

**Movado Group, Inc. v JB Intl. Corp.**

2010 NY Slip Op 32949(U)

October 18, 2010

Supreme Court, New York County

Docket Number: 106545/2010

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Index Number : 106545/2010  
**MOVADO GROUP, INC.**  
 vs.  
**JB INTERNATIONAL CORP.**  
 SEQUENCE NUMBER : 001  
 DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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

**FILED**

OCT 20 2010

**NEW YORK COUNTY CLERK'S OFFICE**

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

Dated: 10/18/10

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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  
MOVADO GROUP, INC. f/k/a North American  
Watch Corporation, d/b/a Movado Watch Co.,  
and d/b/a EBEL,

Plaintiff,

-against-

JB INTERNATIONAL CORP., d/b/a Jorge Bared  
Jewelry, d/b/a Jorge Bared Jewelers, d/b/a  
Gaston Bared Jewelry, and d/b/a JB Jewelry  
Corp.,

Defendant.  
-----X

**Decision/Order**

Index No.: 106545/10  
Seq. No. : 001

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

**FILED**

OCT 20 2010

**NEW YORK  
COUNTY CLERK'S OFFICE**

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

<b>Papers</b>	<b>Numbered</b>
Pltf's n/m [§ 3215] w/GJB affirm, JM affid, exhs . . . . .	1

-----X

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action for breach of contract, account stated, and based upon checks returned for insufficient funds. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor and against defendant, JB International Corp.

This motion has been submitted to the court on default, though due proof of service on defendant has been filed. Defendant is a foreign corporation located in Puerto Rico. Plaintiff served the summons and complaint on defendant through personal service on Jorge Bared, owner of defendant, on June 7, 2010. Plaintiff then

mailed a copy of the summons and complaint to defendant on August 17, 2010. BCL § 307 and CPLR § 3215[g][4][l].

Despite such notice and additional notice, defendant has not appeared, answered the complaint, or moved. Its time to do so has expired and this motion is brought within one year of defendant's default.

### Discussion

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).

Plaintiff provides the sworn affidavit of John Mihalio, who states he is the Credit Manager of plaintiff. Plaintiff asserts four causes of action against defendant for: (1) breach of contract for goods sold and accepted; (2) breach of contract for services rendered; (3) account stated; and (4) based upon checks returned for insufficient funds. Plaintiff alleges that it sold and delivered watches to defendant pursuant to a written agreement. Plaintiff states that, based on the agreement, it sent invoices to defendant,

which it never paid. Plaintiff alleges that defendant owes plaintiff \$54,052.16 for the goods provided, \$9.65 for plaintiff's services, interest, and attorney's fees.

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 (2d Dept. 1990).

Plaintiff has failed to provide the court with a copy of the agreements it alleges defendant breached. While plaintiff has provided a printed document titled "terms and conditions of sale," this document is a standard contract that generally refers to "seller" and "customer," it does not mention either plaintiff or defendant by name, and it is not signed or dated. It is, therefore, unclear whether the parties entered into this specific agreement or what terms and conditions the agreement they entered into set forth. Accordingly, plaintiff has not established the elements of a *prima facie* cause of action for breach of contract.

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 A.D.3d 610 (3d Dept. 2005).

Based on the foregoing, plaintiff has established a *prima facie* cause of action for account stated against the defendant. Plaintiff has provided detailed invoices, mailed to defendant, regarding goods it provided.

While plaintiff claims that defendant owes \$21,120.00 for insufficient funds on returned checks, this amount appears to be factored into the \$54,061.81 plaintiff seeks

for account stated and is, therefore, duplicative.

Accordingly, plaintiff's first, second, and fourth causes of action, for breach of contract and for providing checks returned with insufficient funds, are severed and dismissed. Plaintiff is entitled to entry of default judgment against defendant on its third cause of action for account stated. Plaintiff is, therefore, entitled to \$54,061.81<sup>1</sup> with interest from April 26, 2010, as the date of default, at the statutory rate.

### 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 (2d Dept. 1986). Here, there is no statute or agreement indicating that plaintiff is entitled to attorney's fees, accordingly, this portion of plaintiff's motion is denied.

### Conclusion

*In accordance herewith, it is hereby:*

**ORDERED** that plaintiff's motion for entry of a default judgment against defendant, JB INTERNATIONAL CORP., d/b/a Jorge Bared Jewelry, d/b/a Jorge Bared Jewelers, d/b/a Gaston Bared Jewelry, and d/b/a JB Jewelry Corp., is granted on its third cause of action for account stated; and it is further

**ORDERED** that its first, second, and third causes of action are hereby severed and

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<sup>1</sup>Plaintiff asks for \$54,061.81 plus \$9.65 for services, however, according on the invoices plaintiff provides, the \$54,061.81 already includes the \$9.65.

dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff, MOVADO GROUP, INC. f/k/a North American Watch Corporation, d/b/a Movado Watch Co., and d/b/a EBEL, and against defendant, JB INTERNATIONAL CORP., d/b/a Jorge Bared Jewelry, d/b/a Jorge Bared Jewelers, d/b/a Gaston Bared Jewelry, and d/b/a JB Jewelry Corp., in the sum of Fifty-Four Thousand Sixty-One and 81/100 Dollars (\$54,061.81) plus interest from April 26, 2010 at the statutory rate; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied; and it is further

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

Dated: New York, New York  
October 18, 2010

So Ordered:

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

**FILED**

OCT 20 2010

NEW YORK  
COUNTY CLERK'S OFFICE