

**SA Champagne Chanoine Freres SA v Lubov
Galleries, Inc.**

2008 NY Slip Op 32032(U)

July 16, 2008

Supreme Court, New York County

Docket Number: 0111835/2007

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 _____

Index Number : 111835/2007
SA CHAMPAGNE FRERES SA
vs
LUBOV GALLERIES
Sequence Number : 002
DEFAULT JUDGMENT

Justice

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

_____ this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/16/08

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
SA CHAMPAGNE CHANOINE FRERES SA,

Plaintiff,

- against -

LUBOV GALLERIES, INC.,

Defendant.

Decision/Order
Index No.: 111835/07
Seq. No.: 002

Present:
Hon. Judith J. Gische
J.S.C.

FILED

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NEW YORK

Recitation, as required by CPLR 2215 [a] (4), of the papers considered in the review of this motion:

Papers	Numbered
Pltf's motion [d j/mt] w/ MJS affirm, exhs	1

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

Plaintiff SA Champagne Chanoine Freres SA ("Plaintiff" or "SA") seeks entry of a default judgment against defendant Lubov Galleries, Inc. ("Defendant" or "Lubov"). The prior motion was denied, by Order dated March 17, 2008, because of inconsistencies and inaccuracies contained in Plaintiff's application. Since the denial was without prejudice, permission to renew is granted. CPLR 2221 [e]; Foley v. Roche, 68 AD2d 558, 567-568 [1st Dept 1979].

The instant motion has been submitted to the Court unopposed, although Plaintiff properly served the Summons and Complaint on Lubov, a domestic corporation. Plaintiff has provided the Court with an Affidavit of Service which indicates that the Summons and Complaint were served upon the Secretary of State in accordance with BCL § 306. On April 30, 2008, Plaintiff mailed a copy of the Summons and Complaint to Defendant by first class mail at its last known address at least twenty days before entry of judgment. CPLR § 3215 [g] [4] [i]. Despite such proof of service, Lubov has not answered the Complaint, nor otherwise

appeared in this action, and its time to do so has expired and has not been extended by the court. Therefore, Lubov has defaulted in this action.

According to the Summons and Complaint, Plaintiff commenced this action to recover monies allegedly due and owing to Plaintiff. Plaintiff claims that it sold champagne to Defendant in the sum of €50,325.00. Plaintiff alleges that €33,894.28 is currently due and owing. Plaintiff has asserted three causes of action against Lubov, to wit: (1) seller's right to payment for goods sold and delivered (first cause of action); (2) breach of contract (second cause of action); and (3) account stated (third cause of action).

Discussion

A default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made thereof. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728, 730 [1984]. Plaintiff is entitled to a default judgment in its favor, provided it otherwise demonstrates that it has established a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844, 845-846 [3d Dept 2001].

To establish a cause of action for goods sold and delivered, plaintiff must show sale and delivery of the subject goods, and defendant's acknowledged receipt thereof. Eldon Group Am. v. Equiptex Indus. Prods. Corp., 236 AD2d 329 [1st Dept 1997]. A mere allegation of goods sold and delivered is not enough to show that the claim is valid; plaintiff must show by affidavit that a cause of action exists against defendant. Chambers & McKee Glass Co. v. Roberts, 2 AD 181, 182-183 [1st Dept 1896].

In the Complaint, Plaintiff claims that between October 7, 2002 and November 14, 2003, it sold to Lubov certain goods, wares and merchandise in the agreed sum of €50,325.00, and that Lubov made payments and/or received credits in the sum of €16,430.72, leaving a balance due and owing of €33,894.28. Plaintiff has provided the Affidavit of Allan

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Libov, an agent of Plaintiff with personal knowledge of the underlying transaction between Plaintiff and Defendant. Annexed to the Libov Affidavit is Defendant's purchase order for the goods in question, printed on Defendant's letterhead, addressed to Plaintiff, and indicating the specific champagne being ordered with "delivery no later than September 30, 2002." Further, the Libov Affidavit annexes Defendant's statement of account, reflecting two subsequent payments made after the indicated delivery date. In a dispute over goods sold and delivered, detailed invoices, coupled with the defendant's lack of a timely objection to the invoices, confirms the agreement of the parties. Multitex USA, Inc. v. Marvin Knitting Mills, Inc., 12 AD3d 169, 169-170 [1st Dept 2004]. Accordingly, Plaintiff has offered proof that the goods were sold and delivered to Defendant, and that delivery was acknowledged by Defendant, through a lack of objection to the invoices, and two partial payments on the account, establishing a *prima facie* cause of action for goods sold and delivered against Defendant. Therefore, Plaintiff is entitled to a default judgment on the first cause of action.

To establish a cause of action for breach of contract, plaintiff must show the formation of a contract between the parties, performance by plaintiff, defendant's failure to perform, and resulting damage. Furia v. Furia, 116 AD2d 694, 695 [2nd Dept 1986]. A breach of contract claim is to be dismissed if it fails to allege the breach of a specific contractual provision. Kraus v. Visa Intl. Serv. Assn., 304 AD2d 408 [1st Dept 2003].

As support for Plaintiff's breach of contract claim, Plaintiff states in the Complaint that "this is an action to recover the sum of 33,894.28 Euros due pursuant to a breach of contract occurring on or about November 14, 2003, for goods sold and delivered by plaintiff to defendant." As an indication of the agreement between the parties, Plaintiff states that the sale of the goods was at the "specific instance and request of the defendant." Performance by Plaintiff is reflected in the statement of account annexed to the Libov Affidavit, indicating

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subsequent invoicing for the sale of the goods. Defendant's failure to perform is reflected in the lack of complete payment, as shown in the statement of account, which lists two partial payments made by Defendant. Also, Plaintiff has provided the Court with a statement of account reflecting the amount due and owing, in addition to a purchase order form confirming the sale and delivery of the goods for €50,325.00, thereby setting forth the specific basis for the €33,894.28 Plaintiff is seeking. Gordon v. Dino De Laurentiis Corp., 141 AD2d 435, 436 [1st Dept 1988]. As a result, Plaintiff has established a *prima facie* cause of action for breach of contract against Defendant. Therefore, Plaintiff is entitled to a default judgment on the second cause of action.

To establish a cause of action for account stated, plaintiff must show that the parties agreed upon the account balanced and rendered, and that defendant did not object to the account stated within a reasonable time, resulting in defendant's express or implied promise to pay the balance. Interman Industrial Products, Ltd. v. R. S. M. Electron Power, Inc., 37 NY2d 151, 153-154 [1975]. "There can be no account stated where no account was presented or where any dispute about the account is shown to have existed." Abbott, Duncan & Wiener v. Ragusa, 214 AD2d 412, 413 [1st Dept 1995].

Contained within the Libov Affidavit, Plaintiff has provided statements of Defendant's account, which were prepared by Plaintiff and allegedly transmitted to Defendant in the ordinary course of Plaintiff's business and were retained by Defendant without objection. The statements reflect a balance due of €33,894.28, between October 7, 2002 and November 14, 2003, resulting from three invoices and a "due interests" assessment, less two partial payments. Based on Libov's Affidavit, Plaintiff has shown that the account balanced and rendered was provided to Defendant. Plaintiff has also shown that Defendant did not object within a reasonable period of time. Shea & Gould v. Burr, 194 AD2d 369, 370-371 [1st Dept

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1993]. There is no indication that Defendant objected to the statements for over four years, and defendant has also made two partial payments. For these reasons, Plaintiff has established a *prima facie* cause of action for account stated against Defendant in the amount of €33,894.28. Therefore, Plaintiff is entitled to a default judgment on the third cause of action.

Plaintiff seeks to recover the amount due and owing converted to dollars as of the date of the judgment. However, New York Courts convert amounts due and owing in foreign currency to dollars based upon the prevailing rate of exchange from the date of the accrual of the cause of action. See Hoppe v. Russo-Asiatic Bank, 235 NY 37, 39 [1923]; Richard v. National City Bank, 231 AD 559, 561 [1st Dept 1931]; Kantor v. Aristo Hosiery Co., 222 AD 502 [1st Dept 1928] aff'd 248 NY 630 [1928]. The accrual date in this action would be the date of the breach.

Since Plaintiff has not provided the Court with the value of the amount due and owing converted to dollars as of the date the causes of action accrued, on November 14, 2003, the Court cannot at this time reduce liability to a money judgment. Accordingly, this matter shall be set down for an inquest on the issue of the conversion rate from Euros to dollars, on or about November 14, 2003, to liquidate Plaintiff's damages. In addition, although Plaintiff has established Defendant's liability on each cause of action, Plaintiff's damages arising from the first cause of action for goods sold and delivered are duplicative of its damages on the second and third causes of action for breach of contract and account stated, respectively. Therefore, notwithstanding that Plaintiff is entitled to entry of a default judgment on all three causes of action, Plaintiff may not recover thrice, because it would result in a windfall for Plaintiff. Thus, Plaintiff is entitled to only one money judgment in the total amount of €33,894.28, to be, and as, converted to dollars through the inquest. The inquest shall be before a Special Referee who shall hear and determine the amount Plaintiff may recover from Defendant. Plaintiff shall

serve a copy of this decision and order on the Office of the Special Referee, 60 Centre Street, Room 119, within ninety days, so that this matter may be scheduled and assigned. Failure to do so will result in an immediate dismissal of the action for failure to proceed with the prosecution of the action.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that Plaintiff's motion for entry of a default judgment against defendant Lubov is granted on Plaintiff's three causes of action for goods sold and delivered, breach of contract, and account stated; it is further


ORDERED that there be an inquest before a Special Referee who shall hear and determine the amount Plaintiff may recover for damages from Defendant. Plaintiff shall serve a copy of this decision and order on the Office of the Special Referee, 60 Centre Street, Room 119, within ninety days, so that this matter may be scheduled and assigned.

Any other requested 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.

Date: New York, New York
July 16, 2008

So Ordered:



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

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