

Taboola, Inc. v Newsweek Media Group, Inc.

2021 NY Slip Op 31228(U)

April 6, 2021

Supreme Court, New York County

Docket Number: 654462/2018

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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TABOOLA, INC.,

Plaintiff,

- v -

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

Defendant.

INDEX NO. 654462/2018

MOTION DATE 01/05/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for ORDER TO PAY MONIES INTO COURT

Upon the foregoing documents, it is

Defendants Newsweek Media Group, Inc. and Newsweek LLC (collectively, “Newsweek”) move by way of Order to Show Cause seeking an Order, pursuant to CPLR § 5021(a)(3), permitting Defendants to deposit with the clerk of the County of New York, the sum of \$503,477.45 in full satisfaction of the judgment entered in the above-entitled action on September 11, 2018. For the following reasons, Defendants’ 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 action, Taboola, Inc. (“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. The settlement agreement provided that a failure by Newsweek to comply with the new publishing agreement 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.

Newsweek breached the First Settlement Agreement by failing to comply with the new publishing agreement. 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. Newsweek failed to respond to the Complaint and 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.

In the present third action, Taboola asserts that Newsweek has breached the Second Settlement Agreement by failing to make payment in a timely manner. The Second Settlement Agreement sets forth strict terms to ensure prompt and reliable compliance (NYSCEF Doc. No. 15). 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) (NYSCEF Doc. No. 15). To secure this obligation, Newsweek executed an Affidavit of Confession of Judgment in the amount of \$634,336.53, to be held in escrow by Taboola's counsel (NYSCEF Doc. No. 15). 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]." (NYSCEF Doc. No. 15).

On September 4, 2018, Taboola submitted Newsweek's previously executed confession of judgment (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, for a total of \$634,561.53. (NYSCEF Doc. No. 4.)

Newsweek's motion to vacate the judgment was denied by Justice Joel M. Cohen (NYSCEF Doc. No. 20) and Newsweek's subsequent appeal of Justice Cohen's decision was affirmed by the Appellate Division (NYSCEF Doc. No. 25).

On July 22, 2019, Taboola assigned its rights, title and interest in the Judgment to Westchester Fire Insurance Company ("Westchester") (NYSCEF Doc. No. 61) and thereafter, on or about June 18, 2020, Westchester Fire Insurance Company assigned the Judgment in the principal amount of \$634,336.53 to Creditor Heavy, Inc. ("Heavy") (NYSCEF Doc. No. 54).

Analysis

Defendants are now seeking to deposit with the clerk \$503,477.45, a sum which is \$130,859.08 less than required by the judgement. Defendants' contention that they are entitled to pay a lesser amount because of prepayments previously made is unpersuasive.

The prepayments in question are alleged to have been made prior to September 24, 2018. However, Justice Joel M. Cohen's September 28, 2018 decision denied Defendants' motion to vacate the judgment and dismissed Defendants' argument that it was entitled to credit for prior payments on the Second Settlement Agreement. It is clear, as Justice Cohen stated, that Taboola's acceptance of a lesser amount than the \$634,336.53 was predicated on settlement payments being timely made under the schedule set by the parties in the Second Settlement Agreement.

Relief pursuant to CPLR § 5021(a)(3) to satisfy a judgment is an extraordinary procedure, and there should be a sound reason for resorting to it (*see Meilak v Atl. Cement Co.*,

30 AD2d 254, 255, 291 NYS2d 639, 641 [1968]). Further, in the absence of a tender of payment in the amount of the plaintiff’s judgment, relief under CPLR § 5021(a)(3) is barred (*Id.* at 643).

Defendants allege that they tendered the sum of \$503,477.45 to Heavy Inc. on September 23, 2020. However, this amount is undeniably less than the amount of Taboola’s judgment.


Accordingly, it is hereby

ORDERED that Defendants’ motion pursuant to CPLR § 5021(a)(3), permitting Defendants to deposit with the clerk of the County of New York, the sum of \$503,477.45 in full satisfaction of the judgment entered in the above-entitled action on September 11, 2018, is denied; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

4/6/2021
DATE


SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE