

January 29, 2008

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Re: Cavalier Telephone, LLC

v.

CL07-3521

Step 9 Software Corporation

Dear Counsel:

On January 3, 2008 the defendant, Step 9, brought on a motion to set aside a default judgment entered on October 9, 2007. The motion asserts various grounds for the relief and is accompanied by a motion to quash a garnishment summons issued pursuant

to the judgment and a motion for sanctions pursuant to Va. Code §8.01-271.1.

The background of pertinent litigation between the parties is as follows. In August 2006 plaintiff, (Cavalier Telephone or Cavalier), filed suit in this court against Step 9 claiming breach of contract, fraud, detinue, and conversion under a contract dated January 17, 2005 covering a software license and maintenance agreement. Cavalier is a telephone company with operations in Richmond, Virginia. Step 9 is a Delaware corporation which allegedly contracted with Cavalier to provide computer software and support. On October 4, 2006 upon the agreement of the parties the case was dismissed pursuant to a non-suit under Va.Code §8.01-380. The nonsuit order provided that two of the counts, detinue and conversion, were dismissed with prejudice.

Later, on November 6, 2006, Step 9 brought an action against Cavalier in the Circuit Court of Fairfax County asserting multiple contract breach claims under the parties' computer software and support contract. On May 4, 2007 the Fairfax court pursuant to Rule 4:12(d) entered an order that Step 9 have judgment by default on the issues of liability, reserving for later determination what, if any, damages Cavalier would be responsible for in that action.

In the meantime, on July 13, 2007, Cavalier filed suit against Step 9 again here asserting claims of breach of contract, fraud, detinue, and conversion under the same computer software and support contract dated January 17, 2005. After the Fairfax Court heard and decided that Step 9 would be entitled to \$1.4 million in damages in that case, confirmed by a judgment order dated May 4, 2007, Cavalier moved for default judgment

on its claims in the action then pending in this court resulting in this court's order dated October 9, 2007.

In the proceedings that led to the October 9, 2007 default judgment, Cavalier first attempted service on Step 9 through its registered agent as listed with the State Corporation Commission. Service was not made and the return of service indicated "vacant moved". Cavalier then served Step 9 through the clerk of the State Corporation Commission as provided in Va. Code §13.1-769(D). The commissioner's mailing of process resulted in the same notation on a return as "vacant, moved." Based on service on the clerk of the State Corporation Commission, this court awarded plaintiff a judgment by default on October 9, 2007.

In support of its motion to set aside default judgment, Step 9 makes several claims of fraud. It argues that given the regular interaction between the parties during the Fairfax case, Cavalier committed fraud by failing to disclose the Fairfax litigation to this court and by failing to disclose to counsel the fact that proceedings had been initiated here. Cavalier observes that no statute requires the extension of what is otherwise a professional courtesy to opposing counsel.

In addition, Cavalier contends that the default judgment is a final order and the 21 days under Rule 1:1 have run. Thus, the court is without jurisdiction. However, the default judgment order, drafted and submitted by Cavalier contains the following pertinent language:

“[T]he Court shall not close this case until further Order of the Court to consider any other claims Plaintiff may file against Defendant and others that may have liability associated with Plaintiff’s claims in this case.”

While the motion raises many questions the issue that is dispositive is controlled by the above cited provision in the judgment order. The Court concludes that this language renders the order not final.

“A final order or judgment is one that disposes of the whole subject of the case and gives all relief contemplated.” *Ragan v Woodcroft Village Apartments*, 255 Va. 322, 324, 497 S.E. 2d 740, 743 (1998). “A decree is final only when it disposes of the whole subject, gives all the relief that is contemplated and leaves nothing to be done by the court except its ministerial execution.” *Brooks v Roanoke County Sanitation Auth.*, 201 VA 934, 936, 114 S.E. 2d 758,760 (1960).

So, Cavalier’s argument that the order must contain magic words such as “retains jurisdiction” for the order to remain interlocutory rather than final is not persuasive. No such requirement exists, but even if it does, the plain language of the order states that “[T]he court shall not close this case until further Order of the Court.”

Upon consideration, the court will vacate the previous default judgment order and allow Step 9 to file responsive pleadings. Counsel for Step 9 is directed to draft an order, with exceptions noted, that vacates the default judgment order, grants defendant leave to respond to the complaint within twenty-one days of its entry, and quashes any

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garnishment summons based on the default judgment. The question of any sanctions will be reserved for later determination.

Very truly yours,

Melvin R. Hughes, Jr.