

Hirschfeld v RFD-TV, LLC

2010 NY Slip Op 31650(U)

June 22, 2010

Supreme Court, New York County

Docket Number: 109301/2009

Judge: Saliann Scarpulla

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

PRESENT: Salvatore Scarpulla

PART 19

Index Number : 109301/2009
HIRSCHFELD, WILLIAM
 vs.
RFD-TV, LLC
 SEQUENCE NUMBER : 001
 DEFAULT JUDGMENT

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

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 is determined in accordance with the accompanying decision order.

FILED
 JUN 30 2010
 COUNTY CLERK'S OFFICE
 NEW YORK

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

Dated: 6/23/10

Salvatore Scarpulla
 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: CIVIL TERM: PART 19

----- X
WILLIAM HIRSCHFELD,

Plaintiff,

- against -

Index Number: 109301/2009
Submission Date: May 19, 2010

RFD-TV, LLC and WINDMILL
PRODUCTIONS, LLC,

DECISION AND ORDER

Defendants.

FILED
JUN 3 2010
FILED

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For Plaintiff:
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For Defendants:
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COUNTY CLERK'S OFFICE
NEW YORK

Papers considered in review of this motion for default judgment:

Notice of Motion and Affirm. in Supp. of Mot. for Default Judgment	1
Aff. of William Hirschfeld	2
Memo of Law Opposing Mot. for Default Judgment.	3
Reply in Supp. of Mot. for Default Judgment.	4
Supp. Affirm. in Supp. of Mot. for Default Judgment	5

HON. SALIANN SCARPULLA, J.:

In this action for breach of contract, plaintiff William Hirschfeld ("Hirschfeld") moves for a default judgment against defendants RFD-TV, LLC ("RFD") and Windmill Productions, LLC ("Windmill") (collectively the "defendants") pursuant to CPLR 3215(a) and (b).

This action arises out of an alleged employment contract entered into between Hirschfeld and defendants in February 2008. In or about that date, Hirschfeld was

employed as a Production Manager at Rainbow Studios in New York, New York. In that capacity, he worked on the television program "Imus in the Morning" (the "Imus Show"), which is produced and distributed by defendants. Allegedly, the parties entered into an oral agreement in or about February 2008 whereby defendants agreed to compensate Hirschfeld directly for certain services performed in connection with the Imus Show. The parties dispute the nature of this agreement. Hirschfeld asserts that defendants hired him as a salaried employee with a benefits package, while defendants maintain that Hirschfeld was retained as an independent contractor to perform certain offsite production services for the Imus Show when it was not being filmed at Rainbow Studios.

Hirschfeld alleges that he invoiced defendants for services he performed under the contract from mid-February to mid-June 2008 but that defendants paid Hirschfeld only for those invoices submitted for services performed between mid-February and early March 2008. Defendants argue that they ceased paying based on their belief that Hirschfeld was invoicing them for services performed onsite at Rainbow Studios, which defendants contend are outside of the parties' agreement. Hirschfeld has not been compensated for the invoices submitted for services performed between early March and mid-June 2008 and has not received payment for the benefits he claims were part of the emolument agreed to in the alleged employment contract.

Hirschfeld commenced this action against RFD in or about July 2009 seeking to recover the amount of wages and expenses invoiced to defendants from early March

through mid-June 2008 as well as the benefits he claims are due to him, pro-rated from mid-February to mid-June 2008. Alternatively, Hirschfeld seeks to recover for unpaid wages under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.

Subsequent to service of the original complaint upon RFD in or about July 2009, the parties entered into settlement negotiations. These negotiations became protracted throughout the summer and fall of 2009, with RFD's deadline for answering the complaint being extended via stipulation as well as oral agreement.

Pursuant to stipulation by the parties, in or about November 16, 2009, Hirschfeld filed an amended complaint, which, inter alia, added Windmill as a defendant. This resulted in renewed settlement discussions and further extension of the deadline for defendants' answer.

After a period of inactivity in settlement negotiations, Hirschfeld's counsel informed defendants' attorney on or about February 16, 2010 that if defendants failed to offer a renewed settlement proposal within forty-eight hours, Hirschfeld would consider the settlement negotiations closed and would move forward with "next steps." This deadline was extended via an email from Hirschfeld's attorney to defense counsel, wherein Hirschfeld's counsel stated, "[W]e are not prepared to extend beyond Monday [February 22, 2010]."

The parties offer conflicting accounts of what occurred on February 22, 2010. Defendants' counsel contends that he left Hirschfeld's attorney a telephonic message that

was not returned. Hirschfeld's attorney, meanwhile, maintains that she spoke with defense counsel on that date and was informed that defendants' did not have any further settlement proposals.

Hirschfeld filed the present motion on March 11, 2010, alleging that defendants are in default as a result of their failure to answer the amended complaint by February 22, 2010. In opposition, defendants contend that a default judgment is unwarranted because the parties agreed to an indefinite extension of the time to respond which was not rescinded. Along with their opposition to this motion, the defendants have served their proposed answer to the amended complaint.

Discussion

A motion for a default judgment under CPLR 3215 requires: (1) proof of service of the summons and complaint; (2) proof of the claim; and (3) proof of the default and amount due. CPLR 3215(f); *see also* Siegel, New York Practice, § 295 (4th ed. 2005). This Court finds that Hirschfeld has satisfied the first two requirements of CPLR 3215(f). However, this Court finds that defendants were not in default and that it is appropriate for the Court to exercise its discretion to allow the case to proceed on the merits. Hirschfeld's motion is denied.

Hirschfeld's service of the summons and amended complaint is undisputed. Hirschfeld has provided both an affidavit of service of the amended complaint and correspondence from defense counsel confirming service.

Hirschfeld has also demonstrated proof of his claims. Although defendants suggest that Hirschfeld was under a burden to provide documentary evidence of the contract between the parties, no such evidentiary burden is placed on a plaintiff moving for default judgment. *See Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70-71 (2003) ("Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists."); *Al Fayed v. Barak*, 39 A.D.3d 371, 372 (1st Dep't 2007). Hirschfeld's affidavit asserts personal knowledge as to the existence of an oral employment contract and describes with particularity defendants' failure to remunerate him in accordance with that agreement. This is sufficient to establish a cause of action for purposes of a CPLR 3215 motion. *See Joosten v. Gale*, 129 A.D.2d 531, 535 (1st Dep't 1987) (finding that, on a motion under CPLR 3215, "[t]he standard of proof is not stringent, amounting only to some firsthand confirmation of the facts").

Similarly, Hirschfeld has established the amount due under the alleged contract. His affidavit alleges in detail the salary, expenses, and benefits owed to him by defendants. Hirschfeld has provided copies of invoices he asserts were sent to defendants for the unpaid hours worked and expenses incurred in connection with services he performed for defendants.

Although Hirschfeld has satisfied the first two elements of CPLR 3215(f), this Court declines to find that the defendants are in default, based on the circumstances of the parties' settlement negotiations.

The parties were involved in protracted settlement negotiations during which defendants' deadline to answer was extended - formally and informally - on multiple occasions. Given the nature of these negotiations, Hirschfeld's attorney's vague email statements that Hirschfeld would not "extend beyond Monday" and would "take next steps" do not evince a clear repudiation of the parties' tacit understanding of an indefinite extension of the defendants' time to answer. Previously, in October 2009, Hirschfeld's attorney had sent to defense counsel a formal letter setting a specific deadline for answering the complaint. The absence of such a letter from Hirschfeld's counsel with respect to the communication that occurred in February 2010 provides support for defense counsel's contention that he did not believe that February 22, 2010 marked a final deadline for responding to the amended complaint. *See Simpson v. Aperitivo, Inc.*, 97 A.D.2d 710, 711 (1st Dep't 1983) (reversing default judgment where, among other things, evidence existed that defendant's carrier believed defendants had an open timeframe in which to answer the complaint).

Moreover, the dispute as to the communication that occurred between the parties on February 22, 2010 leaves this Court without sufficient evidence to find that defense counsel failed to comply with the requirements that Hirschfeld's attorney set for that date.

Although Hirschfeld's attorney attests to a phone conversation with defense counsel on February 22, 2010, defendants' attorney asserts that his message to Hirschfeld's attorney was never returned. This uncertainty further warrants this Court's exercise of its discretion in denying Hirschfeld's motion. *See Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 A.D.2d 624, 626 (1st Dep't 1985) (finding a reasonable excuse for failure to timely answer based on defendant's "attorney's understanding of the conversations with opposing counsel").

Defendants' prompt response to Hirschfeld's motion and its concurrent service of an answer demonstrate that the defendants are actively involved in the resolution of this matter. *See Stevens Van Lines, Inc. v. Don's Moving & Storage, Inc.*, 2009 N.Y. Slip. Op. 30539U (Sup. Ct. N.Y. Co. 2009) (denying motion for default where defendant's attorney averred that plaintiff's attorney had granted extension to answer, delay in answering was brief, and defendant had not abandoned defense of the claim). Accordingly, the Court is "satisfied that the defendant[s] at no time intended to abandon the defense of this action, and that the over-all circumstances are such as justify the exercise of [] discretion to allow a resolution of the contested issues on the merits." *Simpson*, 97 A.D.2d at 711; *see*

also Perez v. Jordan, 37 A.D.3d 200, 204 (1st Dep't 2007); *Congress Talcott Corp. v. Pacemakers Trading Corp.*, 161 A.D.2d 554, 555 (1st Dep't 1990).

In accordance with the foregoing, it is

ORDERED that plaintiff William Hirschfeld's motion for default judgment against defendants RFD-TV, LLC and Windmill Productions, LLC is denied. It is further

ORDERED that defendants RFD-TV, LLC and Windmill Productions, LLC are directed to serve an answer to the amended complaint within twenty (20) days after service of a copy of this order with notice of entry. It is further

ORDERED that as the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the uniform Civil Rules for the Supreme Court and the County Court, this action is stricken from the Calendar of this Court and transferred to the Civil Court for the City of New York, County of New York. It is further

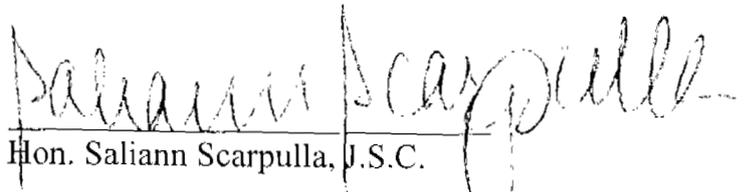
ORDERED that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall place this action upon the appropriate calendar of the said Civil Court, without the payment of any additional fees. It is further

ORDERED that the above-entitled cause be, and it is hereby, transferred to said Court to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

This constitutes the decision and order of the Court.

Dated: New York, New York
June 2, 2010

ENTER:


Hon. Saliann Scarpulla, J.S.C.

FILED
JUN 3 0 2010
COUNTY CLERK'S OFFICE
NEW YORK