

Gitlin v Stealth Media House, LLC
2016 NY Slip Op 32481(U)
December 16, 2016
Supreme Court, New York County
Docket Number: 653000/2016
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SAUL GITLIN,

Index No.: 653000/2016

Plaintiff,

DECISION & ORDER

-against-

STEALTH MEDIA HOUSE, LLC, STEALTH SME,
LLC, GLOBAL WORKS GROUP, LLC, HARVEY
NEWKIRK, DORSEY JAMES, and CHRISTOPHER
ADEN,

Defendants.

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

Plaintiff Saul Gitlin (Gitlin) moves for a default judgment, pursuant to CPLR 3215, against defendants Stealth Media House, LLC (Stealth), Stealth SME, LLC (SME), and Global Works Group, LLC (Global Works) (collectively, Corporate Defendants). Gitlin further moves, pursuant to CPLR 308(b), for additional time to serve defendants Harvey Newkirk (Newkirk), Dorsey James (James), and Christopher Aden (Aden) (collectively, the Individual Defendants) with process, and for leave to serve an information subpoena pursuant to CPLR 5224. The motion is unopposed. Gitlin's motion is granted in part and denied in part, without prejudice, for the reasons that follow.

I. Background and Procedural History

1. Facts Relevant to Claims

The facts recited are taken from the in the complaint affirmed by plaintiff¹ and the documentary evidence. Gitlin is a communications and marketing professional specializing in

¹ Only plaintiff's counsel verifies the complaint, which alleges facts not within counsel's personal knowledge. Dkt. 1 at 18. Nevertheless, in an affidavit annexed to this motion, Gitlin

international and cross-cultural marketing. Dkt. 1 [Verified Complaint (VC)] ¶ 2. Defendant Global Works Group, LLC (Global Works) is an international advertising company. VC ¶ 3.

On April 1, 2014, Global Works hired Gitlin. VC ¶ 4. Gitlin alleges that in October of 2014, Gitlin, Global Works, Stealth, and SME (Stealth's subsidiary), entered into an "Executive Employment Agreement." VC ¶¶ 8 & 19-20. Gitlin does not attach a copy of the employment contract to the complaint or to the instant motion. Thus, the court cannot determine who was actually a party to the contract, or to which parties the contract's liquidated damages provisions apply.

Gitlin alleges the employment contract named Global Works as "employer" and Gitlin as "employee". VC ¶ 22. Gitlin states that he was to serve as Global Works' Chief Marketing and Strategy Officer for an initial term of October 16, 2014 to December 31, 2017, earning \$165,000 per year. *Id.* At the same time that Gitlin entered into his employment contract, the complaint alleges, Stealth purchased Global Works via a separate Membership Interests Purchase Agreement.²VC ¶¶ 7 & 22(c). Defendants Harvey Newkirk, Dorsey James, and Christopher Aden owned Stealth and served as Stealth's general counsel, CEO, and CFO, respectively. *Id.*

According to Gitlin, his employment contract established different procedures for terminating his employment. VC ¶ 22. Before Global Works could terminate Gitlin for cause, it had to provide written notice to Gitlin setting forth the reasons for the termination, and allow at least 20 days to cure. VC ¶ 22(l). If Global Works were to terminate Gitlin without cause, Gitlin was entitled to liquidated damages equal to the greater of (1) Gitlin's base salary for the

incorporates the allegations in the complaint by reference, and affirms that he has personal knowledge of those allegations. Dkt. 5 ¶¶ 1-2.

² Gitlin alleges that delivery of Gitlin's executed employment agreement was a condition precedent to closing on the membership interest purchase agreement. VC ¶ 22. Gitlin does not provide a copy of the membership interest purchase agreement.

remainder of the initial term, or (2) \$165,000 plus any accrued and unpaid performance bonuses. VC ¶ 22(k). The VC alleges that in early 2015, the parties agreed to increase Gitlin's salary to \$250,000, retroactive to January 1, 2015. VC ¶ 3. Gitlin claims that defendant James memorialized Gitlin's salary increase in an April 11, 2015 email (though, again, Gitlin does not provide a copy of the email). VC ¶24. Additionally, Global Works allegedly agreed to reimburse Gitlin for his business related expenses, and to refrain from making disparaging comments about Gitlin. VC ¶ 22.

Gitlin alleges that during his employment with Global Works, DISH Network was the company's largest client. VC ¶ 13. Global Works orchestrated advertising campaigns for DISH Network, which involved entering into contracts with third-party media outlets to run DISH Network's advertisements. VC ¶ 14. DISH Network would pay Global Works for its media placements, and Global Works was to forward DISH Network's payments to the third-party vendors. VC ¶¶ 17-18.

Gitlin claims that in early 2015, he learned that Global Works was improperly diverting DISH Networks' advertising payments to pay off Global Works' own creditors. VC ¶ 25. According to Gitlin, Gitlin objected to the diversions several times. VC ¶ 26. He claims that as a result, on June 4, 2015, Global Works terminated his employment. VC ¶ 53. Gitlin alleges that he received no written notice that he had ever failed to carry out his job responsibilities. VC ¶ 54.

After Gitlin's termination, Global Works allegedly presented Gatlin with a proposed severance package equal to two-weeks' pay, which Gatlin refused to accept. VC ¶¶ 28-29. Moreover, Gitlin alleges that Global Works refused to compensate him for approximately \$3,396.45 in business expenses. VC ¶30. He does not submit any documentation of those expenses.

In light of these allegations, Gitlin seeks to recover: (1) unreimbursed business expenses in the amount of \$3,396.45, (2) \$644,519.13 in liquidated damages, calculated by prorating Gitlin's \$250,000 annual base salary from June 5, 2015 (the day after his firing) to December 31, 2017 (the end of his initial contractual employment term), and (3) costs. VC ¶ 31.

Finally, Gitlin alleges that after his termination, Stealth and Global Works slandered him to DISH Network and Allstate (another company client). VC ¶¶ 60-65. According to the complaint, someone from Stealth falsely represented to DISH Network that Gitlin had been involved in diverting money from their account to pay off Global Works' creditors. *Id.* Gitlin also alleges that someone from Global Works falsely represented to Allstate that Gitlin had failed to properly submit their invoices for payment. *Id.* Based on these allegations, the complaint seeks damages for breach of the employment contract's disparagement provision, defamation, and for unpaid accrued performance bonuses. Gitlin, however, agrees to waive these claims if granted default judgment on his primary breach of contract claim -- breach of the contractual termination provisions and liquidated damages. Dkt. 4 [Lerner Affirmation] ¶ 11.

2. *Facts Relevant to Defendants' Default*

On June 14, 2016, Gitlin served Stealth, SME, and Global Works by delivering two copies of the summons and complaint to their authorized agent in the Office of the New York Department of State. Dkt. 7. The Corporate Defendants failed to answer, move to dismiss, or otherwise appear. Dkt. 4 ¶ 63. On July 15, 2016, Gitlin served the Corporate Defendants with notice under CPLR 3215(g)(4) that unless Corporate Defendants responded to Gitlin's complaint within 20 twenty days, Gitlin would seek default judgment against them. Dkt. 8. Corporate Defendants again did not answer or otherwise plead, and on October 14, 2016, Gitlin filed the instant motion. Defendants have not responded to the motion.

According to plaintiff's counsel, counsel has not been able to locate the Individual Defendants through public record searches and internet searches.³ Dkt. 4 ¶ 65. Gitlin seeks an additional 120 days to serve the Individual Defendants, pursuant to CPLR 306(b). *Id.* ¶ 66. Alternatively, Gitlin requests leave to serve the Individual Defendants via text message to their cell phones. *Id.* ¶ 66. The proposed text message would read:

"Please take notice that a lawsuit has been filed against you by my client Saul Gitlin, NY Supreme Court Index No. 653000116. Please contact me (or have your lawyer contact me) via email richardlerner@msn.com to obtain a copy of the summons and complaint. /s/ Richard E. Lerner, attorney for plaintiff Saul Gitlin"

Finally, although leave is not required to serve an information subpoena, Gitlin seeks leave to serve Brevet Capital Management with an information subpoena regarding the location of the Corporate Defendants' assets, and the individual defendants. CPLR 5224.

II. Discussion

CPLR 3215(a) authorizes the court to enter a default judgment against a party who fails to appear. The moving party must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. CPLR 3215(f); *Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 (2nd Dept 2010) ("A verified complaint may be used as the affidavit of the facts constituting the claim...but it must allege enough facts to enable a court to determine that a viable cause of action exists."); *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (party moving for default must offer firsthand confirmation of facts constituting claim); Siegel, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, p

³ Defendant Newkirk was apparently convicted of felony wire fraud and is pending appeal. *Id.*; see also *United States v Newkirk*, No. 14-CR-534-02 (JSR), 2016 WL 1659149, at *1 (SDNY Apr. 19, 2016) (denying Newkirk's motion for judgment of acquittal or new trial).

557, Thomson Reuters ©2014. The evidentiary effect of a default is that the defendant is deemed to admit the traversable allegations in the complaint, including liability. *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984).

Gitlin's motion is denied, without prejudice with leave to renew and, upon renewal, submission of a complete copy of Gitlin's employment contract and any other documents on which Gitlin bases his breach of contract claims. Gitlin has not stated that the contract is unavailable and cites excerpts from the contract in his motion papers. Without a copy of Gitlin's employment contract, the court cannot determine whether a viable cause of action exists against *all* of the Corporate Defendants for breach of contract. Gitlin should also present proof of a valid, written modification of the employment contract reflecting a salary increase from \$165,000 to \$250,000 retroactive to January 1, 2015, and proof of his unreimbursed business expenses. *See* NY General Obligations Law § 5-1103 (McKinney 2016) ("Modifications to a contract need not be supported by additional consideration when the modification is in writing and signed by the party against whom it is sought to be enforced.").

Gitlin's request for additional time to serve the individual defendants is granted. CPLR 306(b) permits the court to extend the time for service of the summons and complaint for good cause. The court finds that good cause exists to extend the time to serve defendants Newkirk, James, and Aden by an additional 120 days, given Gitlin's good faith efforts to locate them. However, the court notes that the VC, as presently constituted, likely fails to state a claim against the individual defendants. Gitlin does not allege that the individual defendants were parties to Gitlin's employment contract with Global Works, or that any basis exists to hold the individual defendants liable for Global Works' breach. *See Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 (1st Dept 2002). Additionally, Gitlin's defamation

claim lacks the required specificity [CPLR 3016(a)] with respect to the individual defendants and Gitlin's damages.

Gitlin's request to serve Brevet Capital Management with an information subpoena is granted, although the court notes that court approval is not required to serve an information subpoena in the first instance. The subpoena should be limited to determining the location of the Corporate Defendants' assets and the location of the individual defendants. Accordingly it is,

ORDERED that plaintiff Saul Gitlin's motion for a default judgment is denied, without prejudice and leave to renew upon submission of contract documents necessary to establish the facts constituting Gitlin's claims; it is further

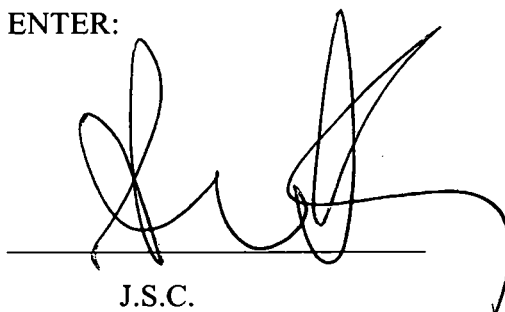
ORDERED that Gitlin's motion for additional time to serve the individual defendants Newkirk, James, and Aden is granted. Gitlin may have another 120 days from the date of the entry of this order on the NYSCEF system to serve said defendants; it is further

ORDERED that Gitlin may serve an information subpoena on Brevet Capital Management; it is further

ORDERED that Gitlin shall serve a copy of this order with notice of entry on all defendants within 5 days of its entry on the NYSCEF system.

Dated: December 16, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
7 J.S.C.