

Rich Button Co. Ltd v ITS Worldwide LLC

2024 NY Slip Op 32900(U)

August 16, 2024

Supreme Court, New York County

Docket Number: Index No. 651083/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

RICH BUTTON CO. LTD,

Plaintiff,

- v -

ITS WORLDWIDE LLC,

Defendant.

-----X

INDEX NO. 651083/2020

MOTION DATE 08/15/2024

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 59, 61, 62, 63, 64, 65, 70, 71, 72, 73, 78

were read on this motion to/for EXTEND - TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 66, 67, 74, 75, 76, 77

were read on this motion to/for INJUNCTION/RESTRAINING ORDER
ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion pursuant to CPLR § 306-b to vacate dismissal of the complaint and to extend its time to serve the summons and complaint upon defendant is granted (motion sequence number 003); and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon 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); and it is further

ORDERED that time for service and filing of proof of service of the summons and complaint is extended for twenty days from service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's motion for a stay of entry of the final judgment of dismissal (motion sequence number 004) is dismissed, as moot; and it is further

ORDERED that defendant shall serve an answer to the complaint or otherwise move within twenty days of service of the summons and complaint; and it is further

ORDERED that counsel shall appear via Microsoft Teams for a preliminary discovery conference on October 22, 2024.

DECISION

By order dated July 10, 2024, this court not only granted defendant's motion to vacate the judgment of default dated March 26, 2024, but also dismissed the action for lack of personal jurisdiction. Upon reconsideration, upon vacating the default judgment, this court should have ordered defendant to answer or otherwise move with respect to the complaint, as the defenses of lack of personal jurisdiction and unauthorized foreign corporation may be waived. See RCA Records, Div of RCA Corp v Wiener, 166 AD2d 221 (1st Dept 1990) (defense of lack of legal

capacity to sue is waived unless raised either by a motion to dismiss or in responsive pleading). On such basis, this court grants plaintiff's motion to vacate the order dated July 10, 2024, only to the extent that such order granted dismissal of this action.

This court agrees that that though such order dismissed the complaint at bar, "the action [is] pending until there is a final judgment". See State of New York Mortgage Agency v Braun, 182 AD3d 63, 68 (2d Dept 2020). Thus, despite the order of dismissal, the action is pending, as final judgment in this action has yet to be entered. On such basis, plaintiff has established that it is entitled to relief pursuant to CPLR § 306-b.

Jimenez v City of New York, 13 AD3d 107 (1st Dept 2004) is not to the contrary, as such case is distinguishable on its facts. As stated by the Second Department in Braun, supra, at 75-76:

However, as discussed above, the statute does not provide that a motion pursuant to CPLR 306-b to extend the time for service must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss and prior to the entry of judgment, or that a motion pursuant to CPLR 306-b to extend the time for service must be made in any particular time frame.

In Jimenez, the First Department cited to Sottile in support of the proposition that "[m]oreover, once the action was dismissed, plaintiff could no longer seek an extension of time to effect service" (Jimenez v City of

New York, 13 AD3d at 107). The decision and order in Jimenez does not indicate whether a judgment had been entered, and it gave this rationale about the plaintiff no longer being able to seek an extension once the action was dismissed only after explaining why an extension was not warranted (see id. ["Although extensions of time should be liberally granted on good cause shown or in the interest of justice, plaintiff made no showing of diligence, that the cause of action had merit, that there had been no undue delay in service, or that he had promptly requested the extension of time. Moreover, once the action was dismissed, plaintiff could no longer seek an extension of time to effect service" (citations omitted)]).

As the record before this court shows that plaintiff was diligent in seeking to serve defendant; promptly moved, immediately after the court granted vacatur of the default judgment, for an extension of time to effectuate proper service; and has a meritorious cause of action, relief pursuant to CPLR § 306-b is warranted.

Debra A. James

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8/16/2024

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: