

**NYS Urban Dev. Corp. v Red Wine With
Fish?**

2007 NY Slip Op 30473(U)

March 13, 2007

Supreme Court, New York County

Docket Number: 0403508/2005

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK **PART 2**
Justice

-----X
NYS URBAN DEVELOPMENT CORP., d/b/a EMPIRE
STATE DEVELOPMENT CORP.,

Plaintiff,

-against-

RED WINE WITH FISH?, INC., and D&E
MURRAY, LLC,

Defendants.

Index No. 403508/05
Motion Date 12/05/06
Motion Seq. No. 001
Motion Cal. No. 116

-----X
The following papers, numbered 1 to _____ were read on this motion for Default Jgmt.

NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: [] Yes [X] No

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After the terrorists attacks on September 11, 2001, plaintiff issued grants to businesses in the vicinity of the World Trade Center site that suffered adverse financial impacts. Co-defendant Red Wine with Fish?, Inc., ("Red Wine") applied for a grant and was deemed eligible to receive \$111,052.00. Through plaintiff's error, however, Red Wine received \$208,420.00, an amount exceeding the correct figure by \$97,368.00.

The grant application form includes the condition that applicants must return grant money if the grant was awarded in error. Plaintiff relied on this provision to seek a recoupment of its overpayment. In January 2003, approximately a month after notification, Red Wine responded; citing continued financial hardship and stating that the funds were

being used to sustain a business in the affected area, it asked that plaintiff allow it to keep the overpayment. Plaintiff refused.

Subsequently, in May 2003, Red Wine transferred its assets to D&E Murray, LLC ("D&E"), a sale which plaintiff, without explanation or support, suggests was fraudulent. At any rate, plaintiff sought a refund of the overpayment from D&E, which refused. As a result, on November 19, 2005, plaintiff commenced this lawsuit against Red Wine and D&E. It seeks a variety of relief, including the right to seize the assets of both defendants. It also asks for attorney's fees.

Now, plaintiff seeks default judgment on the first three claims, which seek monetary relief. Plaintiff annexes a letter from D&E's counsel stating that D&E "contests" the claim but will not litigate it. The letter also states that both defendants are out of business and the only remaining assets are machinery and other equipment.

Based on the above, on plaintiff's annexed documentation and on the fact of defendants' default, plaintiff has established clearly its right to judgment on the first cause of action, against Red Wine. As to the second and third causes of action, which are against D&E, plaintiff has suggested that the sale to D&E was fraudulent and that D&E "is a mere continuation of Red Wine." Complaint ¶15. But, it has provided no evidentiary support for this, and its moving papers do not even explain the basis of these contentions. Even on default, plaintiff must establish a prima facie case. Therefore, the motion as it relates to the second and third causes of action is denied.

Therefore, it is

ORDERED that the motion is granted as to the first cause of action and is otherwise denied, and

ORDERED that the plaintiff's motion for summary judgment is ^{settled and} granted on default, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Red Wine in the sum of \$97,368.00, with interest at the statutory rate from the date of December 9, 2002, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the action shall continue as to the second through eleven causes of action.

Dated: 3/13/07

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Louis B. York, J.S.C.

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