

**CDS Bus. Servs., Inc. v Sharp Lbr. Co.,
Inc.**

2007 NY Slip Op 33446(U)

October 10, 2007

Supreme Court, Nassau County

Docket Number: 6480-07/

Judge: Leonard B. Austin

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INDEX
No. 6480-07

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 8-22-07

Submission Date: 10-1-07

Motion Sequence No.: 001/MOTD

CDS BUSINESS SERVICES, INC.
f/d/a CDS CAPITAL LLC,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF

Pak & Whang PC

12 West 32nd Street

Suite 1200

New York, NY 10001

SHARP LUMBER CO., INC., and
TAMMY SHARP,

Defendants.

COUNSEL FOR DEFENDANT

Kenneth W. Humphries, Esq.

110 East Ninth Street

P.O. Box 74

Hopkinsville, KY 42241

_____ x

ORDER

The following papers were read on Plaintiff's motion for default judgment:

- Notice of Motion dated August 6, 2007;
- Affidavit of Patrick Gesuele sworn to on July 24, 2007;
- Affirmation of Tae Hyun Whang, Esq. dated August 6, 2007;
- Affidavit of Tae Hyun Whang sworn to on August 6, 2007; and
- Affidavit of Hye Jin Yoon sworn to August 6, 2007.

Plaintiff, CDS Business Services, Inc. ("CDS"), moves for a default judgment against Defendants, Sharp Lumber Co., Inc. ("Lumber") and Tammy Sharp ("Sharp").

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BACKGROUND

CDS, a corporation located in West Hempstead, NY, is in the business of asset-based financing, factoring, and accounts receivable management. CDS lends companies the money owed by their customers (the amount of the accounts receivable) in exchange for a percentage of these funds. For a larger percentage of the funds, CDS assumes the responsibility of collecting the outstanding receivables.

Lumber, a corporation located in Hopkinsville, Kentucky, is in the business of selling lumber and building materials. On or about August 23, 2006, CDS and Lumber entered into a Billing and Security Agreement ("Agreement"). Under the terms of the Agreement, CDS purchased Lumber's current accounts receivable.

Sharp, an individual residing in Elkton, Kentucky, executed and delivered a personal guaranty ("Guaranty") on or about August 23, 2006. By executing the guaranty, Sharp unconditionally guaranteed the payment of the purchased accounts, as well as any other fees incurred in accordance with the Agreement to CDS.

After entering into the Agreement, Lumber breached the Agreement by continuing to collect the accounts receivable sold to CDS directly from its customers. On or about February 27, 2007, CDS terminated its relationship with Lumber pursuant to the early termination provisions ("of the Agreement"). The early termination terms of the Agreement require Lumber pay an 8% penalty fee of the unpaid purchased accounts. The terms of the Agreement further provide that in the event of an early

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termination, Lumber would be responsible for all costs and expenses, including reasonable attorneys' fees, which CDS may incur to protect, preserve or enforce the Agreement.

Upon Lumber's default, demands were made to Sharp for the payment of the debt. Sharp failed to make any payments thereby breaching the Guaranty.

As of March 13, 2007, CDS claims to have suffered damages as follows: the unpaid face amount of the purchased accounts of \$156,285.57; the early termination fee of \$12,502.85; UCC filing fees of \$350.00; and reasonable attorneys' fees in the sum of \$3,000.00, for a total of \$172,138.42.

This action was commenced on May 1, 2007. Both Defendants, Lumber and Sharp, were duly served. CDS and Sharp entered into a stipulation extending Sharp's time to answer to June 25, 2007. The time to answer or move with respect to the complaint has expired and has not been further extended. Lumber and Sharp are both in default.

DISCUSSION

Public policy favors resolution on the merits. Mulder v. Rockland Armor & Metal Corp., 315 A.D.2d 140 (2nd Dept. 1988). However, under CPLR 3215(a), a party may obtain a default judgment when the opposing party defaults in appearance.

On a motion for default judgment, the moving party must file proof of service of the summons and complaint along with affidavits of facts constituting the claim, the

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default and the amount of damages. CPLR 3215(f). Also, the moving party must establish the *prima facie* elements of the cause of action. See, Joosten v. Gale, 129 A.D.2d 531 (1st Dept. 1987). This may be supported by either the verified complaint (CPLR 105[u]) or by an affidavit of the facts made by one with personal knowledge of the facts constituting the cause of action. CPLR 3215(f); and Zelnik v. Bidermann Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997). A complaint verified by counsel is insufficient because it is purely hearsay. Beltre v. Babu, 32 A.D.3d 722 (1st Dept. 2006). See also, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The motion for default judgment filed by CDS is supported by both a verified complaint and an affidavit of facts sworn to by Patrick Gesuele, vice president of CDS. These documents provide sufficient support for the cause of action.

A motion for default judgment is only appropriate if the opposing party has been served and then failed to appear. Republic Ins. Co. v. Northern Aire Development, Inc., 88 A.D.2d 973 (2nd Dept. 1982). Lumber and Sharp were duly served with the summons and complaint on May 1, 2007. Both defendants have failed to serve a timely response and have not appeared nor has their time to appear, answer or move been extended. They are now in default.

In order for damages to be awarded, the monetary amount must be for a sum certain. Conten v. Hand, 234 A.D.2d 96 (1st Dept. 1996). If damages cannot be determined summarily, an inquest will be held at which the defendant may appear to

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contest damages. Kocsis v. McLean, 32 A.D.3d 589 (3rd Dept. 2006). The only proof offered by CDS with regards to its damages is the Gesuele affidavit. The Agreement itself is silent as to the amount of the purchased accounts receivables. Due to the uncertainty of the amount of damages, an inquest must be held to determine the actual damages incurred by CDS. Eden Park Health Servs. v. Estes, 2 A.D.3d 1186 (3rd Dept. 2003). Therefore, the matter of damages is referred to a Special Referee to hear and determine Plaintiff's damages.

As to the matter of attorneys' fees and UCC filing fees, the Agreement provides that Lumber is responsible for all costs and expenses, including reasonable attorneys' fees, which CDS may incur to protect, preserve or enforce the Agreement. Such provisions are valid and will be enforced. Arent, Fox, Kinter, Plotkin & Kahn, PLLC v. Lurzer GmbH, 297 A.D.2d 590 (1st Dept. 2002). The attorney's affidavit states CDS has been billed \$3,409.74 in attorneys' fees. However, legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See, Simoni v. Time-Line, Ltd., 272 A.D.2d 537 (2nd Dept. 2000); and Borg v. Belair Ridge Development Corp., 270 A.D.2d 377 (2nd Dept. 2000). The issue of attorneys' fees shall thus be referred to a Special Referee to hear and determine the amount of legal fees to which CDS is entitled. UCC filing fees incurred and recoverable by CDS are \$350.00.

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Although, Lumber and Sharp were served with notice of the motion for default judgment on August 6, 2007. However, in certain circumstances, CPLR 3215(g) requires additional service of the summons upon the defendant at least 20 days before the entry of the default judgment. Corporations are required to be given the additional service if they were served through the Secretary of State pursuant to CPLR 311(a). CDS is not required to give Lumber additional notice because the corporation was served upon its managing agent pursuant to CPLR 311. However, CDS must give additional notice to Tammy Sharp. CPLR 3215(g) requires additional service be given to individuals in a breach of contract case such as this. It does not appear that CDS has served an additional notice upon Sharp. Thus, it has failed to meet this prerequisite for default judgment. A default judgment will be entered in favor of CDS provided that it complies with CPLR 3215(g).

Accordingly, it is,

ORDERED, that Plaintiff's motion for default judgment against Defendants is **granted** as to liability only; and it is further,

ORDERED, that the matter of damages and reasonable attorneys' fees is referred to the Special Referee, Thomas V. Dana, on November 19, 2007 at 10:00 a.m. to hear and determine all issues relating to the award of damages and reasonable attorneys' fees; and it is further,

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ORDERED, that Plaintiff will be awarded \$350.00 for UCC filing fees incurred;
and it is further,

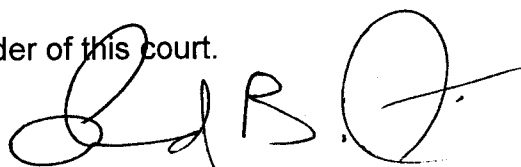
ORDERED, that Plaintiff shall make a showing to the Special Referee that CPLR
3215(g) has been complied with prior to the date of the inquest; and it is further,

ORDERED, that Plaintiff's counsel serve upon the attorneys for the Defendants
and file with the Clerk of the Court, a copy of this Order with Notice of Entry and a
Notice of Inquest, and shall pay the appropriate filing fees on or before October 29,
2007; and it is further,

ORDERED, that upon the determination of damages by the Special Referee, the
County Clerk is directed to enter judgment in favor of Plaintiff, CDS Business Services,
Inc. and against Defendants, Sharp Lumber Co., Inc. and Tammy Sharp, together with
appropriate interest, reasonable attorneys' fees and costs and disbursements as taxed
by the County Clerk.

This constitutes the decision and order of this court.

Dated: Mineola, NY
October 10 2007


Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
OCT 22 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE