipton*, 87 AD2d 856, 857, NYS2d 289, 290 (2d Dept. 1982). In order to demonstrate compliance with 308(2), the serving party must submit proof of service that sets forth facts showing that service was made by an authorized person and in an authorized manner. *James v Brandt*, 543 NYS2d 876, 144 Misc. 2d 190 (Sup Ct, Bronx County 1989). Specifically, the affidavit of service must allege that the mailing was done by first-class mail, in an envelope marked "personal and confidential", and that the envelope did not show that the mailing involved a lawsuit. *Id*, 877. An affidavit of service that is bereft of such necessary detail cannot establish proper service pursuant to CPLR 308 (2). *Stanley Agency v. Behind the Bench (national Basketball Wives Association)*, 2009 WL 975790, \*6, 2009 N.Y. Misc. LEXIS 833 \*21 (Sup. Ct., Kings County 2009). Further, assuming compliance with the mailing requirements of 308(2), in the absence of the necessary allegations, is tantamount to condoning violations of 308(2). Failure to include essential information in proof of service and failure to serve and mail the summons and complaint within 20 days of each other are both considered jurisdictional defects that are grounds for dismissal of an action. *Cobleskill Healthcare of the Mary Imogene Bassett Hosp. v. Waddell*, 655 NYS2d 831, 832 (4th Dept. 1997) (affirming lower court's granting of a motion to dismiss, noting that an affirmation containing incorrect information identifying the party served failed to show compliance with proper service requirements; *Stanley Agency v. Behind the Bench (national Basketball Wives Association)*, 2009 WL 975790, \*6,

N.Y. Misc. LEXIS 833 \*21 (Sup Ct, Kings County 2009) (holding that an affidavit of service that did not comply with requirements of showing the time, date, place and person served, or the requirement of showing that the service was made by an authorized person in an authorized manner, could not satisfy the burden of showing compliance with CPLR 308 (2) and thus merited dismissal).

An examination of the initial affidavit of service pertaining to Carballo, now on record, reveals that several required allegations were absent. Namely, plaintiff has failed to allege that the mailing was done by first-class mail and has failed to allege that the envelope did not state that it involved a lawsuit. Additionally, the affidavit of service fails to state the address that the summons and complaint were mailed to, and New York jurisprudence instructs that such deficiencies render service improper. *Garrison Fuel Oil, Inc. v Grippo*, 1985 N.Y. Misc. LEXIS 2586, \*11, 486 NYS2d 136, 141 (Nassau County Ct 1985). Although a Plaintiff is not required to confirm Defendant's receipt of the mailing, the Plaintiff is required to show that the mailing was properly sent. This jurisdictional requirement is to be met through supporting affidavits. *Stanley Agency v. Behind the Bench (national Basketball Wives Association)*, 2009 WL 975790, \*4, 2009 N.Y. Misc. LEXIS 833 \*12. Thus, with respect to the original affidavit of service, service was not completed.

Plaintiff contends that all defects in its service of process were cured by a supplemental affidavit that it later filed with the Clerk of Court. However, as Defendant notes, the supplemental affidavit was not even executed until April 15, 2010 and Plaintiff has yet to request leave to file a proper affidavit on an untimely basis. This Court will not permit an attempt to correct improper service when the attempt is made well past the established deadline, and the Plaintiff has not moved for an extension.

It is therefore

~~ORDERED~~ **ADJUDGED**  
ORDERED that Defendants' motion to dismiss is granted.

Dated: 8/11/10 2010

Enter:

*LY*  
\_\_\_\_\_  
LOUIS B. YORK, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

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