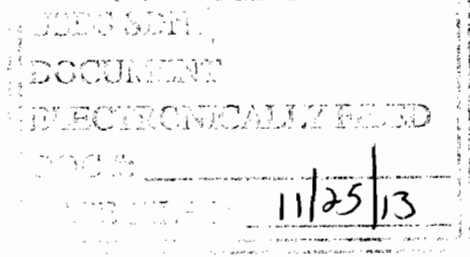


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



MALKA REIZY MOSKOVITZ, et al.,

Plaintiff,

-against-

06 Civ. 4404 (CM)

LA SUISSE, SOCIETE D'ASSURANCE SUR
LA VIE, now known as Merger as SCHWEIZERISCHE
LEBENSVERSICHERUNGS-UND RENTENANSTALT,

Defendant-Third Party Plaintiff,

-against-

MOSES KRAUS and CARUSO AG,

Third Party Defendants.

x

MEMORANDUM ORDER (AMENDED)

McMahon, J.:

This court has been asked by the Court's Assignment Committee, pursuant to Rule 17 of the Rules of the Division of Business Among District Judges in the Southern District of New York, to take over supervision of this action, which has lingered for some years on the dockets of two district judges and a magistrate judge who are no longer sitting on the court. This court was asked to take over the matter based on my familiarity with the underlying facts and the need for expedition in view of the extraordinary – and unfortunate – delay in dealing with open issues in this case.

I make the following orders in connection with this case:

1. *Outstanding Requests for Default Judgment*

I have reviewed the Report and Recommendation of The Hon. George A. Yanthis, dated October 11, 2013. Judge Yanthis recommended that the motion for a default judgment be denied on the ground that neither third party defendant has been properly served with the papers in support of the motion for default judgment.

Copies ~~mailed~~/faxed/handed to counsel on 11/25/13

The third party complaint in this action was filed by La Suisse against Kraus, a resident of the UK domiciled in London, and Caruso, a Liechtenstein corporation with offices in London. Service was properly effected on both third party defendants in accordance with Fed. R. Civ. P. 4(f)(2)(c)(ii) and Article 10 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. There can be no question that the defendants are properly before this court; the docket of this court indicates that both parties received service of process. Therefore, both parties are capable of being held in default.

Caruso never appeared, and the Clerk of the Court noted its default on June 30, 2010.

Kraus executed a stipulation accepting services and waiving defenses to service. He moved, through counsel, for dismissal of the Third Party Complaint. The motion, filed in 2008, was denied on March 30, 2012, by my colleague Judge Owen. The parties, through counsel, stipulated to extend the date for Kraus to answer the third party complaint to April 27, 2012. Kraus did not answer on that date, nor has he filed an answer at any time since; he is plainly in default, and the Clerk noted his default on November 16, 2012.

On May 4, 2012, shortly after the answer should have been filed, Kraus's attorney moved for leave to withdraw. Judge Owen appears to have granted that motion on June 12, 2012. Kraus was given thirty days to retain new counsel. No new counsel has appeared in the intervening year and a half. Kraus is in default of that order as well.

In December 2012, La Suisse moved for entry of a default judgment as against both defendants. Efforts to serve both defendants with the motion papers at the addresses where the summonses and complaints had been served were unsuccessful.

As chronicled in Judge Yanthis's Report and Recommendation, Caruso is no longer located at its office address; efforts to deliver the motion papers to that address by Federal Express were unavailing. As of December 18, 2012, information available on the Internet revealed that Caruso had a registered agent in Liechtenstein. Notwithstanding this, the company's registered agent in Liechtenstein refused to accept delivery of the papers from Federal Express. Federal Express attempted delivery of the default judgment papers at Kraus' home address in London but the papers were not actually received and according to the process server were returned to sender.

The learned Magistrate Judge concluded that service of the default judgment papers on neither defendant comported with due process. He thus recommended that the motion for a default judgment be denied as to both defendants.

Kraus, however, had actual notice of the default judgment papers. Indeed, only a month after the motion was made, Kraus sent an *ex parte* letter to Judge Yanthis on January 22, 2013, alleging that he was out of the country when Federal Express attempted to serve the default judgment papers. In that letter, he revealed that he had received by regular mail a letter dated January 8, 2013, from counsel for La Suisse, in which defendant alleged that Kraus was attempting to evade service. Had that letter included a copy of the default judgment papers, there would be no question that service of the motion papers had been effected on him – and quite

possibly on Caruso as well, since La Suisse's counsel alleges that Kraus controls Caruso and an affidavit filed by Kraus in this action confirms that Kraus is a minority shareholder in Caruso who has worked as an insurance broker at Caruso (albeit under a power of attorney rather than as an employee) from 1989-2000.

In any event, once the existence of Kraus's *ex parte* letter was made known to La Suisse (which knew nothing about it until the learned Magistrate Judge docketed the letter some nine months after it was received, when the Report and Recommendation was filed), La Suisse re-served Kraus. In response to a request from the court, I have received an affirmation of service from La Suisse's counsel; I am also told that Kraus signed for the delivery at his London home, Re-service was, therefore, effective and moots so much of Judge Yanthis's Report as deals with service on Kraus.¹

I have reviewed the papers in support of the motion for a default judgment. As all asserted facts are deemed proved upon default, it is quite clear that La Suisse will be entitled to entry of a default judgment unless Kraus has an acceptable explanation for his failure to file an answer during the last 20 months.

I will give Kraus until 5 PM New York time on December 10, 2013, to file with the court whatever explanation he can offer for his failure to file an answer to the complaint as previously stipulated and ordered. Kraus should understand that he cannot send his response on December 10; if the court does not RECEIVE a response to the default motion from Kraus by 5 PM New York time on December 10, 2013, I will simply enter the default judgment on that day at that hour. If the response arrives on December 11, it will be too late. No default of this order will be tolerated, and no extension will be granted for ANY reason. If Mr. Kraus happens to be away from London and no one is monitoring his mail, that will be his misfortune.

If I do receive a response, it had better be copied to counsel for La Suisse. I will expect reply papers explaining why any excuse offered by Kraus for his failure is inadequate to meet the exacting standards of the Federal Rules of Civil Procedure by December 13, 2013. It counsel can get me something more quickly, so much the better. There will be an immediate ruling. If Kraus's excuse for failing to file an answer to the Third Party Complaint is deemed inadequate, the motion for entry of a default judgment will be granted and judgment will be entered against him. Kraus should understand that he cannot cure the default by filing an answer now; only if the court concludes that he has proffered an adequate excuse for his one and one half years of default will the court permit him to file an answer.

As for Caruso, the corporation was served with process in this case but has never appeared – even to the extent of a limited appearance to contest service of process. That being so, the learned Magistrate Judge appears to have erred in believing that there was some constitutional necessity that Caruso actually receive the papers in support of the motion for a default judgment. Indeed, if a party hasn't appeared, the Federal Rules don't require that a default judgment be served on him at all. Fed. R. Civ. P. 55(b)(2) only requires service of a

¹ I am expecting an affidavit of service of the motion papers on Kraus, specifying the address at which he was served and the means by which the papers were delivered, to be filed forthwith.

notice of default judgment if "the party against whom a default judgment is sought has appeared personally or by a representative."

Rule 55.2(c) of the SDNY Local Rules provides: "Unless otherwise ordered by the Court, all [default judgment papers] shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court. If the mailing is returned, a supplemental affidavit shall be filed with the Court setting forth that fact, together with the reason provided for return, if any."

"Neither Fed.R.Civ.P. 55(b)(2) nor [the SDNY local rule] requires that, before judgment can be entered, the clerk's certificate be served upon an opposing party who has not appeared." *Bobrow Greenapple & Skolnik v. Woods*, 865 F.2d 43, 44 (2d Cir. 1989).

Finally, under Rule 5(b)(2)(C), a set of motion papers can be served by "mailing it to the person's last known address--*in which event service is complete upon mailing.*" (Emphasis added). "[D]ue process only requires notice of 'the pendency of the action' and an opportunity to respond." *Weigner v. City of New York*, 852 F.2d 646, 652 (2d Cir. 1988). In this case it is undisputed that Caruso was actually served with process at its last known addresses – its London office and the address of its Registered Agent in Liechtenstein -- and so had the constitutionally requisite notice and opportunity to appear and contest jurisdiction of the facts. It has done neither.

The papers in support of the motion for default judgment were sent to the corporation at its last two known addresses – the office address in London where it indisputably received service of the summons and complaint in 2008, and the address listed as its Registered Address in Liechtenstein in 2012. Service was complete upon the mailing of those documents to those two addresses. Whether the corporation received the documents or not is of no moment – and the admitted inability to deliver is no bar to the entry of a default judgment.

That being said, I must observe that facts to which Kraus himself avers indicates that he has at all relevant times acted as Caruso's agent with respect to the matters pleaded in the complaint – including specifically the offering of settlements to La Suisse. Therefore, I conclude that Caruso has actual notice of the pendency of the default judgment motion, because its agent, Kraus – who corresponded with Judge Yanthis about the motion -- unquestionably has notice.

Counsel for La Suisse has responded to the original version of this Order by pointing me to the affidavit required by Local Rule 55.2(c). I therefore reject the recommendation of the learned Magistrate Judge, deem all facts asserted against the corporation in the Third Party Complaint PROVED, and direct the Clerk of the Court to enter a judgment of default against Caruso.

2. *Order to Show Cause*

I have reviewed recent correspondence from counsel for La Suisse addressed to Chief Judge Preska. I see that La Suisse believes that there is renewed urgency about some sort of

relief now in that Kraus has recently filed an action in Israel concerning the matters that were litigated to judgment in *Kalman Weiss v. La Suisse*, 97 Civ. 1352 (CM) and *Agi Weiss v. La Suisse*, 01 Civ. 1006 (CM).

I will be mightily offended if it turns out that Kraus – or anyone else – is attempting an end run around the prior judgments of this court. I of course have no ability to enjoin an Israeli court, but I would imagine that the judiciary of that country would be outraged to learn of any such effort. La Suisse should feel free to forward to the Israeli court any and all verdicts, judgments, opinions, and other papers from the two prior *La Suisse* cases.

If La Suisse wishes to file a motion for injunctive relief by order to show cause it is free to do so. But if the court concludes that Kraus does not have an adequate excuse for failing to file an answer from and after April 27, 2012, the entry of a default judgment containing injunctive as well as monetary relief will undoubtedly suffice for La Suisse's purposes.

No purpose will be served by calling for a conference with a *pro se* litigant who lives in London. I prefer to proceed on papers.

Dated: November 25, 2013



U.S.D.J.

BY ECF TO COUNSEL

BY FIRST CLASS MAIL TO MOSES KRAUS IN LONDON

BY FIRST CLASS MAIL TO CARUSO AG C/O ITS REGISTERED AGENT IN
LIECHTENSTEIN AND C/O MOSES KRAUS IN LONDON