

HONORABLE JOHN P. ERLICK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

1st Technology LLC,

Plaintiff,

v.

BODOG ENTERTAINMENT GROUP S.A.,
BODOG.NET, AND BODOG.COM,

Defendants.

CASE NO: 07-2-25305-0 SEA

**1ST TECHNOLOGY'S
OPPOSITION TO DEFENDANTS'
MOTION FOR
RECONSIDERATION**

I. Introduction

In making a last ditch effort to avoid the collections efforts of Plaintiff 1st Technology LLC, Defendants/Judgment Debtors belatedly request the Court to reconsider its prior orders granting Plaintiff's requests for Writ of Execution. Defendants' Motion for Reconsideration is untimely. Defendants fail to articulate the particular grounds for reconsideration or satisfy any such grounds. In any event, Defendants are incorrect as a matter of law – a recent Ninth Circuit case holds that domain names are a species of property like any other. Domain names can be converted and executed upon. A recent federal district court case from California has expressly found that domain names are a species of property subject to execution and levy. Nothing in Washington's execution statutes exclude domain names from the scope of a creditor's collections efforts. Rebuffing Plaintiff's collections efforts would allow Defendants to flout the jurisdiction of the United States courts and a valid judgment for \$49 million which the federal district court in Nevada recently refused to set aside. Defendants' Motion should be denied.

II. Factual Background

1
2 1st Technology presumes familiarity with the background facts of the case, and will not
3 repeat them here. 1st Technology points out that Defendants characterize – without any citations
4 to any evidence – the facts in a manner contrary to the findings of the District Court in Nevada
5 and in this Court. 1st Technology will not rehash those facts here. However, for purposes of
6 Defendants’ Motion, Defendants gloss over one material fact: the Court’s initial Order granting
7 1st Technology’s request for a Writ of Execution was entered on August 21, 2007. While the
8 Court’s subsequent Orders have dealt with ancillary issues, the August 21 Order is the order that
9 first addressed the issue of whether a writ of execution was appropriately issued against the
10 domain names of Defendants. Indeed, it was pursuant to this initial Order that eNom transferred
11 the bulk of domain names at issue into Plaintiff’s account.

12 Defendants’ initial pleading in this Court – which was a motion to stay Plaintiff’s
13 collections efforts – was filed on September 4, 2007. Defendants did not raise the propriety of
14 execution in that motion. Nor did Defendants raise the issue in subsequent motions.
15 Defendants’ Motion for Reconsideration – which purports to request the Court to reconsider its
16 decision to issue a writ of execution against Defendants’ domain names – was filed over 70 days
17 after entry of the initial Order allowing execution, and 60 days after filing of an initial pleading
18 by Defendants.

III. Discussion

A. Defendants’ Motion is Untimely, and Fails to Satisfy any of the Bases for Reconsideration

19 King County Local Rule 7(b)(5) and Washington Civil Rule 59 govern motions for
20 reconsideration.¹

1. Defendants’ Motion is untimely.

22 Local Rule 7(b)(5) requires a motion to be brought within 10 days of the order on which
23 reconsideration is sought. Civil Rule 59 similarly requires the motion to be brought “10 days
24 after the entry of the judgment, order, or other decision.”

25
26 ¹ While Rule 59 falls within the “Judgment” section of the Civil Rules – implying that it only applies once
27 judgment has been entered – Local Rule 7 contains a reference to Civil Rule 59. Additionally, Rule 59’s timing
requirement references “judgment[s], order[s], or other decision[s].” Civil Rule 59 thus provides the standards
applicable to all motions for reconsideration.

1 Here, Defendants failed to raise the issue of whether Washington’s execution statutes
2 allow for execution on domain names within 10 days of the Court’s initial Order granting
3 Plaintiff’s request for a Writ of Execution (i.e., within 10 days of August 21, 2007). Defendants
4 filed numerous pleadings following their initial pleading seeking a stay. Defendants failed to
5 raise the issue in these other pleadings. Defendants’ Motion is untimely as to the Court’s initial
6 decision issued on August 21st and untimely with respect to the subsequent decision issued from
7 the bench on October 12, 2007 (where the Court indicated that 7 or 8 additional domain names
8 registered through Dotster would be transferred, to the extent Plaintiff can demonstrate direction
9 of users to sites accessible from such new domain names). Defendants’ Motion should be denied
10 for failure to comply with the 10 day deadline for reconsideration motions.

11 2. Defendants’ Motion fails to specify any adequate basis for reconsideration.

12 Rule 59 further specifies numerous possible bases for reconsideration, and requires a
13 motion to articulate “specific reasons in fact and law as to each ground on which the motion is
14 based.”

15 Defendants fail to specify what the actual grounds for reconsideration are. Rule 59 sets
16 forth a list of possible grounds for reconsideration. These include, among others, attorney
17 misconduct, newly discovered evidence, and irregularity in the proceedings. Errors of law are
18 allowed as a basis for reconsideration, provided that the party seeking reconsideration “objected
19 to [the error] at the time [the error was purportedly made].” CR 59(a)(8). Here, Defendants do
20 not point to any previous instance where they objected to Plaintiff’s execution efforts on the
21 basis that domain names are not properly subject to execution. Defendants’ Motion should be
22 denied because it fails to cite an adequate bases for reconsideration and fails to comply with CR
23 59.

24 To the extent the Court considers the merits of the Motion, as set forth below, it is
25 unsupported by the law.

26 **B. The Virginia Cases Cited by Defendants are Inapposite**

27 Defendants cite to two Virginia decisions in arguing that “domain names are not property
that is subject to seizure to satisfy a judgment”: Dorel v. Arel and Network Solutions v. Umbro
International, Inc. (Motion, p. 6.) Neither warrant a conclusion in Defendants’ favor. As an
initial matter, 1st Technology notes that Dorel v. Arel did not decide the issue Defendants seek the
Court to reconsider. There, the court expressly noted that the “issue of whether a domain name is

1 personal property subject to the lien of fieri facias ultimately *need not be resolved because there*
2 *is a more readily available*, practical solution to the problem to be found in [the registrar’s]
3 policies.” Dorel v. Arel, 60 F. Supp. 2d 558, 560 (E.D. Va. 1999) (emphasis added). The
4 language from Dorel quoted by Defendants in the Motion would not be binding on this Court
5 even if Dorel were decided by a Washington court.

6 1. Umbro is incorrectly premised on the supposed personal nature of a domain name
7 services agreement.

8 Umbro, the second case cited by Defendants, held that “[a] contract for [domain name]
9 services is not ‘a liability’ as that term is used in § 8.01-511 [Virginia’s garnishment statute] and
10 hence is not subject to garnishment.” Network Solutions, Inc. v. Umbro Int’l, Inc., 259 Va. 759,
11 770 (Va. 2000). Umbro is inapplicable because it was decided against the backdrop of Virginia’s
12 garnishment statutes which Defendants do not demonstrate to bear any resemblance to those of
13 Washington. Moreover, Umbro relied in part on a Fourth Circuit case rejecting the right of a
14 judgment creditor to execute on a contract for services. *See* Umbro, 259 Va. at 770 (citing
15 United States ex rel. Global Bldg. Supply, Inc. v. Harkins Builders, Inc., 45 F.3d 830, 834 (4th
16 Cir. 1995)). Harkins refused to allow a judgment creditor to execute on a contract for services
17 that was clearly personal to the judgment debtor. The Fourth Circuit in Harkins rejected the
18 judgment debtor’s argument that execution should be permitted because the judgment creditor
19 would merely stand in the shoes of a judgment debtor upon execution:

20 to argue that the garnishor stands ‘in the shoes’ of the judgment debtor for any other
21 purpose *poses the risk of inserting the judgment creditor as another party to the contract*.
22 Following this line of reasoning to an extreme, the judgment creditor could thus argue
23 that it was entitled to assume the judgment debtor’s obligations and perform the contract,
24 to earn money that the judgment debtor would otherwise have been entitled to earn. Such
25 an argument, we conclude, distorts the role of garnishment, which is simply to enforce a
26 judgment against property of the judgment debtor in the hands of a third person.

27 United States ex rel. Global Bldg. Supply, Inc. v. Harkins Builders, Inc., 45 F.3d 830, 834 (4th
Cir. 1995)).

The risk envisioned by Harkins and the rationale underlying Umbro is simply not present
in the case. eNom – which Defendants admit is the third largest registrar in the country (and the
largest in the State of Washington) – posed no objection to the Order entered by this Court.
Indeed, eNom already turned over the property in question to 1st Technology, demonstrating that
the view of eNom as a hapless third party upon whom the Order will thrust contractual

1 obligations to a total stranger is simply incorrect. Unlike Harkins, in this case, there is no risk of
2 “inserting [1st Technology] as another party to the contract.”

3 In addition, Umbro has been subsequently discredited.

4 **2. Recent Ninth Circuit cases discredit the approach taken by Umbro.**

5 Several years after Umbro held that domain names were a creature of contract not subject
6 to garnishment, the Ninth Circuit held (under California law) that domain names were a species
7 of property like any other and that misappropriation of a domain name could support a claim for
8 conversion. See Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003). In Kremen, the Ninth
9 Circuit rejected Umbro’s central premise, and held that domain names “satisfy [all of the]
10 criterion [for property].”

11 A domain name is a well-defined interest. Someone who registers a domain name decides
12 where on the Internet those who invoke that particular name whether by typing it into
13 their web browsers, by following a hyperlink, or by other means are sent. Equally
14 important, domain names are valued, bought and sold, often for millions of dollars . . .
15 and they are now even subject to in rem jurisdiction

16 Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003). Indeed, the lower court in Kremen
17 expressly rejected Umbro, noting in its view that “the Virginia Court’s rationale [in Umbro] is
18 not . . . satisfactory.” Kremen v. Cohen, 99 F. Supp. 2d 1168, 1173 fn.1 (N.D. Cal. 2000). Cases
19 have adopted Kremen’s approach rejecting Umbro, in expressly allowing levy of domain names.
20 See Office Depot, Inc. v. Zuccarini, 2007 U.S. Dist. LEXIS 69774 (N.D. Cal. 2007). In
21 Zuccarini, the court noted Kremen’s rejection of Umbro and concluded that

22 the domain names owned by Zuccarini and existing in California are subject to levy
23 under a writ of execution.

24 Id. (Incidentally, in Zuccarini, the court appointed a receiver to auction off and sell the domain
25 names.)

26 **C. Washington Statutes Broadly Define Property for the Purpose of Execution**

27 As Defendants acknowledge, Washington statutes broadly allow for execution by a
judgment creditor of “all property, real and personal, of the judgment debtor that is not exempted
by law.” RCW §6.17.090. Indeed, Washington courts have broadly construed the definition of
property subject to execution, to include such intangibles as claims for indebtedness (see Johnson
v. Dahlquist, 130 Wash. 29, 225 P. 817 (1924)) and unliquidated tort claims (see Woody’s
Olympia Lumber, Inc. v. Roney, 9 Wn. App. 626, 513 P.2d 849 (1973)). Washington cases have

1 expressed reservation only where a contract is truly personal to the judgment debtor. For
2 example, the Washington Court of Appeals held that a judgment debtor's stock appreciation
3 rights (SAR) to shares of stock was not property liable to execution under this section. Safeco
4 Ins. Co. of Am. v. Skeen, 47 Wn. App. 196, *review denied*, 108 Wn.2d 1019 (1987).

5 In Skeen, the court reviewed the provisions of the SAR plan which contained numerous
6 provisions reflecting the intent of the parties to limit exercise of the rights by the employee (who
7 should remain in employment of the company) or the employee's beneficiaries by will (in the
8 event the employee was no longer living):

9 The optionees, the number of shares of stock to be optioned in each case, and the terms
10 upon which the options are granted shall be determined by the Committee, provided that
11 each option shall contain a provision that will prevent exercise of the option unless the
12 optionee remains in the employ of the Company or its subsidiaries at least one year after
13 the granting of the option. Each option and related stock appreciation rights shall expire
14 not later than ten years after the date of grant of such option. No options or stock
15 appreciation rights granted hereunder shall be transferrable by the optionee other than by
16 will or the applicable laws of descent and distribution. During the lifetime of the optionee
17 such options or stock appreciation rights shall be exercisable only by the optionee or by
18 the optionee's guardian or legal representative

19 Skeen, 47 Wn. App. at 199. The court also relied on the fact that the beneficiaries of the plan are
20 likely the employee and the employee's family members.

21 Domain name registration agreements, including those in this case obviously differ from
22 the operative terms of the SAR plan in Skeen. Domain names can be registered by entering into
23 a "click-wrap" agreement over the internet. (*See Linke Declaration submitted in support of*
24 *Motion for Reconsideration, Exhibits F & G.*) Additionally, domain names can be freely
25 transferred – domain name registrars such as eNom do not place any restrictions on who a
26 domain name can be transferred to. (*Id.*) Indeed, in the case of both registrars, services are not
27 even provided directly to the registrant – they may be provided through an intermediary. (*See*
introductory paragraph to eNom Registration Agreement; Motion for Reconsideration, p. 3, fn
4.)

Under Washington law, domain names are not "nontransferrable services" which are
provided to specific individuals. To the extent any services are provided, those services are
fungible, ancillary to the actual registration in question, and freely transferrable. As such,
domain names are property, like any other species of intangible property that may be freely
transferred, converted, and executed upon.

1 **D. Defendants’ Arguments Based on the Purported Uniqueness of Their Domain Names**
2 **Are Similarly Inapposite**

3 Defendants’ obliquely argue that the domain names in this case should be treated
4 differently because they incorporate Defendants’ unique trademark and because the names have
5 no “exchange value”. (See, e.g., Motion. p. 9 (“the domain names in question are largely based
6 on trademarks of various Bodog businesses”))

7 First, no Washington cases adjudicating whether property is subject to execution have
8 ever hinged on whether a particular item has “exchange value.” The rule urged by Defendants
9 has no basis in Washington law. Moreover, Defendants have put forth no evidence as to how
10 their domain name is unique and why the domain names could only be used along with
11 Defendants’ trademarks. Indeed, someone may purchase the domain name to use it as an
12 informational resource and not to provide gambling services at all. Defendant’s claims regarding
13 the unique value of their domain names which can only be used along with Defendants’
14 trademarks are unpersuasive. Defendants’ trademark rights are limited (per the trademark
15 application and registration) to the provision of “sports wagering, event wagering, casino
16 tournaments, in the nature of online gaming”.² Since online gambling is illegal under
17 Washington State and U.S. law, it is impossible for the legal (non-gambling) use of the domain
18 names in Washington and the United States to infringe on the purported U.S. trademark rights of
19 Defendants. Defendants will not be able to use their purported U.S. trademark rights to prevent
20 others from providing competing gambling services in non-U.S. jurisdictions. It certainly is not
21 the role of the judicial system to take special steps to protect the illegal U.S. and Washington
22 state business of the Defendants by virtue of a U.S. trademark registered to provide online
23 gambling services.

24 Another reason why the rule urged by Defendants is untenable is that it would create
25 separate rules for domain names that are considered “common” and separate rules for when they
26 are considered “unique” and cannot be used apart from a judgment creditor’s goodwill. As a

27 ² The full description of services (U.S. Reg. No. 2930682) is as follows:

Entertainment services, namely, providing sports wagering, event wagering, casino tournaments, in the nature of online gaming competitions, and games of chance via the Internet and television, such games of chance including but not limited to card games, including blackjack, poker, roulette, bingo, let it ride, war, red dog, baccarat/mini baccarat, spanish 21, big six, big 2, craps, keno, pai gow tiles, pai gow poker, sic bo, slot machines, video poker, lottery, blackjack switch, casino hold ’em, scratch and win, solitaire, free cell, hearts, spades, hangman, mine sweeper, 9 ball pool, 8 ball pool and lotteries.

1 general matter, this will require expensive factfinding prior to issuance of a writ of execution.
2 The rule will also undermine certainty for creditors which is a common sense purpose underlying
3 all collections laws, including those of the State of Washington.

4 **IV. Conclusion**

5 Defendants' Motion is untimely and fails to articulate any cognizable bases for
6 reconsideration of the Court's previous orders as to whether domain names are subject to
7 execution. On the merits, the cases relied on by Defendants are inapposite or have been
8 discredited by the Ninth Circuit. Those cases are not inline with Washington authorities which
9 only preclude execution on truly personal service contracts. Domain names do not fall into this
10 category. Indeed, they are hardly service contracts, any services provided are ancillary to the act
11 of registration, and in any event are fungible. Preventing 1st Technology's collections efforts
12 would allow Defendants to thumb their noses at the US courts and US laws, and would thwart 1st
13 Technology's valid \$49 million dollar judgment. Indeed, to do so would allow Defendants to
14 merely perpetuate their "corporation shell games." Defendants' Motion should be denied.

15 Respectfully submitted, this 26th day of November, 2007.

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17 _____
18 Venkat Balasubramani, WSBA 28269
19 counsel for 1st Technology, LLC
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2007, I caused the attached **Response to Defendants' Motion for Reconsideration** to be filed with the Court and delivered to counsel for Defendants via email.



Venkat Balasubramani, WSBA 28269
counsel for 1st Technology, LLC

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