

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BIG DADDY GAMES, LLC,

Plaintiff,

v.

REEL SPIN STUDIOS, LLC, *et al.*,

Defendants.

ORDER

12-cv-449-bbc

On November 14, 2012, plaintiff filed a motion to compel defendant George Simonis, a citizen of Australia, to come to the United States to be deposed in Milwaukee, Wisconsin on December 4, 2012. *See* dkt. 111. Simonis's deadline to respond was November 21, 2012; it is now November 28, 2012 and Simonis has not responded.¹ Even so, plaintiff is not entitled to prevail on its motion simply because it is unopposed, particularly when the burden to be imposed on Simonis is so heavy.

As outlined in plaintiff's brief, after this court granted plaintiff's motion for default against Simonis on August 16, 2012, Simonis moved to vacate this order on September 7, 2012, and subsequently filed an answer to plaintiff's amended complaint, along with counterclaims. On October 18, 2012, plaintiff served its first set of written discovery on Simonis by mail and email. On October 29, 2012, plaintiff's attorneys sent an email request to Simonis asking him to be deposed in Australia via videoconference. Simonis declined, indicating that he would not submit to a deposition unless plaintiff complied with the requirements of the Hague Convention.

On November 2, 2012, plaintiff's attorneys sent Simonis a letter advising him that his reliance on the Hague Convention was misplaced in light of the United States Supreme Court's decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). Counsel accompanied this letter with a notice of deposition in Milwaukee, Wisconsin on December 4, 2012 and offered to pay Simonis's reasonable travel expenses, including airfare and lodging. Simonis responded on November 3, 2012, again declining

¹ On November 23, 2012, Simonis did file an opposition to plaintiff's motion to dismiss his counterclaims, including a sworn "statutory declaration." *See* dkt. 114.

to attend the deposition on the ground that the method of service of the notice of deposition did not comply with the requirements of the Hague Convention.

On November 7, 2012, plaintiff's attorneys emailed Simonis and asked him to confer with them about his obligation to attend his deposition in Milwaukee on December 4, 2012. Simonis declined the invitation, hewing to his position that he was not obliged to honor the deposition notice because it did not comply with the Hague Convention. This motion followed.

Plaintiff is correct: pursuant to *Societe Nationale* and subsequent cases, plaintiff is not required to comply with the Hague Convention when noticing Simonis for a deposition in the United States. Federal courts have the discretion to determine whether to require parties to follow Hague Convention procedures, taking into account, among other things, F.R. Civ. Pro. 1's admonition that courts must secure the just, speedy and inexpensive resolution of the proceedings before them.

Here, Simonis did not make his appearance until September 7, 2012 (thus vacating the default against him), summary judgment motions are due from all parties in January, 2013, and trial is firmly set to begin on June 3, 2012. Plaintiff reports that in a related lawsuit, it took nine months for the Australian Attorney-General's Office to provide information requested under the Hague Convention. Simonis has admitted that this court has jurisdiction over him, he has stated his intent to defend against plaintiff's allegations, he has filed three counterclaims of his own against plaintiff, and he recently filed his own sworn statement of events in opposition to plaintiff's motion to dismiss his counterclaims.

Simonis can't have it both ways, tossing substantive documents into the record from Down Under, then raising the Hague Convention as a shield against discovery by his opponent. Simonis was a pivotal participant in the infringement dispute at the heart of this lawsuit. Prompt discovery of his testimony is material to the fair and accurate resolution of this lawsuit. Plaintiff offered to take Simonis's deposition via videoconference but Simonis refused. Plaintiff is allowed by the law and the rules, and is entitled in this situation to obtain Simonis's testimony at a deposition in Milwaukee, so long as plaintiff pays Simonis's reasonable travel and subsistence expenses. Plaintiff already has offered to do that and the offer still stands. In short, all factors weigh in favor of granting

plaintiff's motion, none weigh against it. Simonis should be aware that, pursuant to F.R. Civ. Pro. 37(d), failure to attend his deposition could result in default against him on plaintiff's claims and dismissal of his counterclaims.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Big Daddy Games LLC's motion to compel the deposition of defendant George Simonis is GRANTED.
- (2) Defendant George Simonis shall appear for deposition in this lawsuit as noticed, on December 4, 2012 in Milwaukee, Wisconsin;
- (3) Plaintiff shall pay defendant Simonis's reasonable travel and subsistence expenses incurred in attending this deposition.

Entered this 28th day of November, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge