

Carmela Sutera, Inc. v Exclusives for the Bride, Inc.
2007 NY Slip Op 32583(U)
August 14, 2007
Supreme Court, New York County
Docket Number: 0100778/2006
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 10

Index Number : 100778/2006

CARMELA SUTERA INC

INDEX NO. _____

vs

EXCLUSIVES FOR BRIDE INC

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

DEFAULT JUDGMENT

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

FILED
AUG 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/14/07

JUDITH J. GISCHE, J.S.C. 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
CARMELA SUTERA, INC.,

Plaintiff,

-against-

EXCLUSIVES FOR THE BRIDE, INC. and
NANCY GHUSSEIN,

Defendants.
-----X

Decision/Order

Index No.: 100778/06

Seq. No. : 002

Present:

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

FILED

AUG 21 2007

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

Papers	Numbered
Pltf's motion [d j/mt] w/DL affirm, affid in support (CS), exhs 1

COUNTY CLERK'S OFFICE
NEW YORK

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

Plaintiff, a manufacturer of bridal gowns, seeks to recover payment for gowns delivered to defendant Exclusives for the Bride, Inc. ("Exclusives"). Plaintiff now moves to renew its prior motion for a default judgment in its favor against Exclusives, only. The prior motion was denied, by order dated March 27, 2007, because plaintiff failed to "provide the Summons and Complaint and because the papers submitted [did] not form the basis for the entry of any judgment." Since the denial was without prejudice, permission to renew is granted. CPLR 2221(d)(2), Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept. 1979).

Plaintiff has filed proof of service of the summons and complaint on Exclusives. Service was made on a person who claimed to be authorized to accept service on behalf of defendant Exclusives. This motion is itself submitted on default, although

plaintiff has filed proof of service in the same manner as the summons and complaint. Plaintiff has also complied with the additional notice requirements of CPLR § 3215 [g] [4] [l], since Exclusives is a corporation. Though duly served, Exclusives has failed to answer the complaint within the time provided under the CPLR, appear or seek an order from the court extending its time to do so.

The other defendant in this case is Nancy Ghussein ("Ghussein") is president of Exclusives. It is not clear whether Ghussein was properly served with the summons and complaint. Thus, plaintiff seeks a default judgment solely against Exclusives. For a first cause of action, plaintiff claims defendants refused to pay the aggregate principal sum of \$33,499.25 for gowns delivered and/or manufactured. Plaintiff also pleads account stated (second cause of action) and fraudulent misrepresentation (third cause of action), claiming damages in the same amount.

In support of this motion, plaintiff has provided the affidavit of Carmela Sutera ("Sutera"), president of plaintiff corporation. Sutera claims that defendant owes \$16,924.00 for Oscar de la Renta merchandise, \$1,225.25 for Carmela Sutera, Inc. merchandise, and \$15,350.00 for Carmela Sutera, Inc. merchandise that was produced for Exclusives but not shipped. Sutera also claims that Exclusives accepted and retained the October 30, 2003 statement of account reflecting this amount due. Sutera states that Exclusives has not made any payment to plaintiff since October 30, 2003, the date upon which it seeks interest on the amount due.

Sutera also represented her in affidavit that plaintiff is withdrawing its claim for attorney's fees and its third cause of action.

The October 30, 2003 statement of account indicates that Exclusives accepted

merchandise valued at \$16,924.00 and the account was past due for more than sixty days. Attached to the statement is a letter dated October 30, 2003, from Brian Sutera, Vice President of Operations for plaintiff, which claims that Exclusives made a payment of \$4,140.00 by check which was subsequently returned due to insufficient funds. Also, by the same letter, Brian Sutera claims that merchandise valued at \$15,350.00 was manufactured for Exclusives and has not been shipped "due to non payment."

A default in answering the complaint constitutes an admission of factual allegations therein, and the reasonable inferences which may be made, therefore, [Rokina Optical Co. Inc. v. Camera King, Inc., 63 NY2d 728 (1984)]. Plaintiff is entitled to a default judgment in its favor, provided it demonstrates that it has a prima facie cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)].

Although it has proved that it is entitled to a money judgment in the sum of \$16,924.00 against Exclusives under its theory of account stated, it has not proved that it can recover the additional sum of \$15,350.00 for goods allegedly manufactured but not shipped to Exclusives. Plaintiff has not provided any details with respect to the alleged manufactured goods and has failed to indicate that it was unable to sell these goods. If plaintiff has sold the manufactured goods, the relief it seeks may constitute a double recovery. Given these circumstances, the court hereby severs and dismisses plaintiff's claims in the complaint for remuneration for manufactured goods not delivered to Exclusives.

Plaintiff has not pled any theory of liability as to defendant Ghussein in the complaint. Accordingly, the court hereby dismisses this action as to defendant Ghussein, *sua sponte*.

The first cause of action seeks the same relief as that in the second cause of action. Since plaintiff has established entitlement to relief on its second cause of action for account stated, the court hereby severs and dismisses the first cause of cation as moot.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion pursuant to CPLR § 3215 is granted to the extent that plaintiff is entitled to damages on its second cause of action against defendant Exclusives for the Bride, Inc.; and it is further

ORDERED that the Clerk shall enter a default money judgment in favor of plaintiff Carmela Sutera, Inc. against defendant Exclusives for the Bride, Inc. in the amount of Sixteen Thousand Nine Hundred Twenty Four Dollars (\$16,924.00).

ORDERED that plaintiff's 1st cause of action against Exclusives for the Bride is hereby severed and dismissed without prejudice; and it is further

ORDERED that the complaint is hereby dismissed as to defendant Nancy Ghusein.

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
August 14, 2007

So Ordered:

RECEIVED
AUG 21 2007
COUNTY CLERK'S OFFICE
NEW YORK



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