

<b>Scherl v Powerjam, LLC</b>
2007 NY Slip Op 30356(U)
March 23, 2007
Supreme Court, New York County
Docket Number: 0602081
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAIN  
*Justice*

PART 49

Index Number : 602081/2006

SCHERL, ALLEN I.

vs  
POWERJAM, L.L.C.

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

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

MOTION DATE 10/16/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 10

\_\_\_\_\_ on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**NOTICE OF DECISION AND CONFORMANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

**FILED**

MAR 27 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 31 23 107

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

[\*1]

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----x  
ALLEN I. SCHERL,

Plaintiff,

-against-

POWERJAM, LLC and JOHN STEIN,

Defendants.  
-----x

CAHN, J.

Motion by the plaintiff for summary judgment in lieu of complaint, CPLR 3213.

In connection with the purchase by the defendant Powerjam, LLC of the interests of the plaintiff in defendant Powerjam, LLC, the parties entered into an Agreement (denominated a "Settlement Agreement") on December 23, 2004. The Settlement Agreement was amended by letter dated February 2, 2005 and further amended in writing on March 6, 2006.

The Settlement Agreement and the amendatory letters are complicated, but are basically Agreements to sell and buy, and to pay for that which was sold. Pursuant to the Agreement, Powerjam was required to make periodic payments to plaintiff, which obligations were guaranteed by the individual defendant.

Plaintiff alleges that there was a default in the periodic payments required to be paid under the Agreements and that the full balance is now due.

Defendants argue that the motion should not be granted for a number of reasons. However, they basically do not deny that the Settlement Agreement and amendatory letters were executed by them and are in full force and effect. They point out that only a conformed copy of the Settlement

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Agreement was submitted to the court, and argue that therefore insufficient documents have been submitted to warrant granting the motion. Interestingly enough, they do not deny the execution of the Agreement nor do they deny that the conformed copy of the Agreement submitted is a true copy.

They further argue that the complex nature of the Settlement Agreement and the fact that a UCC-1 was filed should somehow deprive plaintiff of the opportunity of receiving CPLR 3213 treatment. However, CPLR 3213 is not limited to simple Agreements only; the Agreement herein contains an unconditional promise to pay, which can basically be proven without resort to other documents.

Defendants argue that they are not sure of the exact amount of money that they owe. However, they do not specifically deny that the amount claimed by plaintiff, \$178,981.15, plus interest is the correct amount. A statement that a defendant is not sure if plaintiff's calculations are correct, and/or a conclusory statement that it is, or must be, incorrect, is also not sufficient to raise an issue warranting denial of the motion.

The court also notes that in the Settlement Agreement itself, the parties have specifically agreed that for the purposes of this action, the Settlement Agreement is an instrument for the payment of money only, and have agreed that on this motion, they will not "assert or contend that this Agreement fails to constitute an instrument for the payment of money only." § 3.8 of the Settlement Agreement. No valid reason has been set forth why defendants should not be held to their Agreement.

In view of all of the above, it is clear that the motion should be granted. Plaintiff is entitled to judgement against the defendants in the amount of \$178,981.15 plus interest thereon at the rate of 10 percent per annum from June 5, 2006. Plaintiff is also entitled to be reimbursed for its attorney's

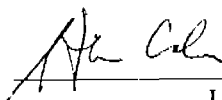
fees.

The issue of the amount of plaintiff's reasonable attorney's fees, for which he shall be reimbursed, is respectfully referred to a Special Referee to hear and report. Pending receipt of the report of the Special Referee together with a motion to confirm or vacate the same, the within motion is held in abeyance.

The foregoing constitutes the decision and order of the court.

Dated: March 23, 2007

ENTER:

  
-----  
J.S.C.

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