

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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COUNTY OF SUFFOLK,

(LGK 5852)

Plaintiff,

-against-

Index No.: CV-07-1644

GEORGE R. SIMPSON, JEAN SIMPSON,
CHARLOTTE SIMPSON, OFFICE
MANAGEMENT SYSTEMS CORP. and
SUFFOLK RESEARCH SERVICE, INC.,

Defendants.

-----X

MEMORANDUM OF LAW IN OPPOSITION

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in opposition to the motion by the defendants, George R. Simpson and Jean Simpson, to set aside the default of the defendants, Office Management Systems Corp. and Suffolk Research Service, Inc., or, in the alternative, to enlarge the time to move to dismiss the Complaint as against those defendants upon the alleged grounds of the pendency of a previously commenced action, erroneously termed “res judicata”. This is an action for injunctive relief and for money damages arising from the defendants’ misappropriation of the plaintiff’s proprietary real property ownership information.

For the reasons set forth below, it is respectfully submitted that the instant action was properly commenced and is properly maintained against the defendants. Service of process has been properly effected upon the moving defendants and personal jurisdiction has been obtained. The corporate defendants are in default and no good cause has been shown to grant relief from the default. Accordingly, the defendants’ motion should be denied in all respects.

POINT I

**THE INSTANT MOTION IS A NULLITY AND
MAY NOT BE ENTERTAINED BY THIS COURT**

Although the Notice of Motion and supporting papers purport to seek relief on behalf of the defendants, Office Management Systems Corp. and Suffolk Research Service, Inc., they are ineffective to do so. Similarly, the Notice of Appearance previously filed by the individual defendants, pro se, George R. Simpson and Jean Simpson, which purports to extend to the corporate defendants, is a nullity, as well, to the extent it attempts to serve as an appearance by the corporate defendants.

It is well established and fundamental that a corporation may not appear pro se in a civil lawsuit in the Federal Courts. In Grace v. Bank Leumi Trust Co. of NY, 443 F.3d 180 (2d Cir., 2006), the Court, quoting the underlying decision of the District Court, stated, “ “it is “well-settled” that a “ ‘corporation may appear in the federal courts only through licensed counsel” and “explained that this rule “has been applied to dismiss any action or motion filed by a corporation purporting to act *pro se.*” ” (citations omitted).

In view of the foregoing, it is indisputable that the corporations have not answered the complaint or entered a proper appearance, despite their principals’ admitted knowledge of the proper service of process upon them. They are, therefore, in default and the plaintiff’s previously submitted motion for a default judgment should be granted.

POINT II

**EVEN IF THE COURT WERE TO CONSIDER THE MOTION,
NO GOOD CAUSE HAS BEEN SHOWN TO SUPPORT THE RELIEF SOUGHT**

While the Memorandum of Law in support of the motion cites certain case law defining “excusable neglect”, no facts establishing the same are set forth. Although the movants’ claim that certain papers were “lost in the mail”, the time of such purported service is irrelevant. The simple fact remains that the corporate defendants, which are separate entities whose existence is wholly independent of the individual defendants, have still not appeared, in any manner, in this action. Despite the movants’ claim of inadvertence and ignorance of the rules, their own papers reflect a working knowledge of the rules and some experience in litigation. More importantly, the moving papers indicate that the corporate principals made a conscious and willful decision not to answer.

Most conspicuous by its absence is any allegation that the defaulting defendants have a meritorious defense to the claims set forth in the complaint. Nowhere in the moving papers is there any claim that the defendants did not misappropriate the plaintiff’s proprietary information and material. Evidence of such a defense is a condition of granting relief from a default in answering.

Instead, the movants argue the pendency of a prior action as a ground for dismissal of this action, erroneously labeling the ground as “res judicata”. It is plain that there can be no res judicata or issue or claim preclusion because there were no determinations on the merits in the prior action.

While the moving defendants, George R. Simpson and Jean Simpson, argue the “pendency” of the action previously commenced under Case No. 05-CV-0715 as a ground for dismissal of this action, they fail to reveal that neither they nor the corporate defendants never

appeared, answered or participated, in any manner, in that action. The only defendant who answered there was Stephanie Fagan (the daughter of the moving defendants), who has participated and appeared at conferences before Magistrate Judge Michael L. Orenstein. The defendants never filed notices of appearance, answers, motions or papers of any kind, nor did they ever appear at any of the several conferences before Magistrate Judge Orenstein. They did not, in any manner, submit to the jurisdiction of this Court. They appear to be equally determined to evade the Court's jurisdiction here.

A motion for a default judgment was made in the prior action and was denied by this Court, with leave to renew. However, after a review of the service of process in that action, it was determined that commencement of a new action would be the best way to proceed, in accordance with discussions during the course of conferences before Magistrate Judge Orenstein. A further conference is currently scheduled for July 13, 2007.

It is, therefore, clear that the prior action is not being actively pursued against the moving defendants here. Accordingly, they should not be heard to complain that they are being subjected to defending duplicative litigation. They are not.

In any event, the pendency of a prior action is not a ground enumerated in F.R.C.P. Rule 12 as a basis for dismissal. It has been held that the pendency of a prior action between the same parties respecting the same subject matter does not mandate dismissal. See, e.g., Coseka Resources (U.S.A.) Ltd. v. Jordan, 75 F.R.D. 694 (D.C.Okl. 1977), Private Medical Care Foundation, Inc. v. Califano, 451 F.Supp. 450 (D.C.Okl., 1977), Purcell v. Summers, 126 F.2d 390 (4th Cir., 1942). This is particularly so since jurisdiction in the prior action is questionable and there is no possibility of inconsistent determinations.

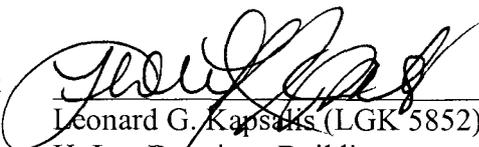
CONCLUSION

In view of the foregoing, it is respectfully submitted that the corporate defendants are in default and no good cause has been shown to grant relief from the default. This action is properly maintained and should not be dismissed upon the alleged ground of the pendency of a prior action. Accordingly, the within motion should be denied in its entirety, together with such other and further relief as to this Court may seem just and proper.

Dated: Hauppauge, New York
June 21, 2007

Respectfully submitted,

CHRISTINE MALAFI
Suffolk County Attorney

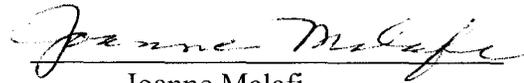
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That on the 21st day of JUNE, 2007 deponent served the within MEMORANDUM OF LAW IN OPPOSITION in the matter of County of Suffolk v. George R. Simpson, et al (CV-07-1644), upon the following defendants in this action at the addresses designated by defendants for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York:

To:

George Simpson
P.O. Box 775
Hampton Bays, NY 11946

Jean Simpson
P.O. Box 775
Hampton Bays, NY 11946


Joanne Malafi

Sworn to before me this
21st day of June, 2007



L. Adriana Lopez

Notary Public, State of New York
Cert No. 02L06145268
Qualified in Suffolk County
Commission Expires May 1, 2010