

Urban Broadband, Inc. v Heirtzler

2007 NY Slip Op 30979(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0110458/2006

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

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

PART _____

Index Number : 110458/2006

URBAN BROADBAND, INC.

vs

HEIRTZLER, MARK

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ his 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~~

RECEIVED
MAR 13 2007
MOTION
SUPPORT OFFICE

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

FILED
APR 30 2007
CLERK'S OFFICE
NEW YORK

MAR 09 2007

Dated: _____

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

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

Case 110458/06

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

EA

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

-----X
URBAN BROADBAND, INC., AVANTGARDE
NETWORK INTEGRATION GROUP, INC.,
D/B/A AVANTGARDE GROUP, IRENA
REZNIK and EUGENE LAYKHTMAN,

Plaintiffs,

-against-

MARK HEIRTZLER,

Defendant.
-----X

Decision/Order

Index No.: 400263/06
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
Pltf's motion [dj/mt] w/NJK affirm in support, exhs	1

-----X

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

Plaintiffs have collectively asserted a number of claims against the defendant resulting from a convoluted business relationship. Before the court is plaintiffs' motion for an order: directing the Clerk of Court to enter a default judgment in favor of plaintiff and against Mark Heitzler ["Heitzler"], pursuant to CPLR § 3215; or in the alternative directing that an inquest be held for a determination of plaintiffs' damages resulting from defendant's liability on the causes of action in the Verified Complaint. The motion itself is not opposed and is considered by the court on default.

The individual plaintiffs are Irena Reznik ("Reznik") and Eugene Laykhtman ("Laykhtman"). The corporate plaintiffs are Avantgarde Network Integration Group, Inc.

[* 3]

d/b/a Avantgarde Group ("Avantgarde"), a New York Corporation and Urban Broadband, Inc. ("Urban"). Avantgarde is a New York Corporation and provides electrical contracting services. Avantgarde was formed in 2000 by Reznik and Laykhtman.

In 2004, Heitzler together with Reznik and Laykhtman formed Urban, a Delaware Corporation. Urban is high-tech wireless communications services provider.

Discussion

This action is against Heitzler, an individual. The Summons and Verified Complaint were filed with the New York County Clerk's Office on July 27, 2006. Pursuant to CPLR § 308(2), plaintiff personally served defendant at his actual place of business upon a person of suitable age and discretion on July 31, 2006 and service was completed by mailing the Summons and Verified complaint to the defendant's place of business on that same day. 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 his time to do so. Further, plaintiff has complied with CPLR § 3215 [g], since the instant motion was itself served at least 20 days prior to entry of a default judgment.

Since Heitzler has defaulted in this action, and has not opposed this motion, plaintiffs are entitled to entry of a default judgment provided they otherwise demonstrate a *prima facie* case on the causes of action asserted in the complaint. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001).

The difficulty of this unopposed motion stems from the fact that plaintiffs failed to

[* 4]

distinguish which claims asserted belonged to the individual and corporate plaintiffs. As the analysis below shows, not every plaintiff is entitled to relief on ever aspect of every cause of action.

Breach of Loan Agreement (1st cause of action)

For its first cause of action, plaintiff alleges breach of several verbal loan agreements. 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). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

In January 2005, Heitzler allegedly asked Reznik and Laykhtman for a personal loan to pay personal obligations. Between January 2005 and May 2005, Avantgarde issued nine checks to Heitzler for \$11,500, and, on November 7, 2005, Laykhtman personally issued a check to Heitzler for \$2,000. Plaintiffs claim that these transactions represent loans to Heitzler which Heitzler expressly promised to repay within a reasonable period of time. Further, in December 2005, plaintiffs allege that Reznik personally loaned \$1,000 to Heitzler in exchange for an undated check from Heitzler to Reznik in the same amount. Plaintiffs state that in February 2006, they collectively demanded repayment of the loans and that Heitzler has not repaid the loans. Reznik further claims he deposited the undated check which was denied for

insufficient funds.

Plaintiffs have established that Avantgarde, Laykhtman, and Resnik each issued checks to Heitzler in the total amount of \$11,500, \$2,000 and \$1,000, respectively.

Plaintiffs' contention that "Heitzler expressly promised to repay any such loan within a reasonable period of time" is sufficient to establish mutual assent sufficiently definite to assure that the parties were in agreement with respect to all material terms.

Specifically, plaintiffs have established that Heitzler expressly promised to repay and has yet to repay: Avantgarde the total amount of \$11,500 within a reasonable period of time; Laykhtman the total amount of \$2,000 within a reasonable period of time; and Reznik the total amount of \$1,000 within a reasonable period of time.

Although the loan agreements do not define what is a reasonable time for payment, these plaintiffs demanded repayment within a time they believed to be reasonable for Heitzler to perform his obligations. Heitzler did not respond to the demand to assert that the time for repayment was unreasonable. Nor did Heitzler make any payment. Therefore, Avantgarde, Laykhtman and Reznik have each stated a *prima facie* cause of action for breach of the respective loan agreements.

Accordingly, the instant motion by Avantgarde, Laykhtman and Reznik for an entry of default judgment against Heitzler on the first cause of action is hereby granted to the following extent: (1) Avantgarde, against Heitzler, in the amount of \$11,500; (2) Laykhtman, against Heitzler, in the amount of \$2,000; and (3) Reznik, against Heitzler, in the amount of \$1,000.

[6]

Conversion (3rd cause of action)

The third cause of action is for conversion based on Heitzler's use of the checks he fraudulently obtained.

Conversion is the wrongful interference with the property of another. Republic of Haiti v. Duvalier, 211 AD2d 379 (1st dept. 1995). In order to assert a cause of action for conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted State v. Seventh Regiment Fund, Inc., 98 NY2d 249 (2002).

In addition to the various loan agreements between Avantgarde, Laykhtman, Reznik, and Heitzler, plaintiffs also state the Heitzler fraudulently obtained checks from an independent check printing service and placed Urban's operating account number a JP Morgan Chase Bank ("Chase") on the fraudulent checks. Plaintiffs allege that, without authorization, Heitzler presented two fraudulent checks for payment to Chase which were written to "Cash." The checks were subsequently honored. The first check, for \$200, was debited against Urban's operating account at Chase. The second check, for \$2,000 was debited against Avantgarde's operating account.

At bar, Urban and Avantgarde each had an ownership interest in the \$200 and \$2,000, respectively, which Heitzler wrongfully converted. Plaintiffs have established, on behalf of Urban and Avantgarde, a *prima facie* cause of action for conversion against Heitzler.

Accordingly, the instant motion by Urban and Avantgarde for an entry of default judgment against Heitzler on the third cause of action is hereby granted to the following extent: (1) Urban, against Heitzler, in the amount of \$200, with interest from the date of the alleged conversion; and (2) Avantgarde, against Heitzler, in the amount of \$2,000,

[* 7]

with interest, from the date of the alleged conversion.

Monies Had and Received (2nd cause of action)

The court's disposition of plaintiffs' motion on the first and third causes of action renders their motion for default judgment on the second cause of action moot. Plaintiffs may not recover twice because it would be a windfall. Moreover, plaintiffs failed to establish a *prima facie* cause of action for monies had and received because this is an equitable claim, that may not be asserted where an action at law may be brought. SAA-A Inc. v. Morgan Stanley Dean Witter & Co., 281 A.D.2d 201 (1st Dept. 2001).

Accordingly, the second cause of action is hereby dismissed.

Breach of Fiduciary Duty (4th cause of action)

As for the fourth cause of action, plaintiffs allege breach of fiduciary duty against Heitzler based on Heitzler's conversion of corporate funds. Plaintiffs claim that Urban, Avantgarde and Reznik have been damaged in the amount of \$2,200. However, plaintiffs have already established that Urban and Avantgarde were damaged in the amount of \$200 and \$2,000, respectively, and the court's disposition of the third cause of action granted default judgment for the same subject matter. Again, plaintiffs may not recover twice.

In any event, plaintiffs' have not established that Heitzler had any relationship with Avantgarde that would give rise to a fiduciary duty. Frank v. Sobel, 2007 WL 656294 (1st Dept. 2007).

Accordingly, plaintiffs motion for a default judgment on the fourth cause of action

[8]
is denied and this cause of action is hereby dismissed.

Punitive Damages (5th cause of action)

Plaintiffs have asserted a claim for punitive damages, predicated on all causes of action asserted, in the amount of \$20,000, against Heitzler.

Heitzler's actions do not measure up to the level of outrage or malice underlying the public policy which would allow an award of punitive damages, i.e., "to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights." Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 466 (1993). This court, therefore, concludes that the Heitzler's conduct, without more, does not constitute sufficient moral culpability to support the award of punitive damages.

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

Attorneys Fees (6th cause of action)

The sixth cause of action is for attorneys fees in connection with this action against Heitzler. Plaintiffs' 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." 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, plaintiffs motion for a default judgment on the sixth cause of action

[* 9]
is denied and this cause of action is hereby dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the instant motion by Avantgarde Network Integration Group, Inc. d/b/a Avantgarde Group, Eugene Laykhtman and Irena Reznik for an entry of default judgment against Heitzler 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 plaintiffs: (1) Avantgarde Network Integration Group, Inc. d/b/a Avantgarde Group, against defendant Mark Heitzler, in the amount demanded on the first cause of action, totaling Eleven Thousand Five Hundred Dollars (\$11,500.00); (2) Eugene Laykhtman, against defendant Mark Heitzler, in the amount demanded on the first cause of action, totaling Two Thousand Dollars (\$2,000.00); and (3) Irena Reznik, against defendant Mark Heitzler, in the amount demanded on the first cause of action, totaling One Thousand Dollars (\$1,000.00); 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; and it is further

ORDERED that the instant motion by Urban Broadband, Inc. and Avantgarde Network Integration Group, Inc. d/b/a Avantgarde Group for an entry of default judgment against Heitzler on the third cause of action is hereby granted; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiffs: (1) Urban Broadband, Inc., against defendant Mark Heitzler, in the amount demanded on the third cause of action, totaling Two Hundred Dollars (\$200.00); and (2) Avantgarde Network Integration Group, Inc. d/b/a Avantgarde Group, against defendant Mark Heitzler, in the amount demanded on the third cause of action, totaling Two Thousand Dollars (\$2,000.00); and it is further

ORDERED that plaintiffs' motion with respect to the fourth, fifth and sixth causes of action are hereby denied and that the fourth, fifth and sixth causes of action are 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 9, 2007

So Ordered:



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

FILED
APR 30 2007
COUNTY CLERKS OFFICE
NEW YORK