

Ibonic Holdings, LLC. v Vessix, Inc.

2018 NY Slip Op 33215(U)

December 11, 2018

Supreme Court, New York County

Docket Number: 160018/2017

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2

Justice

INDEX NO. 160018/2017

IBONIC HOLDINGS, LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

VESSIX, INC. and FLYING LABS SOFTWARE, INC. AS
SUCCESSOR BY MERGER WITH VESSIX, INC.,

Defendants.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14
were read on this motion to/for AMEND CAPTION/DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action to recover on a promissory note, plaintiff Ibonic Holdings, LLC moves: 1)
pursuant to CPLR 2001 and, in effect, pursuant to CPLR 305 (c) and 3025 (b), to amend the caption
to correct minor typographical errors; and 2) pursuant to CPLR 3215, for a default judgment
against defendants Vessix, Inc. and Flying Labs Software, Inc., as Successor by Merger with
Vessix, Inc. in the sum of \$125,000 plus interest, costs, disbursements, and attorneys' fees. The
motion is unopposed. After a review of plaintiff's motion papers, as well as a review of the
relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The factual and procedural background of this matter is set forth in the order of this Court
entered April 30, 2018 (Doc. 12) and additional relevant facts are set forth herein. That order
denied plaintiff's motion for summary judgment in lieu of complaint, deemed the motion papers

to be the complaint, and directed defendants to answer the complaint within 30 days after service of that order with notice of entry. Doc. 12.¹ Despite service of the order with notice of entry in April 2018 (Doc. 13), defendants have failed to respond to the complaint.

Plaintiff now moves, pursuant to CPLR 2001 and, in effect, pursuant to CPLR 305 (c) and 3025 (b), to amend the caption to correct certain typographical errors and, upon amendment of the caption, for a default judgment against defendants pursuant to CPLR 3125.

LEGAL CONCLUSIONS:

Motion to Amend Caption

A party may amend a pleading or supplement it at any time by leave of court, and such leave shall be freely given upon such terms as may be just. CPLR 3025(b). Pursuant to CPLR 305(c), "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced." The amendment of a summons is justified "where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that the plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it." *Medina v. City of New York*, 167 A.D.2d 268, 269-70 (1st Dept. 1990). A motion to amend the caption to reflect the true name of the defendant should be granted where the designated entity was the

¹ This Court denied the motion for summary judgment in lieu of complaint on the grounds that: 1) extrinsic evidence was needed to prove the amount due under the note; 2) plaintiff failed to prove the essentials of its cause of action; 3) plaintiff failed to prove that the defendants merged; and 4) plaintiff failed to establish the proper rate of interest after the due date of the note (January 7, 2017). According to the note, the rate was the lower of that permitted by the law of Delaware, which controlled the terms of the note (and which plaintiff now shows sets no limit on interest), and 20%.

intended subject of the lawsuit, knew or should have known of the existence of the litigation against it, and will not be prejudiced thereby. *See, Rodriguez v. Dixie N.Y.C., Inc.*, 26 A.D.3d 199 (1st Dept. 2006); *National Refund and Utility Services, Inc. v. Plummer Realty Corp.*, 22 A.D.3d 430 (1st Dept. 2005).

Plaintiff seeks to amend the caption to reflect that its name is actually “Ibionic Holdings, LLC” and not “Ibionic Holdings, LLC”. It also seeks to amend the caption to reflect that defendant “Flying Labs Software, Inc.” is actually named “Flying Software Labs, Inc.” This branch of plaintiff’s motion is granted, as these errors were minor irregularities which did not result in any prejudice to defendants, who were properly served and thus knew a judgment could be entered against them. *See CPLR 305 (c); United Community Ins. Co. v Ciraco*, 195 AD2d 333 (1st Dept 1993); *Houghtalen v Norstar Bank*, 191 AD2d 371 (1st Dept 1993). Thus, the caption is amended accordingly to reflect these changes.

Motion for Default

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that, in order to establish one’s entitlement to a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s failure to answer or appear. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, plaintiff has submitted proof of service of the amended motion for summary judgment in lieu of complaint which, as noted above, was deemed the complaint pursuant to this Court's order entered April 30, 2018. Docs. 9, 12, and 14. Additional service of the motion was made pursuant to CPLR 3215(g)(4). Doc. 14. Nevertheless, the affirmation of plaintiff's attorney establishes that defendants failed to respond to the complaint. Doc. 14. Further, the affidavit of Andrew Garnock, a member of plaintiff, sets forth the facts constituting the claim. Doc. 14.

Plaintiff has also established that, as prevailing party herein, it is entitled to attorneys' fees pursuant to the terms of the note.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Ibionic Holdings, LLC seeking to amend the caption is granted as follows: the name of plaintiff is hereby changed from "Ibionic Holdings, LLC" to "Ibionic Holdings, LLC", and the name of defendant "Flying Labs Software, Inc." is hereby changed to "Flying Software Labs, Inc."; and it is further

ORDERED that the caption of this action will hereinafter read as follows:

IBIONIC HOLDINGS, LLC,

Plaintiff,

Ind. No. 160018/17

against

VESSIX, INC. and FLYING SOFTWARE LABS, INC., as
Successor by Merger with VESSIX, INC.,

Defendants.

and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order, with notice of entry, on the County Clerk (Room 141B), by filing with NYSCEF a completed "Notice to the County Clerk" (NYSCEF Form EF-22, available on the NYSCEF site), within 14 days after this order is uploaded to NYSCEF, and the Clerk is directed to mark the court's records to reflect the change to the caption; and it is further,

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on the General Clerk's Office (Room 119) pursuant to e-filing protocol at genclerk-ords-nonmot@nycourts.gov, within 14 days after this order is uploaded to NYSCEF, and the Clerk is directed to mark the court's records to reflect the change to the caption; and it is further,

ORDERED that the branch of the motion by plaintiff Ibionic Holdings, LLC seeking a default judgment against defendants Vessix, Inc. and Flying Software Labs, Inc., as Successor by Merger with Vessix, Inc., jointly and severally, is granted; and it is further

ORDERED that plaintiff Ibionic Holdings, LLC shall, within 14 days of the entry of this order, serve a copy of this order, with notice of entry, upon defendants Vessix, Inc. and Flying Software Labs, Inc., as Successor by Merger with Vessix, Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the principal amount of \$125,000, plus interest at the rate of 10% for the period of July 7, 2016 until January 7, 2017, and at the rate of 20% commencing January 7, 2017, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of the amount of attorneys' fees to which plaintiff is entitled is hereby referred to a Special Referee to hear and report; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, plaintiff shall file a Note of Issue, pay the appropriate fees, and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that this constitutes the decision and order of the court.

12/11/2018

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE