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

PRESENT: Madden Justice

PART 11

Edman & Co., LLC

-v-

Z&M Media, LLC

INDEX NO. 102178/11

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Vacate Default Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED

DEC 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: December 5, 2012

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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EDMAN & COMPANY, LLC,

Plaintiff,

INDEX NO. 102178/11

-against-

Z & M MEDIA, LLC,

Defendant.

----------X

JOAN A. MADDEN, J.:

Defendant moves for an order pursuant to CPLR 317 and CPLR 5015(a)(4) vacating the default judgment entered against it on May 22, 2012 in the amount of $165,434.85, and to dismiss the complaint on various grounds. Plaintiff opposes the motion and cross-moves for "leave of court to cure any alleged procedural irregularities or defects in prior submissions or otherwise that under the law are curable."

Plaintiff commenced this action in February 2011, seeking to recover damages for breach of a September 2009 contract entitled Agreement for Advertising Sales in Hip Hop Weekly Magazine. The contract describes defendant Z & M Media, LCC as "Publisher" and owner of Hip Hop Weekly Magazine, and plaintiff Edman & Company LLC, as an "independent contractor" and defendant's "Representative" for the purpose of "direct[ing] and develop[ing] sales as East Coast and West Coast Ad Sales Director for Hip Hop Weekly Magazine." The contract provides that the "interpretation and enforcement of this Agreement will be governed by the laws of the State of New York." The contract also provides that "[b]oth Publisher and Representative shall defend and indemnify each other for all claims, liabilities, actions or proceedings (including reasonable attorney's fees) arising out of acts and omissions of the other."

The complaint asserts a first cause of action for breach of contract alleging that defendant breached the agreement by failing to pay plaintiff the commissions due under the agreement. The complaint asserts a second cause of action for double damages and attorneys fees based on Labor Law §191-c. The complaint alleges that plaintiff is a Connecticut limited liability company, and that defendant is a Florida limited liability company, which "[t]ransacted business and/or supplied goods in New York State . . . [r]egularly did or solicited business in New York State . . . [e]ngaged in any other persistent course of conduct in New York State . . . and/or . . . [e]xpected or should reasonably have expected its acts to have consequences in the state and derived substantial revenue from interstate or international commerce."

Defendant does not dispute that it neither appeared in this action nor answered the complaint. After this court granted plaintiff's motion for a default judgment and directed an inquest and assessment of damages, defendant failed to appear at the inquest. A judgment was entered on May 22, 2012 in the total amount of $165,434.85, which includes reasonable attorney's fees, costs and disbursements in the amount of $13,693, and interest in the amount of $16,861.85. In an effort to enforce the judgment, plaintiff served a Restraining Notice with Information Subpoena dated June 4, 2012 on JP Morgan Chase Bank in Indianapolis, Indiana. On or about June 28, 2012, defendant filed an order to show cause seeking to vacate the default judgment, dismiss the complaint and vacate the restraining notice.

In support of the motion, defendant makes the following arguments: 1) plaintiff, a foreign limited liability company, was not licensed to do business in New York, and as such was prohibited from bringing this action pursuant to New York Limited Liability Company Law §808; 2) the default judgment was improper as plaintiff submitted an out-of-state affidavit

without a certificate of conformity which "rendered the default void" under CPLR 2309(c); 3) the court lacked personal jurisdiction over defendant pursuant to Limited Liability Company Law §304, warranting vacatur pursuant to CPLR 317; 4) the court "lacked subject matter jurisdiction over this case as the contract was executed outside the State of New York by a Connecticut plaintiff and a New Jersey defendant, with its only business location in the State of Florida, and that the only connection with New York was that the plaintiff drafted the contract setting New York law as governing the business relationship"; 5) even if the court has subject matter jurisdiction, the judgment should be vacated and the complaint dismissed pursuant to CPLR 327 on forum non conveniens grounds; 6) defendant has meritorious defenses; and 7) the restraining notice served on Chase Bank in Indiana does not retrain defendant's bank account in Florida based on the "separate entity rule" of Global Technology, Inc v. Royal Bank of Canada, 34 Misc3d 1290(A) (Sup Ct, NY Co 2012).

None of defendant's arguments provides a sufficient factual or legal basis for vacating the default judgment or dismissing the complaint. While plaintiff acknowledges that it was not licensed as a foreign limited liability authorized to do business in New York, which was necessary under Limited Liability Company Law §808 to bring this action, that defect is not fatal to this action, but is curable nunc pro tunc. See Mobilevision Medical Imaging Services, LLC v. Sinai Diagnostic & Interventional Radiology, P.C., 66 AD3d 685 (2nd Dept 2009) Showcase Limousine, Inc v. Carey, 269 AD2d 133 (1st Dept 2000). To that effect, plaintiff cross-moves for leave to obtain authorization to do business in New York as a foreign limited liability company. That cross-motion is granted, and the enforcement of the judgment shall be stayed to afford plaintiff a opportunity to comply with Limited Liability Company Law §808. Id.

Likewise, the absence of a certification of a foreign affidavit required by CPLR 2309(c) is a "mere irregularity, and not a fatal defect." Matapos Technology Ltd v. Compania Adina De Comercio Ltda, 68 AD3d 672, 673 (1st Dept 2009). "As long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary." Id. In response to the motion, plaintiff has satisfied this requirement by submitting a Certificate of Conformity.

Defendant fails to raise any issue as to the lack of personal jurisdiction based on defective service pursuant to Limited Liability Company Law §304. On June 20, 2011, plaintiff filed an "Affidavit of Compliance" which satisfies the service, notice and filing requirements of section 304. In its original motion papers, defendant relied solely on the separate and initial Affidavit of Service dated April 11, 2011 and filed April 13, 2011. Notably, defendant's motion papers did not include and therefore did not address the later Affidavit of Compliance filed in June. Now, in reply, defendant argues that such affidavit does not satisfy the following portion of section 304(e): "If acceptance [of the registered mailing] was refused, a copy of the notice and process together with notice of the mailing by registered mail and refusal to accept shall be promptly sent to such foreign limited liability company at the same address by ordinary mail and the affidavit of compliance shall so state."

Contrary to defendant's argument, plaintiff has complied with the foregoing provision. The Affidavit of Compliance explicitly states that the summons and complaint were served on defendant by delivery to the Secretary of State on April 8, 2011, pursuant to section 304 of the Limited Liability Company Law, that copies were mailed to defendant on April 1, 2011 by registered mail, return receipt, and that "[r]egistered mail return envelope were received by

deponent [process server] on June 20, 2011, returned by the U.S. Post Office, marked 'return to sender-unclaimed.'" The Affidavit of Compliance further states that "[o]n June 20, 2011 a true copy of said Summons and Complaint and Notice were mailed to defendant at said address by first class mail, with certificate of mailing." Also, on a separate page attached to the Affidavit of Compliance, are copies of the certificate of mailing, and the post office stamp indicating that the registered mail addressed to defendant was "unclaimed." Thus, since the Affidavit of Compliance establishes that plaintiff satisfied the requirements of Limited Liability Company Law §304, defendant has failed to raise any issue as to personal jurisdiction.

Defendant's objection as to subject matter jurisdiction does not properly address the issue of subject matter jurisdiction. Defendant's assertion that the parties are both foreign companies with no connection to New York, goes to the issue of long-arm jurisdiction, which is a question of personal, as opposed to subject matter jurisdiction. The court notes that even if an issue of long-arm jurisdiction were raised, defendant does not dispute the allegations in the complaint, quoted above, regarding its business activities in New York.

Defendant seeks dismissal of the complaint on grounds of forum non conveniens. Since defendant has not provided a sufficient basis for vacating its default, it is not in a position to move for dismissal on forum non conveniens grounds pursuant to CPLR 327.

As defendant has failed to establish a legal basis for vacating the default judgment based on the grounds asserted in the motion, the court need not determine whether defendant otherwise has a meritorious defense.[1]

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[1]The court notes that defendant's motion papers provide no excuse or explanation for its failure to timely appear and answer, and that defendant is not moving to vacate its default under CPLR 5015(a)(1) which requires a showing of both a reasonable excuse and a meritorious

Finally, defendant argues that the restraining notice served on Chase Bank in Indiana does not act to restrain its bank account in Florida, citing the "separate entity rule." Plaintiff's opposition papers do not address this argument. The court agrees with defendant that under the separate entity rule the restraining notice served on the bank branch in Indiana does not restrain bank accounts in Florida. See International Legal Consulting Ltd v. Malabu Oil & Gas Ltd 35 Misc3d 1203(A) (Sup Ct, NY Co 2012); Global Technology, Inc. v. Royal Bank of Canada, supra. Nevertheless, the court declines to grant any relief with respect to the Indiana restraining notice, as defendant has not made any showing that plaintiff is attempting to use it to restrain bank accounts in Florida.

Accordingly, it is

ORDERED that defendant's motion to vacate the default judgment entered against it on May 22, 2012 in the amount of $165,434.85 and to dismiss the complaint, is denied in its entirety and the judgment shall stand; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent that the enforcement of the judgment shall be stayed until further order of this court, to give plaintiff an opportunity to comply with Limited Liability Company Law §808; and it is further

ORDERED that upon compliance with Limited Liability Company Law §808, plaintiff may move by Order to Show Cause for a further order of this court lifting the stay.

DATED: December 5, 2012

ENTER:

J.S.C.

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defense. See Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co, Inc, 67 NY2d 138, 141 (1986); Theatre Row Phase II Assocs v. H & I, Inc, 27 AD3d 216 (1st Dept 2006).