

First Funds, LLC v ID Graphics Inc.

2008 NY Slip Op 30116(U)

January 7, 2008

Supreme Court, New York County

Docket Number: 0110060/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 110060/2007
FIRST FUNDS, LLC
VS.
ID GRAPHICS INC.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

... REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 1/7/08

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
FIRST FUNDS, LLC,

Plaintiff,

-against-

ID GRAPHICS INC. and DON KAVALIUNAS,

Defendant.
-----X

Decision/Order

Index No.: 110060/07

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's motion w/AAE affirm in support, exhs

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JAN 16 2008
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Numbered

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The underlying action is for breach of contract. This is plaintiff's motion for entry of a default judgment, pursuant to CPLR § 3215, against defendants ID Graphics Inc., ("ID Graphics") and Don Kavaliunas ("Kavaliunas"), which has been submitted to the court on default.

This action is against Kavaliunas, an individual defendant, and ID Graphics a corporate defendant. Plaintiff served the summons and verified complaint on ID Graphics, by delivering a copy to Kavaliunas on August 23, 2007, who is the President of ID Graphics. Plaintiff served the summons and verified complaint on Kavaliunas, personally, on August 8, 2007, by "Nail and Mail" service at defendant's residence. CPLR § 308(4). The affidavit of service establishes due diligence by in hand delivery before resorting to such service. Plaintiff thereafter mailed the summons and verified complaint to Kavaliunas on August 8, 2007.

Neither defendant has appeared, or answered the complaint within the time provided under the CPLR, nor obtained an order from the Court extending their time to do so. On September 7, 2007, plaintiff mailed an additional copy of the summons and verified complaint to Kavaliunas bearing the legend "Personal and Confidential," thereby complying with the additional notice requirements of CPLR § 3215(g)(3)(i). Such additional notice was served at least 20 days prior to entry of a default judgment.

A copy of the contract entered into by ID Graphics on December 4, 2006 has been provided to the court (the "Contract"). Based upon the foregoing, ID Graphics and plaintiff executed the Contract wherein the parties mutually agreed that plaintiff would purchase from ID Graphics \$79,920.00 of its future credit card receivables, deliverable to plaintiff at the rate of 25% per credit card transaction. Plaintiff thereafter paid ID Graphics in the amount of \$54,000.00 as the purchase price for the above-described sale. Pursuant to the Contract, Kavaliunas executed a personal guarantee, on behalf of ID Graphics, to plaintiff.

As provided in the contract, the parties utilized a third-party credit card processor ("Processor"). Under the terms of the contract, for each credit card transaction that ID Graphics processed, the Processor would divert the agreed-upon percentage to plaintiff's account and credit the remaining amount to ID Graphics account until plaintiff collected the total amount due under the contract. There was no time specified in which performance had to be completed and the defendants expressly agreed that ID Graphics shall not sell, dispose, convey or otherwise transfer its business or assets without plaintiff's written consent.

Plaintiff claims that on May 1, 2007, ID Graphics materially breached the contract

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by selling, disposing, conveying or otherwise transferring its business or assets without plaintiff's express written consent. Plaintiff has provided a statement of account wherein the outstanding balance pursuant to the contract is \$79,005.01 (first cause of action). Based upon the personal guarantee contained in the Contract signed by Kavaliunas, which guarantees payment of ID Graphics' indebtedness to plaintiff under the Contract, plaintiff contends that Kavaliunas is jointly and severally liable for ID Graphics' debt (fifth cause of action). As and for a third cause of action, plaintiff claims that it is due the same amount, \$79,005.01, on the theory that defendants, by their acts and omissions, have committed a violation of GBL § 349. Plaintiff has also pled a cause of action for conversion against both defendants (fourth cause of action). For the second and sixth causes of action, plaintiff seeks costs and attorneys' fees incurred in prosecuting this action against ID Graphics and Kavaliunas, respectively.

Discussion

Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1984)], plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kitzanv Productions Ltd., 289 A.D.2d 844 (3rd dept. 2001)].

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently

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definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

The above claims establish the elements of a *prima facie* cause of action for breach of contract against ID Graphics and Kavaliunas. Plaintiff further seeks interest from the date of default, May 1, 2007. Accordingly, plaintiff is entitled to entry of default judgment on the first and fifth causes of action and a money judgment against ID Graphics and Kavaliunas, joint and severally, for the amount demanded in the complaint, to wit, \$79,005.01, with statutory interest thereon from May 1, 2007.

In addition, plaintiff has not pled any facts which would otherwise establish that the defendants violated GBL § 349, and therefore, plaintiff is not entitled to treble damages.

The court's disposition of plaintiff's motion on the first and fifth causes of action renders its motion for default judgment on the third cause of action moot. Plaintiff may not recover twice, because it would be a windfall. Accordingly, plaintiff's motion for entry of a default judgment on the third and fourth causes of action is denied and these causes of action are hereby dismissed.

The second and sixth causes of action are for costs and attorneys' fees in connection with this action against ID Graphics and Kavaliunas, respectively. It is well settled that in the absence of a statutory authority, or unless the parties have otherwise agreed or stipulated, "a civil litigant may [not] sue his adversary to recover fees paid to his attorney for legal services." Rahabi v. Morrison, 81 A.D.2d 434 (2nd Dept. 1981); City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241(1971).

The Contract does not contain a provision for attorneys' fees and costs associated

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with collection of any indebtedness thereunder. As plaintiff has failed to identify any other agreement which obligated the defendants to pay such costs and attorneys' fees, plaintiff's motion for a default judgment on the second and sixth causes of action is denied and these causes of action are hereby dismissed.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that plaintiff's motion is granted with respect to the first and fifth causes of action; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiff First Funds, LLC, against defendants ID Graphics, Inc. and Don Kavaliunas, joint and severally, in the amount demanded on the first and fifth causes of action, totaling Seventy Nine Thousand Five and 1/100 Dollars (\$79,005.01), plus statutory interest thereon from May 1, 2007; and it is further

ORDERED that plaintiff's motion is denied with respect to the second, third, fourth and sixth causes of action; and it is further

ORDERED that the second, third and fourth and sixth causes of action are hereby dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the order, decision and judgment of the Court.

Dated: New York, New York
January 7, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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