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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JOHN WILEY & SONS, INC., WILEY PERIODICALS, INC., and BLACKWELL PUBLISHING, LTD., INDEX NO. 650375/13

Plaintiffs,

-against-

PIERRE GROSSMAN, CAMILLE GROSSMAN, ROBERTO SAAD, SUSANAN ISAY a/k/a SUSANA MARTA ISAY SAAD, FELIPE GARCIA, JOAO HACKER and RUTH PFINGST,

Defendants.

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JOAN A. MADDEN, J.:

Defendant Pierre Grossman moves for an order pursuant to CPLR 5015(a) to vacate the default judgment against him in the amount of $261,984.90 (motion seq. no. 002).[1] Defendant also moves by order to show cause pursuant to CPLR 2001, 2004 and 2214©, and court's inherent power, for leave to file surreply papers out of time in further support of his pending motion to vacate the default judgment (motion seq. no. 004).[2] Plaintiffs oppose both motions.[3]

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[1] After inquest, the Hon. Martin Schoenfeld awarded plaintiffs damages on their RICO claim in the sum of $64,124.65, which were trebled pursuant to the RICO statute, making the sum of $192,373.95, together with attorney's fees in the sum of $67,494.50 and costs of $2,116,46.

[2]Defendant Grossman initially moved *pro se*, and in addition to vacating the default judgment, sought to dismiss the complaint for lack of personal jurisdiction based on improper service. After Grossman retained counsel, his attorney submitted sur-reply papers merely seeking to vacate the default judgment, and no longer requesting dismissal based on improper service.

[3]The motions are consolidated for determination herein.

At the outset, defendant Grossman's motion for leave to file surreply papers is granted. "[A] court in the exercise of discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented evidence." Kennelly v. Mobius Realty Holdings LLC, 33 AD3d 380 (1st Dept 2006). Here, when Grossman originally made his motion to vacate the default judgment, he was representing himself. Before the parties had a chance to appear for oral argument on the motion, Grossman retained counsel for the first time and counsel attempted to submit a surreply in further support of the motion. After plaintiffs objected, Grossman's counsel filed the instant motion by order to show cause, seeking leave of court to submit a surreply. In response to the order to show cause, plaintiffs submitted opposition papers and had an opportunity to address any new arguments in the surreply. Under these circumstances, where Grossman initially appeared *pro se*, and plaintiffs had an opportunity to respond to the newly presented arguments and consequently suffered no prejudice, the court in the exercise of discretion will permit Grossman's counsel to submit the surreply so as to ensure a fair hearing of all issues presented and adequate briefing. See id; Fiore v. Oakwood Plaza Shopping Center, Inc, 164 AD2d 737 (1st Dept), aff'd 78 NY2d 952 (1991), cert den 506 US 823 (1992); Pope Investments LLC v. Pacificnet Games Ltd, 2013 NY Slip Op 33136 (U) (Sup Ct, NY Co 2013).

Turning to the merits of the underlying motion, a defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must establish both a reasonable excuse for his failure to appear and answer the complaint, and a meritorious defense to the action. See CPLR 5015(a); Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138 (1986); 60 E 9th St. Owners Corp. v. Zihenni, 111 AD3d 511 (1st Dept 2013); Goldman v. Cotter, 10 AD3d 289 (1st

Dept 2004). "The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court." Id at 291. "In exercising its discretion, the motion court should 'consider the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief.'" Nash v. Port Authority of New York and New Jersey, 22 NY3d 220, 226 (2013) (quoting Weinstein – Korn – Miller, NY Civ Prac ¶ 5015.03 at 50-284).

Here, defendant Grossman has put forth a sufficient excuse for his default, based on his reasonable belief that he could only be served in New York if he were physically present in New York to accept process, and as a citizen and resident of Brazil, he could only be served in Brazil in accordance with the Inter-American Convention on Letters Rogatory (28 USC §1781). The Affidavit of Service states that Grossman was served on February 11, 2013 at 6:35 p.m, by delivery of the summons and verified complaint to a "suitable age person . . . John Smalle Combe, Concierge at 100 Hilton Avenue, Unit M23, Garden City, New York, the said premises being the respondent's *place of Work within the State of New York*." Notably, plaintiffs also filed an Affidavit of Non-Service stating that on February 7, 2013 at 12:25 p.m., the process server "non-served the summons and complaint . . . for the reason that I failed to find Pierre Grossman or any information to allow further search." The affidavit provides the following details:

> Address provided [100 Hilton Avenue, Unit M23, Garden City, NY 11530] has security and a concierge. Personal in hand service was attempted on 2/6/13@ at 1:21 PM and 7/7/13 [sic] @ 12:225 PM, but on each attempt the concierge, Terrell S. stated that Pierre Grossman was not in. I asked if I could go up to Pierre Grossman's unit and Terrell informed me that I could only go up if Mr. Grossman gave permission.

CPLR 308(2) authorizes substituted service on a "person of suitable age and discretion" at a defendant's "actual place of business." The statute defines "actual place of business" to "include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business. CPLR 308(6); Vid v. Kaufman, 282 AD2d 739 (2nd Dept 2001). Case law holds that a person's "actual place of business" for the purposes of CPLR 308(2) "must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location." Selmani v. City of New York, 100 AD3d 861 (2nd Dept 2012); see Rosario v. NES Medical Services of New York PC, 105 AD3d 831 (2nd Dept 2013).

In his original *pro se* motion papers, defendant Grossman asserted, without the benefit of counsel, that he was not properly served at the apartment he owns in Garden City, because he is a resident and citizen of Brazil and service had to be made by letters rogatory pursuant to the Inter-American Convention of Letters Rogatory. Grossman submitted an affidavit that he does not reside or "live at" the Garden City apartment, he has "conducted no business in New York," and he received the "court papers" through an "informal way and too late to file an answer." In sur-reply, Grossman submits an Affidavit in Further Support of the Motion explaining that he stays in the Garden City apartment "one or two times each year . . during my occasional trips to New York," and even "though I have included the Garden City apartment as one of several business addresses for some of my business ventures on some of business cards and websites, from February 2013 and the present I have only occasionally been present at the Garden City apartment and I do not regularly check the mail." He further explains that he did not "immediately retain counsel out of the mistaken belief – based on my own research – that

plaintiffs' service of process was insufficient under the Inter-American Convention on Letters Rogatory and Brazilian law," and "mistakenly believed that unless I was handed the Summons and Complaint during one of my occasional visits to New York – Plaintiffs were required to effectuate service via letters rogatory because I am a Brazilian national who was in Brazil at the time when process was served." He states that "I did not formally appear in this action or respond to Plaintiff's Complaint with a formal answer, and instead wrote to Plaintiffs via e-mail on February 27, 2013 to demand that they withdraw the Complaint . . . [and] disputed, among other things, that basis of Plaintiffs' claims in this action."

Grossman states that had "I known after I sent the February 27, 2013 e-mail to Plaintiffs, that Plaintiffs were continuing to pursue this case against me, I would have made sure to either reach out to the Court directly from Brazil and attempt to defend against Plaintiffs' claims myself, or else I would have found a lawyer to represent me in this case sooner. However, I did not realize that Plaintiffs were continuing to pursue this case against me because I did not receive the notices that Plaintiffs were serving on me by mail at the Garden City apartment." Grossman explains he was not aware of plaintiff's motion for a default judgment, or the court's decision granting that motion, since plaintiff notified him by mail to the Garden City apartment in April 2013 and June 2013, and he was not present at the apartment during April, May or June 2013. He states, "I did not become aware that a judgment had been entered against me in this action until September 2013, when the plaintiff in a federal action where I am a defendant made reference to the judgment."[4]

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[4]Grossman is one of the defendants in an ongoing action in federal court, Elsevier, Inc. v. Pierre Grossman, IBIS Corp. and Publicacoes Tecnicas Internacionoais, 2015 WL 72604 (SDNY 2015), in which Elsevier, a publisher of scholarly books and journals, asserts subscription fraud

Grossman states, "I thereafter reached out to Roberto Bedrikow, Esq., a Brazilian attorney who represented one of my business ventures," and at his "request, Mr. Bedrikow wrote to plaintiffs' counsel on November 21, 2013, expressed the view that this action was improperly filed and sought a meeting with Plaintiffs' counsel to discuss the issues in this case." Grossman submits a copy of Mr. Bedrikow's email, and states that plaintiffs "did not consent to a meeting." Defendant also states he was not aware of the December 17, 2013 inquest, since plaintiffs again mailed the notice to the Garden City apartment and he did not receive the notice until January 2014. Grossman first appeared in this matter *pro se* when he attempted to file a motion to vacate the default judgment on January 31, 2014 and his papers were "rejected as defective." He successfully filed the motion in February 2014 and retained counsel sometime after the motion was submitted in the submissions part, but prior to oral argument before this court.

Based on the foregoing, the court concludes that Grossman has sufficiently established a reasonable excuse for his default, as he had a reasonable basis for believing that he was not properly served in New York. Plaintiffs served Grossman by substituted service on the doorman at his Garden City apartment building as his "actual place of business" pursuant to

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claims that are similar to the claims in instant action, i.e. civil RICO, fraud and conversion claims. On January 5, 2015, the federal district court issued a decision denying defendants' motion to dismiss. Id. In a prior opinion and order dated December 5, 2013, the federal court denied Elsevier's motion for default judgments against the three defendants, including Grossman, and granted defendants' cross-motion to vacate their defaults, on condition defendants reimburse Elsevier $5,000 for attorney's fees and costs incurred in connection with the motion. Elsevier, Inc v. Grossman, 2013 WL 6331839 (SDNY 2013).

By September 2013, this court, in May 2013 had granted plaintiffs' motion for a default judgment, set the matter down for an inquest on damages and directed plaintiffs to file note of issue by June 28, 2013. However, the inquest was not held until December 17, 2013 and the judgment was not filed until March 18, 2014. In the meantime, Grossman filed his motion to vacate the default in February 2014.

CPLR 308(2). Since Grossman uses the apartment "one or two times each year" on his "occasional trips to New York," it is questionable whether he is physically present with regularity at the apartment or regularly transacts business there. See Selmani v. City of New York, supra; Rosario v. NES Medical Services of New York PC, supra. Even if, as plaintiffs assert, Grossman has a car registered at the Garden City address and a telephone at the Garden City apartment, those facts are not inconsistent with an occasional presence at the apartment. Although Grossman now admits, with the benefit of counsel, that he has held out the Garden City address as his business address, that fact alone does not discount the reasonableness of his original belief as to improper service.

Moreover, the Affidavit of Non-Service demonstrates that plaintiffs were well aware that Grossman was not present at the apartment. Notably, although plaintiffs presumably knew that Grossman resided in Brazil and had his email address, every document mailed to Grossman was sent to only the Garden City address, and no additional mailings were sent to him in Brazil. Plaintiffs did not use Grossman's email address for any other document or notice other than the notice of the March 28, 2013 preliminary conference. Contrary to plaintiff's contention, the federal court's finding that Grossman wilfully defaulted in that case, has no bearing on this action, since the circumstances on which the federal court relied are not present here, and in any event, the federal court actually granted Grossman's motion to vacate his default.[5]

Turning to the issue of a meritorious defense, the court concludes that Grossman has made a strong showing as to potentially meritorious defenses to each cause of action in the

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[5]Defendants' counsel represented to the federal court that his client had instructed him not to file an answer or otherwise defend the case, and that his client "was not in any particular hurry to move this case along, feeling that it's a side show to disputes between the parties in Brazil.".

complaint. The complaint asserts causes of action for civil RICO violations (1st and 2nd causes of action), fraud (3rd cause of action), conspiracy to commit fraud (4th cause of action), breach of contract (5th cause of action) and conversion (6th causes of action).

As noted above, at the inquest, Justice Schoenfeld awarded plaintiffs damages, including treble damages, attorney's fees and costs, on their civil RICO claims. Under RICO (the Racketeer Influenced and Corrupt Organization Act, 18 USC §1961), "it is unlawful to use income from a 'pattern of racketeering activity' (1) to acquire an interest in or to establish or operate an enterprise engaged in or affecting interstate commerce (18 USC §1962[a]), (2) to acquire or maintain an interest in such an enterprise through a pattern of racketeering activity (§1962[b]), (3) to conduct or participate in the conducting of such an enterprise through a pattern of racketeering activity (§1962[c] and (4) to conspire to do any of the foregoing acts (§1962[d])." Simpson Electric Corp v. Leucadia Inc, 72 NY2d 450, 453 (1988).

Courts have "imposed a heightened pleading requirement" for civil RICO violations as such claims have been "found to be 'an unusually potent weapon – the litigation equivalent of a thermonuclear device." Besicorp Ltd v. Kahn, 290 AD2d 147, 151 (3rd Dept), lv den 98 NY2d 601 (2002) (quoting Miranda v. Ponce Federal Bank, 948 F2d 41 (2nd Cir 1991). The elements of a civil RICO claim are: 1) conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. See Podraza v. Carriero, 212 AD2d 331, 335 (4th Dept), lv dism 86 NY2d 885 (1995). To establish a pattern of racketeering activity, plaintiff must allege at least two related predicate acts of racketeering activity as defined under 18 USC §1961(5). See DC Media Capital LLC v. Sivan, 2009 WL 1030808 (Sup Ct, NY Co 2009); Pinnacle Consultants, Ltd v. Leucadia National Corp, 101 F3d 900, 904 (2nd Cir 1996). Section 1961(1) enumerates the different predicate

offenses that constitute "racketeering activity," including, *inter alia*, mail fraud and wire fraud. See 18 USC §1961(1).

Here, defendant Grossman has established several meritorious defenses to the RICO claims, including that they are not pleaded with the requisite specificity, and are time-barred, in whole or part. The complaint alleges that defendants engaged in "subscription fraud" by conspiring to purchase individual subscriptions at discounted rates and then reselling those subscriptions to institutions at the higher rate, thereby reaping "substantial profits, while causing Plaintiffs to sustain injury to their business and property." Grossman objects that the complaint, including the schedule annexed to the complaint, fails to plead the particulars as to the date, time or location of the allegedly fraudulent statement, the identities of the persons who whom those statements were made, and the specific content of the statements, the schedule annexed . He further object that the complaint fails to identify the institutional end users to whom he allegedly re-sold the journals, and the specific dates on which made the alleged misrepresentations as to the identities of the end-users. Grossman submits an affidavit directly refuting plaintiffs' allegations by denying that he made any misrepresentations as to the en-users of plaintiffs' journals, and denying that he purchased subscriptions or journals at the discounted rates for individuals and then re-selling them to institutions. Grossman states that if "I ever represented that I was the end-user of any journals I ordered or caused to be ordered from Plaintiffs, I was, in fact, the end-user."

The statute of limitations for a RICO violation is four years, and the cause of action accrues from the time the alleged injured party knew or reasonably should have known of the injury. See Podraza v. Carriero, supra at 339. The instant action was commenced on February

4, 2013. The complaint alleges that from "[b]etween approximately 1998 through 2012 . . . the Enterprise was used to obtain at least 54 fraudulent subscriptions from Plaintiffs." Grossman objects that the complaint does not specify the dates on which any alleged acts of mail or wire fraud occurred, and according to Schedule A to the complaint, of the 54 journals listed as allegedly resold to institutional end-users, 42 have dates ranging from 1998 to 2008. Thus, it is unclear to what extent the RICO claims are timely.

Turning to the balance of the complaint, Grossman asserts, *inter alia*, that the fraud claim is duplicative of the breach of contract claim, which alleges that by purchasing discounted subscriptions, defendants entered in to a contract with plaintiffs requiring them to identify the correct end-users and prohibited them from reselling discounted subscriptions. See OP Solutions, Inc v. Crowell & Moring, LLP, 72 AD3d 622 (1st Dept 2010). Grossman likewise asserts that the conversion claim is duplicative of the contract claim. See M.D. Carlise Realty Corp v. Owners & Tenants Electric Co Inc, 47 AD3d 408 (1st Dept 2008). He argues the contract claim may be barred at least in part by the six-year statute of limitations, since the complaint does not set forth the dates of any alleged contracts or breach of such contracts. As to the conspiracy to commit fraud claim, Grossman argues that it cannot survive in the absence of the fraud claim, since New York does not recognize a independent tort to commit a conspiracy. Abacus Federal Saving Bank v. Lim, 75 AD3d 472 (1st Dept 2010).

Finally, as to the additional factors considered in deciding whether to vacate a default judgment, plaintiffs fail to demonstrate that vacating the default will unjustly prejudice them, and the State's preference for resolving controversies on the merits weighs in favor of vacating Grossman's default. See Rosenblatt v. New York City Transit Authority, 122 AD3d 410 (1st

Dept 2014); Spira v. New York City Transit Authority, 49 AD3d 478 (1st Dept 2008). However, in view of the litigation necessitated and costs incurred as a result of Grossman's default, vacatur is conditioned upon the payment of $6,000 to plaintiffs' attorney within 30 days of service of a copy of this decision and order. See Rosenblatt v. New York City Transit Authority, supra; Spira v. New York City Transit Authority; supra; Goldman v. Cotter, 10 AD3d 289 (1st Dept 2004).

Accordingly, it is

ORDERED that defendant Grossman's motion to vacate the default judgment is granted and the judgment entered in favor of plaintiff and against defendant Pierre Grossman is vacated, on condition that defendant Pierre Grossman pay plaintiffs' counsel the sum of $6,000 within 30 days of service of a copy of this decision and order; and it is further

ORDERED that within 20 days of the date of this decision and order, defendant Grossman shall serve and file an answer; and it is further

ORDERED that the Clerk is directed to restore this matter to active status and place it on this court's conference calendar for a preliminary conference on March 5, 2015 at 11:00 am; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on March 5, 2015 at 11:00 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: January 21, 2015

ENTER:

HON. JOAN A. MADDEN
J.S.C.