SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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SHAMPAN LAMPORT, LLC and JAY SHETH

Plaintiffs,

Index No. 158757/2016
Motion Seq: 003

-against-

TAO GROUP, LLC and TAO DOWNTOWN,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendants.

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The motion to vacate the default judgment entered against defendants is granted. The cross-motion to amend the judgment to name BD Stanhope, LLC as judgment debtor is denied.

Background

On the evening of August 27, 2015, plaintiff Sheth visited the Tao nightclub located at Ninth Avenue and West 16th Street in New York, New York along with a business client and some friends. Sheth is a financial advisor affiliated with plaintiff Shampan Lamport, LLC.

Sheth disputes a number of items included in the bill at the end of the evening, which totaled nearly $42,000. Sheth claims he stopped ordering drinks after placing an order for six tequila shots (which Sheth contends was supposed to be "on the house") that cost $270. Sheth insists that servers at the club continued to bring (and charge) him for alcohol, including a $12,000 bottle of Krug Grande Cuvee, without his consent. Sheth paid the bill using the credit card of plaintiff Shampan Lamport, LLC of which he is an authorized signatory.

Plaintiffs obtained a default judgment against defendants (NYSECF Doc. No. 23).

Defendants now move, by order to show cause, to vacate the default judgment and note that the entities named as defendants are not proper legal entities. The proper legal name for Tao Downtown is BD Stanhope LLC and Tao Group is purportedly only a trademark used for licensing purposes. Defendants claim that if plaintiff's attorney had checked the New York State Liquor Authority's website using the proper address for the club (369 West 16th Street) he would have located the correct entity to sue.

Defendants also challenge the alleged service on the named defendants on the ground that the employees served are not authorized to accept service on behalf of the BD Stanhope LLC. Defendants contend they have a meritorious defense to plaintiffs' claims– Sheth did not dispute the charges when he signed the receipt.

In opposition and in support of the cross-motion, plaintiffs claim that defendants were properly served, that defendants intentionally concealed the identity of the entity operating the nightclub and that defendants offered no proof to back up their claims that the employees served could not accept service.

Discussion

"A party may move to vacate a default judgment against it under CPLR 317 or CPLR 5015. Even where the moving party cites only one statutory provision, the reviewing court may consider whether application of either statute would warrant the relief requested" (*Peacock v Kalikow*, 239 AD2d 188, 189, 658 NYS2d 7 [1st Dept 1997]). "[B]oth statutes require that, in order to prevail, the movant must demonstrate that it has a meritorious defense to the action" (*id.*). A meritorious defense must include an affidavit from an individual with knowledge of the facts (*id.* at 190).

"In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68, 760 NYS2d 727 [2003]).

As an initial matter, it is undisputed that plaintiffs served the wrong entity and the misnaming of an entity is "in fact no naming at all" (*Ross v Lan Chile Airlines*, 14 AD3d 602, 603, 789 NYS2d 77 [2d Dept 2005] citing *Maldonado v Maryland Rail Commuter Serv. Admin.*, 91 NY2d 467, 472, 672 NYS2d 831 [1998]).

Obviously, the name BD Stanhope, LLC is not a name plaintiffs or plaintiffs' attorney would ordinarily be aware of when commencing a lawsuit against Tao nightclub. Plaintiffs' attorney would have had to know this entity's exact name to perform an effective search for relevant information on the Secretary of State's website. But there is no rule requiring defendants to pick a name that is related to the name of the business the entity operates or to advertise the name of that entity on the business' website. A plaintiff is less likely to identify the correct party to sue the more obscure a name is and the more difficult a name might be to find. But there are disadvantages to defendants as well– as demonstrated here, a defendant might have to expend resources to move to vacate a default judgment.

Defendants' assertion that a simple search of the New York State Liquor Authority website would have revealed the correct entity is a bit presumptuous. While defendants submit printouts from Tao's website indicating that the nightclub entrance is at 369 West 16th Street, those printouts also contain a template at the bottom of each page noting that the address is "92 Ninth at 16th Street" (defendants' affirmation in support, exh B). It is not inherently obvious that the proper address to input into a search is 369 West 16th Street rather than 92 Ninth Avenue. An

entrance is not necessarily the address for a business. Of course, an exhaustive investigation would have led plaintiffs' attorney to search for liquor licenses for both addresses.

In any event, the fact is that plaintiffs served the wrong entity– therefore, because actions should be decided on their merits, the motion to vacate is granted in the interests of substantial justice. Defendants should not be on the hook for a judgment of almost $42,000 without litigating the instant matter.

Further, service on the wrong entity is a reasonable excuse to vacate a default judgment. And defendants have presented a meritorious defense by submitting a copy of a receipt signed by plaintiff Sheth for a $41,471.34 bill at the Tao nightclub (*id.* exh F) and an affidavit from an individual with knowledge of the facts (*see* Bonbrest aff). The fact that Sheth signed the receipt does not necessarily signify that he accepted these charges or waived any right to contest them– but it does provide defendants with a meritorious defense in support of a motion to vacate a default judgment.

Cross-Motion

Plaintiffs' cross-motion to amend the judgment to identify the right party, BD Stanhope, LLC, is denied. Plaintiffs cannot serve the wrong parties, obtain a default judgment against those incorrectly-named entities, and simply change the name of the judgment debtor after learning the correct name from defendants. Plaintiffs rely on CPLR 305[c] in support of the motion, but that provision allows a Court to amend the summons or proof of service if a substantial right of a party is not prejudiced. The case cited by plaintiffs, *Ober v Rye Town Hilton* (159 AD2d 16, 557 NYS2d 937 [2d Dept 1990]), is inapposite because in that case the Court permitted a misnamed defendant to remain in the case– it did not allow an amendment to facilitate the entry of a default

judgment. It would also be highly prejudicial to permit this amendment without allowing the proper defendant to present a defense. Further, defendants are not seeking to dismiss the action for lack of jurisdiction– defendants' notice of motion seeks an opportunity to answer the complaint and litigate the case.

The email from Mr. Ramirez of Tao Group to a paralegal for plaintiffs' attorney's firm informing her that Tao Group had received notification of the lawsuit (affirmation in support of the cross-motion, exh D) does not compel a different outcome. Defendants should have attempted to take action sooner, but defendants have one year to move to vacate a default judgment and defendants complied with that deadline here.

Summary

Defendants' demand for costs are denied. As stated above, defendants decided to use an obscure name for the entity that runs the Tao nightclub and chose to seek a liquor license for that business for 369 West 16th Street instead of 92 Ninth Avenue. And defendants did not make this information clear on its website or anywhere else. Defendants were within their rights to make these decisions, although even defendants' attorney notes that other plaintiffs have misidentified the proper Tao entities. But those decisions created the problems in the instant case and defendants are therefore not entitled to recover costs for making the instant motion.

"[T]his state has adopted a liberal policy with respect to opening defaults so that the parties may have their day in court" (*Bellomo v Shiffman*, 157 AD2d 590, 551 NYS2d 776 (Mem) [1st Dept 1990]). The parties are to appear for a preliminary conference on November 21, 2017 at 2:15 p.m.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that the default judgment is vacated, the properly named entity (BD Stanhope, LLC) may answer the complaint and denied to the extent that defendants seek costs; and it is further

ORDERED that plaintiffs' cross-motion is denied.

This is the Decision and Order of the Court.

PC: November 21, 2017 at 2:15 p.m.

Dated: August 10, 2017
New York, New York

ARLENE P. BLUTH, JSC

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