Ghim v Sang Ho Kim
2011 NY Slip Op 30868(U)
April 7, 2011
Supreme Court, New York County
Docket Number: 108274/2010
Judge: Judith J. Gische
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SCANNED ON 4/11/2011

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 108274/2010

GHIM, SCOTT N.

vs

KIM, SANG HO

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

FILED

APR 11 2011

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: APR 08 2011

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.

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

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Scott N. Ghim a/k/a Scott N. Kim, Gregory Ghim and New Marco Polo Pizza,

Plaintiff (s),

-against-

Sang Ho Kim a/k/a Stuart Kim, Joann Kim and J.A.K. Madison, Inc.,

Defendant (s).

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DECISION/ ORDER
Index No.: 108274-10
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	**Numbered**
Pltff's n/m (3215) w/GB and GG affids, exhs, AOS	1

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

GISCHE J.:

Plaintiffs seek entry of a default judgment against defendants Joann Kim ("Joann") and J.A.K. Madison, Inc. ("JAK") on their fourth cause of action and an order severing the fifth and sixth causes of action against the defaulting defendants. Plaintiffs have settled their claims against defendant Sang Ho Kim a/k/a Stuart Kim, Esq. ("Attorney Kim") and filed a stipulation of discontinuance as to that defendant dated January 24, 2011.

Plaintiffs have filed proof of service of the summons and complaint upon Joann and JAK. JAK was served through the secretary of state on June 25, 2010 and Joann was served through a person of suitable age and discretion (her sister) at her home on October 13, 2010. Service on Joann was completed with the mailing of the summons and complaint on November 18, 2010. Plaintiffs have also complied with the additional notice requirements of CPLR 3215.

Despite such notice and additional notice, neither of the defaulting defendants have answered the complaint or appeared. Their time to do so has expired and not been extended by order of the court. This motion is, in itself, before the court unopposed, although there is due proof of service thereof.

A default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). The following is established in the verified complaint and in the sworn affidavit of Gregory Ghim ("Gregory").

Discussion

Fourth Cause of Action:

Gregory hired Attorney Kim to represent him and his son, Scott, in connection with the purchase of the assets of JAK, a café. The purchase agreement is not part of this record, but according to Gregory, paragraph 8 of the purchase agreement

states that "Seller [JAK and Joann] has no tax deficiency outstanding, proposed or assessed, against it ..." and that "Seller is not contesting [any] taxes, assessments, charges or levies unless expressly set forth herein ..."

In connection with this conveyance of assets, JAK, Joann and Scott entered in an indemnification agreement dated August 31, 2008 ("indemnification agreement"). The indemnification agreement provides that JAK and Joann, in her personal capacity, would indemnify and hold harmless Scott (i.e. the transferee) of and from any and all manner of claims, etc., which might be asserted against Scott by any of the transferor's (i.e. JAK's) creditors. The term "creditor "specifically includes any governmental taxing authority.

Ghim has provided proof the Department of Taxation made a claim against Scott and Marco Polo Pizza Café for unpaid taxes from 2005 up until the date of purchase. Two of plaintiffs' bank accounts were levied against. The unpaid taxes were assessed at $291,506.73. Joann and JAK apparently negotiated a reduction with the Department of Taxation, reducing the unpaid taxes to $60,000.

Gregory has provided proof that he paid $51,862.35 to the New York State Department of Finance for the unpaid sales and use taxes in connection with JAK's operations. Other monies totaling $4,573.20 were segregated and levied against from the corporate plaintiff's bank accounts. He has arrived at a monetary settlement with Attorney Kim.

Since the indemnification agreement specifically provides for indemnification and neither by Joann and JAK, but neither of these defendants have appeared in this action or opposed this motion, plaintiffs have proved their entitlement to the relief demanded in their fourth cause of action. Therefore, plaintiffs' motion for entry of a default judgment on the fourth claim against defendant Joann Kim and J.A.K. Madison, individually and severally, in the principal sum of $56,686.67, plus interest from July 8, 2010, that being the date that Gregory paid the unpaid sales and use taxes to the Department of Taxation and Finance.

Fifth and Sixth Causes of Action

Plaintiffs request that their fifth and sixth causes of action against Joann and JAK be severed and set down for an Inquest on damages. These causes of action are based in fraud. Whereas the fifth cause of action is for damages based upon the fraudulent claims made in the purchase agreement, the sixth cause of action is for rescission of the purchase agreement and restitution.

To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff (Held v. Kaufman, 91 N.Y.2d 425 [2d Dept. 1998]). Furthermore, where the fraud is alleged in connection with a contract (i.e. fraudulent inducement),

there must be a misrepresentation of then-present fact, which is extraneous to the contract and involves a duty separate from, or in addition to, that imposed by the contract (Hawthorne Group, LLC v. RRE Ventures, 7 AD3d 320, 323 [1st Dept 2004]; Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114 [1st Dept 1998]).

Although on default, plaintiffs have failed to show they are entitled to the relief sought in either of the fraud based causes of action. Therefore, the request for a hearing on damages is relief that is unavailable and must be denied. The fifth and sixth causes of action are severed and dismissed.

The other claims in the complaint against Attorney Kim (first and second causes of action) have been resolved and are hereby severed and dismissed with prejudice, as provided in the stipulation of discontinuance dated January 14, 2011.

The third cause of action under the purchase agreement (a copy of which was not provided to the court) against Joann and JAK is hereby severed and dismissed

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that plaintiffs' motion is granted only as to the fourth cause of action against defendants Joann Kim and J.A.K. Madison, Inc.; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiffs Scott N. Ghim a/k/a Scott N. Kim, Gregory Ghim and New Marco Polo Pizza, Inc. against defendants

Joann Kim and J.A.K. Madison, Inc., individually and severally, on the fourth cause of action in the principal sum of Fifty Six Thousand Six Hundred Eighty Six and 67/100 Dollars ($56,686.67), plus interest from July 8, 2010, together with the costs and disbursements of this action, as taxed by the clerk; and it is further

ORDERED that the third, fourth and fifth causes of action are hereby severed and dismissed; and it is hereby

ORDERED that the first and second causes of action against defendant Sang Ho Kim a/k/a Stuart Kim have been resolved and are hereby severed and dismissed with prejudice, as provided in the stipulation of discontinuance dated January 14, 2011; and it is further

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

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 7, 2011

FILED
APR 11 2011
NEW YORK
COUNTY CLERK'S OFFICE

So Ordered:

Hon. Judith J. Gische, JSC