

**Yohalem v Trufoods Sys., Inc.**

2008 NY Slip Op 32220(U)

August 5, 2008

Supreme Court, New York County

Docket Number: 0114552/2007

Judge: Barbara R. Kapnick

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

PRESENT: Hon. **HON. BARBARA R. KAPNICK** PART 12

Justice

Yohalem, Kathy C.  
- v -

INDEX NO.

114552/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

TRU FOODS SYSTEMS, INC

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

*and cross-motion are decided  
in accordance with the  
accompanying memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE \_\_\_\_\_  
DATED: \_\_\_\_\_ J.S.C.

Dated: 8/5/08

**BARBARA R. KAPNICK**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
AUG - 7 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

-----X  
KATHY C. YOHALEM LTD.,

Plaintiff,

-against-

TRUFOODS SYSTEMS, INC.,

Defendant.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 114552/07  
Motion Seq. No. 001

In this action, plaintiff Kathy C. Yohalem Ltd. seeks to recover the sum of \$102,600.000 against defendant Trufoods Systems, Inc. ("TF") for senior advisory/business consulting services allegedly provided by plaintiff pursuant to a written agreement between the parties dated April 3, 2006 and revised on September 18, 2006.

Plaintiff now moves for an order pursuant to CPLR § 3215(a) granting a default judgment against the defendant on the ground that it has failed to timely serve an Answer and/or appear in this action.

Defendant opposes the motion and cross-moves for an order pursuant to CPLR § 2004 extending the time for it to serve its Answer to and including 14 days after entry of this Court's Order determining the instant motion and cross-motion.

**FILED**  
2006-11-20  
CLERK OF COURT

Defendant claims that no copies of the Summons and Complaint, which were served through the Secretary of State, were ever delivered to it prior to service of plaintiff's motion for a default judgment.

In addition, defendant has annexed a Verified Answer in which defendant alleges, inter alia, that (i) plaintiff lacks standing to bring this action because the agreement was between defendant and "Yohalem & Associates, Ltd.", not Kathy C. Yohalem Ltd. (first affirmative defense); (ii) any agreement between the parties was properly and timely terminated by defendant effective October 31, 2007 and defendant, which had decided to cease operating its business, has no liability for any fees incurred after that date (second affirmative defense), and (iii) by reason of plaintiff's acceptance and deposit of a check in payment of the fee for October 2007, plaintiff is barred from recovering any other fees from defendant under the doctrines of compromise and settlement (fifth affirmative defense) and accord and satisfaction (sixth affirmative defense).

Plaintiff argues in reply that defendant has failed to demonstrate a reasonable excuse for its default because defendant failed to amend its Certificate of Incorporation to reflect its current address, although defendant contends that it was essentially out of business and thus had no current address.

Plaintiff next argues that defendant has failed to demonstrate a meritorious defense to this action.

The revised agreement provides, in relevant part, as follows:

The term of this agreement shall commence on May 1, 2006 and continue through April 30, 2009. If either TF or we wish to renew or extend this agreement, the party wishing to extend will notify the other not later than January 1, 2009, and the parties will engage in good faith negotiations for up to 30 days after receipt of such notice. If either party wishes to terminate this agreement, they can do so October 31, 2006, with 60 days written notice; specifically by September 1, 2006. If there is no written notification to stop work on October 31, 2006 by either party specifically on or by September 1, 2006, the contract continues through April 30, 2009 (emphasis supplied).

Defendant's President, Jeffrey Bernstein, sent an e-mail dated September 28, 2007 to Kathy Yohalem stating

First of all I trust you are aware that I am exceptionally distressed over the fact that I was only able to give you 30 days notice that we will not continue. I hoped that by now we would have concluded a transaction with Burrito Ville or the acquisition of R.J. Gator's, either of which would have given us a budget that would have allowed us to continue using your services going forward However; since neither of these events has as yet materialized and frankly the fact that we are no closer to a transaction on BurritoVille creates its own set of additional issues, we just cannot afford to continue inasmuch as TruFoods Systems, Inc. no longer has operating revenue.

This in no way reflects the value that we place on your services, which I acknowledge have been extremely beneficial to us; it is simply the result of budgetary constraints.

It is my sincere hope that we can remain in communication and I would like to keep the door open to the possibility of future projects together if you are amenable to this. I did speak with Barry Mines and let him know that Andy has reached out to another firm. If we do not give Barry the assignment I will deal directly with him on payment for work performed to date.

On a personal note Kathy, I'm truly very sorry.

Plaintiff argues that the agreement was not terminated by 60 days written notice prior to September 1, 2006, and thus under the terms of the parties' agreement, "the contract continues through April 30, 2009."

Defendant refers to Mr. Bernstein's letter of May 1, 2006 to Ms. Yohalem which states that "[i]n accordance with our conversation, this contract [i.e., the April 3rd contract] will be cancellable by either party on thirty days' written notice," but that was before the contract was amended as provided above.

Plaintiff further argues that defendant's allegation that plaintiff is the wrong party is mistaken, i.e., Yohalem & Associates Ltd. is nothing more than a trade name used by the plaintiff.

Finally, plaintiff contends that the defenses of compromise and settlement and accord and satisfaction based on plaintiff's acceptance and deposit of a check in payment of the fee for October

2007 fail because, at the time, there was no dispute between the parties.

However, plaintiff has not submitted any proof that Yohalem & Associates, Ltd. is merely a trade name for the plaintiff.

In addition, defendant has set forth meritorious defenses pursuant to the doctrines of compromise and settlement and accord and satisfaction based on the acceptance of a payment after Ms. Yohalem's receipt of the September 28, 2007 e-mail.

Accordingly, based on the papers submitted and the oral argument held on the record on May 21, 2008, plaintiff's motion for a default judgment is denied, and plaintiff's cross-motion for an extension of time to serve its Answer is granted on the condition that defendant forwards \$250.00 costs to plaintiff within 14 business days.

Defendant's proposed Verified Answer, in the form annexed to the cross-moving papers as Exhibit "1", is deemed served tunc pro tunc.

**FILED**

AUG - 7 2008

NEW YORK  
COUNTY CLERKS OFFICE

This constitutes the decision and order of this Court

Dated: August 5, 2008

  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**