

Howley v KR Capital Mgt., LLC

2010 NY Slip Op 31471(U)

June 9, 2010

Sup Ct, NY County

Docket Number: 602771/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. Justice

PART 10

Index Number : 602771/2009
HOWLEY, IWONA
 VS.
KR CAPITAL MANAGMENT LLC
 SEQUENCE NUMBER : 002
 DEFAULT JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. 002
 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

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

FILED

JUN 14 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/9/10


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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X

IWONA HOWLEY,

Plaintiff,

DECISION/ORDER
Index No.: 602771/09
Seq. No.: 002

- against -

KR CAPITAL MANAGEMENT, LLC and
KRAVETZ REALTY GROUP LLC,

Defendants.

Present:
Hon. Judith J. Gische
J.S.C.

-----X

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

Papers
Pltf's n/m [contempt] w/SJJ affirm, IH affid, exhs

Numbered
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

FILED

Upon the aforementioned papers the decision and order of the court is as

follows:

Plaintiff seeks a default judgment against both defendants in this action. Plaintiff previously sought the same relief in a prior motion dated January 5, 2010 (seq. no. 001). That motion was denied without prejudice in a previous decision/order dated February 2, 2010. This court found that defendants, KR Capital Management, LLC ("Capital") and Kravetz Realty Group, LLC ("Kravetz"), were served properly (see prior order, Hon. Judith J. Gische, dated 2/2/10). Therefore, the only issue remaining is the merits of the motion.

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). 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 [1st Dept. 1984]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim [Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u)].

The following facts have been established by the plaintiff in the summons and complaint, through the sworn affirmation of Shibu J. Jacob and affidavit of merit of Iwona Howley, who is someone with personal knowledge of the underlying facts and events. Plaintiff's affidavit includes sufficient facts to establish a *prima facie* case of liability and damages.

Plaintiff asserts three causes of action against defendants for enforcement of a promissory note, guaranty, and attorney's fees. Plaintiff claims that on July 25, 2008, pursuant to a promissory note (the "Note"), Capital promised to pay plaintiff the principal sum of \$100,000.00, plus interest. Plaintiff contends Capital failed to pay each and every installment due under the Note since the Fall of 2008 and Capital was in default since October 25, 2008. Plaintiff also contends that Kravetz guaranteed the obligation under the Note.

The Note provides, in relevant part, as follows:

FOR VALUE RECEIVED, KR CAPITAL MANAGEMENT LLC ("Maker"), a Delaware limited liability company, having an address of C/o Kravetz Realty Group . . . hereby promises to pay to the order of Iwona Howley ("**Payee**"), an individual, . . . the principal sum of One Hundred Thousand (\$100,000) together with interest as set forth below, in accordance with the following terms and conditions.

The Note was signed on July 25, 2008 by a person who is the managing member of Kravetz and also of Capital.

Based on the foregoing, plaintiff prevails on its first cause of action for enforcement of the Note. Plaintiff may recover from defendants the principle sum of \$100,000.00, plus accrued interest at the rate of fifteen percent (15%) per annum from October 25, 2008 until entry of judgment. Once judgment has been entered, interest shall continue to accrue at the rate of nine percent (9%) per annum from the date of judgment until it is paid, together with the costs and disbursements of this action. CPLR § 5001.

Plaintiff has failed, however, to provide the court with any proof that either defendant guaranteed payment of the Note and, therefore, not established the elements of a *prima facie* cause of action for enforcement of a guaranty agreement. Accordingly, plaintiff's second cause of action to enforce a guaranty is hereby severed and dismissed.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG

Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986). Here, the Note expressly provides that defendants are liable to pay plaintiff "all costs, expenses and reasonable attorneys' fees at any time incurred or paid by Payee to collect the indebtedness under this Promissory Note or otherwise enforce this Promissory Note." Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The court, therefore, refers the issue of what plaintiff may recover from defendants for its reasonable attorneys fees, costs, and disbursements to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that plaintiff, Iwona Howley's, motion for entry of a default judgment against defendants, KR Capital Management, LLC and Kravetz Realty Group, LLC, is granted, on default as to its first cause of action for enforcement of a promissory note; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff and against defendants, KR Capital Management, LLC and Kravetz Realty Group, LLC, jointly and severally, in the principal amount of One Hundred Thousand Dollars (\$100,000.00), with interest in the amount of Fifteen percent (15%) per annum from October 25, 2008 until entry of judgment, and then accruing at the rate of nine percent (9%) per annum from

the date of judgment until paid, together with the costs and disbursements of this action as taxed; and it is further

ORDERED that the issue of what plaintiff may recover from defendants for its reasonable attorneys fees, costs, and disbursements is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that plaintiff's second cause of action for enforcement of a guarantee agreement is hereby severed and dismissed; and it is further

ORDERED that any relief requested but not addressed is hereby expressly denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
June 9, 2010

So Ordered:



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

FILED
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE