

J & R Ismaili Gem Corp. v Bassali

2007 NY Slip Op 30295(U)

March 12, 2007

Supreme Court, New York County

Docket Number: 0602496

Judge: Judith J. Gische

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SCANNED ON 3/21/2007

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART _____

Index Number : 602496/2005

J & R ISMAILI

vs

BASSALI, IRADJ

Sequence Number : 002

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~~

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

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/13/07

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

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION [*1]

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
THOSE INTERESTED UNDERWRITERS
SUBSCRIBING TO POLICY OF INSURANCE
NUMBERED HN02AA3X, as subrogees and
assignees of J & R ISMAILI GEM CORP.,

Plaintiffs,

-against-

IRADJ BASSALI d/b/a IRADJ BASSALI CO.,

Defendant.
-----X

Decision/Order

Index No.: 602496/05

Seq. No. : 002

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

Pltfs not. motion [d j/mt], affirm (JJP), affid (PM), aff serv., bill costs, prop. ord. 1

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

Plaintiffs seek a default judgment against defendant Iradj Bassali d/b/a Iradj Bassali Co. ("Bassali"). This action is for reimbursement in connection with an insurance claim. Before the court is plaintiffs' motion to renew its motion for entry of a default judgment against Bassali for Bassali's failure to answer the Summons and Complaint. The prior motion was denied because of defects identified in the court's order dated October 25, 2006 which have now been addressed. Since the denial was without prejudice, permission to renew is granted. CPLR 2221(d)(2), Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979).

Plaintiffs are those interested underwriters subscribing to insurance policy

number HNO2AA3X (the "Underwriters"), who were the underwriters of the insurance policy subscribed by J&R Ismaili Gem Corp. ("J&R") with respect to diamonds allegedly consigned by J&R to Bassali and subsequently lost by Bassali.

Background

This action is against an individual, Bassali, and is for damages arising from lost property consigned under two Memorandum Contracts ("Memo Contracts") entered into between J&R and Bassali. The Summons and Complaint were personally served on Bassali on July 13, 2005. CPLR 308. Defendant did not appear, or answer the complaint within the time provided under the CPLR, nor did he obtain an order from the Court extending its time to do so. On November 30, 2005, plaintiffs mailed an additional copy of the Summons and Complaint, thereby complying with the additional requirements of CPLR § 3215. Such additional notice was served at least 20 days prior to entry of a default judgment.

Plaintiffs' motion is supported by the affirmation of Joseph J. Porrovecchio and the sworn affidavit of Peter Montalbano. A copy of the insurance policy ("Policy") entered into between the Underwriters and J&R has been provided. Based on the foregoing, plaintiffs contend they underwrote an insurance policy which insured J&R for risk of certain losses, including coverage in the amount of \$50,000 for loss of property consigned to a dealer or individual in the jewelry trade. The Policy contained a \$5,000 deductible.

Plaintiffs have also provided copies of the Memo Contracts between J&R and

Bassali dated July 15, 2003 and July 21, 2003. Plaintiffs contend that Jacob Ismaili, principal of J&R, delivered diamonds to Bassali on consignment pursuant to the two Memo Contracts. The total value of the diamonds delivered to Bassali was \$44,428.25. Plaintiffs further contend that the Memo Contracts provide that all risk of loss of the consigned merchandise rested with Bassali, regardless of the cause of the damage.

Plaintiffs allege that Bassali did not return the diamonds which were consigned to him by J&R in July 2003. Plaintiffs also claim that Bassali admitted that the consigned merchandise was stolen at the Avis Rental Center in LaGuardia Airport in Flushing, New York. As a result, J&R submitted a claim, via a Proof of Loss, for payment of the consigned merchandise under the Policy (the "Claim"). Plaintiffs settled the Claim, on September 24, 2003, and paid J&R the total amount of \$33,185.20. In exchange, J&R executed a Proof of Loss which assigned and subrogated all rights, title and interest in the consigned property and/or against Bassali to plaintiffs.

Plaintiffs allege Bassali breached the Memo Contracts by failing to return the consigned merchandise to J&R or pay for same (first cause of action). As a result, plaintiffs seek reimbursement from Bassali, for the \$33,185.20 they paid J&R in connection with the Claim. Plaintiffs further allege that, in the alternative, Bassali was negligent in failing to return the consigned merchandise to J&R (second cause of action) and thereby seek reimbursement from Bassali in the amount of \$33,185.20.

Discussion

Since 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 NY2d 728 (1984)], plaintiffs are entitled to default judgment in their favor, provided they otherwise demonstrate that they have a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)].

Plaintiffs first cause of action is for breach of contract. 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 (2nd Dept. 1990). The above claims establish the elements of a *prima facie* cause of action for breach of contract and plaintiffs are therefore entitled to an entry of default judgment with respect to the first cause of action.

Further, plaintiffs are entitled to reimbursement for, at most, \$44,428.25, under the Memo Contracts, against Bassali. Since plaintiffs' actual damages are \$33,185.20, plaintiffs are hereby awarded a money judgment in the same amount, with prejudgment interest at the statutory rate thereon from September, 24, 2003, the date of the Proof of Loss.

Accordingly, plaintiffs motion for a default judgment on the first cause of action is hereby granted.

As for the second cause of action, plaintiffs claim they sustained a loss as a result of Bassali's negligence. The necessary elements for a cause of action for negligence are as follows: (1) the existence of a duty; (2) the breach of that duty; (3) that such breach was the proximate cause of the injury; and (4) damages. Turcotte v. Fell, 68 N.Y.2d 432 (1986). Plaintiffs contend that Bassali breached his duty to

exercise reasonable care to secure, maintain, and return the consigned merchandise to J&R.

Plaintiffs state that Bassali admitted that the consigned merchandise was stolen from him by unknown individuals. According to plaintiffs, Bassali also admitted that he put a bag containing the merchandise on a counter while waiting at an Avis Rental Center at Laganardia Airport, and that the bag was stolen from the counter, which resulted in the loss of the consigned merchandise. Nonetheless, plaintiffs have not established that Bassali's act of placing a bag containing the consigned merchandise on the rental agency's counter was a breach of his duty of care to J&R. Plaintiffs have failed to establish a material element of a cause of action for negligence. Therefore, plaintiffs are not entitled to default judgment on this cause of action.

In addition, the court need not consider plaintiffs' second cause of action given that plaintiffs have already established that Bassali damaged them for the same act and in the same amount as demanded in the first cause of action, and the court's disposition of the first cause of action. Plaintiffs may not recover twice.

Accordingly, plaintiffs motion for a default judgment on the second cause of action is hereby denied and the second cause of action is hereby severed and dismissed.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that the motion by Those Interested Underwriters Subscribing to

Policy of Insurance Numbered HNO2AA3X, as subrogees and assignees of J&R Ismaili Gem Corp., plaintiffs in this action, for an entry of a default judgment, against defendant Iradj Bassali d/b/a Iradj Bassali Co., on the first cause of action is hereby granted; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of Those Interested Underwriters Subscribing to Policy of Insurance Numbered HNO2AA3X, as subrogees and assignees of J&R Ismaili Gem Corp., plaintiffs in this action, against defendant Iradj Bassali d/b/a Iradj Bassali Co., in the amount demanded on the first cause of action, totaling Thirty Three Thousand One Hundred Eighty Five and 20/100 Dollars (\$33,185.20); and it is further

ORDERED that plaintiffs motion for an entry of a default judgment on the second cause of action is hereby denied; and it is further


ORDERED that plaintiffs' motion with respect to the second cause of action is hereby denied and that the second cause of action is hereby severed and dismissed.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 12, 2007

So Ordered:


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

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Page 6 of 6