

B & S Fragrances & Cosmetics, Inc. v I.S. Shani, Inc.
2007 NY Slip Op 33450(U)
October 15, 2007
Supreme Court, New York County
Docket Number: 0100896/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JUDITH J. GISCHÉ, J.S.C.

PRESENT: _____
Justice

PART 10

Index Number : 100896/2007
B & S FRAGRANCES & COSMETICS
vs.
I.S. SHANI, INC.
SEQUENCE NUMBER : 002
DEFAULT JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

Th

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/15/07

JUDITH J. GISCHÉ, 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
B & S FRAGRANCES & COSMETICS, INC.,

Plaintiff,

-against-

I.S. SAHNI INC. and RANI SAHNI,

Defendants.
-----X

Decision/Order

Index No.: 100896/07

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

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/LS affirm, SK affid, exhs 1
Proof of Service (separately)----- 2, 3

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

This is an action arising from defendants' alleged misappropriation of plaintiff's insurance premiums. Before the court is plaintiff's motion to renew its prior motion, pursuant to CPLR § 3215, for entry of a default judgment in its favor. The prior motion was denied without prejudice, by order dated August 14, 2007, principally because plaintiff failed to establish a *prima facie* cause of action for either breach of contract (first cause of action) or breach of fiduciary duty (second cause of action). Since the denial was without prejudice, and plaintiff appears to have addressed the deficiencies previously identified by the court, permission to renew is now granted. CPLR 2221(d)(2), Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept. 1979).

The plaintiff seeks entry of a default judgment against the defendants on the issue of liability, and an inquiry on damages. It has filed proof of service of the summons and verified complaint on both the corporate and individual defendants. The corporate defendant was served in a manner compliant with BCL 306. This motion has been brought less than one year after the corporate defendants' default in answering the complaint or appearing. Plaintiff has also complied with the additional notice requirements of CPLR 3215 [g] [4]. The individual defendant was served in a manner compliant with CPLR 308(2). Plaintiff has also complied with additional notice requirements of CPLR 3215 [g] [3]. This motion is itself submitted to the court without any opposition, although there is proof of service. 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.

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 NY2d 728 (1984)] plaintiff is entitled to a default judgment in its favor, provided he demonstrates it has a *prima facie* cause of action. [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)]. The plaintiff is B & S Fragrances and Cosmetics, Inc., a New York corporation. The corporate defendant is I.S. Sahni, Inc., an insurance brokerage company. The individually named

defendant Rhani Sahni ("Sahni"), is also the president of I.S. Sahni, Inc. Plaintiff contends it had a contract with defendants, pursuant to which I.S. Sahni, Inc. and Sahni were to act as plaintiff's insurance broker and agent. According to the plaintiff, part of the agreement was for it to pay insurance premiums to defendants who would then forward them to the insurance company actually providing insurance. Plaintiff further contends that although it paid defendants insurance premiums pursuant to invoices it received from them, defendants failed to pay the underwriter. As a result the insurance premiums were in default and coverage lapsed, requiring plaintiff to repay the underwriter directly for the insurance premiums. Based upon these allegations, plaintiff sets forth two causes of action in the complaint against defendants for breach of contract and breach of fiduciary duty. They are addressed more fully below.

Breach of Contract (First Cause of Action)

The complaint has been verified by Saleem Khan ("Khan"), president of plaintiff, who also provided his sworn affidavit in support. In the complaint, Mr. Khan asserts that although defendants were collecting premium payments from the plaintiff, they were not sending those payments to the underwriters. Plaintiff has established that it had an agreement with defendant I.S. Sahni, Inc., an insurance broker or agent, for it to secure insurance coverage for the plaintiff. Plaintiff provides proof that defendant I.S. Sahni, Inc. billed it for premiums which plaintiff paid, but which the defendant I.S. Sahni, Inc. failed to send to the insurance underwriter. Plaintiff provides proof from the insurance underwriter that the defendants failed to pay the premiums. As a result, plaintiff was forced to again pay premiums directly to the insurance company to maintain coverage.

It has proven that it has directly paid \$47,756.41 to the insurance company in order to cover the unpaid premiums.

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). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termlanl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

Plaintiff establishes the elements of a *prima facie* cause of action for breach of contract against I.S. Sahni, Inc. Plaintiff is entitled to entry of a default judgment on its first cause of action.

However, the cause of action for breach of contract against Sahni, the individually named defendant, must be denied. There is no proof that Sahni acted in his individual capacity. All documents have corporate headings on them and where Sahni has signed them, it is only in a corporate capacity. See Mendez v. City of New York, 687 N.Y.S.2d 346 (1999); Metropolitan Switch Bd. Co., Inc. v. Amici Associates, Inc., 799 N.Y.S.2d 531 (2005). Therefore, the breach of contract cause of action against Sahni, the individual defendant, must be severed and dismissed and the motion pursuant to CPLR 3215 is denied.

Breach of Fiduciary Duty (Second Cause of Action)

This cause of action is asserted only against the individual defendant, Sahni.

Plaintiff contends that Sahni had a fiduciary obligation to plaintiff to ensure that the premiums paid to his company were then paid to the insurance underwriters. Plaintiff further contends that this fiduciary obligation was breached, because of Sahni's failure to pay the premiums to the underwriters. Such a cause of action will not lie against Sahni for two reasons.

Plaintiff contends that there was a fiduciary relationship with Sahni, because Sahni acted as plaintiff's insurance broker. In fact, I.S. Sahni, Inc. and not Sahni was plaintiff's insurance broker. Moreover, insurance agents and brokers do not stand in a fiduciary relationship with their clients, absent exceptional circumstances. See Murphy v. Kuhn, 90 N.Y.2d 266 (1997). Plaintiff fails to provide evidence of any exceptional circumstances that would create a fiduciary relationship with Sahni. Thus, Sahni should not be held personally liable.

Therefore, the second cause of action must be severed and dismissed and the motion pursuant to CPLR 3215 is denied.

Plaintiff has established that it was required to pay the insurance underwriter the sum of \$47,756.41 in order to restore insurance coverage as a result of I.S. Sahni, Inc.'s failure to pay it. The court, therefore, awards plaintiff a money judgment against I.S. Sahni, Inc. in the amount of \$47,756.41. Plaintiff is also entitled to the pre-judgment interest from February 2, 2006, the date by which plaintiff covered the misappropriated premiums.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against the corporate defendant, I.S. Sahni Inc., is granted on the first cause of action and the clerk is directed to enter a money judgment in favor of plaintiff in the amount of \$47,756.41 plus interest from February 2, 2006; and It is further

ORDERED that the motion for a default judgment against defendant Rani Sahni on the first cause of action is denied and such cause of action is severed and dismissed; and it is further

ORDERED that the motion for a default judgment as to the second cause of action is denied in its entirety and the second cause of action is severed and dismissed

Any requested relief not expressly addressed herein has been nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
October 15, 2007

So Ordered:



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

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE