

Arrow Elecs., Inc. v CI Lumen Indus., LLC

2009 NY Slip Op 31732(U)

July 23, 2009

Supreme Court, New York County

Docket Number: 018026-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ARROW ELECTRONICS, INC.,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 018026-08

Motion Seq. No: 1

**CI LUMEN INDUSTRIES, LLC, CI DISPLAYS,
LLC, JAMES SABATIER and JACOB KOHN,**

Submission Date: 6/1/09

Defendants.

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Papers Read on this Motion:

- Notice of Motion, Affidavit in Support (J. Young) and Exhibits.....x**
- Affidavit in Support (G. Gibson) and Exhibits.....x**
- Affidavit (B. Schwab).....x**
- Affirmation in Opposition, Affidavits in Opposition (3) and Exhibit.....x**
- Defendants' Memorandum of Law.....x**
- Supplemental Affirmation in Opposition,**
- Supplemental Affidavit in Opposition and Exhibits.....x**
- Transcript of Proceeding before Special Referee on 6/1/09.....x**

This matter is before the court on the motion by Plaintiff Arrow Electronics, Inc. ("Arrow" or "Plaintiff") for an Order directing the entry of a default judgment in favor of Plaintiff and against Defendants, filed December 17, 2008 and submitted June 1, 2009.¹ For the reasons set forth below, the Court grants Plaintiff's motion to the extent that it grants Plaintiff's application for a default judgment against Defendants CI Lumen Industries, LLC ("CI

¹ This Court assumed responsibility for this case, and this motion, on May 8, 2009.

Lumen”) and CI Displays, LLC (“CI Displays”) (collectively “Corporate Defendants”) and directs an inquest on the issue of damages and counsel fees. In light of the prior Order of the Court (Austin, J.) directing the withdrawal of Plaintiff’s motion as to Defendants James Sabatier (“Sabatier”) and Jacob Kohn (“Kohn”) (collectively “Individual Defendants”), the Court has considered Plaintiff’s motion only against the Corporate Defendants. The claims against the Individual Defendants are severed and will continue.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3215(b), granting it a default judgment against Corporate Defendants.

To address Defendants’ claim that service of the summons and complaint (“Complaint”) was improper, the Court (Austin, J.) signed an Order, dated March 9, 2009, referring this matter to Special Referee Frank Schellace (“Referee Schellace”) to conduct a traverse hearing. In that Order, the Court also 1) ordered that Plaintiff’s motion was withdrawn as to the Individual Defendants; and 2) ordered that Plaintiff’s motion as against the Corporate Defendants was stayed pending the determination of the traverse hearing before Referee Schellace.

Referee Schellace conducted that traverse hearing and, after hearing testimony from witnesses, made a finding of fact that service was properly made upon all Defendants, by actual service upon Mr. Cassidey, the person designated to accept deliveries at the business offices of the Corporate Defendants, as reflected in the affidavits of service. The Special Referee therefore recommended that the Court has jurisdiction over all defendants. This Court adopts the finding of the Special Referee, and confirms his report.

Counsel for Defendants, in his Supplemental Affirmation dated May 13, 2009, affirms that he “recently...learned that information that defendants had not discussed with me earlier provides a meritorious defense for the Corporate Defendants, sufficient to vacate the default regardless of the outcome of the traverse hearing.”² As discussed *infra*, the Court has considered this information and concludes that it does not constitute a meritorious defense that

² By letter to the Court dated May 27, 2009, a copy of which was sent to opposing counsel, counsel for Plaintiff objected to Defendants’ Supplemental Affirmation on procedural grounds and argued why, even if the Court were to entertain the Supplemental Affirmation, the new information does not establish a meritorious defense.

would defeat Plaintiff's motion.

B. The Parties' History

In the Complaint, filed on September 20, 2008, Plaintiff describes itself as a global provider of products, services and solutions to industrial and commercial users of electronic components and enterprise computing solutions. The Complaint describes CI Lumen as a limited liability company that supplies LCD (liquid crystal display) enhancements and monitor solutions for government and industry, and describes CI Displays as a limited liability company that provides flat panel displays. The Complaint alleges, further, that Sabatier and Kohn are the CEO and CFO, respectively, of CI Lumen and CI Displays. Plaintiff alleges that Arrow has sold electronic components to CI Displays since 2005 and to CI Lumen since 2008.

The Complaint alleges, *inter alia*, that 1) the Corporate Defendants fraudulently induced Arrow to increase their joint credit limit for certain purchases; and 2) the Corporate Defendants failed to pay for over \$1 million worth of purchases from Arrow. The Complaint contains causes of action sounding in breach of contract and fraud. In its motion, Plaintiff affirms that, since the filing of the Complaint, Arrow has determined that it made an accounting error and has since concluded that Corporate Defendants owe Arrow the principal sum of \$999,533.79, not \$1,004,240.99 as alleged in the Complaint.

In its motion, Plaintiff affirms, and provides supporting documentation reflecting, that it served the Complaint on CI Lumen and CI Displays on October 1, 2008 and filed the applicable Affidavits of Service with the Nassau County Clerk on October 15, 2008. CI Lumen and CI Displays failed to appear or interpose an answer in response to the Complaint and the time for them to answer has expired. Plaintiff affirms, further, that pursuant to an agreement between Plaintiff and Corporate Defendants, Plaintiff may recover costs and expenses, including counsel fees, that it incurs in collecting sums owed to it by the Corporate Defendants.

C. The Parties' Positions

Plaintiff submits that Corporate Defendants are in default as a result of their failure to respond to the Complaint. Thus, Plaintiff submits that the Court should grant Plaintiff a default judgment against Corporate Defendants 1) for compensatory damages in the sum of \$1,069,367.31, representing principal of \$999,533.79 and interest of \$69,833.52, and 2) for attorneys' fees and costs in the sum of \$29,236.17.

Defendants' oppose Plaintiff's motion, in part, on jurisdictional grounds. That issue has been resolved by the traverse hearing, and this Court's adoption of the Referee's recommendation that Plaintiff obtained personal jurisdiction over the Defendants.

Defendants also oppose Plaintiff's motion by contending that they have demonstrated good cause for their failure to answer. In their Affirmation in Opposition, Defendants provide affidavits of Sabatier and Craig Ari Loren, Director of Operations for Corporate Defendants, in support of their claim that they have established good cause for their default. Mr. Loren affirms that he relied on his prior counsel who advised him and Individual Defendants that prior counsel had received a copy of Plaintiff's lawsuit but did not believe it had been filed. Sabatier affirms that Corporate Defendants learned of this suit "by accident" while they were "looking at other corporate issues," and that, upon learning of the lawsuit, terminated the services of prior counsel, on whom they had relied to address the lawsuit.

In his Supplemental Affirmation, counsel for Defendants affirms that he recently learned information from Defendants that provides them with a meritorious defense. Specifically, counsel for Defendants affirms that Plaintiff's counsel wrote a letter ("Letter") that intentionally interfered with a proposed buy-out of Corporate Defendants by a company called Jaco Electronics, Inc. ("Jaco"), thereby affecting the ability of Corporate Defendants to repay Arrow. Defendants provide a copy of that Letter, which is addressed to the Individual Defendants and reflects that copies were sent to Jaco and Arrow. The Court has reviewed that letter in which counsel for Plaintiff, *inter alia*, demanded that Plaintiff be paid in full immediately and stated that if Plaintiff did not receive certain requested documentation, it might pursue legal action to protect its interests.

RULING OF THE COURT

The Court concludes that Plaintiff has demonstrated its entitlement to the entry of a default judgment against the Corporate Defendants based on the Plaintiff's submission of proof of 1) the service of the summons and verified complaint on Corporate Defendants, which this Court holds is valid, 2) the facts constituting its claim for breach of contract and 3) the default in answering or appearing by the Corporate Defendants. CPLR § 3215(f); *see generally Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978 (2d Dept. 2008), *lv. app. den.* 11 N.Y.3d 715 (2009); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008); *Grinage v. City of New York*, 45

A.D.3d 729 (2d Dept. 2007).

To avoid the entry of a default judgment, CI Lumen and CI Displays were required to demonstrate a reasonable excuse for the default and a meritorious defense to the action. *Matone; Allstate Ins. Co.; Grinage*. While the proffered excuse of law office failure is acceptable, CPLR § 2005; *Moore v. Day*, 55 A.D.3d 803 (2d Dept. 2008); *Whitfield v State*, 28 A.D.3d 541 (2d Dept. 2006), there has not been a showing of a meritorious defense, *see generally Baldwin v. Mateogarcia*, 57 A.D.3d 594 (2d Dept. 2008).

Sabatier affirms in his affidavit in opposition that, during the relevant periods of time, he was the CEO of Components International Inc., the parent company of CI Lumen and CI Displays. In his supplemental affidavit in opposition, Sabatier admits that the Corporate Defendants were experiencing financial difficulties. Sabatier further acknowledges in that supplemental affidavit that the Corporate Defendants entered into discussions with Jaco Electronics regarding Jaco purchasing the assets, and assuming much of the debt, of the Corporate Defendants. In their supplemental affirmation, Corporate Defendants argue that the conduct of Plaintiff's attorneys, in sending a copy of the Letter to Jaco, was "wrongful and malicious conduct" and a "scare tactic to kill the Jaco deal." The Court has reviewed the letter and does not share Defendants' view of that letter. On the contrary, the Court concludes that Plaintiff's counsel wrote the Letter in an attempt to ensure that Corporate Defendants did not engage in activity that might jeopardize their repayment of Plaintiff.

The Court concludes, under all of the circumstances of this case, that the Letter does not provide Corporate Defendants with a meritorious defense to Plaintiff's claims. *See Out of Box Promotions LLC v. Koschitzki*, 55 A.D.3d 575, 577 (2d Dept. 2008) (where one's actions are motivated at least in part by economic self-interest, they cannot be characterized as "solely malicious"); *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614, 625 (1996) (letter written to secure an economic advantage, not to injure plaintiffs, constituted persuasion alone, not a malevolent act or "wrongful means"); *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 193 (2004) (economic pressure constituted legitimate persuasion, not "wrongful means"). The Court notes that Corporate Defendants have failed to refute, except in conclusory and unsubstantiated allegations, the concern that Plaintiff expressed in the Letter that it would be offered "essentially pennies on the dollar" in the event of the sale to Jaco. Accordingly, the

Court concludes that Corporate Defendants have not provided a potentially meritorious defense to Plaintiff's claims, and consequently, grants Plaintiff's motion for entry of a default judgment against Corporate Defendants.

Moreover, as the Terms and Conditions of Sale executed by the parties provide for, *inter alia*, payment of Plaintiff's "reasonable attorneys' fees" incurred in collecting any sums due thereunder, Plaintiff is entitled to recover such fees. However, unless the parties can stipulate to the amount of such fees, a hearing is required for a determination of reasonableness. *Key Equipment Finance Inc. v. South Shore Imaging Inc.*, 39 A.D.3d 595 (2d Dept. 2007); *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006). In light of the foregoing, it is hereby

ORDERED, that Plaintiff have judgment by default against Corporate Defendants CI Lumen Industries, LLC and CI Displays, LLC for the relief demanded in the Complaint; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace to hear and determine all issues relating to the determination of damages, interest, counsel fees and other costs, if appropriate, pursuant to CPLR § 3215, on September 15, 2009 at 10:00 a.m.; and it is further

ORDERED, that counsel for Plaintiff is directed to advise the Court on or before October 2, 2009, via letter with copies to opposing counsel, of the status of the hearing before Referee Schellace; and it is further

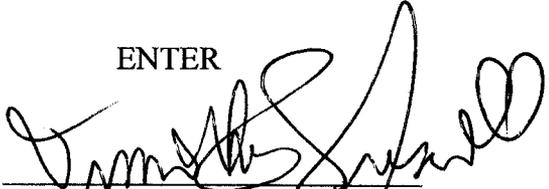
ORDERED, that counsel for the Individual Defendants are directed to appear at a conference before the Court on October 7, 2009 at 9:30 a.m.; and it is further

ORDERED, that counsel for Plaintiff shall serve upon all Defendants by certified mail, return receipt requested and regular mail with certificate of mailing a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before August 21, 2009; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Corporate Defendants in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
July 23, 2009

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUL 27 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE