

Eva Mar. Corp. v Destiny Yachts, LLC

2008 NY Slip Op 30304(U)

January 24, 2008

Supreme Court, Nassau County

Docket Number: 0119-07/

Judge: Leonard B. Austin

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INDEX
No. 10119-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-29-07
Submission Date: 10-29-07
Motion Sequence No.: 001/MOT D

EVA MARINE CORP.

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Richman & Levine, P.C.
666 Old Country Road, Suite 101
Garden City, New York 11530

DESTINY YACHTS, LLC. AND EDWARD
G. WEINER,

Defendants.

COUNSEL FOR DEFENDANT

NO APPEARANCE

_____x

ORDER

The following papers were read on Plaintiff's motion for leave to enter a default judgment against the Defendants:

- Notice of Motion dated September 27, 2007;
- Affidavit of Keith H. Richman, Esq. dated September 27, 2007.

Plaintiff, EVA Marine Corp., moves for leave to enter a default judgment against the Defendants.

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BACKGROUND

Plaintiff, EVA Marine Corp. ("Marine"), is a corporation organized and existing pursuant to the laws of the State of Delaware that maintains offices in Nassau County.

Marine alleges that, on or about July 13, 2007, it entered into a Yacht Construction Contract ("Contract") with Defendant, Destiny Yacht, LLC ("Destiny"), pursuant to which Destiny was to construct and sell a vessel to Marine. Although the complaint alleges the existence of a contract, the Court has not been provided with a copy of it.¹

The complaint further alleges that, on or about July 13, 2001, Defendant, Edward G. Weiner ("Weiner"), executed the Contract as the personal guarantor of Destiny's obligations thereunder, including the payment of any money that might become due to the Marine as a result of Destiny's breach of the Contract. The Court has not been provided with a copy Weiner's guaranty.

The complaint further alleges that, on or about January 14, 2003, Marine sent Weiner a notice of default. Despite Marine having performed all of its obligations under the Contract and despite having been sent a notice of default in accordance with the terms of the Contract, Defendants have failed and refused to perform their contractual obligations. As a result thereof, Marine seeks to recover substantial monetary damages.

Paragraph 6 of the complaint alleges that Marine and Destiny entered into a contract on July 13, 2007. This action was commenced on June 8, 2007. The Court questions how an action for breach of contract can be commenced before the parties entered into the contract.

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This action was commenced by filing of the summons and complaint with the County Clerk on June 8, 2007. Destiny was personally served by delivering a copy of the summons and complaint to Weiner, who is described as Destiny's owner, on June 20, 2007. Weiner was personally served by delivering a copy of the summons and complaint to him personally at 101 Plaza Real S., Apt. 315, Boca Raton, Florida 33432 on June 20, 2007.

Destiny and Weiner have not appeared in the action. Marine now moves for leave to enter a default judgment against both Defendants and to have the matter set down for an assessment of damages.

DISCUSSION

The first issue is whether Marine has standing to maintain an action in New York.

The complaint specifically alleges Marine is a Delaware corporation with offices located in Nassau County.

Before a foreign corporation that has been doing business in New York without obtaining authority can maintain an action in the New York courts, it must (1) obtain authority to business; and (2) pay the franchise taxes, penalties and interest retroactive to the time it first began doing business in New York. Kerr-McGee Chemical Corp. v. Bullard Orchards, Inc., 45 A.D.2d 786 (3rd Dept. 1974); and Business Corporation Law §1312(a).

Rather than dismissal of an action brought by a foreign corporation that is doing business in New York without having been authorized to do business in New York, the

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action should be stayed to permit the foreign corporation to become authorized to do business in New York. McIntosh Builders, Inc. v. Ball, 247 A.D.2d 103 (3rd Dept. 1998). If such foreign corporation fails to obtain authorization to do business in New York, the action should be dismissed. Matter of United Environmental Techniques, Inc. v. State of New York Dept. of Health, 88 N.Y.2d 824 (1996).

Since Marine maintains an office in Nassau County, it is doing business in New York. Bryant v. Finnish National Airline, 15 N.Y.2d 426 (1965); Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917); and Sedig v. Okemo Mountain, 204 A.D.2d 709 (2nd Dept. 1994). Thus, Marine lacks standing to maintain this action until such time as it has obtained authority to do business in New York and it has paid all of the franchise taxes, penalties and interest retroactive to the time it first began doing business in New York before the Court can or will hear this action.

For this reason alone, the motion must be denied.

However, even if Marine qualifies to do business in New York, the motion papers do not contain the proof required to obtain a default judgment.

CPLR 3215 permits a party to obtain a default judgment against a defendant who defaults in appearance. An application for leave to enter a default judgment must be supported by proof of service of the summons and complaint, an affidavit made by a person with actual knowledge of the facts surrounding the claim and proof of the default. Siegel, *New York Practice 4th* §295; and CPLR 3215(f). The party seeking a default

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judgment must establish the existence of a *prima facie* cause of action against the defaulting party. Joosten v. Gale, 129 A.D.2d 531 (1st Dept. 1987).

The motion for leave to enter a default judgment must be supported by an affidavit of fact or a factually detailed complaint which has been verified by an individual with personal knowledge of the facts surrounding the claim. 599 Ralph Avenue Development, LLC v. 799 Sterling, Inc., 34 A.D.3d 726 (2nd Dept. 2006); Zino v. Joab Taxi, Inc., 20 A.D.3d 521 (2nd Dept. 2005); and CPLR 105(u). Marine's motion is not supported by an affidavit of fact made by anyone with personal knowledge. While the complaint is verified by the president of Marine, it is not factually detailed.

Marine alleges a cause of action for breach of contract against Destiny.

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). Plaintiff must establish the provisions of the contract the defendant is alleged to have breached. Sud v. Sud, 211 A.D.2d 423 (2nd Dept. 1995); and Atkinson v. Mobil Oil Corp., 205 A.D.2d 719 (2nd Dept. 1994).

The complaint makes no mention of any of the provisions of the Contract or how or when those provisions were breached by Destiny. In fact, a copy of the Contract is not attached to either the complaint or the motion papers. Thus, the proof of the breach of contract cause of action is insufficient.

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The second cause of action alleges Weiner personally guaranteed Destiny's obligations on the contract.

A guaranty must be in writing executed by the person to be charged. Schulman v. Westchester Mechanical Contractors, Inc., 56 A.D.2d 625 (2nd Dept. 1977); and General Obligations Law §5-701(a)(2).

A party establishes a *prima facie* case on a guarantee by establishing the existence of the underlying obligation, the guarantee and the failure of the prime obligor to make payment in accordance with the terms of the obligations. Royal Commercial Corp. v. Kotrulya, 304 A.D.2d 742 (2nd Dept. 2003); and E.D.S. Security Systems, Inc. v. Allyn, 262 A.D.2d 351 (2nd Dept. 1999).

Marine has failed to place a copy of the guaranty allegedly executed by Weiner before the Court. Thus, Plaintiff has failed to establish the existence of the cause of action on the guaranty.²

Finally, the Court notes that Plaintiff has failed to establish compliance with CPLR 3215(g)(3).

Accordingly, it is,

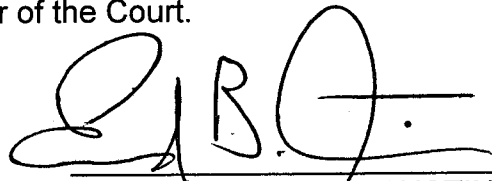
²Destiny is or was a limited liability company organized and existing pursuant to the laws of the State of Florida with a principal place of business in Fort Lauderdale, Florida. Weiner is an individual residing in Boca Raton, Florida. The summons states that venue and jurisdiction in Nassau County, New York is based upon the contract between Marine and Destiny. The Court notes that other than a contractual consent to jurisdiction in New York, the plaintiff has failed to establish any factual basis for the court to exercise *in personam* jurisdiction over the Defendants.

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ORDERED, that Plaintiff's motion for leave to enter a default judgment is **denied** with leave to renew upon proof that Marine is authorized to do business in New York and it has paid all of its franchise taxes, penalties and interest retroactive to the date it began doing business in New York and upon proper proof of the causes of action alleged in the complaint.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
January 24, 2008



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

ENTERED

JAN 29 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**