

IP 08-0463-C Y/K Noble Romans v Rahimian
Judge Richard L. Young

Signed on 09/26/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NOBLE ROMAN'S, INC.,)	
)	
Plaintiff,)	
vs.)	NO. 1:08-cv-00463-RLY-TAB
)	
SHAHRAM RAHIMIAN,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NOBLE ROMAN’S, INC.,)
Plaintiff,)
)
vs.) 1:08-cv-0463-RLY-TAB
)
SHAHRAM RAHIMIAN,)
Defendant.)

**ENTRY ON (1) PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT AND ENTRY OF
DEFAULT and (2) DEFENDANT’S MOTION TO SET ASIDE ENTRY OF DEFAULT,
RESPONSE IN OPPOSITION TO MOTION FOR DEFAULT JUDGMENT, AND
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

Plaintiff, Noble Roman’s, Inc. (“Plaintiff”), moves for default judgment against defendant, Shahram Rahimian (“Defendant”). Defendant opposes Plaintiff’s motion on grounds that Plaintiff has not obtained proper service, the court lacks personal jurisdiction over Defendant, and that Defendant has meritorious defenses such that default is not warranted in this case. For the reasons set forth below, that Plaintiff’s Motion for Default Judgment is **DENIED**, the Defendant’s Motion to Set Aside Entry of Default is **GRANTED**, and Defendant’s Motion to Dismiss for Lack of Jurisdiction is **STRICKEN**.

I. Background

Defendant is a California resident operating a business in California. Plaintiff contends that Defendant entered into a franchise agreement with it on January 15, 2008. Days before Defendant’s restaurant was to open, Defendant disputed the validity of the franchise agreement, stating that he did not sign the franchise agreement and is not obligated to comply with its terms. Plaintiff thereafter filed the present lawsuit on April 9, 2008, for trademark infringement, unfair

competition, and unjust enrichment.

On April 14, 2008, Plaintiff attempted to serve Defendant by sending a Summons to Defendant at 1200 East Imperial Highway, Brea, California, 92821, via certified mail. The docket shows a “return of service” with a certified mail return receipt bearing a signature that appears to be that of a “Jose” with an illegible last name. (Docket # 7). Defendant contends that “Jose” is a cashier of one of his businesses, but is not authorized to accept service on his behalf. (Affidavit of Shahram Rahimian (“Rahimian Aff.”) ¶ 5). Plaintiff did not serve Defendant personally or in any other manner. (Rahimian Aff. ¶¶ 2-3).

On June 11, 2008, Plaintiff filed a motion for entry of default, which the court granted two days later. On June 23, 2008, Plaintiff moved for default judgment. On June 30, 2008, Defendant’s Indianapolis counsel filed an appearance on his behalf and filed a notice of intent to respond to the motion for default judgment and to the Clerk’s entry of default.

II. Discussion

Federal Rule of Civil Procedure 55(c) provides that for good cause shown the court may set aside an entry of default. To succeed in setting aside a default entry under Rule 55(c), defendant must show “(1) good cause for [its] default; (2) quick action to correct it; and (3) a meritorious defense to the plaintiff’s complaint.” *United States v. DiMucci*, 879 F.2d 1488, 1495 (7th Cir. 1989). Whether to grant or deny a motion to set aside an entry of default is a matter within the court’s discretion. *Merrill Lynch Mortgage Corp. v. Narayan*, 908 F.2d 246, 250-51 (7th Cir. 1990).

Rule 4(e)(1) of the Federal Rules of Civil Procedure provides that service upon an individual may be effected pursuant to the law of the state in which service is effected or in which the district court sits. Service may also be made pursuant to Rule 4(e)(2), by service in

person, leaving copies at the individual's residence, or delivering a copy to an authorized agent. In this case, Plaintiff was not served personally or at his residence. The person who signed the return receipt was not authorized to accept service on Defendant's behalf. The issue, then, is whether service by certified mail to a business address is effective under Indiana law¹ when the person who accepts service is not the individual party or a person authorized to accept service.

Although Indiana Trial Rules 4.1(A) and 4.11 allow for service on an individual by certified mail, service is not effective unless the individual himself or a person authorized to accept service signs for the mail. *Robinson v. Turner*, 886 F.Supp. 1451, 1456 (S.D. Ind. 1995); *see also Cardenas v. Benter Farms*, 2000 WL 1693807, at * 2 (S.D. Ind. Nov. 7, 2000); *LaPalme v. Romero*, 621 N.E.2d 1102, 1106 (Ind. 1993).

This authority is required because a person accepting service for another has a duty, under Indiana Trial Rule 4.16(B)², to promptly deliver the papers or give notice in accordance with that Rule. Under Indiana law, service is not accomplished if the signatory does not have the authority to accept the certified mail. *Robinson*, 886 F.Supp. at 1457.

In the present case, Defendant submitted an affidavit stating that the person who signed for the certified mail addressed to him at one of his businesses did not have the authority to

¹ Plaintiff did not respond to Defendant's argument that service is also improper under California law. There being no response to this argument, the court finds the Plaintiff concedes this argument.

² That Rule provides:

Anyone accepting service for another person is under a duty to:

- (1) Promptly deliver the papers to that person;
- (2) Promptly notify that person that he holds the papers for him; or
- (3) Within a reasonable time, in writing, notify the clerk or person making the service that he has been unable to make such delivery of notice when such is the case.

IND.TR.R. 4.16.

accept certified mail for him personally. (Rahimian Aff. ¶ 5). Although Plaintiff refutes Defendant's assertion, Plaintiff offers no evidence to substantiate that point.

The court is sympathetic to Plaintiff's predicament. Plaintiff did send a courtesy copy of the Complaint to Defendant's California counsel by e-mail correspondence on April 9, 2008. However, e-mailing a copy of a Complaint to Defendant's California counsel is not proper service. For these reasons, the court finds that Defendant met his burden of showing good cause for his default.

The court further finds that Defendant took quick action to correct the default. He hired Indianapolis counsel on June 30, 2008, two and one-half weeks after the entry of default, and one week after the motion for default judgment.

Finally, the court finds Defendant has meritorious defenses. He asserts that (1) the court does not have personal jurisdiction over him and (2) that he did not execute the franchise agreement that is the subject of this lawsuit. Thus, Defendant contends he did not unlawfully infringe Plaintiff's trademark, commit unfair competition, and has not been unjustly enriched.

In Defendant's Response Brief, Defendant separately moves to dismiss this case for lack of personal jurisdiction. Plaintiff did not respond to that motion on grounds that Defendant violated Local Rule 7.1's prohibition against filing "a new motion within a brief, response, or reply to a previously filed motion[.]" The court agrees with the Plaintiff, and hereby **STRIKES** the Defendant's motion to dismiss for lack of personal jurisdiction. Defendant may re-file that motion in due course.

For the reasons set forth above, the court finds, in its discretion, that Plaintiff's Motion for Default Judgment should be **DENIED**, and that the Clerk's Entry of Default, entered on June 13, 2008, should be **SET ASIDE**. Defendant's Motion to Dismiss for Lack of Jurisdiction is

STRICKEN.

III. Conclusion

Because Plaintiff did not effect proper service upon the Defendant, that Plaintiff's Motion for Default Judgment (Docket # 11) is **DENIED**, the Defendant's Motion to Set Aside Entry of Default (Docket # 17) is **GRANTED**. Moreover, Defendant's Motion to Dismiss for Lack of Jurisdiction (Docket # 17) is **STRICKEN**. Defendant may re-file his

Motion to Dismiss for Lack of Jurisdiction if he so desires.

SO ORDERED this 26th day of September 2008.

s/ Richard L. Young

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Electronic Copies to:

Peyton Louis Berg
BOSE MCKINNEY & EVANS, LLP
pberg@boselaw.com

Sara R. Bradbury
LEWIS & KAPPES
sbradbury@lewis-kappes.com

Peter S. French
LEWIS & KAPPES
pfrench@lewis-kappes.com