

Taboola, Inc. v Newsweek Media Group, Inc.

2018 NY Slip Op 32428(U)

September 28, 2018

Supreme Court, New York County

Docket Number: 654462/2018

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

-----X INDEX NO. 654462/2018

TABOOLA, INC.,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEWSWEEK MEDIA GROUP, INC. F/K/A IBT MEDIA, INC., NEWSWEEK, LLC

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD

Upon the foregoing documents:

Defendants Newsweek Media Group, Inc. and Newsweek LLC (collectively, "Newsweek") seek an Order vacating the September 11, 2018, Judgment entered against them by the Clerk of the Court in the above-referenced matter. The judgment was entered based on an Affidavit of Confession of Judgment executed by Newsweek's Chief Executive Officer, which was submitted by Plaintiff Taboola, Inc. ("Taboola") upon Newsweek's breach of a settlement agreement between the parties. Newsweek also seeks an Order declaring that it is in "full compliance" with the settlement agreement.

In support of its motion, Newsweek contends that it was only one business day late in making a payment to Plaintiff Taboola, Inc. ("Taboola") under the parties' agreement. While not disputing that the late payment breached the terms of the parties' agreement, Newsweek nevertheless contends that in fairness it should be spared the consequences of the breach - which are set forth with specificity in the agreement - because it was "de minimis" and did not

Taboola v. Newsweek
654462/2018

2

prejudice Taboola. For the reasons set forth below, and as stated on the record at a hearing on September 27, Newsweek's motion is Denied.

Background

This is the third lawsuit between these parties based on a series of breaches of contract by Newsweek.

In the first action¹, Taboola alleged that Newsweek breached its agreement to display Taboola's "widget" on the Newsweek website on an exclusive basis and had failed improperly to permit Taboola to recoup substantial prepayments that had been made to Newsweek in connection with the agreement. Taboola and Newsweek entered into a settlement agreement on September 9, 2013, resolving those claims. Under this First Settlement Agreement, the parties entered into a new publishing arrangement under which Taboola's widget would be displayed on the Newsweek website and Taboola would receive all revenue share payments made to Newsweek by third parties until it had been repaid in full for its unrecouped prepayments under the initial agreement (\$343,510.54). The settlement agreement provided that a failure by Newsweek to duly launch Taboola's widget on its website would trigger an obligation to pay the full amount of unrecouped payments in installments, plus interest, plus \$250,000 in attorneys' fees, for a total of \$634,336.53. According to Taboola, and not rebutted by Newsweek, Newsweek breached the First Settlement Agreement by failing to launch Taboola's website and failing to make the required payments.

Taboola then filed a *second* lawsuit in this Court, this time asserting breach of the First Settlement Agreement and seeking to recover damages of \$634,336.53.² Newsweek failed to

¹ *Taboola, Inc. v. IBT Media, Inc., et al.*, Index No. 650470/2016 (Sup. Ct., NY Cty.).

² *Taboola, Inc. v. IBT Media, Inc., et al.*, Index No. 651426/2018 (Sup. Ct., NY Cty.).

Taboola v. Newsweek
654462/2018

3

respond to the Complaint. In lieu of a default judgment, the parties entered into a *Second Settlement Agreement* on April 17, 2018. Under that agreement, Taboola agreed to accept \$384,336.53 in settlement of its claims, payable in installments pursuant to a clearly defined schedule.

We are now faced with a *third* action, in which Taboola asserts that Newsweek has breached the Second Settlement Agreement by failing to make payment in a timely manner. It is in that context that the instant motion arises.

The Second Settlement Agreement

The Second Settlement Agreement sets forth strict terms to ensure prompt and reliable compliance. Specifically, Newsweek was to pay Taboola \$40,000 by April 30, 2018, and then \$34,443.65 “by the last day of the month for the ten following months, beginning on May 31, 2018.” (Katzen Aff. Exhibit 1 (“2nd Settl. Agt.”) at ¶ 1). The agreement provides that, in the event of a failure by Newsweek to make the required payments, it would be obligated to pay Taboola the *full* amount sought in the second lawsuit (\$634,336.53). (*Id.* at ¶ 3.) To secure this obligation, Newsweek was required to (and did) execute an Affidavit of Confession of Judgment in the amount of \$634,336.53, to be held in escrow by Taboola’s counsel. (*Id.* at ¶ 1.) In the event of a breach, Taboola’s counsel was authorized to release the Confession of Judgment to Taboola, after which “Taboola may, at its option, proceed with filing and seeking to enforce the Confession of Judgment in court without further notice to [Newsweek].” (*Id.* at ¶ 3.)

Furthermore, the Second Settlement Agreement was explicit with respect to the existence of a strictly circumscribed grace period for late payments. Specifically, it provides for “a *one-time only* cure period of two weeks . . . with respect to the payment deadlines” set forth in the agreement. (*Id.* at ¶ 4 (emphasis added)). To emphasize the point, the agreement further states

Taboola v. Newsweek
654462/2018

4

that “[Newsweek] shall only be permitted to invoke the Cure Period *once* under the [Second] Settlement Agreement.” (*Id.*) (emphasis added). Finally, the Second Settlement Agreement provides that “[i]n the event [Newsweek] fail[s] to make any payment in a timely manner under the Payment Schedule in Paragraph 1 (or during the Cure Period if applicable) [Newsweek] will be deemed in breach and Taboola shall be permitted to file and enforce the Confession of Judgment *without allowing any cure period for late payment.*” (*Id.* at ¶ 4.)

Newsweek’s first failure to make timely payment occurred less than two weeks after it signed the Second Settlement Agreement. The payment due on April 30, 2018, was not made until May 9, 2018, thus exhausting the one and only grace period permitted under the contract. After making timely payments at the end of May and June, Newsweek again failed to make timely payment on July 31, 2018. That payment was not made until August 17, 2018.³

Finally, Newsweek failed to make its next monthly payment, which was due on August 31. The payment was, instead, made on the next business day, September 4, 2018. According to Newsweek’s President, the failure to make the payment on August 31 was due to an “administrative error.” (NYSCEF Doc. No. 7, Aff. of Dev Pragad ¶¶ 5, 9.)⁴

Taboola submitted Newsweek’s previously executed confession of judgment on September 4, 2018. (NYSCEF Doc. No. 1.) Judgment in favor of Taboola was entered by the Clerk on September 11, 2018, in the amount of \$634,336.53 plus costs and disbursements of \$225. (NYSCEF Doc. No. 4.)

³ According to an affirmation submitted by Taboola’s general counsel, the payment was made only after Taboola complained about the missed deadline. (NYSCEF Doc. No.14, Aff. of Ezra Katzen ¶ 27.)

⁴ Taboola’s general counsel states that Taboola “believes” the late payment was initiated only after Newsweek became aware that Taboola had filed the Confession of Judgment and proposed judgment with the Court earlier that day. (Aff. of Ezra Katzen ¶ 28.) Although it was not entirely clear at the hearing, Newsweek’s counsel seemed to deny that assertion.

Taboola v. Newsweek
654462/2018

5

Newsweek's Motion

On September 14, Newsweek filed a motion by order to show cause seeking, *inter alia*, to vacate the judgment under CPLR §5015(a) and CPLR §2001. It also sought a temporary restraining order prohibiting all actions, efforts, and proceedings by Taboola, its agents and attorneys to enforce the judgment pending a hearing on Newsweek's motion. Justice Perry granted the temporary restraining order that same day, pending a hearing on Newsweek's motion. (NYSCEF Doc. No. 12.) The hearing was held on September 27, 2018.

In support of its motion to vacate the judgment, Newsweek relies on the fact that the August payment was made one business day late due to an administrative error, and that it would be "wholly unjust" to allow Taboola to undertake a "bad-faith attempt to hold Defendants in default of the [Second] Settlement Agreement based on what can, at best, be described as a *de minimus* [sic] default" (NYSCEF Doc. No. 6, Aff. of Glenn Spiegel ¶¶ 4, 7.) Newsweek further contends that "equity dictates" that a "technical breach" should not result in a substantial financial forfeiture. (Id. ¶ 11.)

Notably, the supporting affirmation submitted by Newsweek's President (and repeated by counsel) in support of its appeal to equity did not disclose the background facts leading up to the Second Settlement Agreement (including Newsweek's breach of the First Settlement Agreement) and, most significantly, did not disclose the fact that Newsweek had failed to make timely payment on *two separate occasions* (in April and July). Worse yet, the affirmations represent that all prior payments were made "in accordance with the terms of the [Second] Settlement Agreement" (Aff. of Dev Pragad ¶ 8; Aff. of Glenn Spiegel ¶ 6.), without disclosing that two of those payments were late. Given the significance of the timeliness of payments, and

Taboola v. Newsweek
654462/2018

6

Newsweek's suggestion that Taboola took action in "bad faith" after a single *de minimis* breach, the Court regards those statements to be misleading at best.

The Court did not know the relevant facts of the case until Taboola filed its opposition. At the hearing on September 27, Newsweek's counsel did not contest the accuracy of the factual presentation by Taboola, with the possible exception of the contention that Newsweek's September 4 payment was made only after Taboola had filed the Confession of Judgment earlier that day. The denial was made without reference to any specific evidence. In any event, the Court does not consider the point to be material to its decision. Whatever precipitated the payment, the fact remains that it was late.

Analysis

The Second Settlement Agreement was negotiated and signed by sophisticated parties. Its terms are not ambiguous, including as to both the importance of Newsweek adhering to the payment schedule (which is understandable in light of the unexplained breach of the First Settlement Agreement) and as to the consequences to Newsweek in the event of a breach.

It is undisputed that the August payment was late, as were the April and July payments before it. Although Newsweek suggests it is significant that there was not a "time is of the essence" provision in the agreement, it entirely ignores the fact that the agreement very clearly states that there is only one cure period. In this case, that cure period was already exhausted (twice) before the delayed payment for September. The agreement expressly provides that "[i]n the event [Newsweek] fail[s] to make *any* payment in a timely manner under the Payment Schedule in Paragraph 1 (or during the Cure Period if applicable) [Newsweek] will be deemed in

Taboola v. Newsweek
654462/2018

7

breach and Taboola shall be permitted to file and enforce the Confession of Judgment *without allowing any cure period for late payment.*" (2nd Settl. Agt. at ¶ 4.) Particularly in view of the past relationship between the parties, it should have come as no surprise to Newsweek that Taboola would assert the rights expressly granted to it under the Second Settlement Agreement in the event of a default. Accordingly, it was incumbent on Newsweek to turn square corners in complying with the agreement. It failed to do so.

The grounds for granting vacatur of a judgment are set forth in CPLR §5015(a). None of the specific grounds set forth are satisfied (or even applicable) in this case.⁵ Even assuming the Court has the discretion asserted by Newsweek to go beyond the terms of CPLR 5015(a) in the name of equity, the facts set forth above and discussed on the record at the hearing do not warrant such a result. In fact, the balance of equities tilts decidedly in the opposite direction. This was an agreement between two sophisticated parties. There is nothing inequitable in holding Newsweek to the terms of its agreement.

Newsweek's reliance on CPLR §2001 is both unexplained and unavailing. That provision focuses on the Court's ability, in certain circumstances and upon such terms as may be just, to disregard "mistakes, omissions, defects, and irregularities" in connection with court filings and pleading. Newsweek offers no support for applying that section to relieve it of compliance with the unambiguous terms of the Second Settlement Agreement.

Therefore, it is:

⁵ Under CPLR §5015(a) there are five specific grounds for seeking vacatur of a judgment. They are as follows: (i) excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; (ii) newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; (iii) fraud, misrepresentation, or other misconduct of an adverse party; (iv) lack of jurisdiction to render the judgment or order; or (v) reversal, modification or vacatur of a prior judgment or order upon which it is based.

Taboola v. Newsweek
654462/2018

ORDERED Defendant's motion to vacate the September 11, 2018, judgment (NYSCEF Doc. No. 4) and declare that they are in compliance with the Second Settlement Agreement is denied; and it is further

ORDERED that the temporary restraining order entered by this Court on September 14, 2018 is dissolved; and it is further

ORDERED that Defendant is to file this Order along with the transcript of the hearing held on September 27, 2018, with Notice of Entry on NYSCEF which will constitute good service on Plaintiff.

HON. JOEL M. COHEN
J.S.C.


JOEL M. COHEN, J.S.C.

9/28/2018
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE