

**Donato Guadagnoli, P.C. v Smith**

2011 NY Slip Op 32463(U)

September 19, 2011

Sup Ct, NY County

Docket Number: 114183/2010

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

~~JANE S. SOLOMON~~

Index Number : 114189/2010  
DONATO GUADAGNOLI, P.C.  
vs  
SMITH, DARRELL ANDRE  
Sequence Number : 001  
DEFAULT JUDGMENT

PART 55

INDEX NO. \_\_\_\_\_  
MOTION DATE 7/22/11  
MOTION SEQ. NO. \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

No(s) 1-3

Answering Affidavits — Exhibits \_\_\_\_\_

No(s) 4-6

Replying Affidavits \_\_\_\_\_

No(s) 7-10

Upon the foregoing papers, it is ordered that this motion is *decided by the*  
*amassed Memorandum decisions and order*  
*this action is referred to the Trial*  
*Support office for random reassessment*  
*to another ITS Part for the filing*  
*of a Preliminary Conference.*

**FILED**

SEP 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 9/19/11

*[Signature]*  
~~JANE S. SOLOMON~~, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

DONATO GUADAGNOLI, P.C. and DONATO  
GUADAGNOLI,

Index No. 114189/2010  
DECISION and ORDER

Plaintiffs,

-against-

DARELL ANDRE SMITH and/or JOHN DOE  
(acting under the names "TED  
VINCENETE" and "TED V")

Defendants.

-----X

JANE S. SOLOMON, J.:

This is an internet defamation action. Plaintiffs Donato Guadagnoli, P.C. and Donato Guadagnoli (together, Guadagnoli) move for a default judgment against defendant Darell Andre Smith (Smith). Smith, *pro se*, opposes the motion.

Guadagnoli is an attorney who represents clients in the entertainment industry. The complaint alleges that on October 29, 2009, Guadagnoli received an email from a "Ted Vincenete" stating that "[a]nyone who searches for your name . . . on the internet will know the truth about your dirty unethical business practices, scumbag." The email also contained a link to "www.theripoffreport.com" (The Ripoff Report), a publicly accessible website.<sup>1</sup> The link opens a "Report" entitled "Donato

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<sup>1</sup> The Ripoff Report describes itself as "a worldwide consumer reporting Web site . . . by consumers, for consumers, to file and document complaints about companies or individuals."

**FILED**

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3]

Guadagnoli is a lying unethical manipulative 'attorney' who breaches contracts, and rips clients off," posted by "Ted V." of a company named "Caldner, LLC." The Report is several paragraphs long and is rife with statements that, if untrue, are patently defamatory. Guadagnoli believes Smith is the Report's author.

The summons and complaint were served on Smith at 12481 Cascade Canyon Road, Granada Hills, CA 91344 (the Granada Address). The affidavit of service reflects personal service at that location by a registered California process server. The process server states that, upon arriving at the Granada Address, a man matching Smith's description shouted at him from the second story window, denied being Smith, but acknowledged that Smith lived there (Aff. of Service, attached to Goldberg Affirmation, Ex. B). Smith did not answer or appear in this action.

Smith was served the instant motion by regular mail at the Granada Address. He opposes the motion on the ground that the Granada Address is inaccurate, and that the "correct address for any and all contact" is 10153 Riverside Drive #531, Toluca Lake, California, 91602 (the Toluca Address).<sup>2</sup> He claims that he is ready to address the lawsuit on the merits now that he is aware of its existence.

In reply, Guadagnoli argues that service was patently

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<sup>2</sup> The address is for a company called Mailbox Toluca Lake, a mailbox rental service--not Smith's residence or place of business.

[\*4]  
sufficient, and supplies a "Lexisnexis Accurint Report" (Goldberg Reply Affirmation, Ex. E) which lists the Grenada Address as a "Previous and Non-Verified Address" for Smith. He also supplies Smith's MySpace webpage, which has a photograph, captioned "THE NEW CRIB!",<sup>3</sup> which purportedly shows the Grenada Address (Goldberg Reply Affirmation, Ex. G). He also states that in a related California action, Smith responded to several papers served on him at the Grenada Address.

To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense (*Morrison Cohen LLP v. Fink*, 81 AD3d 467 [1st Dept., 2011]). It is within the court's discretion to determine whether the excuse for the default is sufficient (*Chevalier v. 368 E. 148th Street Associates, LLC.*, 80 AD3d 411, 412 [1st Dept., 2011]). Whether an excuse is reasonable is based on all relevant factors, including the length of the delay, prejudice, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits (*Id.* at 413-4).

The court is aware of the difficulty that Guadagnoli had in locating Smith's correct address, and is persuaded that the Grenada Address is or was an acceptable address. Nevertheless, the nature and severity of the allegations and the

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<sup>3</sup> "Crib" is a slang term for a home.

amount in controversy (several million dollars) militates strongly towards allowing the case to proceed on the merits.

Smith has stated that he is ready to proceed; and he has submitted an answer (in the form of a general denial) and a counterclaim for defamation, which he served on the plaintiffs; and he gave an address for the further service of papers (the Toluca Address). Considering the foregoing, it heraby is

ORDERED that plaintiffs' motion for default judgment is denied; and defendant Darell Andre Smith's opposition is deemed a cross motion to accept his answer in the form annexed to his affidavit and the same is deemed timely served, nunc pro tunc, upon entry hereof.

Dated: 9/19/, 2011

ENTER:   
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**

**FILED**

SEP 20 2011

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