

Hoge v Sunland Mar. & Sporting World

2007 NY Slip Op 30514(U)

March 28, 2007

Supreme Court, New York County

Docket Number: 0105073/2006

Judge: Judith J. Gische

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SCANNED ON 4/4/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART _____

Index Number : 105073/2006

HOGE, JAMES F., JR.

vs
SUNLAND MARINE & SPORTING

Sequence Number : 002

DEFAULT JUDGMENT

X NO. _____

ION DATE _____

ON SEQ. NO. _____

ON CAL. NO. _____

The following papers, numbered 1 to _____ were read 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

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

FILED

APR 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/28/07

HON. JUDITH J. GISCHE
J.S.C. 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: PART 10

-----X

JAMES F. HOGE, JR.,

Plaintiff,

-against-

SUNLAND MARINE AND SPORTING
WORLD and J. COUILLARD,

Defendants.

-----X

Recitation, as required by CPLR 2219 (2) of the papers considered in the review of this (these) motion(s):

Decision/Order

Index No.: 105073/06

Seq. No. : 002

Present:

Hon. Judith J. Gische
J.S.C.

FILED
APR 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

Papers

Pltf's motion [ord/ref] w/SMB affirm in support, exhs 1

Numbered

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

Plaintiff seeks to recover money due and owed with respect to the sale of 14.6 foot propelled water skiing boat. Presently before the court is plaintiff's motion to renew its prior motion for an order for entry of a default judgment against defendants Sunland Marine and Sporting World ("Sunland") and J. Couillard ("Couillard") for defendants' failure to answer the Summons and Verified Complaint therein. The prior motion was denied because of defects identified in the court's order dated November 8, 2007 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).

Background

This action is against Sunland, a foreign corporation which does business in New York, and Couillard, an individual defendant. Plaintiff personally served the Summons

and Verified Complaint on Couillard, at his place of residence, on April 17, 2006. Plaintiff then served the Summons and Verified Complaint on Sunland, by personally serving Couillard, a person authorized to accept service for Sunland, on April 27, 2006.

None of the defendants have appeared, or answered the complaint within the time provided under the CPLR, nor obtained an order from the Court extending their time to do so. On January 25, 2007, plaintiff mailed an additional copy of the Summons and Verified Complaint to Sunland and Couillard, each, bearing the legend "Personal and Confidential," 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. The instant motion was served on both defendants on February 21, 2007.

Plaintiff's motion is supported by the affirmation of Sarah M. Biscone and the complaint, which is verified. Plaintiff alleges that in 1999, it entered into an verbal contract ("Contract") with Sunland to market and sell plaintiff's SEADOO, a 14.6 foot propelled water skiing boat (the "Property"). Plaintiff states that in March 2003, Sunland secured a private buyer, Couillard, for purchase of the Property at an agreed upon price of \$4,500. At the time of the sale, Couillard was employed by Sunland in a managerial position. The terms of the sale of the Property were as follows: Couillard was to make an initial payment of \$500, and at the time of delivery, Couillard pay the balance of \$4,000.

Plaintiff signed over his boat's registration, to be held in escrow, at the request of Sunland. Plaintiff contends that he never received any payment on the Property, and that the Property was then delivered to Couillard. Plaintiff states the delivery was unauthorized and that the Property still remains in Couillard's possession. Plaintiff further alleges that Sunland repeatedly assured plaintiff that a check for the purchase of the

Property was forthcoming.

Plaintiff claims that Sunland breached the Contract by failing to forward the proceeds from the Property sale, damaging plaintiff in the amount of \$4,500 (first cause of action). Plaintiff also claims that Sunland fraudulently misrepresented material facts regarding the Property sale, and as a result, plaintiff lost any use and enjoyment and/or proceeds from said sale in the amount of \$4,500 (second cause of action). Plaintiff claims that Couillard has been unjustly enriched in the amount of \$4,500, by inducing plaintiff, through Sunland, to transfer registration of the Property into his name and control without giving any consideration for that transfer.

Plaintiff also generally seeks interest on the sum of \$4,500 from March 2003 and attorneys' fees in the amount of \$5,000, together with the costs and disbursements of this action.

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 N.Y.2d 728 (1984)], plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd dept. 2001)].

Breach of Contract (first cause of action)

With respect to the first cause of action, plaintiff alleges that Sunland breached a verbal 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. Sunland failed to forward the proceeds from the Property sale and thereby failed to perform, damaging plaintiff in the amount of \$4,500. Plaintiff is therefore entitled to an entry of default judgment on the first cause of action, against defendant Sunland, in the amount of \$4,500 with interest thereon from March 2003.

Fraud (second cause of action)

For his second cause of action, plaintiff alleges that Sunland fraudulently misrepresented material facts upon which plaintiff relied, and, as a result, plaintiff has lost use and enjoyment and/or proceeds from the sale of the Property. To establish a *prima facie* case for fraud, plaintiff must prove: (1) a misrepresentation or material omission of fact; (2) such misrepresentation or material omission of fact was made and known to be false; (3) that the misrepresentation or material omission of fact was made to induce the other party's reliance thereupon; (4) justifiable reliance; and (5) damages. Lama Holding Co. V. Smith Barney Inc., 88 N.Y.2d 413 (1996).

Plaintiff has not identified specific conduct or a specific failure to act which would establish a misrepresentation or material omission of fact. Plaintiff's blanket generalizations that "[he] relied on the words and promises that [Sunland] often conveyed to [plaintiff]" fail to identify conduct or a failure to act which would give rise to a claim for fraud.

Accordingly, plaintiff has failed to state a claim for fraud. The motion with respect to the second cause of action is denied. The second cause of action is hereby severed

and dismissed.

Unjust Enrichment (third cause of action)

As for the third cause of action, plaintiff claims that Couillard was unjustly enriched by inducing plaintiff, through Sunland, to transfer registration on the Property into his name without making any payment. An action to recover on the theory of unjust enrichment is for restitution or on quasi contract and is based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another.

Waldman v. Englishtown Sportswear, Ltd., 92 A.D.2d 833 (1st Dept., 1983).

Plaintiff has not established any basis for his conclusion that Couillard did not make any payment to Sunland for the Property. Rather, plaintiff states that Sunland "repeatedly assured the Plaintiff herein that a check for the purchase of said boat would be forthcoming." It is unclear and plaintiff has no personal knowledge whether Couillard paid or did not pay Sunland.

Accordingly, the motion with respect to the third cause of action is hereby denied. The third cause of action is hereby severed and dismissed.

Attorneys' Fees and Costs

With respect to plaintiff's claim for attorneys' fees and costs, this claim is without merit as a matter of law. It is well settled that in the absence of a statutory authority, or unless the parties have otherwise agreed or stipulated, "a civil litigant may [not] sue his adversary to recover fees paid to his attorney for legal services" or costs. Rahabi v. Morrison, 81 A.D.2d 434 (2nd Dept. 1981); City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241(1971).

Accordingly, the aspect of the complaint claiming attorneys' fees and costs is hereby severed and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the instant motion by plaintiff for an entry of default judgment against Sunland Marine and Sporting World 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 James F. Hoge, Jr., against defendant Sunland Marine and Sporting World, in the amount demanded on the first cause of action, totaling Four Thousand Five Hundred Dollars (\$4,500.00) with interest thereon from March 31, 2003; and it is further

ORDERED that plaintiff's motion with respect to the second and third causes of action is hereby denied and that the second and third causes of action are hereby severed and dismissed; and it is further

ORDERED that the aspect of the complaint claiming attorneys' fees and costs 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 order, decision and judgment of the Court.

Dated: New York, New York
March 28, 2007

So Ordered:
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HON. JUDITH J. GISCHE, J.S.C.

FILED
APR 17 2007
NEW YORK
COUNTY CLERK'S OFFICE