

Spence v Shanieke Peru

2007 NY Slip Op 33912(U)

November 26, 2007

Supreme Court, New York County

Docket Number: 0601719/2007

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

DEBORAH ANN SPENCE,
ETAL.

INDEX NO. 601719/07

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

SHANIEKE PERU

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

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

DEC 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/26/07

JUDITH J. GISCHE, J.S.C.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

SPENCE, DEBORAH ANN d/b/a NEW
WORLD BUSINESS SERVICES,

Plaintiff,

-against-

SHANIEKE PERU,

Defendant.

-----x

Decision/Order

Index No.: 601719/07
Seq. No. : 001

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 OSC [d j/mt] w/ affirm in support, NL affid, exhs 1

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

Plaintiff, *pro se*, has brought this action to recover for alleged contractual damages. Plaintiff now moves by order to show cause, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in her favor and against defendant Shanieke Peru. Although proof of service has been provided to the court, the motion must be denied at this time, without prejudice to renew within ninety days, for the reasons that follow.

Plaintiff alleges that defendant entered into a contract with Julien Tumma, "[i]n 2006 ... for transportation services" (the "Contract"). According to plaintiff, Mr. Tumma completed his duties but has not been paid for over one year in the amount of \$7,002.00. Plaintiff states that Mr. Tumma assigned the Contract to her, and that the

debt of \$7,002.00 remains due and owing from defendant.

Plaintiff has asserted five causes of action, to wit: [1] breach of contract; [2] breach of implied-in-fact contract; [3] breach of implied covenant of good faith and fair dealing; [4] promissory estoppel; and [5] intentional infliction of emotional distress.

Discussion

Since defendant has defaulted in this action, and has not opposed this motion, plaintiff is entitled to entry of a default judgment provided she otherwise demonstrates a *prima facie* case on the causes of action asserted in the complaint. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001).

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 Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

Absent written or otherwise overt expression, an enforceable implied-in-fact contract may be inferred from the conduct of the parties. Zimmer v. Town of Brookhaven, 247 A.D.2d 109 (2d Dept, 1998); Parsa v. State of New York, 64 N.Y.2d 143 (1984). An implied-in-fact contract would arise from a mutual agreement and an intent to promise, "when the agreement and promise have simply not been expressed in words." 1 Williston, Contracts § 1:5, at 20 (4th ed. 1990). An implied-in-fact contract still requires such elements as consideration, mutual assent, legal capacity and legal

subject matter. Maas v. Cornell University, 94 N.Y.2d 87 (1999).

Every contract imposes an obligation of good faith and fair dealing between the parties in its performance and its enforcement, and if the promise of the defendant is not expressed by its terms in the contract, it will be implied. Van Valkenburgh, Nooger & Neville v. Hayden Publ. Co., 30 N.Y.2d 34 (1972), *cert denied* 409 U.S. 875. A plaintiff may bring a cause of action for breach of the implied covenant of good faith and fair dealing, even though the plaintiff has not alleged a breach of that contract.

Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc., 41 A.D.3d 269 (1st Dept. 2007).

“The doctrine of promissory estoppel is intended to avoid the harsh results of allowing the promisor to repudiate, when the promisee has acted in reliance upon the promise.” James King & Son, Inc. v. De Santis Const. No. 2 Corp., 97 Misc.2d 1063 (1977). The elements of promissory estoppel are: (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance is both reasonable and foreseeable; and (4) the party that relied on the promise must be injured by its reliance. Rogers v. Town of Islip, 230 A.D.2d 727 (2d Dept. 1996).

The elements of a claim for intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent to cause severe emotional distress or a substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and the injury, and (4) sever emotional distress. Howell v. NY Post Co. Inc., 81 NY2d 115 (1993). Whether conduct complained of is outrageous in the first instance is for the court to decide. Rocco v. Smithtown, 229 AD2d 1034 (4th dept. 1996). Satisfying the element of outrageous conduct is rigorous and difficult.

Roach v. Stern, 252 AD2d 488 (2nd dept. 1998).

Plaintiff has failed to establish that the Contract was assigned to her. Moreover, plaintiff has failed to allege any facts which would support her claim that defendant entered into an agreement with Mr. Tumma. For these reasons, plaintiff is not entitled to entry of a default judgment on the first, second, third and fourth causes of action.

Plaintiff has also not met her burden on this motion with respect to the fifth cause of action. Her general claim that "defendant's unlawful conduct ... produce[d] emotional distress in the plaintiff" is manifestly insufficient to establish a *prima facie* cause of action for intentional infliction of emotional distress.

Accordingly, the instant motion is denied in its entirety without prejudice to renew upon proper papers. Pursuant to CPLR § 3216, plaintiff has ninety (90) days to either resume prosecution of this action, serve and file a note of issue or notify the court that she is abandoning this action. Plaintiff's failure to comply with this order will result in immediate dismissal of this matter for unreasonably neglecting to proceed.

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
November 26, 2007

So Ordered:



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

FILED
DEC 05 2007
NEW YORK
COUNTY CLERK'S OFFICE