

GTR Source, LLC v Zomongo.tv USA Inc.
2022 NY Slip Op 35143(U)
December 28, 2022
Supreme Court, Nassau County
Docket Number: Index No. 000531/2018
Judge: Conrad D. Singer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,
Justice

TRIAL PART: 23

-----X
GTR SOURCE, LLC,

Plaintiff,

-against-

ZOMONGO.TV USA INC. D/B/A ZOMONGO.TV USA and
JOCELYNE LISA HUGHES-OSTROWSKI and JEREMY
GENE OSTROWSKI,

Defendants.
-----X

Index No.: 000531/2018

Motion Seq. No.: 002

Motion Submitted: 11/1/2022

DECISION AND ORDER ON
MOTION
XXX

The following papers read on this motion:

Defendants' Notice of Motion and Supporting Papers.....	1
Plaintiff's Affirmation in Opposition to	
Defendants' Motion to Reargue and Renew.....	2
Defendants' Memorandum of Law in Reply.....	3

Upon the foregoing e-filed documents, the motion filed by the defendants in this matter,

ZOMONGO.TV USA INC. D/B/A ZOMONGO.TV USA and Jocelyne Lisa Hughes-Ostrowski and Jeremy Gene Ostrowski [collectively, "defendants"], for an Order pursuant to CPLR § 2221(f), granting leave to reargue and leave to renew this Court's Decision and Order dated March 30, 2022; and pursuant CPLR § 5015(d) entering restitution with interest from May 30, 2018, is determined as follows herein:

The prior Short Form Order dated March 30, 2022¹ that is the subject of the defendants' Motion to Renew and Reargue denied the defendants' prior motion which was filed June 1, 2021 and which sought an Order pursuant to CPLR § 5015[a] and CPLR § 5240: 1) vacating the Execution and Levy issued to BMO Harris Bank, N.A.; and, 2) upon vacatur, directing that plaintiff pay restitution to the defendants in

¹ The prior Short Form Order was issued by Hon. Helen Voutsinas while she was the Supreme Court Justice presiding over this matter. This case was transferred to this Part after Judge Voutsinas was elevated to the Appellate Division, Second Department.

an amount equal to all monies paid out by BMO Harris Bank, N.A., 3) together with attorney's fees.

The defendants' motion is a combined motion for leave to reargue and leave to renew the Court's prior Decision dated March 30, 2022. Under CPLR § 2221(d), a motion for leave to reargue:

- "1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry...." (CPLR § 2221[d]).

Under CPLR § 2221(e), a motion for leave to renew:

- "1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR § 2221[e]).

The defendants' motion is a combined motion for leave to reargue and renew. Under CPLR § 2221(f), such motion,

"...shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination." (CPLR § 2221[f]).

The portion of the defendants' motion which seeks leave to renew is first premised on arguments and facts that were previously raised and relied upon by the defendants in their prior motion, i.e., that the subject Levy and Demand were served by fax out of the Marshal's jurisdiction in violation of New York law. The defendants contend, however, that at the time of their original motion, they did not have a copy.

and could not obtain a copy, of the subject Execution and Levy. Judge Voutsinas noted in her Short Form Order that “plaintiff [*sic*] has not provided a copy of the Marshall’s Execution and Levy...”.

The defendants contend that because this index number (000531/2018) does not apply to an action but instead applies to a confession of judgment, the defendants were precluded from serving discovery in this matter. They further contend that, upon commencing a plenary action under index number 606686/2021, in which they have brought claims against GTR Source LLC, Tsvi Davis, Tzvi Reich, and David Fogel, P.C., they were able to engage in discovery and serve the Marshal with a Subpoena Duces Tecum and that they have since obtained the documents that were missing when they filed their initial motion, i.e., copies of the subject Execution and Levy. The plenary action was commenced on May 26, 2021, with the filing of a Summons and Complaint. According to the defendants, discovery in the plenary action did not begin until nearly a year later, in March of 2022.

As cited above, a motion to renew brought pursuant to CPLR § 2221(e), “shall be based upon new facts not offered on the prior motion that would change the prior determination...” [CPLR § 2221(e)(2)], and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]). In this case, the Court finds that the defendants have failed to provide a reasonable justification for the failure to include the subject Execution and Levy documents with their initial motion papers. Accordingly, the Court finds that it is without discretion to grant leave to renew based on the submission of those facts. (*See Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc.*, 271 AD2d 636, 638 [2d Dept 2000]; *Greene v. New York City Hous. Auth.*, 283 AD2d 458, 459 [2d Dept 2001]).

The Court further finds that by relying on the Decision and Order of Kings County Supreme Court Justice Lillian Wan dated May 4, 2022, the defendants fail to establish entitlement to leave to renew based on an alleged “change in the law that would change the prior determination”. (CPLR § 2221[e][2]). The

defendants have failed to establish how a decision issued by a judge in a coordinate jurisdiction, and deciding a dispute which involves different parties and different facts, could qualify as “a change in the law that would change the prior determination”. (CPLR § 2221[e][2]). Furthermore, after reviewing the Decision and Order of Hon. Lillian Wan, the Court finds that the decision, while well-reasoned and well-supported, did not “change” the applicable law, but rather, reflected Justice Wan’s understanding of the present law as she believed it applied to the facts of that case.

Accordingly, as the Court finds that the defendants have failed to satisfy the requirements to succeed on a motion to renew brought pursuant to CPLR § 2221[e], the portion of the defendants’ motion which seeks leave to renew is DENIED.

The defendants have also moved for reargument pursuant to CPLR § 2221[d], and argue that such relief is warranted based on: 1) Judge Voutsinas’s alleged misapplication of the law in holding that the defendants failed to provide any admissible proof as to where the subject bank accounts were located; and 2) Judge Voutsinas allegedly misconstruing the defendants’ argument in support of their prior motion. “A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law”. (*McGill v. Goldman*, 261 AD2d 593, 594 [2d Dept 1999] [citations omitted]). “It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented,” (*McGill*, 261 AD2d at 594 [citations omitted]).

The defendants correctly contend that their submission of a sworn affidavit in proper form by an individual with personal knowledge of the facts constitutes admissible evidence. (*O’Sullivan v. Atrium Bus. Co.*, 246 AD2d 418, 419 [1st Dept 1998]). The Court has been presented with no basis to reject the

affirmant's sworn statement that defendants' bank accounts were at all times maintained at a branch of BMO Harris Bank in Tempe, Arizona. (*Affidavit of Jeremy Ostrowski submitted in support of prior motion*, appended as Ex. F to defendants' motion to renew/reargue, NYSCEF Doc. 67, ¶ 6). Accordingly, insofar as Justice Voutsinas appeared to have determined that the defendants did not provide "any admissible proof as to where the subject accounts were located", the defendants' motion to reargue is granted as the Court's determination in that regard appears to be a misapprehension of facts.

However, upon granting the defendants' motion to reargue, and accepting as true that the defendants proved the location of the defendants' bank accounts, the Court finds that the defendants have otherwise failed to prove that the Court overlooked or misapprehended relevant facts or that the Court misapplied any controlling principle of law. The defendants contend that Justice Voutsinas misconstrued the defendants' argument, and that "because there are no BMO Harris Banks within the NYC Marshal's jurisdiction of the five boroughs, any attempt by any NYC Marshal to levy upon any BMO Harris Bank account anywhere in the U.S. would be considered void *ab initio* as it would be impossible to serve the levy personally within the Marshal's jurisdiction of New York City as required by the CPLR and NYCAA." (Reply Affirmation of Ashlee Colonna Cohen, Esq., dated July 11, 2022, p. 13). However, the defendants have failed to establish that in their specific case, Justice Voutsinas misapplied the law by determining that the defendants were nonetheless required to establish how the levy was served in their specific case, which required evidence that the defendants did not submit in their initial motion, and for which omission they failed to provide reasonable justification, precluding the Court from granting their motion to renew.

Accordingly, the defendants' motion to reargue is GRANTED to the extent that the defendants established the location of the defendants' bank accounts through a sworn affidavit, but, upon reargument,

the Court hereby adheres to the initial determination issued by Hon. Helen Voutsinas, and the defendants' motion to vacate the Execution and Levy issued to BMO Harris Bank, N.A., is DENIED.

Accordingly, it is hereby,

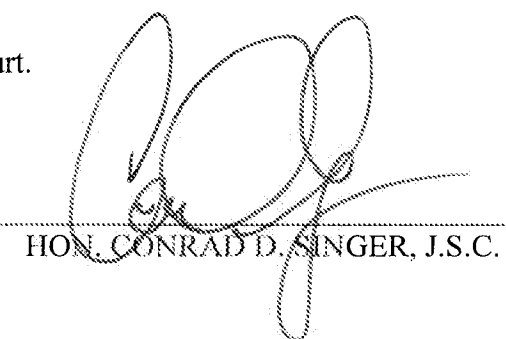
ORDERED, that the portion of the defendants' motion which seeks leave to renew pursuant to CPLR § 2221[d] is DENIED; and it is further,

ORDERED, that the portion of the defendants' motion which seeks leave to reargue pursuant to CPLR § 2221[e] is GRANTED, and, upon reargument, this Court adheres to the determination of Hon. Helen Voutsinas, issued by Short Form Order dated March 30, 2022, and the defendants' motion to vacate the Execution and Levy issued to BMO Harris Bank, N.A., is DENIED; and it is further,

ORDERED, that all other requests for relief not specifically addressed herein are deemed DENIED.

This constitutes the decision and Order of this Court.

Dated: December 28, 2022
Mineola, New York



HON. CONRAD D. SINGER, J.S.C.

ENTERED

Jan 04 2023

NASSAU COUNTY
COUNTY CLERK'S OFFICE