

**Hachette Filipacchi Media US, Inc. v Smith Photo,
Corp.**

2011 NY Slip Op 32816(U)

October 13, 2011

Sup Ct, NY County

Docket Number: 0603263/2003

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

HACHETTE FILIPACCHI MEDIA US, INC,
Plaintiff,

Index No.: 603263/03

Motion Date: 8/30/11

- v -

SMILE PHOTO, CORP.,
Defendant.

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 6 were read on this motion to vacate a default judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1, 2
3
4 - 6

Cross-Motion: Yes No

Upon the foregoing papers,

This action involves a dispute over advertising fees. The 5-count complaint, dated October 16, 2003, alleges that plaintiff Hachette Filipacchi Media US, Inc. (Hachette) ran advertisements in its magazines for defendant Smile Photo Corp. (Smile), from January 2002 to March 2003, pursuant to an agreement whereby Smile was to pay Hachette \$470,247. Hachette's complaint avers that, of the \$470,247, Smile paid only \$12,000, leaving \$458,247 unpaid. On June 28, 2004, Hachette obtained a default judgment against Smile in the amount of \$508,611.65 (Default Judgment).

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

Smile now moves to vacate the Default Judgment and dismiss this action, claiming that: the Default Judgment was entered solely upon an unverified complaint and a hearsay attorney's affirmation in violation of CPLR 3215(f); this action was filed and prosecuted by an attorney without a New York office; and the summons and complaint were not properly served upon Smile under CPLR 311(a)(1). Hachette cross-moves for a 120-day extension of time to effect proper service upon Smile, in the event that service of process is deemed insufficient.¹

Under CPLR 3215(f), "any application for a judgment by default" requires the applicant to file "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." The First Department has "consistently held that a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." Beltre v Babu, 32 AD3d 722, 723 (1st Dept 2006). "Indeed, a judgment entered without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim renders that judgment a nullity." Id.; see also Wolf v 3540 Rochambeau Assoc., 234 AD2d 6, 6-7 (1st Dept 1996) (default

¹ The court notes that there is a second action with a similar caption pending before this court (herein referred to as the "Related Action") raising many of the same claims. Hachette Phillipacchi Media, U.S., Inc., v. Smile Photo Corp, Index No.: 112809/2008.

judgment deemed nullity where "plaintiffs, in support of their motion, failed to provide a complaint verified by the party plaintiffs, rather than plaintiffs' attorney, or an affidavit in support of the motion executed by a party with personal knowledge of the merits of plaintiffs' claims").

Here, the Default Judgment was entered upon an unverified complaint, signed only by Ronald Monterosso (Monterosso), Hachette's counsel, and what Monterosso purports to be his "Affidavit of Facts Constituting the Claim." Monterosso's purported affidavit states that Hachette "mailed invoices for each of the advertisements run . . . in the amounts shown on the attached Exhibit A," including "sums past due for all past advertisements"; that Hachette "ceased allowing [Smile] to run advertisements in its magazines"; and that Smile "never contested the amounts stated in [tho] invoices."

However, Monterosso is not a party in this action, and the purported affidavit is not sworn; rather, while Monterosso identified the supporting document as an "affidavit," he merely "affirms" the statements made in it. That Monterosso submitted an attorney affirmation, and not an affidavit, is confirmed by Monterosso himself, as he now admits that his "'affidavit of facts constituting the claim and amount due' is really an affirmation." In its opposition brief, Hachette claims that "Monterosso had personal knowledge of the substance of the claims

underlying the Default Judgment," but this claim is undermined by Hachette's admission that Monterosso was not retained until after Smile's alleged failure to make the payments referred to in Monterosso's affidavit. Hachette's Director of Advertising states that Monterosso was not retained until sometime after early fall of 2003, while Monterosso's affidavit claims that Smile owed Hachette for advertisements run "in the calendar year 2002 and through April of 2003". Therefore, having failed to comply with the requirements of CPLR 3215(f), the Default Judgment is a nullity. Beltrac, 32 AD3d 722, supra; Wolf, 234 AD2d 6, supra.

The Judiciary Law provides that "[a] person, regularly admitted to practice as an attorney and counselor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counselor, although he resides in an adjoining state." Judiciary Law § 470 (emphasis added). The First Department has interpreted section 470 "as requiring such attorney at least to maintain an office in this state for such purpose," stating that "[f]ailure to maintain such a local office requires dismissal of an action commenced by such attorney, without prejudice to commencing anew." Kinder Morgan Energy Partners, LP v Ace Am. Ins. Co., 51 AD3d 580, 580 (1st Dept. 2008); Empire HealthChoice Assur., Inc. v Lester, 81 AD3d 570, 571 (1st Dept. 2011) ("[f]ailure of counsel

to maintain a local office requires striking of a pleading served by such attorney, without prejudice"). For instance, in Cheshire Academy v Lee (112 Misc 2d 1076 [Civ Ct, Bronx County, 1982]), relied upon by the First Department in Neal v Energy Transp. Group (296 AD2d 339 [1st Dept 2002]), the plaintiff's non-resident attorney moved for a default judgment. The court found that the plaintiff's lawyer appeared to be a member of the New York bar but failed to maintain a New York office under section 470 of the Judiciary Law. On its own motion, the court vacated the defendant's default and dismissed the action without prejudice to renewal.

Here, it is undisputed that Monterosso failed to maintain a New York office from the commencement of the action through entry of the Default Judgment. Hachette admits that "Monterosso did not have a New York State law office," and that Hachette's new counsel was retained in August 2004, after entry of the Default Judgment, and thereafter began attempts to enforce the judgment. Because it is undisputed that Monterosso at all times failed to maintain a New York office, the complaint must be stricken and the action dismissed without prejudice.² Empire HealthChoice

² However, see Schoenfeld v State of New York, (US Dist Ct, ND NY, Docket No. 09 Civ 00504, 2011 WL 3957282, Sep 7, 2011, Kahn, J.), which holds that § 470 of New York's Judiciary law infringes on non-resident attorneys' right to practice law in violation of the Privileges and Immunities Clause of the United States Constitution.

Assur., Inc., 81 AD3d 570, supra; Kinder Morgan Energy Partners, LP, 51 AD3d 580, supra; Neal, 296 AD2d 339, supra; Cheshire Academy, 112 Misc 2d 1076, supra.

According to Hachette, "any argument that the lack of a New York State office rendered the Default Judgment a nullity would have been rendered moot when [its new attorney,] Martin S. Rapaport, Esq., took over representation . . . in around August, 2004, because he has a New York State law office." As a preliminary matter, although Cheshire supports vacating the default based upon Monterosso's failure to maintain a law office, as discussed above, the Default Judgment is a nullity for failure to comply with CPLR 3215(f). In any event, Hachette submits no legal authority in support of the conclusion that an attorney with a New York office substituted after entry of judgment can cure prior counsel's failure to maintain an office from the commencement of the action through entry of judgment.³

Hachette also argues that it will be prejudiced by dismissal, because it is now time-barred from commencing a new

³ It is also undisputed that, during the action and through entry of the Default Judgment, Monterosso never established a working relationship with a New York attorney sufficient to meet the requirements of the Judiciary Law, as the Third Department found acceptable in Matter of Tatko v McCarthy (267 AD2d 583, 584 [3d Dept 1999] [Massachusetts attorney admitted in New York but who failed to maintain New York office satisfied Judiciary Law where she established, during the proceeding, "an of counsel relationship with a New York attorney who has an office in this State"]).

action, based upon the statute of limitations. Hachette cites no legal authority in support of this argument. Nor are Hachette's arguments supported by the plain language of the statute, which unequivocally requires the attorney residing in an adjoining state "at least to maintain an office in this state." Kinder Morgan Energy Partners, LP, 51 AD3d at 580. As stated in Rosenberg v John-Manville Sales Corp. (99 Misc 2d 554, 557 [Sup Ct, NY County 1979]), also relied upon by the First Department in Neal (296 AD2d at 339), the requirement of non-resident attorneys to maintain a New York office, under section 470 of the Judiciary Law, "appears to be absolute."

Hachette will not be prejudiced by the statute of limitations defense any more than it was at the time the action was originally commenced. CPLR 205(a) permits an action that is terminated to be commenced anew "upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period," as long as the initial action was not terminated as a result of voluntary discontinuance, failure to obtain personal jurisdiction over the defendant, dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits.

For the reasons discussed above, the Default Judgment is vacated and, therefore, there has been no final judgment on the merits. Moreover, while Smile's motion also seeks dismissal based upon lack of personal jurisdiction (for improper service), the court does not reach the issue of personal jurisdiction, because the action is dismissed without prejudice under section 470 of the Judiciary Law. Thus, while the issue of the timeliness of the instant action, as originally commenced, is not presently before the court, and the court makes no determination concerning its timeliness, the prejudice claimed by Hachette is vitiated by the six-month tolling provision set forth in CPLR 205(a).

Hachette's Related Action, to a large extent, survives defendants' motion to dismiss. That action, although primarily asserting claims based upon violations of the Debtor and Creditor Law, resonates back to Hachette's claims for recovery for Smile having "ordered and received considerable advertising" from Hachette "for which [Smile] never paid." The Related Action is based upon the same transactions and occurrences as this action, and its survival further undermines any prejudice claimed by Hachette by dismissal of this. Because this action is dismissed under the Judiciary Law, the court does not reach the issue of personal jurisdiction, and Hachette's cross motion for an extension of time to effect service of process is denied as moot.

Accordingly, it is

ORDERED and ADJUDGED that motion is granted to the extent that the default judgment, filed on June 28, 2004, is vacated and the action is DISMISSED WITHOUT PREJUDICE, pursuant to Judiciary Law § 470, and the motion is otherwise denied; and it is further

ORDERED that the cross motion is denied as moot.

This is the decision and order of the court.

Dated: October 13, 2011

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.