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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MPG ASSOCIATES, INC.,d/b/a THE KTI GROUP,

Plaintiff,

-against-

BRIAN RANDONE,

Defendant.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 008057-10
Motion Seq. No: 1
Submission Date: 9/7/10

Papers Read on this Motion:

Notice of Motion, Affirmation in Support, and Exhibits.....x
Correspondence dated 9/9/10 from T. and P. Randone.....x
Correspondence dated 9/23/10 from T. and P. Randone.....x
Correspondence dated 9/24/10 from R. Klein.....x

This matter is before the court on the motion by Plaintiff filed August 19, 2010 and submitted September 7, 2010. For the reasons set forth below, the Court denies Plaintiff's motion, directs Defendant to file and serve a Supplemental Answer to the Complaint on or before January 31, 2011 and directs counsel for the parties to appear for a Preliminary Conference before the Court on February 24, 2011 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Plaintiff MPG Associates, Inc., d/b/a The KTI Group ("Plaintiff" or "KTI") moves, pursuant to CPLR § 3215, for an Order granting a default judgment in favor of Plaintiff..

As outlined below, the parents of Defendant Brian Randone ("Randone" or "Defendant"), who is incarcerated in California, have provided the Court with their opposition

on Defendant's behalf.

B. The Parties' History

Plaintiff filed its summons and verified complaint ("Complaint") (Ex. A to Klein Aff. in Supp.) on April 26, 2010. The Complaint alleges as follows:

The Complaint describes the nature of this action as one to obtain injunctive relief and recover special, general and punitive damages arising from Defendant's tortious conduct injuring KTI's business reputation by 1) publishing false, defamatory and misleading statements about KTI regarding its lack of trustworthiness and failure to pay sums due to subagents; and 2) encouraging KTI's subagents to terminate their contractual and other business relationships with KTI. The Complaint alleges that Defendant engaged in this conduct following KTI's termination of Defendant for cause, following Defendant's arrest and incarceration for murder and torture charges.

KTI is a New York corporation with its principal place of business in Bethpage, New York. Randone is a resident of California who is currently incarcerated in a correctional facility in Los Angeles, California.

Prior to September 15, 2009, Randone acted as a sales agent for KTI in California. Defendant declined to sign the final versions of his Subagent Agreement, Schedule A and other documents memorializing the agreement he entered into with KTI despite KIT's repeated requests. On or about September 10, 2009, Randone received the sum of $26,702.44, via direct deposit into his corporate account, representing the full payment of all monies purportedly due to him for services he rendered to KTI.

On September 11, 2009, Randone was arrested and incarcerated on charges of torture and murder. Following that arrest, he made no attempt to contact "Gina."[1] Randone, instead, directed members of his sales team not to inform KTI of his arrest ("Arrest"). KTI learned of the Arrest on September 15, 2009 through a different subagent. Upon learning of the Arrest, KTI, by letter dated September 15, 2009, terminated its business relationship with Randone.

KTI alleges that its termination ("Termination") of Randone was warranted because the Arrest, *inter alia*, 1) precluded Randone from providing the required level of service to KTI's customers; 2) adversely affected KTI's reputation; and 3) prevented Randone from being

[1] The Complaint does not reflect who "Gina" is.

actively involved in KTI's business, as required by the parties' agreement.

KTI alleges, further, that Randone breached his agreement with KTI by, *inter alia*, 1) improperly selling the services of a competing provider in violation of the exclusivity provisions in the parties' agreement; 2) improperly soliciting business from customers of at least one other KTI representative without KTI's prior written consent; and 3) accessing customers' personal and confidential account information without their prior approval.

Although she was not obligated to do so, KTI's principal considered providing financial assistance to Randone following his Arrest, but ultimately concluded she was unable to do so. Following that determination, Randone "embarked on a campaign to injure KTI's business reputation in the industry by falsely and maliciously claiming that KTI fails and refuses to pay its agents and subagents sums contractually due them for services rendered" (Comp. at ¶ 15). For example, Randone arranged, through another subagent, a series of three-way telephone conversations from his jail cell with other KTI subagents as well as a KTI employee in Texas. During these conversations, Randone allegedly 1) falsely claimed that KTI owes him $25,000, which it is unjustifiably refusing to pay; 2) impugned KTI's character and integrity by falsely alleging, *inter alia*, that KTI "pretends to be nice to its subagents while it stabs them in their backs" (Compl. at ¶ 17(b)); and 2) urged subagents to break their contractual arrangements with KTI and to work, instead, with KTI's competitors. As a result of Randone's conduct, 1) Jim Roeske ("Roeske") has left KTI to work for a competitor called Pipe One; and 2) Roeske and Avi Einav, Pipe One's principal, are actively recruiting KTI's subagents to leave KTI and join Pipe One.

The Complaint contains three (3) causes of action. The first and second causes of action are for trade libel and tortious interference with business, for which Plaintiff seeks compensatory damages and punitive damages. The third cause of action is for *prima facie* tort, for which Plaintiff seeks an injunction permanently restraining Randone from engaging in any of the conduct alleged in the Complaint.

Plaintiff has provided an Affidavit of Service (Ex. B to Klein Aff. in Supp.) reflecting service of the Complaint on Defendant on May 4, 2010 at the Long Angeles County Jail by personal delivery. In his Affirmation in Support, counsel for Plaintiff ("Counsel") affirms that on May 27, 2010, he received a voicemail message from Rosalyn Maldonado ("Maldonado") of the law firm of French & Casey, requesting an extension of time for Defendant to respond to the

Complaint. By e-mail dated May 28, 2010 (Ex. C to Klein Aff. in Supp.), Counsel advised Maldonado that Counsel would consent to the requested extension upon her service of a notice of appearance on Defendant's behalf. Counsel never received any subsequent communication from that law firm advising him that it represented Defendant.

The Court received a faxed communication dated September 9, 2010 from Terry and Patty Randone, the parents ("Parents") of Defendant. In that communication, the Parents advised the Court that Defendant is incarcerated in the Los Angeles County Jail. They also stated that the Defendant "had answered all the questions proposed by [Plaintiff's Attorney] and mailed to the Nassau County Clerk's office on April 26, 2010" and included a copy of the Summons filed in this matter which contained an Index Number of 005057-10, rather than 008057-10. They also advised the Court that Defendant "received the complaints alleged against him and then mailed his answers using the incorrect Index number provided by KTI's attorney."

The Parents subsequently sent to the Court a letter dated September 23, 2010 in which they stated that 1) Defendant was arrested on September 11, 2009 and has been incarcerated in California since that date; 2) they do not understand how Defendant can be subject to the jurisdiction of the courts of New York in light of the fact that the events complained of did not occur in New York and Defendant does not do business in New York; 3) Defendant sent an answer ("Answer") to the Complaint dated May 5, 2010, of which they provide a copy, to the court and Plaintiff's counsel which contains the same incorrect index number as the Summons and, therefore, do not understand how Plaintiff's counsel can assert that Defendant has not answered the Complaint; 4) Defendant has meritorious defenses and counterclaims to Plaintiff's claims and prepared a document dated September 2, 2010 titled "Declaration," of which they provide a copy, which Plaintiff's counsel rejected via a Notice of Rejection ("Rejection") dated September 7, 2010 of which they also provide a copy; and 5) Defendant's trial (presumably in his criminal matter) should be resolved by the end of the year and they request that the Court permit Defendant to submit an amended answer on or before January 31, 2011.

In the Answer referred to *supra*, Defendant, *inter alia*, 1) states that he is incarcerated in Los Angeles, California; 2) denies the allegations in the Complaint; and 3) affirms that a "correct set of facts will be provided in cross-complaint and/or separate civil action." There is apparently a page three missing from that Answer. In the Declaration referred to *supra*, Defendant affirmed that 1) he received the Complaint on or about May 15, 2010; 2) he answered the Complaint and

mailed the Answer to Plaintiff's counsel; 3) Plaintiff's Counsel stated in an e-mail that he had no opposition to extending Defendant's time to answer and "left open any amount of time that he was willing to wait for an answer from Maldonado;" and 4) he was diligent in attempting to serve his Answer, but was provided with an incorrect index number.

In the Rejection, Counsel submits that the Declaration "is inherently lacking in credibility because it is replete with internal factual contradictions and inconsistencies" including, but not limited to, 1) Defendant claims to have mailed an Answer to Counsel but does not state when it was mailed, does not provide proof of its mailing and does not include a copy of the Answer to his Declaration; 2) the incorrect index number on the Summons would not have prevented Defendant from mailing his responsive papers, and the first page of the Complaint contained the correct index number; and 3) Counsel never granted the request for an extension of Defendant's time to answer because the attorney purporting to represent Defendant never responded to Counsel's request for a notice of appearance.

In his letter to the Court dated September 24, 2010, Counsel objects to the Court's consideration of the Parents' letter on the grounds that it is untimely and insufficient in form and substance to constitute a valid opposition to Plaintiff's motion. Should the Court consider the letter, over Counsel's objection, Counsel notes, *inter alia*, that 1) Defendant's incarceration did not prevent him from interposing a timely response to the Complaint; 2) Counsel has never received an answer to the Complaint; 3) Defendant has not provided any proof of his alleged efforts to serve his Answer; and 4) Defendant's contention that he is not subject to jurisdiction in New York is incorrect, *inter alia*, in light of the fact that Defendant filed a lawsuit in New York in 2006, thereby availing himself of New York's court system and rendering his claims unworthy of belief.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its entitlement to a default judgment through the Complaint, which establishes Plaintiff's claims and the sums due, and in light of Defendant's failure to appear, answer or move with respect to the Complaint.

Defendant opposes Plaintiff's application and submits documentation reflecting efforts he submits he has made to respond to the Complaint.

RULING OF THE COURT

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

Public policy favors the resolution of cases on the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004). In light of Defendant's incarceration, and evidence before the Court reflecting that Defendant took steps to respond to the Complaint whose allegations he disputes, the Court denies Plaintiff's motion. In consideration of the representation of Defendant's Parents that Defendant's pending criminal matter is expected to be resolved by the end of the year, the Court directs Defendant to file and serve a Supplemental Answer to the Complaint on or before January 31, 2011 and directs counsel for the parties to appear for a Preliminary Conference before the Court on February 24, 2011 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
October 26, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 28 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE