

Wood v Pacific Telecom Communications Group

2013 NY Slip Op 32768(U)

January 28, 2013

Sup Ct, Westchester County

Docket Number: 55539/12

Judge: Linda S. Jamieson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF: 01/29/2013

Disp _____ Dec x Seq. Nos. 1-2 Type misc.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON
-----X
MICHAEL R. WOOD,

Plaintiff,

-against-

Index No. 55539/12

DECISION AND ORDER

PACIFIC TELECOM COMMUNICATIONS GROUP,
STEVE HAMILTON, MANCHESTER SERVICES,
INC., VALBUENA, et. al,

Defendants.

-----X

The following papers numbered 1 to 13 were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affidavit and Exhibits	1
Memorandum of Law	2
Affirmation and Exhibit in Opposition	3
Affidavit and Exhibit in Opposition	4
Notice of Motion	5
Affirmation and Exhibit	6
Memorandum of Law	7
Memorandum of Law	8
Affidavit and Exhibits	9
Reply Memorandum of Law	10
Reply Affidavit and Exhibit	11
Supplemental Affidavit	12

There are two motions before the Court in this case involving allegations of abuse of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"). Plaintiff is an ordinary cell phone owner and New York resident who has received numerous sales calls and solicitations on his cell phone. He complains that these calls violate the TCPA. Defendant Pacific Telecom Communications Group ("Pacific") and its owner and sole employee, Steve Hamilton, are the only defendants who have appeared in the action. Pacific is a Nevada corporation with its principal place of business in California.

Pacific is a "competitive local exchange carrier," which offers telephone switching services in Washington State, Montana, North Dakota and Oregon. Pacific also supplies automatic number identification ("ANI") numbers to a customer in Belize. That foreign company then supplies the ANI numbers to various calling companies, which use them to make calls on behalf of various other businesses and charities. Pacific does not place any calls itself, nor does it generate any revenue through calls placed by the Belizean company's clients.

Plaintiff's motion seeks (1) an order dismissing Pacific and Hamilton's first and second affirmative defenses; and (2) judgment against defendants Pacific, Hamilton, Economic Strategy Group, Inc. ("ESG") and Jacob deJongh (collectively, the "312-a defendants") pursuant to CPLR § 312-a. Defendants Pacific and

Hamilton's motion seeks to dismiss the complaint for lack of personal jurisdiction over them.

Turning first to the service issue, CPLR § 312-a provides for personal service by mail if a plaintiff follows certain rules. There is no dispute that here, plaintiff followed the statute exactly. All defendants served pursuant to this section were supposed to complete an acknowledgement form, and return it within a certain time period. None of the 312-a defendants did so. Plaintiff thus was forced to serve them all via traditional methods of service. CPLR § 312-a plainly states that "Where the signed acknowledgement of receipt is not returned within thirty (30) days . . . the reasonable expense of serving process by an alternative method shall be taxed by the court . . . as a disbursement to the party serving process, and the court shall direct immediate judgment in that amount." There is no defense to this statute, where a plaintiff has complied with its requirements.

Plaintiff has submitted to the Court evidence demonstrating that he spent \$141.50 in serving Pacific; \$141.50 in serving Hamilton; \$193 in serving ESG; and \$193 in serving deJongh. He is thus entitled to "immediate" judgments against each of them in the amount listed above. See *Murphy-Tarver v. Lester*, 23 A.D.3d 993, 803 N.Y.S.2d 450 (4th Dept. 2005). Plaintiff may submit proposed judgments, on Notice of Settlement, to the Judgment Clerk.

Next, the Court has reviewed all of the parties' arguments about personal jurisdiction over Pacific and Hamilton. While it may well be true, as Pacific and Hamilton vociferously argue, that the Court ultimately does not have personal jurisdiction over them pursuant to CPLR §§ 302(a)(1) or (3), plaintiff here has alleged enough facts to warrant further investigation. As the Second Department recently held in the case of *Doe v. McCormack*, 100 A.D.3d 684, 953 N.Y.S.2d 666 (2d Dept. 2012), "the party seeking to assert personal jurisdiction . . . bears the ultimate burden on this issue. However, in opposing a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction." The Court went on to state that all that a plaintiff need do is "set forth a sufficient start, and show their position not to be frivolous. The jurisdictional issue is likely to be complex. Discovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits."


That is exactly the case here. Plaintiff has alleged that the Qwest agreements permit Pacific to make and receive calls to and from New York. Pacific denies that it does make or receive any calls from New York. The Court finds that limited discovery on Pacific's contracts with Qwest and any other interconnection agreements, and whether there are any contacts with New York, is

appropriate before the Court will make a final determination about personal jurisdiction. Because Hamilton and Pacific are so closely aligned, the Court will keep Hamilton in the action until the discovery has been completed. Accordingly, the Court denies plaintiff's motion to dismiss the first two defenses, and Pacific and Hamilton's motion to dismiss the complaint. The parties may make further motions once discovery has been completed.

As a practical matter, given the amount of expense that this discovery will entail, perhaps it makes sense for the parties to attempt to settle this matter. Plaintiff does not seek substantial damages and, if Pacific and Hamilton have never made any calls to plaintiff, it should not be difficult for them to agree not to call plaintiff in the future.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
January 28, 2013


HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Michael Wood
1214 W. Boston Post Road, #251
Mamaroneck, NY 10543

Porzio, Bromberg & Newman, P.C.
Attorneys for Pacific Telecom Communications Group and Steve
Hamilton
156 W. 56th St., Suite 803
New York, NY 10019