Chaos Commerce, Inc. v Chain Rothman
2014 NY Slip Op 31896(U)
July 17, 2014
Sup Ct, New York County
Docket Number: 650223/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

CHAOS COMMERCE, INC.,

Plaintiff,

- v -

CHAIN ROTHMAN and ROSS ELECTRONICS, LTD.,

Defendants.

INDEX NO. 650223/2014

MOTION DATE

MOTION SEQ. NO. 1, 2

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion for/to	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

This is an action for breach of contract, breach of fiduciary duty, misappropriation, theft of trade secrets, unfair competition, and conspiracy based on an alleged non-disclosure and non-competition agreement between an e-commerce company and its former employee. Plaintiff Chaos Commerce Inc. ("Chaos" or "Plaintiff") claims to have entered into a "Non-Disclosure and Invention Assignment Agreement" (the "Agreement") with defendant, Chain Rothman ("Rothman"), on August 2, 2011, upon hiring Rothman as Plaintiff's Manager of the Returns Department. Plaintiff further claims that the Agreement prevents Rothman from disclosing Plaintiff's "confidential information", diverting or attempting to divert Plaintiff's business, and engaging, investing, or participating in any "competitor business" or "planned new business" in the United States, for a period of one year after Rothman's employment with Plaintiff terminated, for any reason.

Plaintiff claims that Rothman resigned from his position as Plaintiff's Manager of the Returns Department, effective January 11, 2013, and that Rothman breached the terms of the Agreement by obtaining employment with another e-commerce company, defendant Ross Electronics Ltd. ("Ross") (and together with Rothman, "Defendants"), shortly thereafter. Plaintiff also claims that Rothman revealed Plaintiff's confidential information, including the names of Plaintiff's

vendors and "know-how", to Ross, in violation of the Agreement, and that, as a result, Ross was able to expand into new markets and undercut Plaintiff's sales.

Additionally, Plaintiff claims that Ross knew of, and wrongfully interfered with, the Agreement, that Ross intentionally misappropriated Plaintiff's confidential information, and that together, Defendants knowingly converted Plaintiff's proprietary information for their own use.

Plaintiff's complaint seeks injunctive relief "restraining defendants from soliciting or contacting the plaintiff's suppliers, from using and/or disclosing plaintiff's confidential, proprietary and trade secret information for the benefit of themselves or any other person or entity, the defendant Rothman from obtaining or continuing to be employed by defendant Ross or any other competitor of the plaintiff;" injunctive relief "requiring defendants and all those acting in concert with them to account for and return to plaintiff any and all of plaintiff's materials, business information, supplier lists and other property wrongfully in defendants' possession, custody or control, including all copies thereof;" as well as damages no less than $10 million, punitive damages, and attorney's fees and costs.

Plaintiff commenced the instant action on January 23, 2014. Plaintiff moves for an order, pursuant to CPLR § 3215(b), directing the entry of judgment granting a permanent injunction in favor of Plaintiff and against defendants Chain Rothman ("Rothman") and Ross Electronics, Ltd. ("Ross") (collectively, "Defendants"), and setting this matter down for an inquest for damages.

In support, Plaintiff submits the affidavit of Elie Robinson ("Robinson"), Plaintiff's Chief Operating Officer, the affidavit of Kim Steven Juhase ("Juhase"), Plaintiff's attorney, a copy of the Agreement, the affidavit of service upon Rothman by Juhase, the affidavit of service upon Ross via the Secretary of State by Juhase, the affidavit of additional service upon Ross pursuant to CPLR § 3215(g)(4), and the affidavit of service of the RJI on Defendants.

With respect to Plaintiff's motion as against Rothman, CPLR § 3215(f) provides, in relevant part, "On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . .".

CPLR § 312-a(a), which permits personal service by first class mail, provides:

[* 3]

> As an alternative to the methods of personal service authorized by section 307, 308, 310, 311 or 312 of this article, a summons and complaint, or summons and notice, or notice of petition and petition may be served by the plaintiff or any other person by mailing to the person or entity to be served, by first class mail, postage prepaid, a copy of the summons and complaint, or summons and notice or notice of petition and petition, together with two copies of a statement of service by mail and acknowledgement of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender.

"The mailing of process pursuant to CPLR § 312-a does not effect personal service. Service is complete only when the acknowledgment of receipt in the form prescribed by CPLR § 312-a(d) is mailed or returned to the sender (CPLR 312-a[b]). If the acknowledgment of receipt is not mailed or returned to the sender, the sender is required to effect personal service in another manner (CPLR 312-a[e][f])." (*Shenko Electric, Inc. v. Harnett*, 1990 N.Y. App. Div. LEXIS 9337, 1 [4th Dep't 1990]).

In the affidavit of service upon Rothman, Juhase avers, "On January 24, 2014, I served the within Summons and Complaint with Notice of Commencement of Action Subject to Mandatory Electronic Filing by overnight delivery service by depositing a true copy thereof enclosed in a Federal Express wrapper in an official depository under the exclusive care and custody of the Federal Express Service to be delivered the next day, addressed to [Rothman]".

Here, Rothman was allegedly served by Federal Express, rather than first-class mail, as required to effectuate service pursuant to § 312-a. Additionally, Plaintiff's affidavit of service upon Rothman does not state whether Juhase enclosed two copies of the statement of service by mail and the acknowledgment of receipt in the format required under § 312-a, nor does Juhase state whether the acknowledgment of receipt was mailed or returned to sender. Thus, Plaintiff fails to demonstrate that the requirements for proper service upon Rothman were met, (CPLR 312-a; *Ananda Capital Partners, Inc. v. Stav Elec. Sys. (1994) Ltd.*, 301 A.D.2d 430, 430 [1st Dep't 2003]), and therefore fails to make a sufficient showing for purposes of § 3215(f).

As for Plaintiff's motion for a default judgment with respect to Ross, Ross now moves for an Order, pursuant to CPLR § 317, vacating the default judgment that will be imminently entered against Ross for failure to appear, or, in the alternative, pursuant to CPLR § 3012(d), extending Ross's time to appear in this action. Ross submits the affidavit of Rueven Lakein, Ross's owner and director of sales.

Pursuant to CPLR § 3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In order to be permitted to serve an untimely answer as timely, Defendant must provide both a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep't 2008]).

Lakein avers that Ross has a reasonable excuse for its delay because Ross did not receive actual notice of Plaintiff's summons and complaint. Lakein avers that "Ross maintains its principal place of business at 100 Rochester Avenue, Brooklyn, New York. One of Ross's previous addresses was 665 Crown Street, Brooklyn, New York, which up until this past month was the address on file with the Secretary of State. When Ross moved from the old Crown Street address, the company inadvertently failed to update its address with the Secretary of State." Lakein avers that Plaintiff's initiatory papers were delivered to the Secretary of State, but were returned unclaimed as a result of Ross's inadvertent failure to update its filing address with the Secretary of State.

Lakein further avers, "Ross first learned that plaintiff had filed a Summons and Complaint against the Company approximately two months ago, when it received a copy of the pleadings from plaintiff's lawyer via regular mail." Lakein avers that, "the mail was addressed to the Rochester avenue address, and the Summons lists the Company's address as 100 Rochester Avenue, Brooklyn, New York."

Additionally, Lakein avers that Ross contacted Plaintiff upon receipt of Plaintiff's summons and complaint "in an effort to reach a resolution" and that, "Unbeknownst to Ross, however, plaintiff pursued a default judgment against the Company while settlement discussions were taking place. When Settlement

discussions fell apart, it was then that Ross first learned that plaintiff's motion for default was fully submitted".

With respect to a meritorious defense, Lakein avers that Ross had "no knowledge whatsoever of any agreements [Rothman] may have had with plaintiff or any restrictive covenants prohibiting his employment with the company." Lakein further avers, "Nor did Ross have any contact with Rothman while Rothman was employed by plaintiff or otherwise attempt to persuade Rothman to breach any duties he may have owed to Plaintiff" and that "Rothman did not disclose to the Company any confidential or proprietary information allegedly belonging to plaintiff. Ross has never seen any confidential list of plaintiff's vendors, any of plaintiff's market research, or any insight into plaintiff's marketing techniques and sales channels." Additionally, Lakein avers that, "Ross does not have any confidential relationship with plaintiff and has never entered into any agreement with plaintiff concerning any matter whatsoever."

Lakein also avers that, "[Ross's] primary way of selling products is via third-party marketplaces such as Amazon, eBay, Rakuten (formerly Buy.com), Newegg, Nomorerack, Tango, and LivingSocial. The Company also sells products on its own website, Zagerz.com." Lakein avers that, "buyers such as Rothman monitor various deal sites such as woot, onesaleaday, nomorerack, slickdeals, eBay daily deals, Amazon daily deals, and the Buy.com (Ratuken) newsletter, as well as monitor Groupon and LivingSocial, on a daily basis to see what products are being sold and to find vendors to begin selling those products. Such information is easily and readily available to any buyer who is doing market research."

Lakein further avers, "[Ross's] decision to sell bedding was not based on any proprietary market data; rather, the Company's decision was based on easily accessible public information" and that "Ross and plaintiff are in a very competitive business; it is a commodities industry where thousands of online sellers are selling the same products at the same time. There is nothing proprietary about the choice of products that are sold online, as the same vendors sell to numerous customers who then re-sell their products on competing marketplaces regularly."

Settlement negotiations are in themselves an insufficient excuse for default. (*Krell v. Pelham Syndicate, Inc.*, 220 N.Y.S.2d 966 [1st Dep't 1961]). However, in certain circumstances, settlement negotiations may constitute a reasonable excuse for a defendant's delay in answering. (*Finkelstein v. East 65th St. Laundromat*, 215

A.D.2d 178 [1st Dep't 1995] [finding that "settlement negotiations between plaintiff and defendant landowner's insurer constitutes a reasonable excuse for defendant's delay in answering"]; *Mendoza v. Bi-County Paving*, 227 A.D.2d 302, 302-03 [1st Dep't 1996] [granting motion for leave to serve a late answer and vacating default where "settlement negotiations then made it prudent to delay service of an answer").

Additionally, "As a matter of general policy, disposition of controversies on the merits is favored" (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep't 1964]).

Here, Ross's delay was relatively short, and Plaintiffs have not shown that they have been prejudiced. "Under these circumstances, defendants' excuse for the default is reasonable and will be accepted." (*Pieretti v. Flair De Art, Inc.*, 99 A.D.2d 980, 981 [1st Dep't 1984]; *Mendoza v. Bi-County Paving*, 227 A.D.2d 302, 302-03 [1st Dep't 1996]).

Furthermore, Defendant appears to raise a potentially meritorious defense to Plaintiffs' complaint. Accordingly, in view of the relatively short delay and lack of prejudice to Plaintiffs, as well as the "settlement negotiations evincing defendant['s] interest in resolving the dispute, and the potential merit of a defense to the claim, and especially in view of our policy preference for resolving disputes on the merits, (*535 East 86th St. Corp. v. Mark*, 1998 N.Y. App. Div. LEXIS 13730, 1 [1st Dep't 1998]), permission to file a late answer is warranted.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for default judgment against Defendants is denied; and it is further

ORDERED that defendant Ross Electronics Ltd.'s motion for leave to serve a late answer is granted, and defendant Ross Electronics Ltd. is directed to serve its answer within 10 days of receipt of this Order with a copy of the notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 17, 2014

HON. EILEEN A. RAKOWER