

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**KINGVISION PAY-PER VIEW  
CORPORATION, LTD.,  
Plaintiff**

**v.**

**2501 X FACTOR, INC. d/b/a/  
III ELEMENTS, and  
ALBERT NORAT  
Defendants**

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**CIVIL ACTION  
NO. 05-3359**

**MEMORANDUM OPINION AND ORDER**

**RUFE, J.**

**December 16, 2005**

Plaintiff Kingvision Pay Per View Corp. (“Kingvision”) brings this diversity suit against Defendants 2501 X Factor, Inc., d/b/a III Elements (“III Elements”) and Albert Norat (“Norat”), president of III Elements, for allegedly intercepting and broadcasting a closed-circuit boxing match in violation of various federal laws. Presently pending before the Court is Plaintiff’s Motion for Default Judgment [Doc. #5] and Defendants’ Petition to Set Aside Default [Doc. #6].

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff commenced this action on June 29, 2005. On July 22, 2005, Plaintiffs filed two returns of service executed by a private process server, in which the process server averred that copies of the summons and complaint were accepted by an unnamed bartender at III Elements in Philadelphia.<sup>1</sup> After Defendants failed to file a timely response, Plaintiff requested

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<sup>1</sup> Plaintiff filed an individual return of service for III Elements [Doc. #2] and Norat [Doc. #3].

entry of default, which the Clerk of Court entered on August 17, 2005. Plaintiff filed its Motion for Default Judgment on September 30, 2005.

On November 11, 2005—almost four months after the docket reflects service—Defendants made their presence known to the Court by filing a Petition to Set Aside Default. The Petition alleges that Defendants became aware of the suit only after receiving copies of the Motion for Default Judgment. The Petition thus seeks to set aside default on the grounds that Defendants were never served and that they have a meritorious defense, namely they never showed the boxing match in question.

## **II. DISCUSSION**

Although the motions at bar are somewhat coextensive, the Court, for purposes of analytical clarity, first considers the Defendant’s Petition to Set Aside Default and then considers the Plaintiff’s Motion for Default Judgment.

### **A. Whether to Set Aside Entry of Default**

Pursuant to Federal Rule of Civil Procedure 56(c), a Court may for good cause shown set aside an entry of default. In deciding whether to set aside an entry of default, the Court must consider the following four factors: “(1) whether lifting the default would prejudice the plaintiff; (2) whether the defendant has a prima facie meritorious defense; (3) whether the defaulting defendant’s conduct is excusable or culpable; and (4) the effectiveness of alternative sanctions.”<sup>2</sup> The Third Circuit disfavors default. “[I]n a close case, doubts should be resolved in

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<sup>2</sup> Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73-74 (3d Cir.1987).

favor of setting aside the default and reaching the merits.”<sup>3</sup>

Here, the only “good cause” alleged by Defendants to set aside default is their failure to receive service of the summons and complaint. In other words, they claim their default is excusable because they never knew a lawsuit had been initiated against them. Since the docket clearly reflects entry of returned and executed summons establishing service on July 19, 2005, the only issue to consider is whether such service was legally proper.<sup>4</sup>

The Federal Rules of Civil Procedure provide for service in accordance with either the federal standards for service or “pursuant to the law of the state in which the district court is located.”<sup>5</sup> Accordingly, the Court must determine whether service on Norat and III Elements—both of whom were served by delivery of the summons and complaint to the bartender at III Elements—was proper under federal standards or Pennsylvania law.

### **1. Service on Norat**

Under Federal Rule of Civil Procedure 4(e), service upon an individual may be effected by personal delivery, delivery to certain persons at the individual’s home, or delivery “to an agent authorized by appointment or by law to receive service of process.”<sup>6</sup> Based on the summons, which is the only evidence relating to service in this matter, the bartender of III Elements was not Norat’s agent for purposes of receiving service. Therefore, service on Norat

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<sup>3</sup> Zawadski de Bueno v. Bueno Castro, 822 F.2d 416, 420 (3d Cir.1987).

<sup>4</sup> See Joe Hand Promotions, Inc. v. Limit XXI, Inc., No. 00-1187, 2000 WL 875709, at \*1 (E.D. Pa. June 14, 2000) (assessing adequacy of service as a “threshold matter” in deciding a motion for default judgment); Lease Corp. of America, Inc. v. Gibbs, No. 96-6927, 1997 WL 214811, \*1 (E.D. Pa. Apr. 22, 1997) (“In order for a court to enter a default judgment against a defendant, that defendant must have been properly served with a summons and a copy of the complaint.”).

<sup>5</sup> Fed. R. Civ. P. 4(e)(1) (governing service on individuals), h(1) (governing service on corporations) .

<sup>6</sup> Fed. R. Civ. P. 4(e)(2).

was not proper under the federal standards.

Under Pennsylvania law, specifically Pennsylvania Rule of Civil Procedure 402, service upon an individual may be effected by delivery at “any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.”<sup>7</sup> The Third Circuit has held that a “person for the time being in charge” for purposes of Rule 402 “must either be an individual with some direct connection to the party to be served or one whom the process server determines to be authorized, on the basis of her representation of authority, as evidenced by the affidavit of service.”<sup>8</sup> In so holding, the Third Circuit explained that a secretary at an individual’s place of work qualifies as a proper party to be served.<sup>9</sup> Moreover, an “office or usual place of business” refers to “a place where the defendant has a proprietary interest and not where the defendant is merely an employee.”<sup>10</sup>

Here, delivery of the summons and complaint to the bartender at III Elements qualifies as proper service under Rule 402. III Elements is an office or usual place of business of Norat because he has a proprietary interest in the company by virtue of being its president. The bartender at III Elements who received the summons and complaint qualifies as a “person for the time being in charge” because he had a direct connection to Norat as a subordinate employee of the same company, similar to a secretary at an individual’s office.

Therefore, since service was proper under Pennsylvania law, Norat was properly

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<sup>7</sup> Pa. R. Civ. P. 402(a)(2)(iii).

<sup>8</sup> Grand Entm’t Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 486 (3d Cir. 1993).

<sup>9</sup> Id. at 485.

<sup>10</sup> Harmon Electronics, Inc. v. Nat’l Signal Corp., No. Civ. A. 94-3071, 1997 WL 158216, at \*2 (E.D. Pa. 1997 Apr. 2, 1997).

served for purposes of this federal suit.

## **2. Service on III Elements**

Under Federal Rule of Civil Procedure 4(h), service upon a domestic corporation “shall be effected . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.” Here, no evidence indicates the bartender who received the summons and complaint qualifies as a person to receive service under Rule 4(h). Therefore, service on III Elements was not proper under the federal standards for service on corporate defendants.

Under Pennsylvania law, specifically Pennsylvania Rule of Civil Procedure 424, service upon a domestic corporation shall be effected:

by handing a copy to any of the following persons provided the person served is not a plaintiff in the action: (1) an executive officer, partner or trustee of the corporation or similar entity, or (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or (3) an agent authorized by the corporation or similar entity in writing to receive service of process for it.<sup>11</sup>

The Third Circuit’s interpretation of the phrase “person for the time being in charge” is the same for purposes of Rule 402 and 424.<sup>12</sup> Therefore, having already decided that the bartender qualifies as a “person for the time being in charge,”<sup>13</sup> as discussed above, the Court holds that service upon III Elements was proper under Pennsylvania law.

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<sup>11</sup> Pa. R. Civ. P. 424.

<sup>12</sup> See Cooperstein v. Independence Blue Cross, No. 05-194, 2005 WL 1819972, at \*5-6 (E.D. Pa. Aug. 2, 2005).

<sup>13</sup> See also Knez Optical, Inc. v. Singer Optical Group, Inc., No. 94-7582, 1995 WL 241428, at \*2 (E.D. Pa. Apr. 20, 1995) (holding that a secretary employed by the defendant was a proper person to receive service on behalf of the corporate defendant).

Therefore, since Plaintiffs properly served Defendants, there is no basis for this Court to set aside the entry of default. Despite the liberal standard governing motions under Federal Rule 56(c), the Court finds no good cause for the Defendants' failure to timely respond to Plaintiff's complaint.

**B. Whether to Grant Default Judgment**

Having decided that the Clerk of Court's entry of default should not be set aside, the Court turns to Plaintiff's Motion for Default Judgment. Pursuant to Rule 55 of the Federal Rules of Civil Procedure, Kingvision asks this Court to enter default judgment against III Elements and Norat. When default judgment is entered, "the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true."<sup>14</sup>

Here, taking the factual allegations of the complaint as true, III Elements and Norat are liable to Kingvision. Defendants—without authorization—intercepted, received, and broadcasted the Event to patrons of III Elements, in violation of 47 U.S.C. § 605<sup>15</sup> and 47 U.S.C.

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<sup>14</sup> Comdyne I, Inc. v. Corbin, 908 F.3d 1142, 1149 (3d Cir. 1990). "[E]ven after default it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action." 10 Wright, Miller, & Kane, Federal Practice § 2688 (3d ed. 1998); see also Degen v. Bruce, No. 93-5674, 1995 WL 120483, at \*2 (E.D. Pa. Mar. 13, 1995) ("[A] default does not constitute an admission of law or of liability.").

<sup>15</sup> Section 605(a) provides: "No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto."

§ 553.<sup>16</sup> Indeed, the basis for awarding default judgment in this case is virtually identical to a number of previous cases.<sup>17</sup>

Having established Defendants' liability, all that remains is the amount of damages to which Kingvision is entitled. "If the damages are not for a 'sum certain or for a sum which can by computation be made certain,' Fed. R. Civ. P. 55(b)(1), 'the court may conduct such hearings or order such references as it deems necessary and proper.'"<sup>18</sup> Plaintiff seeks statutory damages, attorneys fees, and costs under both sections 605 and 553. The damages provisions of those statutes provide a fixed range of statutory damages, within which a court has discretion to award an amount it deems just.<sup>19</sup> Moreover, both statutes authorize a court to award larger damages if it finds the "violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain."<sup>20</sup> Thus, because the amount of damages in this case is a matter of considerable discretion, the Court will hold a hearing to determine the appropriate amount of damages.

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<sup>16</sup> Section 553(a)(1) provides: "No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law."

<sup>17</sup> See, e.g., Kingvision Pay-Per-View Ltd. v. Spice Restaurant & Lounge, Inc., 244 F. Supp. 2d 1173 (D. Kan. 2003) (awarding default judgment for violations of § 605 and § 553 where defendants illegally intercepted and broadcast a championship boxing match); DirectTV, Inc v. Crumlish, No. 03-3265, 2004 WL 1614872 (E.D. Pa. July 16, 2004) (awarding default judgment for violation of § 605).

<sup>18</sup> Comdyne I, 908 F.3d at 1149.

<sup>19</sup> § 605(e)(3)(C)(i)(II); § 553(c)(3)(A)(ii).

<sup>20</sup> § 605(e)(3)(C)(ii); § 553(c)(3)(B).

### **III. CONCLUSION**

For the forgoing reasons, the Court denies Defendants' Petition to Set Aside Default and grants Plaintiff's Motion for Default Judgment with respect to issues of liability. Pursuant to Federal Rule 55, the Court will hold a hearing on the issue of damages before entering final judgment.

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**ORDER**

**AND NOW**, this 16th day of December 2005, upon consideration of Plaintiff's Motion for Default Judgment [Doc. #5] and Defendants' Petition to Set Aside Entry of Default [Doc. #6] and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED** and Defendants' Petition is **DENIED**.

It is further **ORDERED** that a hearing on the issue of damages will be held on **Monday, January 30, 2006 at 10 a.m.** at United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania. Counsel and all interested parties should report to the Fourth Floor for courtroom assignment.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**