Empire Wine & Spirits, LLC v Convenient Sys., LLC
2018 NY Slip Op 33879(U)
April 10, 2018
Supreme Court, Albany County
Docket Number: 17-904871
Judge: Michael H. Melkonian

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

EMPIRE WINE & SPIRITS, LLC,

Plaintiff,

-against-

CONVENIENT SYSTEMS, LLC d/b/a THE RESULTS GROUP,

Defendant.

DECISION AND ORDER

(Supreme Court, Albany County, Motion Term, January 4, 2018)
Index No. 17-904871
(RJI No. 01-17-126665)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Whiteman Osterman & Hanna, LLP
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MELKONIAN, J.:

Plaintiff Empire Wine & Spirits, LLC ("plaintiff") moves for a default judgment with attorney's fees against defendant Convenient Systems, LLC d/b/a The Results Group ("defendant") for its failure to answer the Amended Verified Complaint. Defendant opposes and cross-moves for summary judgment and cancellation of plaintiff's trademark.

On July 27, 2017, plaintiff commenced the instant action by filing a summons and verified complaint with the Albany County Clerk's office. On September 14, 2017, defendant filed its verified answer containing three counterclaims. Plaintiff's complaint contained 52 allegations of fact in support of three causes of action: statutory and common-law service mark/trade name infringement (see, General Business Law § 360–k), dilution of its mark (see, General Business Law § 360–l) and unfair competition. Plaintiff also sought injunctive relief. In sum and substance, plaintiff alleges it is the service mark holder of "Empire Wine" and "Empire Wine & Liquor Outlet." Plaintiff contends that in or about April 2017, defendant scheduled a wine festival marketed as "Empire Winefest" in violation of its service mark(s), which caused confusion among plaintiff's customers. On October 4, 2017, plaintiff filed an Amended Complaint and a Reply to defendant's counterclaims. Although defendant served an answer to the original complaint, it is undisputed that it never served an answer to the amended complaint.

The Court turns first to defendant's cross-motion for summary judgment dismissing the complaint and granting it summary judgment cancelling plaintiff's trademark.

"A motion for summary judgment may not be made before issue is joined (CPLR § 3212[a]) and the requirement is strictly adhered to" (Rochester v Chiarella, 65 NY2d 92, 101 [1985]). An amended complaint, once served, supersedes the initial complaint and becomes the only complaint in the case as though the initial complaint was never served (Schoenborn v Kinderhill Corp., 98 AD2d 831, 832 [3rd Dept. 1983]). In Schoenborn, the Court held that the trial court was powerless to grant summary judgment before defendant answered the amended complaint (98 AD2d at 832); see, also, Pourquoi M.P.S. v Worldstar Int'l, 64

AD3d 551 (2nd Dept. 2009); Greene v Hayes, 30 AD3d 808 (3rd Dept. 2006); see, also, Valentine Transit, Inc. v Kernizan, 191 AD2d 159 [1st Dept. 1993]).

By amending the complaint and serving it upon defendant, plaintiff replaced the original complaint as if the original complaint never existed. Accordingly, defendant's motion for summary judgment is premature (see, Schoenborn v Kinderhill Corp., 98 AD2d 831, 832 [3rd Dept. 1983]). Moreover, the record is replete with conflicting factual allegations, and thus summary judgment is inappropriate for that reason as well (see, generally, Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

The Court turns next to plaintiff's motion which is for an order granting a default judgment.

To establish entitlement to a default judgment, a plaintiff is required to submit proof of service of the summons and the complaint, of the facts constituting the claim, and of the default (see, CPLR § 3215[f]).

As afore stated, on July 27, 2017, plaintiff commenced the instant action by filing a summons and verified complaint with the Albany County Clerk's office. Thereafter, the parties executed a stipulation consenting to New York State Court's electronic filing system. On September 14, 2017, defendant filed its verified answer containing three counterclaims. On October 4, 2017, plaintiff filed an Amended Complaint. In support of its motion for leave to enter a default judgment against defendant, plaintiff submits a confirmation notice from the e-filing system with the above titled caption and index number noting that on October 4, 2017, it indeed filed an "Amended Complaint." On December 12, 2017, defendant served an amended answer with counterclaims against plaintiff, which was

rejected by plaintiff as untimely.

In response to plaintiff's motion, defendant concedes that it failed to file an amended answer to plaintiff's amended complaint. Defense counsel argues, however, that plaintiff's motion should be denied since "plaintiff has made no showing of prejudice to his case caused by the short delay in responding to plaintiff's new factual allegations." Counsel argues that defendant timely answered the original complaint and consented to this Court's jurisdiction. Counsel also argues that the amended complaint "contains literally the same causes of action as the original complaint, adding only six new factual allegations, and making small cosmetic changes to a couple more paragraphs." In a Memorandum of Law, defendant asks the court, in effect, to compel the plaintiff to accept its untimely amended answer. Counsel explains that defendant's failure to timely respond to the new pleading occurred, in part, due to attorney error. Counsel states that when plaintiff filed its amended complaint, plaintiff did not simultaneously file a response to the defendant's counterclaims (the reply was e-filed separately 4 hours later) and counsel "missed it in his email." Defendant's counsel states that he was under the misapprehension that since no response to the defendant's counterclaims had apparently been filed by the plaintiff, that the defendant still had leave, pursuant to CPLR § 3025(a), to file an amended answer controverting plaintiff's new factual allegations at any time prior to the plaintiff's answer to the counterclaims. Counsel also argues that public policy is served by deciding this dispute on the merits.

Defendant's application for affirmative relief was not, however, as pointed out by plaintiff's counsel, set forth in a notice of cross-motion duly served pursuant to CPLR §

2215. Instead, the defendant included the application in a memorandum of law by its' attorney submitted in opposition to the plaintiff's motion.

Although defendant failed to timely answer the amended verified complaint in this action, it previously appeared by counsel and answered the original complaint. The Court finds that the Amended Complaint does not allege new causes of action or theories against defendant. Defendant has alleged law office failure in the nature of an oversight by defense counsel in not answering the amended verified complaint. The defendant has raised a meritorious defense in its answer which is essentially the same answer as the original complaint. Defendant timely opposed plaintiff's default motion and submitted a proposed amended answer. Given the foregoing, it is clear defendant did not intend to default in appearing in this action.

Public policy favors the resolution of cases on the merits. There is no indication of prejudice to plaintiff or willfulness on defendant's part.

While defendant did not make a proper cross-motion as is required under CPLR § 2215, defendant did clearly seek to have the Court compel the acceptance of its amended answer (which was attached to its papers). Plaintiff was on notice of this request, and responded to it in its reply papers. Accordingly, the Court waives this procedural defect, pursuant to CPLR § 2001 (see, Fox Wander W. Neighborhood Assn. v Luther Forest Community Assn., 178 AD2d 871, 872 [1991] [in the absence of an explicit notice of cross motion, the Court is not "prohibited" from entertaining the nonmoving party's request for relief]); see, also, Baron v Grant, 48 AD3d 608 [2nd Dept. 2008]).

Accordingly, and in an exercise of this Court's discretion, it is ORDERED, that the

motion for a default judgment against defendant is denied, and it is further ORDERED, that defendant's default in answering is vacated, and it is further that the proposed amended answer annexed to defendant's opposition papers shall be deemed served upon plaintiff *nunc pro tunc.*

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the defendant. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Troy, New York
Dated: April 10, 2018

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Notice of Motion dated December 6, 2017;
(2) Affirmation of Tara McNeill, Esq., dated December 6, 2017, with exhibits annexed;
(3) Affidavit of Bradley Junco dated December 5, 2017, with exhibits annexed;
(4) Memorandum of Law;
(5) Affidavit of Tom Tarry dated December 27, 2017, with exhibits annexed;
(6) Notice of Cross-Motion dated December 28, 2017;
(7) Affirmation of Frank C. Pavia, Esq., dated September 13, 2017, with

exhibit annexed;

(8) Memorandum of Law;

(9) Memorandum of Law;

(10) Affirmation of Tara McNeill, Esq., dated January 8, 2018, with exhibits annexed; and

(11) Affidavit of Bradley Junco dated January 8, 2018.