

**3835 Elec. & Wholesale Supply, Inc. v 890
Morris Ave.**

2007 NY Slip Op 32214(U)

July 11, 2007

Supreme Court, New York County

Docket Number: 0102559/2007

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 10

3835 Electronic
Wholesale Supply, Inc.,
Et Al.

INDEX NO. 102559/07
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

890 Morris Avenue, Et Al

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

Submitted on default (11:35 am) J

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

FILED

JUL 17 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/11/07

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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
3835 ELECTRONIC & WHOLESALE SUPPLY,
INC. d/b/a LEBRON EQUIPMENT SUPPLY,

Plaintiff,

-against-

890 MORRIS AVENUE, USA GOURMET DELI,
NO. 7, INC., ("890 MORRIS AVE. DELI") and
NAGEIB A. ALDAYLAM,

Defendants.

DECISION/ORDER

Index No.: 102559/07

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
JUL 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X

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

Papers	Numbered
Pltf's OSC w/ EHH affirm, exhs	1
Order, Gische J., 6/19/07 re: granting TRO	2
Proof of service of motion	3

Upon the foregoing papers the court's decision is as follows:

Plaintiff has commenced this action for breach of contract by filing the summons and complaint with its motion for an order of seizure for certain restaurant equipment from that is the subject of a sales contract allegedly between plaintiff and the defendant 890 Morris Avenue, USA Gourmet Deli, No. 7 Inc. (the "Deli"). Defendant Nageib A. Aldaylam ("Aldaylam") personally guaranteed the aforementioned sales contract.

On June 19, 2007, the court granted plaintiff a TRO pending the hearing on the motion, and made the motion returnable on June 28, 2007. Neither defendant

appeared in court on June 28, 2007 nor did they serve or file opposition thereto, even though plaintiff filed proof of service. Service on the Deli was made on June 20, 2007 by delivering a copy of the Order to Show Cause to Mr. Ali personally, an agent authorized to accept service on behalf of the corporation. CPLR § 311(a). Service on Aldaylam was made on June 20, 2007 by delivering a copy of the Order to Show Cause to a person of suitable age and discretion at Aldaylam's residence within the state. Plaintiff completed service on Aldaylam by mailing him an additional copy of the Order to Show Cause on June 20, 2007. CPLR § 308. Such service is compliant with the court's Order of May 23, 2007 (the Order to Show Cause).

Since the relief in plaintiff's motion (an Order of Seizure) is unopposed, it will be considered on default and granted, provided plaintiff is otherwise entitled to such relief.

Plaintiff claims that the Deli entered into a conditional sales contract (the "Contract") with it on February 16, 2006. Pursuant to the Contract, plaintiff delivered certain restaurant equipment and the Deli was to make monthly interest and principal payments for such equipment. Aldaylam thereafter executed a promissory note which personally guaranteed payments under the Contract to plaintiff. Plaintiff claims that the Deli defaulted under the Contract. However, the Contract that has been provided to the court is illegible. Even if plaintiff was able to establish *prima facie* entitlement to an order of seizure, the court is unable to discern what equipment plaintiff may seize under the Contract due to the illegibility therein.

Further, annexed as Exhibit "C" to the summons and verified complaint is a notice of sale. Plaintiff claims that by the notice of sale, it notified the Deli and

Aldaylam that they were in default and that the entire principal plus interest and other charges had become due and payable. However, the notice of sale, dated June 23, 2006, indicates that the restaurant equipment under the Contract was sold on July 5, 2006 at 10 a.m. at 890 Morris Avenue. Plaintiff has failed to explain what impact, if any, such sale has on the relief it now seeks and why this action has been brought almost a year after the date of the notice of sale.


Accordingly, the motion for an order of seizure is denied at this time, without prejudice to renew, upon proper papers.

Moreover, at times, plaintiff refers to this motion as one for a default judgment. However, the notice does not refer to such relief. Therefore, to the extent that plaintiff seeks entry of a default judgment (CPLR § 3215) on any potential claims for monetary damages, it has the right to separately seek such relief, notwithstanding the order of seizure hereby denied.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 11, 2007

So Ordered:


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

FILED
JUL 17 2007
NEW YORK
COUNTY CLERK'S OFFICE