

**Orix Fin. Servs., Inc. v Impulse Eng'g.,
Inc.**

2007 NY Slip Op 33113(U)

September 24, 2007

Supreme Court, New York County

Docket Number: 0104540/2007

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.

PART 10

Index Number : 104540/2007

ORIX FINANCIAL SERVICES INC

vs

IMPULSE ENGINEERING INC

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 _____

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

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

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/24/07

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

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ORIX FINANCIAL SERVICES, INC. formerly
known as ORIX CREDIT ALLIANCE, INC.,

Plaintiff,

-against-

IMPULSE ENGINEERING, INC., and
ROSS A. TESSIEN,

Defendants.

-----x

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

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Papers

Numbered

Pltf's motion [d j/mt] w/ASF affirm in support, exhs 1

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

Plaintiff Orix Financial Services, Inc. formerly known as Orix Credit Alliance, Inc.
("OCAI"), now moves, pursuant to CPLR § 3215, for an order directing the Clerk of
Court to enter a default judgment in its favor and against defendants Impulse
Engineering, Inc. ("Impulse") and Ross A. Tessien ("Tessien"), jointly and severally.
The motion itself has been submitted to the court on default.

Discussion

Plaintiff has filed proof that the summons and complaint were served on May 8,
2007, in the manner agreed to by the parties in this action. There is also proof that the

designated agent mailed a copy of the summons and complaint to both defendants. Finally, plaintiff has filed proof of additional service in compliance with CPLR § 3215, and this motion was itself served more than 20 days before entry of the judgment.

Despite such notice, neither defendant has appeared in this action nor answered the complaint. Their time to do so has expired and has not been extended by the court. Plaintiff is proceeding with entry of a default judgment within one year of such default.

Based on the affidavit of Yvonne Kalpakoff, who has access to plaintiff's books and records, including computer records in connection with defendants' account, plaintiff avers as follows. On February 24, 1998, Mazak Corp. (the "Seller") entered into a Conditional Sale Contract Note (the "Note") with Impulse, whereby it sold to Impulse certain equipment. Also on February 24, 1998, Seller assigned the Note to Plaintiff. By separate document, also dated February 24, 1998, Impulse and Tessien acknowledged receipt of the Equipment and represented that they had no defenses, offsets or counterclaims against OCAI and waived any claims or offsets against OCAI. Tessien also executed a personal guaranty for Impulse's performance and obligations under the Note.

Impulse made a series of payments, but thereafter defaulted on the Note by failing to tender payment due to Plaintiff on March 24, 2001. Plaintiff thereafter accelerated the balance owed under the Note. A record of Impulse's payment history with Plaintiff has been provided. Tessien failed to honor his obligations under the guaranty.

As provided for in the Note, Plaintiff took possession and subsequently sold the Equipment on October 5, 2001. Plaintiff claims that the sale was conducted in a

* 4]
commercially reasonable manner for a gross purchase price in \$40,000.00. The total amount of costs and expenses of the sale of the Equipment was \$11,733.70. Pursuant to the Note, Defendants are afforded a credit in the amount of \$28,266.30.

Default interest, as provided under the Note, accrues at a rate of one fifteenth of one percent (1/15 of 1%) per *diem* from the date of default. The total amount of default interest accrued from March 24, 2001, until October 5, 2001 is \$6,605.07.

Plaintiff claims that the amount due from Impulse and Tessien, jointly and severally, is \$51,513.89, plus late charges of \$62.70, plus default interest from the date of default to October 5, 2001 of \$6,605.07 and less the resale credit of \$28,266.30, resulting in a total balance due of \$29,915.36. Plaintiff also seeks default interest from October 5, 2001 at the rate of one fifteenth of one percent (1/15 of 1%) per *diem*.

Plaintiff also seeks legal fees in the amount of \$5,983.07, equal to 20% of the outstanding balance. Plaintiff has provided the affirmation of William M. Stein, Esq. which details the services that have been provided.

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 N.Y.2d 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 A.D.2d 844 (3rd dept. 2001)].

Plaintiff's sole cause of action is for breach of contract. 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 (2nd Dept. 1990). The above claims establish the elements of a *prima facie* cause of action for breach of contract against Imuplse. Further, since Tessien personally guaranteed the Impulse's obligations under the Note, the judgment shall be joint and several between the defendants. Plaintiff has also investigated whether Tessien is on active duty in the military service, and learned he is not. and plaintiff is therefore entitled to an entry of default judgment.

Accordingly, Plaintiff's motion for entry of judgment in favor of plaintiff against Impulse and Tessien, jointly and severally, in the amount demanded in the complaint is granted, to wit: the sum of \$29,915.36 with interest from October 5, 2001 at the rate of one fifteenth of one percent (1/15 of 1%) per *diem*.

Plaintiff may also recover its legal fees. The note provides that "reasonable" legal fees are agreed to be equal to 20% of the unpaid balance. Counsel has provided an affirmation of services setting forth its hourly rate, number of hours spent, and other expenses. The law firm seeks legal fees of \$5,983.07. These fees bear a reasonable relationship to the services provided. First National Bank of East Islip v. Brower, 42 N.Y.2d 471 (1977).

Conclusion

In accordance herewith, it is hereby

ORDERED that Plaintiff's motion pursuant to CPLR § 3215 for entry of a default judgment is granted in all respects; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of Plaintiff Orix Financial Services, Inc. formerly known as Orix Credit Alliance, Inc. against defendants Impulse Engineering, Inc. ("Impulse") and Ross A. Tessien ("Tessien"), jointly and

severally, in the amount demanded, to wit:

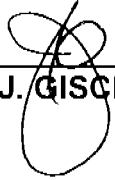
1. \$29,915.36 with interest from October 5, 2001 at the rate of one fifteenth of one percent (1/15 of 1%) per *diem*.
2. \$5,983.07 as and for reasonable legal fees, together with the costs and disbursements of this action.

Any requested 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
September 24, 2007

So Ordered:



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

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