

Clipso USA, Inc. v Lynch-Geis
2013 NY Slip Op 32988(U)
November 22, 2013
Sup Ct, NY County
Docket Number: 653315/13
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JEFFREY K. OING
J.S.C.

PRESENT: _____
Justice

PART 48

Index Number : 653315/2013
CLIPSO USA, INC.
vs.
LYNCH-GEIS, DORIAN
SEQUENCE NUMBER : 002
VACATE DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

"This motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 11/22/13


JEFFREY K. OING, J.S.C.
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 48

-----x

CLIPSO USA, INC., CLIPSO AMERICAS,
INC., CLIPSO FINANCES SAS, BERNARD
GEIS, CATHERINE GEIS, CLIPSO
PRODUCTION, CLIPSO RUSSIE, CLIPSO
INDIA AND CLIPSO E&D,

Petitioners/Defendants,

Index No. : 653315/13

-against-

Mtn Seq. No. 002

DORIAN LYNCH-GEIS, individually and
derivatively on behalf of CLIPSO
USA, INC., FRANCOIS GEIS, AND
NATHANIEL WERNER,

Respondents/Plaintiffs.

-----x

JEFFREY K. OING, J.:

Relief Sought

Respondents/plaintiffs, Dorian Lynch-Geis, Francois Geis and Nathaniel Werner (collectively referred to as "respondents"), move for an order vacating this Court's order, entered October 21, 2013, which this Court granted on default, changing the venue of the underlying commercial action from Kings County to New York County. Further, upon vacatur, respondents, seek to have this Court deny petitioners/defendants, Clipso USA, Inc., Clipso Americas, Inc., Clipso Finances SAS, Bernard Geis, Catherine Geis, Clipso Production, Clipso Russie, Clipso India and Clipso E&D (collectively referred to as "petitioners") motion to change venue of the underlying commercial action.

I heard oral arguments on the motion on November 13, 2013. I directed counsel to submit supplemental papers to resolve the

issues herein. The November 13, 2013 transcript is incorporated herein, and made a part of this decision and order for all purposes.

Discussion

Respondents motion to vacate this Court's order changing venue is granted. The record demonstrates reasonable excuse for the default, namely, law office failure. As to meritorious defense to the motion to change venue, the record also demonstrates a meritorious defense.

Accordingly, respondents' motion to vacate this Court's order is granted, and it is hereby vacated.

Turning to the motion to change venue, respondents argue that the motion should have been brought before Supreme Court, Kings County. In that regard, respondents contend that bringing that motion in Supreme Court, New York County was not proper pursuant to CPLR 511(b) because they timely interposed objections to petitioners' demand.

That argument is unavailing. Clearly, CPLR 511(b) provides that if the plaintiff opposes defendant's demand within five days after service of the demand the motion to change venue is to be brought in the county where the action is pending. Here, respondents' counsel acknowledges that she received by electronic means petitioners' demand on September 12, 2013 at 8:30 p.m. On September 18, 2013, respondents' counsel served her objection to

the demand. Contrary to respondents' counsel's argument, the objection was to have been served on September 17, 2013, the fifth day after receipt of the demand. Under these circumstances, respondents' objection was not timely, and, as such, petitioners' motion to change venue made to this Court was proper. The question that remain is whether venue in Kings County is proper pursuant to CPLR 503(c) or 508.

CPLR 508 provides that the "place of trial of an action to recover chattel may be in the county in which any part of the subject of the action is situated at the time of the commencement of the action." Here, the underlying verified complaint alleges that the chattels are located in Blauvelt, NY and Nyack, NY. Nowhere in the verified complaint is there an allegation that any of the chattel is located in Kings County. Respondents' reliance on Bernard Geis's affidavit, dated June 24, 2013, submitted in a California action, to demonstrate otherwise, is misplaced. There, Geis states that the "property" at issue is located in California, New York and the United States (Geis Aff., ¶¶ 15-16). He does not state that the "property" is located in Kings County. Accordingly, CPLR 508 does not provide a proper basis for venue of the underlying action in Kings County. This determination is not dispositive.

CPLR 503(c) provides that a corporation " shall be deemed a resident of the county in which its principal office is located."

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Here, with respect to Clipso USA, Inc., petitioners argue that Clipso USA, Inc.'s principal office is in New York County. In that regard, they rely on the filing with the New York State Secretary of State. Indeed, that filing clearly indicates a New York County address. The problem is that Clipso USA, Inc. effectuated that filing on June 28, 2012. Further, the supplemental submissions indicates that a change of address, albeit to another New York County address, was made on December 21, 2012. The New York State tax return provided in the supplemental submissions also do not provide a resolution of this issue because it lists a California address.

Respondents point to Bernard Geis's statements in his affidavit, submitted in a California action, which clearly indicate that Clipso USA, Inc. has an "office in Brooklyn, New York, located at 66 North 11th Street, Brooklyn, NY 11249 ("Brooklyn Office")" (Geis Aff., ¶ 2). Further, Geis indicates that the Brooklyn office is more than a mere address; it is where Clipso USA, Inc. has its principal office (Id. at ¶¶ 13-15). Those statements alone may ring hollow, except when you consider the timing of the statements. What undermines petitioners' argument and reliance is the fact that Geis's affidavit, which respondents' rely on to support their argument that Clipso USA, Inc. has a Kings County office address, is dated June 24, 2013, nearly six months **after** the last filing with the Secretary of

State. Fatal to petitioners' argument is the fact that they failed to proffer a supplemental affidavit from Geis explaining his contradictory statements. Under these circumstances, petitioners have failed to demonstrate that Clipso USA, Inc. has its principal office in New York County, rather than Kings County. Accordingly, petitioners' motion to change venue from Kings County to New York County is denied.

Accordingly, it is

ORDERED that branch of respondents' motion to vacate the this Court's order, entered dated October 21, 2013, which this Court granted on default, changing the venue of the underlying commercial action from Kings County to New York County, is granted, and the order is hereby vacated; and it is further

ORDERED that the motion to change venue from Kings County to New York County is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/22/13


HON. JEFFREY K. OING, J.S.C.