

Fast Capital, LLC v One Percent Distributing

2007 NY Slip Op 34282(U)

December 20, 2007

Supreme Court, New York County

Docket Number: 0602469/2007

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

Justice

Index Number : 602469/2007

FAST CAPITAL, LLC

vs.

ONE PERCENT DISTRIBUTING

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

FILED

JAN 08 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/02/07

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

... REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
FAST CAPITAL, LLC,

Plaintiff,

-against-

ONE PERCENT DISTRIBUTING and
CHAD E. BUBB,

Defendants.
-----X

Decision/Order

Index No.: 602469/07

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 motion [d j/mt] w/LJW affirm, exhs	1

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

Plaintiff seeks a default judgment against defendants for recovery of damages arising from an alleged breach of a written Purchase and Sale of Future Receivables Agreement (the "Agreement"). At the outset, the court notes that plaintiff has alleged the basis for jurisdiction is the Agreement. Plaintiff has failed to provide a copy of the Agreement to the court. Without providing the Agreement, plaintiff is unable to demonstrate that this court does in fact have personal jurisdiction over the defendants.

Moreover, although proof of service has been provided and the defendants have not appeared, or answered the complaint within the time provided under the CPLR, the motion for entry of a default judgment must be denied for the additional reasons that follow.

This action is against One Percent Distributing ("One Percent") and Chad E. Bubb ("Bubb"). Plaintiff alleges that it purchased from defendants, pursuant to a written Agreement, "certain present and future attributable to credit and other card receivables"

owned by defendants for payment of \$6,084.00, made on March 21, 2006. Plaintiff further alleges that the Agreement provides that Fast Capital "is to receive the funds associated with the Receivables directly from the card processor, from a designated percentage of [defendants'] card processing receipts" and that defendants "are obligated to process all of its card transactions exclusively through a card processor that is approved by Fast Capital." Twenty percent of defendants' total card receivables were to be paid to plaintiff, until plaintiff received 100% of the purchased amount, \$6,084.00.

Plaintiff claims that it provided to defendants a periodic statement of account, however, plaintiff has only provided one "example of said statement of account," dated April 30, 2007, reflecting an unpaid balance of \$6,084.00 and addressed to One Percent, only.

Plaintiff claims that defendants have "breached the Agreement, by processing some or all of its [sic] card transactions to a processor other than the Designated Processor and/or directing the Designated Processor to cease making payments to [plaintiff], despite the fact that [plaintiff] has not been paid the Purchased Amount and/or transacting business under another business name for the primary purpose of diverting card transactions from the Designated Processor."

Plaintiff has asserted six causes of action in the verified complaint, to wit: [1] breach of contract; [2] account stated; [3] unjust enrichment; [4] fraud; [5] conversion; and [6] legal fees.

Discussion

As to the merits of this motion, plaintiff fails to state a *prima facie* cause of action. While 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 default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)].

First cause of action

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).

Plaintiff has not provided a copy of the alleged contract, nor any explanation for its failure to do so. It is unclear which, if either, of the defendants was obligated to perform as plaintiff alleges. Moreover, plaintiff has not demonstrated any proof of its own performance pursuant to the Agreement, i.e. proof of the \$6,084.00 payment, allegedly made on March 21, 2006. Therefore it has not established a *prima facie* cause of action for breach of contract.

Accordingly, plaintiff's motion for entry of a default judgment on the first cause of action is denied.

Second cause of action

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 A.D.3d 610 (3rd Dept. 2005).

While plaintiff has provided only one "example" of a statement of account, this statement is only addressed to the One Percent defendant, and not to Hubb. Moreover, a

cause of action for account stated requires proof that plaintiff delivered the account statements to the defendants for services rendered. Plaintiff has not proved its own performances on this otherwise unsubstantiated motion. Therefore, plaintiff cannot prevail on the second cause of action at this time and its motion for entry of a default judgment on that cause of action is denied.

Third cause of action

Plaintiff has alleged that a valid contract exists. A claim of unjust enrichment must fail in the face of a valid contract. Clark-Fitzpatrick v. L.I.R.R., 70 N.Y.2d 382 (1987). Accordingly, plaintiff's motion for default judgment on the third cause of action is denied and the third cause of action is hereby severed and dismissed.

Fourth cause of action

To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 N.Y.2d 425 (1998). General allegations that defendants entered into a contract while lacking the intent to perform it are insufficient to support a cause of action sounding in fraud. Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603 (1994).

Here, plaintiff attempts to convert a contract action into an action for fraud by alleging that the defendants did not intend to meet their contractual obligations. Nonetheless, plaintiff has failed to prove that the defendants had a contractual obligation which they failed to fulfil. Accordingly, plaintiff's motion for default judgment on the

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fourth cause of action is denied and the fourth cause of action is hereby severed and dismissed.

Fifth cause of action

In its fifth cause of action, plaintiff claims that defendants' alleged failure to meet their contractual obligations constitutes conversion. Conversion is the wrongful interference with the property of another. Republic of Haiti v. Duvalier, 211 AD2d 379 (1st dept. 1995). In order to assert a cause of action for conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted State v. Seventh Regiment Fund, Inc., 98 NY2d 249 (2002). Plaintiff alleges that it tendered payment to defendants in the total amount of \$6,084.00, allegedly made on March 21, 2006. Plaintiff has not provided any proof of such payment. Therefore, plaintiff is unable to establish, *prima facie*, a cause of action for conversion because the defendants cannot wrongfully take a payment which plaintiff has not proven it made. Accordingly, plaintiff's motion for default judgment on the fifth cause of action is denied.

Sixth cause of action

It is well settled that in the absence of a statutory authority, or unless the parties have otherwise agreed or stipulated, "a civil litigant may [not] sue his adversary to recover fees paid to his attorney for legal services." Rahabi v. Morrison, 81 A.D.2d 434 (2nd Dept. 1981); City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241(1971).

Plaintiff "demands legal fees in the fair and reasonable sum of thirty-five (35%) percent of the sums due and court costs." Even if plaintiff had prevailed on any of the asserted causes of action, plaintiff has not demonstrated any basis, contractual or otherwise, for defendants' alleged liability for plaintiff's legal fees incurred in prosecuting

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this action. Accordingly, plaintiff's motion for entry of a default judgment on the sixth cause of action is hereby denied.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against each defendant is denied in all respects; and it is further

ORDERED that the third and fourth causes of action against each defendant are hereby dismissed, with prejudice; and it is further

ORDERED that 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 it 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 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
December 20, 2007

So Ordered:



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

FILED
JAN 08 2008
NEW YORK
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