

Town Sports Intl., LLC v Zakharyayev

2011 NY Slip Op 33904(U)

September 26, 2011

Supreme Court, New York County

Docket Number: 651064/2010

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY

Index Number : 651064/2010

TOWN SPORTS INTERNATIONAL,
vs.
ZAKHARYAYEV, ZACHARY

SEQUENCE NUMBER : 004

REARGUMENT/RECONSIDERATION

PART 54

INDEX NO. _____

MOTION DATE 08/24/11

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 57, 56-61

Answering Affidavits — Exhibits _____ No(s) None No Opp

Replying Affidavits _____ No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 9/26/11

[Signature], 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: PART 54

-----X
TOWN SPORTS INTERNATIONAL, LLC,

Plaintiff,

Index No.: 651064/2010

-against-

DECISION and ORDER

ZACHARY ZAKHARYAYEV,

Defendant.

-----X
HON. SHIRLEY WERNER KORNREICH, J.:

Upon the foregoing papers, plaintiff's motion to reargue its motion for an order to compel non-party Google, Inc. (Google) to comply with a subpoena duces tecum is denied, on default. This action arises out of defendant Zachary Zakharyayev's alleged misappropriation and theft of confidential information and trade secrets belonging to his former employer, plaintiff Town Sports International, LLC (TSI).

On August 4, 2010, plaintiff allegedly served Google with a subpoena requesting the production of emails. When Google did not respond, on February 4, 2011, plaintiff's counsel, Eric Schaer, contacted Google by mail requesting that it comply with the subpoena and enclosing an additional copy. Schaer Affirm., dated May 11, 2011, Ex. B. By letter dated February 8, 2011, Ted Charlton, on behalf of Google's Legal Investigations Support division, notified TSI's counsel that it would not do so. *Id.*, Ex. C. Mr. Charlton's letter referred plaintiff to Section 2702(a) of the Electronic Communications Privacy Act of 1986 (18 USC 2510 *et seq.*) which he claimed barred Google from disclosing the requested emails. *Id.* Mr. Charlton further objected to production on the grounds of, *inter alia*, the burden on Google, the possibility of production

via less burdensome means, vagueness, and overbreadth. *Id.*

In a subsequent letter to Mr. Charlton dated April 4, 2011, plaintiff's counsel asserted that under the ECPA, Google was permitted to answer the subpoena if the registered email user consented to them doing so and included with the letter a sworn statement by Zakharyayev authorizing Google

to provide plaintiff with full and complete copies of any email or other communication that are responsive to the Subpoena, including without limitation any email or other communications, along with the attachments thereto stored in the electronic mail account zacharyz1@gmail.com or any other electronic mail account registered to or affiliated with the user 'Zachary Zakharyayev.'

Id., Ex. D. Mr. Schaer avered that Mr. Charlton then called TSI to acknowledge receipt of the April 4, 2011 letter but further "stated that Google still refused to comply with the subpoena because Google's 'policy' is that it 'still do[es] not produce content with consent of the user.'" Accordingly, plaintiff moved for an order to compel Google to comply with the subpoena.

In its decision and order dated July 15, 2011, this court denied plaintiff's initial motion to compel Google to comply with the subpoena. The decision rested on the ground that Google was a non-resident, non-party and, therefore, the demand for these documents must be made via an open commission to a court in California, Google's primary place of business. Plaintiff now moves for reargument and has submitted proof that Google is an authorized foreign corporation in New York. Schaer Affirm., dated July 27, 2011, Ex. 2. Neither Google nor Zakharyayev have opposed this motion.

CPLR § 2302(a) states that "[a] subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons..." CPLR § 311 authorizes service of a summons upon a corporation by delivery of the summons "to an officer, director, managing or

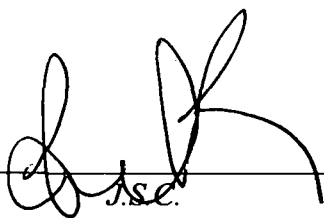
general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.” Unlike CPLR § 308 which specifies that personal service on a natural person be made “within the state,” there is no such limit on personal service on an authorized agent of a corporation. *See Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C311:1, at 359* (“The delivery need not take place in New York. Service can be made on an authorized representative anywhere he or she may be found.”). As such, proper service of a subpoena duces tecum on an authorized agent of an authorized foreign corporation would be binding on that corporation.

However, it does not appear from the record that plaintiff has submitted proof of such proper personal service upon Google. At most, it has submitted a letter which it purportedly mailed to Google, along with a copy of the original subpoena and a certified mail receipt indicating that an “agent” of Google signed for the letter. *Schaer Affirm.*, dated May 11, 2011, Ex. B. Service by mail of a subpoena duces tecum is insufficient, and even if it were, the evidence submitted by plaintiff does not show that whomever signed for the letter was authorized to accept service of a subpoena. Finally, while plaintiff did submit a letter from Google, appearing on Google’s letterhead and apparently signed by Ted Charlton of Google’s “Legal Investigations Support” division, acknowledging receipt of a subpoena dated August 4, 2010 and refusing to respond, this does not obviate the fact that proof of proper service was never submitted. *See Raschel v Rish*, 69 NY2d 694 (1986) (“When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents.”). Accordingly, it is hereby

ORDERED that plaintiff’s motion for reargument is granted, on default; and it is further

ORDERED that, upon reargument, plaintiff's motion to compel nonparty Google, Inc. to comply with the subpoena plaintiff claims to have served upon it on August 4, 2010, is denied, on default, with leave to renew upon submission of proof of original proper service of the subpoena upon Google or proof of subsequent service of the subpoena upon Google pursuant to the CPLR or BCL 306.

Dated: 9/26/11

Enter:  J.S.C.