

<b>First Funds, LLC v Gorell, Dean &amp; JDS Mech., Inc.</b>
2007 NY Slip Op 31509(U)
May 7, 2007
Supreme Court, New York County
Docket Number: 0117221/2006
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.

PART \_\_\_\_\_

Index Number : 117221/2006

FIRST FUNDS, LLC

vs

GORELL, DEAN

Sequence Number : 001

DEFAULT JUDGMENT

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

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

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**  
MAY 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: MAY 07 2007

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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  
FIRST FUNDS, LLC,

Plaintiff,

-against-

GORELL, DEAN & JDS MECHANICAL, INC.  
D/B/A J.D. STEWARD MECHANICAL, INC.,

Defendants.  
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**Decision/Order**

Index No.: 117221/06

Seq. No. : 001

Present:

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

**FILED**

MAY 14 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

**Papers**

**Numbered**

Pltf's motion [df/jg] w/JIS affirm in support, exhs ..... 1  
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The underlying action is for breach of contract. Before the court is a motion by plaintiff, pursuant to CPLR § 3215, for an order directing the Clerk of the Court to enter a default judgment in favor of plaintiff and against defendants Dean Gorell ("Gorell") and JDS Mechanical Inc. d/b/a J.D. Steward Mechanical, Inc ("JDS"). The motion itself has been submitted to the court on default.

**Background**

This action is against Gorell, an individual defendant, and JDS, a corporate defendant. Plaintiff served the Summons and Verified Complaint on Gorell, personally, on December 14, 2006. Plaintiff served the Summons and Verified Complaint on JDS, by delivering a copy to Gorell, who is the President and owner of JDS.

Neither defendant has 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 17, 2007, plaintiff mailed an additional copy of the Summons and Verified Complaint to Gorell bearing the legend "Personal and Confidential," thereby complying with the additional notice requirements of CPLR § 3215(g)(3)(i). Such additional notice was served at least 20 days prior to entry of a default judgment.

Plaintiff's motion is supported by the affirmation of Joseph I. Sussman. A copy of the contract entered into by JDS on August, 24, 2006 has been provided to the court. Based upon the foregoing, JDS and plaintiff executed a contract wherein the parties mutually agreed that plaintiff would purchase from JDS \$55,200.00 of its future credit card receivables, deliverable to plaintiff at the rate of 25% per credit card transaction. Plaintiff thereafter paid JDS in the amount of \$40,000.00 as the purchase price for the above-described sale. Defendant Gorell executed a personal guarantee, on behalf of JDS, to plaintiff. Such guarantee has also been provided to the court.

As provided in the contract, the parties utilized a third-party credit card processor ("Processor"). Under the terms of the contract, for each credit card transaction that JDS processed, the Processor would divert the agreed-upon percentage to plaintiff's account and credit the remaining amount to JDS' account until plaintiff collected the total amount due under the contract. There was no time specified in which performance had to be completed and the defendants expressly agreed that JDS shall not sell, dispose, convey or otherwise transfer its business or assets without plaintiff's written consent.

Plaintiff claims that on October 23, 2006, JDS materially breached the contract by selling, disposing, conveying or otherwise transferring its business or assets without

plaintiff's express written consent. Plaintiff has provided a statement of account wherein the outstanding balance pursuant to the contract is \$48,521.47 (first cause of action). Based upon the Personal Guarantee signed by Gorell on August 24, 2006, which guarantees payment of JDS' indebtedness to plaintiff under the Contract, plaintiff contends that Gorell is jointly and severally liable for JDS' debt (fourth cause of action). As and for a second cause of action, plaintiff claims that it is due the same amount, \$48,521.47, on the basis of account stated. As and for the third and fifth causes of action, plaintiff seeks costs and attorneys' fees incurred in this action against JDS and Gorell, respectively.

### **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 NY2d 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 AD2d 844 (3<sup>rd</sup> dept. 2001)].

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 (2<sup>nd</sup> 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).

The above claims establish the elements of a *prima facie* cause of action for breach of contract against JDS and Gorell. Plaintiff is therefore entitled to entry of default judgment on the first and fourth causes of actions.

The court's disposition of plaintiff's motion on the first and fourth causes of action renders its motion for default judgment on the second cause of action moot. Plaintiff may not recover twice, because it would be a windfall. Accordingly, the second cause of action is hereby dismissed.

The third and fifth causes of action are for costs and attorneys' fees in connection with this action against JDS and Gorell, respectively. 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 (2<sup>nd</sup> Dept. 1981); City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241(1971).

Certain portions of the contract, as provided to the court, are illegible and the legible portions of the contract contain no provisions for attorneys' fees and costs associated with collection of any indebtedness thereunder. Further, plaintiff has failed to indicate if and where the contract obligates the defendants to pay such costs and attorneys' fees. Accordingly, plaintiff's motion for a default judgment on the third and fifth causes of action is denied and these causes of action are hereby dismissed.

### **Conclusion**

In accordance with this decision, it is hereby:

**ORDERED** that plaintiff's motion is granted with respect to the first and fourth

causes of action; and it is further

**ORDERED** that the Clerk shall enter a money judgment in favor of plaintiff First Funds, LLC, against defendants Dean Gorell and JDS Mechanical, Inc. d/b/a J.D. Steward Mechanical, Inc., joint and severally, in the amount demanded on the first and fourth causes of action, totaling Fourty Eight Thousand Five Hundred Twenty One 47/100 Dollars (\$48,521.47); and it is further

**ORDERED** that plaintiff's motion is denied with respect to the second, third and fifth causes of action; and it is further

**ORDERED** that the second, third and fifth causes of action are hereby 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  
May 7, 2007

So Ordered:

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

**FILED**  
MAY 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE