

Rand v Joon W. Chong

2007 NY Slip Op 32382(U)

July 26, 2007

Supreme Court, New York County

Docket Number: 0600261/2007

Judge: Judith J. Gische

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

JUDITH J. GISCHE, J.S.C.

PART _____

Index Number : 600261/2007

RAND GREER

vs
CHONG, JOON W.

Sequence Number : 001

DEFAULT JUDGMENT

9

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION 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

FILED
AUG 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: 7/26/07

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

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

-----X

Greer Rand,
Plaintiff

-against-

Joon W. Chong and
Geneva Holding Corporation, LLC

Defendants.

DECISION/ORDER

Index No.: 600261/07
Seq. No.: 001

Present:

Hon. Judith J. Gische
J.S.C

-----X

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

Papers

Pltff n/m [§3215] w/GR affid, SP affirm (sep backs), exhs . . .
Affidavit of service
Proof of additional notice
Form order

FILED
Numbered
1,2,3 1 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

GISCHE, J.

This is an action for breach of contract, an account stated, fraudulent misrepresentation, and other related relief. Plaintiff's motion is for entry of a default judgment against defendants (individually and severally) on the claims he has set forth in the complaint, to wit: a money judgment in the amount of \$42,000 plus interest at the rate of 4.5% from October 26, 2006.

This motion is before the court on default, though proof of service has been filed. Plaintiff alleges that each named defendant was personally served with the summons

and complaint, but neither of them has appeared in this action or served an answer. Their time to do so has expired and not been extended by the court or agreement. This motion was brought within one year of defendants' default in answering the complaint, therefore it is timely. The court will decide whether this action was properly commenced and plaintiff has established the existence of a prima facie cause of action against the defendants. Josten v. Gale, 129 A.D.2d 531 (1st Dept. 1987).

Discussion

Plaintiff has provided proof that defendant Joon W. Chong (apparently also known as Wook Chong) ("Mr. Chong") was personally served with the summons and complaint on February 7, 2007 at his residence in California. Mr. Chong is also the president of defendant Geneva Holding Corporation, LLC ("Geneva"). He was served (and accepted service) on behalf of Geneva on February 8, 2007. Plaintiff, a New York resident, has presented unrefuted facts establishing that this cause of action is directly related to, and arises from, business transacted within this state. Storch v. Vigneau, 162 A.D.2d 241 (1st Dept. 1990). Plaintiff has therefore established that the summons and complaint were properly served on each defendant.

Since this action seeks entry of a money judgment, plaintiff must also provide the court with proof that she has complied with the additional notice requirements of CPLR § 3215. She has done so by providing an affidavit stating that copies of the summons and complaint were also mailed to each defendant (to Mr. Chong at his residence and to Geneva at its principal place of business) on March 23, 2007, more than 20 days before entry of judgment. CPLR § 3215 (f) and (g). Despite such notice and additional

notice, neither defendant has appeared, or opposed this motion.

In support of this cause of action, plaintiff provides her own sworn affidavit and a copy of the Terms of Agreement ("agreement") among the parties, dated October 23, 2006. As per this agreement, plaintiff invested the sum of \$30,000 in connection with a real estate transaction (purchase of an apartment) among the parties which was scheduled to close on November 15, 2007. Plaintiff contends that this was her life savings. She states further that she trusted the defendants who assured her they were sophisticated investors of capital and/or holders of investment real estate, and that this was a great short term investment for her with a solid return.

As per the terms of the agreement, in return for investing the \$30,000, plaintiff would receive her initial investment of \$30,000 plus a return on investment of \$12,000. This money would be paid to her no later than November 17, 2006, regardless of when - or if - the real estate transaction was completed, and the agreement expressly states it is the scenario of the "deal fall[ing] through" is "unlikely." If the closing did not take place within the time specified in the agreement (e.g. 2-3 days of November 15, 2006), then the buyer (a non party to this action) would be charged a 10% late fee which, in turn, would be turned over to plaintiff. As per the agreement, plaintiff is entitled to interest of 4.5% from the date the agreement was made.

Mr. Chong signed the agreement on behalf of Geneva and he also personally guaranteed the contract. To date, defendants have not made any payment to the plaintiff, although she has demanded it. Therefore, both defendants are in default of the agreement. Since this agreement involves a return on investment, this transaction

does not come within the usury statute. Brown v. Kahanick, 3 A.D.2d 825 (1st dept 1957) *affd* 4 A.D. 2d 782 (1958).

Although plaintiff has proved she is entitled to damages equal to \$30,000 plus the return on investment of \$12,000, with interest thereon at the rate of 4.5% from the date of the loan (October 23, 2006), she has not pled facts that would entitle her to the additional sum of \$3,000 claimed. This additional sum would only be paid to her by the defendants if the real estate transaction was delayed more than "2 to 3 days after the agreed to date of November . . ." and only if the 10% were paid by the buyer as a late fee.

Plaintiff's motion for entry of a default judgment against the defendants is granted, but only in the sum of \$42,000 plus interest, and the costs and disbursements of this action. The additional sum of \$3,000 is denied. To the extent that plaintiff also seeks recovery of her legal fees, that motion is denied as well since this agreement does not provide for such recovery. The claims sounding in fraud or tort (6th, 7th, 8th causes of action) are hereby severed.

Conclusion

It is hereby

Ordered that plaintiff's motion is granted to the extent that the clerk shall enter judgment against defendant Joon W. Chong and defendant Geneva Holding Corporation, LLC, jointly and severally, in the sum of Forty Two Thousand Dollars (\$42,000), plus interest thereon at the rate of 4.5% from October 26, 2006, together with the costs and disbursements of this action; and it is further

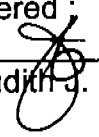
Ordered that plaintiff's motion for the additional sum of \$3,000 and to recover her legal fees is denied; and it is further

Ordered that the claims in the complaint sounding in fraud or tort (6th, 7th, 8th causes of action) are hereby severed; and it is further

Ordered that any relief not expressly addressed has been nonetheless considered and is hereby denied; and it is further

Ordered that this shall constitute the decision and order of the court.

Dated: New York, New York
July 26, 2007

So Ordered :


Hon. Judith J. Gische, JSC

FILED
AUG 01 2007
NEW YORK
COUNTY CLERK'S OFFICE