Pope Inv., LLC v Pacificnet Games Ltd.
2013 NY Slip Op 33136(U)
December 11, 2013
Sup Ct, New York County
Docket Number: 650379/2009
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

POPE INVESTMENTS LLC,

INDEX NO. 650379/2009

-against-

MOTION DATE

PACIFICNET GAMES LIMITED, et al.

MOTION SEQ. NO. 008

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | No (s). ______

Answering Affidavits — Exhibits ______ | No (s). ______

Replying Affidavits ______ | No (s). ______

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

Defendant Victor Tong's motion is denied in accordance with the accompanying decision/order dated December 11, 2013.

Dated: 12-11-13 [signature], J.S.C.

MARCY S. FRIEDMAN, J.S.C.

1. Check one: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:.................. ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

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POPE INVESTMENTS, LLC,

Plaintiff,

- against -

PACIFICNET GAMES LIMITED, PACIFICNET, INC., SINO MART MANAGEMENT LIMITED, VICTOR TONG, TONY TONG, TAO JIN, JEREMY GOODWIN, GUO JING SU, MIKE FEL SHAOJIAN WANG, PHILLIP WONG, and JOHN DOE(S) 1-20,

Defendants,

-- x

Index No.: 650379/2009

DECISION/ORDER

Motion Sequence 008

This is an action to recover a loan made by plaintiff Pope Investments, LLC (Pope) to PacificNet Games Limited (PacNet Games), and guaranteed in part by defendant Victor Tong (Tong). Tong moves to vacate a default judgment entered against him and to dismiss the action.

According to the complaint, in January 2007, Pope and PacNet Games executed a Convertible Secured Promissory Note (Note) under which Pope lent $5,000,000 to PacNet Games. (Complaint, ¶ 2.) At the same time, Tong executed a guaranty (Guaranty) of $3,000,000 for monies owed on the Note. (Id.; Tong Aff. in Support [Tong Aff.], Ex. H.) Plaintiff alleges that once PacNet Games received the loan proceeds, Tong and the other defendants engaged in a scheme to misappropriate funds for the benefit of other entities in which Tong had an interest. (Complaint, ¶ 2.) Plaintiff further alleges that after PacNet Games defaulted, it provided notice of the default to PacNet Games, and accelerated the balance due on the Note. (Id., ¶ 3.)

Pope filed the summons and complaint on June 26, 2009. By order dated June 9, 2010, this court (Fried, J.) granted a default judgment in favor of Pope Investments LLC and against defendants PacNet Games, Tong, PacificNet Inc., Sino Mart Management Limited, and Tony Tong (defaulting defendants) in the amount of $5,903,288.00 plus interest. In the June 9, 2010 order, the court also referred the assessment of reasonable attorneys' fees to a special referee. By order dated September 8, 2010, the court (Fried, J.) confirmed the special referee's report and directed the Clerk of the Court to enter judgment in favor of Pope and against the defaulting defendants in the amount of $74,345.87. On October 20, 2010, the Clerk entered judgment (New York judgment or judgment) for Pope and against the defaulting defendants in the amounts of $3,349,177.92 and $3,980,510.75, for a total award of $7,329,688.67. (Tong Aff., Ex B.) On December 17, 2010, Pope also obtained a judgment in California based on the New York judgment (California judgment). (Tong Aff., Ex. A.)

Prior to the commencement of this action, on or about February 5, 2009, Pope brought an action on the guaranty at issue in this case in the High Court of the Hong Kong Special Administrative Region. On April 29, 2009, Pope obtained a judgment in the Hong Kong action in the amount of $3,000,000.00 plus interest and fixed costs. (Id., Ex. E.) Pope subsequently initiated a creditor's bankruptcy proceeding against Tong in Hong Kong on April 1, 2010, and obtained a bankruptcy order on October 20, 2010 (Hong Kong Bankruptcy Order). (Id., Exs. G, F.)

By order to show cause filed on April 11, 2013, Tong moves to vacate the New York judgment on the grounds that this court lacks personal jurisdiction over him or, in the alternative, that he has an excuse for his default and meritorious defenses to this action.

[* 4]

Lack of Personal Jurisdiction

The personal jurisdiction issue is a threshold issue which the court is required to resolve "before determining whether it is appropriate to grant a discretionary vacatur of the default. . . ." (Caba v Rai, 63 AD3d 578, 581 n 1 [1st Dept 2009] [internal quotation marks and citations omitted].)

Tong alleges that the court does not have personal jurisdiction because he does not reside in or otherwise have sufficient contacts with New York, and because service was made improperly. With respect to his residency and contacts, Tong asserts in wholly conclusory fashion that he "was, is and will continue to be a resident of China"; that he "has never resided in New York"; and that "[n]o party hereto including Plaintiff, conducts, nor conducted business in New York." (Tong Reply Aff., ¶¶ 4-6.)[1] In response, Pope submits a copy of a lease, dated June 1, 2005, naming the tenant as PacificNet/Victor Tong, for a primary residence at 135 East 50th Street, Apt 8F, New York, New York. (Aff. of Yang Mulligan [Financial Analyst with Pope Asset Management LLC, the managing member of Pope Investments LLC] [Mulligan Aff.], Ex. A.) Although the lease was for a one-year term, Pope also submits a statement from November 24, 2010 on Tong's Weibo Account, the Chinese equivalent of Twitter, that: "I even have a residence on 50th Street and Lex Ave." (Mulligan Aff., Ex. C at 5.) Tong does not deny that he signed the lease, and does not contest the authenticity of the statement on his Weibo account.

[1]At a court appearance on on May 16, 2013, this court found that Tong had included new factual matter and substantive arguments in his reply affirmation, and authorized Pope to serve a sur-reply. After the court appearance on May 16, 2013, Tong for the first time retained counsel who served an unauthorized "sur-sur-reply" dated July 8, 2013. Pope then served an unauthorized response, entitled "Supplemental Brief," dated July 18, 2013. This court, in its discretion, will accept these briefs, as Tong initially appeared pro se, and a relaxation of the procedural standards is warranted to ensure a fair hearing of the issues and adequate briefing. The court holds Tong to the same substantive standards as any represented litigant.

[* 5]

(See Sino Clean Energy Inc. v Little, 35 Misc3d 1226[A] [Sup Ct, New York County 2012] [considering defendant's assertions on his personal LinkedIn page in a jurisdictional analysis].)[2]

In the "Writ of Summons" for the Hong Kong action, Pope alleged that Tong's last known address was one in a commercial building in Hong Kong – Room 2702, Richmond Commercial Building, 107-111 Argyle Street, Mong Kok, Kowloon, Hong Kong. (Tong Aff., Ex. D.) In its petition in the Hong Kong bankruptcy proceeding, Pope alleged that Tong maintained addresses at various specified locations in Hong Kong (specifically, Duplex Flat B on 51/F & 52/F, Tower 7, Park Avenue, 18 Hoi Ting Road, Tai Kok Tsui, Kowloon, Hong Kong and Room 2702, Richmond Commercial Building, 107-111 Argyle Street, Mongkok, Kowloon, Hong Kong). (Tong Aff., Ex. F [Hong Kong Bankruptcy Order].) While these actions were brought in close proximity to the instant action which, as stated above, was filed on June 26, 2009, Tong rests solely on his conclusory averments that he never resided in New York, and makes no showing that he did not have both Hong Kong and New York addresses during the same time period.

Tong thus fails to demonstrate that he did not reside in New York as of the date of commencement of this action, or to make a sufficient showing to warrant a traverse hearing in this regard.

As to the propriety of service of the papers upon Tong, CPLR 308 (2) authorizes service upon a natural person by delivery of the papers to a person of suitable age and discretion at the

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[2]Tong also does not dispute the authenticity of a statement on his LinkedIn page discussing his association with PacificNet in which he acknowledged that, at least between 2003 and 2007, he was doing business in New York. (Aff. of Thomas B. Watson [Pope's counsel] [Watson Aff.], Ex. 2 at 2 [Victor Tong's LinkedIn page, stating: "He [Tong] was one of the most active Chinese executives doing bi-monthly road shows in the New York Wall Street & throughout the USA from 2003 to 2007"].)

actual place of business, dwelling place or usual place of abode of the person to be served, followed by mailing. CPLR 313 authorizes service on a person subject to jurisdiction of the New York courts by service "without the state, in the same manner as service is made within the state . . . ." "While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing." (NYCTL 1998-1 Trust v Rabinowitz, 7 AD3d 459, 460 [1st Dept 2004]; see also Finkelstein Newman Ferrara LLP v Manning, 67 Ad3d 538, 538 [1st Dept 2009].) However, "mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper." (Grinshpun v Borokhovich, 100 AD3d 551, 552 [1st Dept 2012], lv denied 21 NY3d 857 [2013]. See also Perilla v Carchi, 100 AD3d 429, 429 [1st Dept 2012]; Wells Fargo Bank, NA v Edwards, 95 AD3d 692, 692 [1st Dept 2012].)

Here, the affidavit of service attests to service on Tong by substituted service in Aberdeen, South Dakota. (Declaration of Jason R. Wolf [Attorney for Pope] [Wolf Dec.], Dkt No. 38, Ex. A [Richard D. Hansen's Affidavit of Service of Initiating Papers].) Tong asserts that he "was never served with process in this matter" (a legal conclusion), and "did not personally receive notice of the summons in time to defend." (Tong Reply Aff., ¶ 2 [a].) He also asserts that he "never resided or worked in Aberdeen, South Dakota." (Id., ¶ 12.) Tong also states that he "quit PacNet [PacificNet] and PacGames in 2008," and that PacificNet ceased to maintain an office in South Dakota after 2008 when it was delisted by NASDAQ. (Id., ¶ 13.) Although he claims that PacificNet stopped paying rent to its landlord in Aberdeen in 2008, he provides no documentation showing that the lease was terminated or that the office was closed. Pope, in

contrast, provides the above-referenced affidavit of service attesting to service at an open office in Aberdeen, and a business card of an employee of PacificNet Inc., obtained at the time of service, showing that the address of PacificNet was 416 Production St. N., Aberdeen, SD 57401, USA. (Wolf Dec., Ex. A.) Tong also does not deny that he was affiliated with a separate entity, PacificNet Ventures, which also worked at the Aberdeen office, but claims that his affiliation ended prior to 2008. (Tong Reply Aff., ¶ 14.) However, he also provides no evidence documenting the end of his affiliation or the end of Pacific Ventures' maintenance of the Aberdeen office. Finally, Tong's LinkedIn page describes him as "Founder & Angel Investor" of Webplus (Watson Aff., Ex. 2), a business that he acknowledges is also located in Aberdeen. (Tong Reply Aff., ¶ 15.) Again, Tong asserts, without any evidentiary support, that "being the founder of Angel Investor in the LinkedIn profile does not mean that Defendant work[ed] there." (Id.)

The court holds that Tong's conclusory assertions that he did not work at the Aberdeen, South Dakota office at the time of service are insufficient to rebut the presumption of the validity of service or to warrant a traverse hearing. The court accordingly finds that it has personal jurisdiction over Tong.

Excusable Default

It is well settled that in order to vacate a default pursuant to CPLR 5015(a), "the moving party must set forth both a reasonable excuse for the default and a meritorious defense to the action." (Theatre Row Phase II Assocs. v H & I, Inc., 27 AD3d 216, 216 [1st Dept 2006]. See also Matter of Commissioner of Social Servs. v Kastriot D., 101 AD3d 574 [1st Dept 2012], lv denied 21 NY3d 853 [2013]; Navarro v A. Trenkman Estate, Inc., 279 AD2d 257 [1st Dept

2001].) "[I]t is within the sound discretion of the motion court to determine whether the proffered excuse and the statement of merits are sufficient." (Navarro, 279 AD2d at 258.) Moreover, under CPLR 5015(a)(1), the defendant must move within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party. (See Taveras v Philibert, 107 AD3d 492, 492 [1st Dept 2013].)

In his initial affidavit, Tong acknowledges that he became aware of the default judgment in this action in 2011, when he came into possession of the California judgment based on the New York judgment. (Tong Aff., ¶ 3.) In his reply affidavit, he claims, inconsistently, that he became aware of the California judgment in late 2011, but did not become aware of the New York judgment until the summer of 2012, when his bank accounts were levied. (See Tong Reply Aff., ¶ 19.) In either event, Tong does not explain his further delay of approximately 3/4 of a year, until April 11, 2013, in filing the instant order to show cause to vacate the default judgment. Apparently by way of explanation for this delay, defendant asserts that he "did not have the means to hire independent counsel to defend against this action," and that "[i]t has become physically and financially [a] hardship for Defendant to comply with the New York Court. . . ." (Id. ¶ 21.) These conclusory assertions are plainly insufficient to excuse Tong's lengthy delay in seeking relief from the default judgment.[3]

Tong also fails to make a colorable showing that he has potentially meritorious defenses to this action. First, he claims that the action was improperly brought in this venue (Tong Aff., ¶

[3]In view of this delay, the court need not reach the issue of when Tong first had notice of the default judgment. The court notes, however, that Pope submits an affidavit of service which states that Victor Tong was personally served with the California and New York judgments on July 13, 2011. (See Watson Aff., Ex. 13, 12 [Proof of service on July 13, 2011 of Watson Declaration which attaches the New York and California judgments].)

6), and that the Guaranty he signed required the action to have been brought in Hong Kong. (Tong Reply Aff., ¶ 22.) Contrary to Tong's contention, the Guaranty contains a permissive, not mandatory, provision which states, in pertinent part: "Any judicial proceeding brought by or against Guarantors with respect to any of the Guaranteed Obligations or any of the rights or obligations hereunder, this Guaranty or any related agreement may be brought in any court of competent jurisdiction located in Hong Kong." (Guaranty, § 11 [Tong Aff., Ex. H].)

Tong next claims that the New York judgment has been discharged in the Hong Kong bankruptcy proceeding. (Tong Aff., ¶ 6.) Pope's expert, Neil Edward McGregor McDonald, a solicitor of the High Court of Hong Kong and partner at Hogan Lovells, Solicitors, Hong Kong, avers that Hong Kon bankruptcy law provides for an automatic discharge from bankruptcy no earlier than four years after the date of the Bankruptcy Order. (McDonald Aff., ¶ 6.) Tong himself acknowledges that "[t]he bankrupt is normally discharged from bankruptcy four years after the making of the Bankruptcy Order . . . . <u>When a bankrupt is discharged, the discharge releases him/her from all the provable debts</u>. . . ." (Tong Reply Aff., ¶ 31 [emphasis in original].) The Hong Kong Bankruptcy Order is dated October 20, 2010 (Tong Aff., Ex. F), less than four years ago, and Tong does not allege that he sought, or was granted, early discharge of his debts in the Hong Kong bankruptcy proceeding.

Tong also fails to provide any legal support for his claim that the Hong Kong Bankruptcy Order bars the New York judgment. Tong argues that the Bankruptcy Order effected an automatic stay of proceedings of Tong's creditors, prohibiting any proceedings to be taken against the debtor/bankrupt without leave of the Hong Kong Court. (Sur-Sur Reply Memo. at 1-2.) Tong, however, submits no legal authority that the automatic stay, if any, had extra-territorial

[* 10]

effect. Moreover, while Tong argues that the New York court should extend comity to the Hong Kong bankruptcy proceeding (id. at 3), the cases on which he relies in support of this contention pre-date the enactment of Chapter 15 of the U.S. Bankruptcy Code, which provides a mechanism for recognition of foreign bankruptcy proceedings by U.S. courts. (See 11 U.S.C. §§ 1501, et seq.) U.S. Bankruptcy Code § 1520(a)(1) thus expressly provides: "(a) Upon recognition of a foreign proceeding that is a foreign main proceeding– (1) sections 361 and 362 [11 USC §§ 361 and 362] apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States."[4] It is undisputed that a Chapter 15 proceeding has not been instituted. Tong therefore fails to demonstrate the merits of his claim that the Hong Kong Bankruptcy Order is a bar to the New York proceedings.

Tong asserts that because Pope also obtained a judgment on the guaranty in the Hong Kong action, it may not proceed in this court. Tong makes no showing that the Hong Kong judgment is subject to recognition pursuant to CPLR 5304(a). (P.'s Memo in Opp at 14.)[5]

In addition, Tong argues that the judgment reflects that the court incorrectly pierced the corporate veil to hold Tong personally liable for the wrongs of PacNet Games and PacNet. (Tong Reply Aff., ¶ 30.) As a result of his execution of the $3,000,000 guaranty, Tong was

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[4]The purpose of chapter 15 of the U.S. Bankruptcy Code is to provide "effective mechanisms for dealing with cases of cross-border insolvency." (11 USC § 1501.) It is designed to enable cooperation between U.S. courts, debtors, and "the courts and other competent authorities of foreign countries involved in cross-border insolvency cases." (Id.) It applies where "assistance is sought in the United States by a foreign court or foreign representative in connection with a foreign proceeding" or where "assistance is sought in a foreign country in connection with a case under this title." (Id.)

[5]Pope should have disclosed the Hong Kong Bankruptcy Order and Hong Kong judgment to this court. However, the court rejects Tong's contention that the failure to do so was a fraud on the court (Tong Reply Aff., ¶ 23), given the absence of any showing that the Order or judgment bars the New York proceedings.

liable for that amount without piercing of the corporate veil. In addition, the complaint pleads a direct cause of action against Tong for breach of fiduciary duty. Tong's conclusory statements regarding his management of the business (id., ¶ 26) are insufficient to show that he has a potentially meritorious defense to that cause of action.

Finally, Tong fails to establish a defense based on his argument that Pope cannot be permitted to "double dip" by recovering under the both the New York judgment and the Hong Kong judgment. (Tong Reply Aff., ¶ 32.) As Pope acknowledges, double recovery can be avoided by appropriate proceedings at the collection stage. (See Pope Supp. Brief at 9.)

The court has considered Tong's remaining contentions and holds that he fails to demonstrate an excuse for his default in appearing in this action and potentially meritorious defense.

It is accordingly hereby ORDERED that defendant Victor Tong's motion to vacate the default judgment against him and to dismiss the complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
December 11, 2013

MARCY S. FRIEDMAN, J.S.C.