

<b>Friesland Corp. v I. Grace Co., Inc.</b>
2007 NY Slip Op 31115(U)
April 24, 2007
Supreme Court, New York County
Docket Number: 0602958/2004
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justice*

PART \_\_\_\_\_

Index Number : 602958/2004  
FRIESLAND  
vs  
I. GRACE COMPANY  
Sequence Number : 004  
DEFAULT MONEY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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~~

**FILED**  
MAY 07 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

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

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

Dated: 4/24/07

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

-----X

FRIESLAND CORPORATION,  
  
Plaintiff,

-against-

THE I. GRACE COMPANY, INC., 838 ASSOCIATES  
L.L.C., and JEFFREY FLANIGAN,

Defendants.  
-----X

**Decision/Order**  
Index No.: 602958/04  
Seq. No. : 004

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):

<b>Papers</b>	<b>Numbered</b>
Pltf's motion [d j/mt] w/YRS affirm in support, exhs .....	1

-----X

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

Before the court is a motion to renew brought by Fourth Party Plaintiff The I. Grace Company, Inc. ("I. Grace"), for entry of a default judgment in favor of I. Grace and against Fourth Party Defendant Niclin Builders, Inc. ("Niclin") for: (i) negligence damages, contractual indemnification and common law indemnification of I. Grace, in the event a judgment is rendered in favor of the Third Party Plaintiff Friesland Corporation ("Friesland") against I. Grace; and (ii) for the costs, disbursements and attorneys' fee incurred in defending against the Third Party Complaint and in prosecuting the Fourth Party action. CPLR 3215.

Although the prior motion was submitted on default, it was denied because of defects identified in the court's order dated February 20, 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 (1<sup>st</sup> Dept. 1979). The instant motion itself is also unopposed and is considered by the court on default.

### **Discussion**

The main action is for property damage. This action is against a corporation, Niclin, and is based on an indemnity clause contained in a subcontract ("Niclin Subcontract") entered into by I. Grace, as general contractor, and Niclin, as subcontractor, whereby Niclin agreed to provide labor and services in connection with a project located at the eighth floor unit of the building located at 838 Fifth Avenue, New York, New York (the "Apartment"). The Niclin Subcontract has been provided.

I. Grace filed the Fourth Party Summons and Verified Complaint, against Niclin and two other co-Fourth Party Defendants, in the Office of the County Clerk, New York County, on Oct. 25, 2005. The Fourth Party Summons and Verified Complaint were served upon the Secretary of State on October 31 2005. BCL § 306. Niclin did not appear, or answer the complaint within the time provided under the CPLR, nor obtained an order from the Court extending its time to do so. The two other co-Fourth Party Defendants, F.W. Sims, Inc. And Wind's Mechanical, Inc., were properly served, appeared, and have answered the Fourth Party Complaint.

On November 21, 2006, plaintiff mailed an additional copy of the summons and verified complaint, thereby complying with the additional requirements of CPLR § 3215 [g] [4] [ii], since this is a corporate defendant. Such additional notice was served at least 20 days prior to entry of a default judgment.

Since Niclin has defaulted in this action, and has not opposed this motion, I.

Grace is entitled to entry of a default judgment provided they demonstrate they have a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3<sup>rd</sup> dept. 2001).

Based on the Verified Complaint and the sworn affidavit of Yasmin R. Saeed in support of entry of judgment, I. Grace factually claims it had a subcontract with Niclin to provide labor and services in connection with a project located at the Apartment. I. Grace argues that it is entitled to common law indemnification from Niclin for any judgment entered against it in relation to the main action (fourth cause of action). I. Grace contends that pursuant to the Niclin Subcontract, Niclin agreed to indemnify and hold I. Grace harmless against all claims of whatever nature and kind which may be asserted against it by any person or party arising out fo the work covered by the contract (fifth cause of action).

I. Grace also contends that Niclin's allegedly negligent actions are the cause of any damages that I. Grace may be liable for with respect to the main action, and therefore seeks contribution (sixth cause of action). The remaining causes of action in the Verified Complaint are not against Niclin and I. Grace does not move at this time thereon.

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)]. The above claims demonstrate that I. Grace has *prima facie* causes of action for negligence damages, contractual indemnification and common law indemnification, and for the costs, disbursements and attorneys' fee incurred in defending against the Third Party

Complaint and in prosecuting the Fourth Party action.

Accordingly, I. Grace is entitled to entry of default judgment on liability with respect to the fourth, fifth and sixth causes of action. Since damages can only be ascertained at a hearing, the court directs that there be an inquest at the time of trial in the main action.

**Conclusion**

In accordance with this decision, it is hereby:

**ORDERED** that the motion by Fourth Party Plaintiff I. Grace for entry of a default judgment against Fourth Party Defendant Niclin Builders, Inc. is hereby granted to the extent that I. Grace is entitled to entry of a default judgment on liability with respect to the fourth, fifth and sixth causes of action; and it is further

**ORDERED** that there be an inquest at the time of trial in the main action for an assessment of damages with respect to the fourth, fifth and sixth causes of action.

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  
April 24, 2007

So Ordered:

HON. JUDITH J. GIBSON, J.S.C.

**FILED**  
MAY 07 2007  
COUNTY CLERKS OFFICE  
NEW YORK