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INDEX
No. 15252-08

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 11 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 12-2-08
Submission Date: 12-2-08
Motion Sequence No.: 001/MOT D

RESIDUE NATIONAL CORP.,

Plaintiff,

- against -

LAUNCH PAD DISTRIBUTION INC.,

Defendant.

COUNSEL FOR PLAINTIFF
Locke, Lord, Bissel & Liddell, LLP
885 Third Avenue, 26th Floor
New York, New York 10022

COUNSEL FOR DEFENDANT

NO APPEARANCE

ORDER

The following papers were read on Plaintiff's motion for a default judgment:

Notice of Motion dated November 18, 2008;
Affirmation of Sarah M. Chen, Esq. dated November 18, 2008.

BACKGROUND

This action for breach of contract and interference with prospective advantage.

According to the complaint, Plaintiff, Residue National Corp. ("Residue"), is engaged in the business of buying and selling prime and off-grade flexible polyurethane foam scrap. Defendant, Launch Pad Distribution, Inc. ("launch Pad") provides packing,

crating and storage services. For approximately three years, Residue has purchased foam scrap from Launch Pad.

Residue alleges that, on June 20, 2008, Launch Pad's CEO entered into an oral agreement with Residue's president whereby Residue agreed to purchase 40 containers of "A" grade polyurethane foam scrap from Launch Pad for $.2731 per pound to be delivered ten containers at a time. Each container holds approximately 45,000 pounds of foam scrap. The cost for the 40 containers was approximately $106,695.

Launch Pad followed up this conversation with a written quote ("Quote"), dated June 20, 2008, which contained the terms of the oral agreement. According to the Quote, the price of $.2731 per pound was good for ten containers only despite Residue having ordered 40 containers. Residue's president signed the Quote on June 23, 2008.

Residue alleges that, on June 25, 2008, it contracted with Alliance Carpet Cushion ("Alliance") to re-sell the foam Residue purchased from Launch Pad to Alliance. Alliance agreed to purchase the foam for $.335 per pound representing a profit of $.0619 per pound for Residue.

On July 8, 2008, Launch Pad's CEO sent Residue's president an email informing Residue that, due to market conditions, Launch Pad would be unable to fill the order at the quoted rate. On July 9, 2008, Residue advised Launch Pad that Residue had already sold the material and demanded that the order be filled. Residue warned, in the July 9th email, that, in the event, Launch Pad did not begin to ship the ten containers as

ordered, Residue would purchase the materials from another source and bill Launch Pad for the difference.

After not receiving the ten containers by July 15, 2008, Residue's president sent another email to Launch Pad's CEO asking Launch Pad to confirm that Launch Pad would not be providing the ten containers of foam and reminding Launch Pad that Residue would have to bill Launch Pad for the difference in covering the order by Alliance. On July 15, 2008, after not being able to cancel the order with Alliance, Residue sent Launch Pad an invoice for $225,000. To date, Launch Pad has not responded to this invoice.

Residue brought suit alleging two causes of action: (1) breach of contract for $225,000 in damages; and (2) interference with prospective advantage for $27,855 in damages.

On August 18, 2008, Launch Pad was served with a copy of the summons and complaint at its offices located at 1050 E. Grant Line Road, Suite 500, Tracy, California, pursuant to CPLR 311(a)(1). In the complaint, Residue alleges that the Court has jurisdiction over Launch Pad pursuant to CPLR 302 inasmuch as Launch Pad regularly does and solicits business in New York, expected or should have reasonably expected its acts to have consequences in New York and derives substantial revenue from interstate commerce.

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Residue filed the instant motion on November 18, 2008 seeking default after Launch Pad's time to respond, move or otherwise respond to Residue's complaint expired and its time to do so has not been extended.

Launch Pad has not opposed this motion.

DISCUSSION

A. Standard--CPLR 3215

CPLR 3215(a) permits a plaintiff to seek and obtain a default judgment against a defendant who has failed to move or answer in an action. Plaintiff's application for a default judgment must be supported by proof of service of the summons and complaint, an affidavit of merit made by a person with actual knowledge of the facts constituting the claim, proof of default and the amount due by affidavit made by the party. CPLR 3215(f). Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due. CPLR 105(u); 3215(f); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70 (2003).

A plaintiff seeking a default judgment pursuant to CPLR 3215(e) must present some proof of liability to satisfy the court as to the *prima facie* validity of the cause of action. CPLR 3215(f); Silberstein v. Presbyterian Hosp. in City of New York, 95 A.D.2d 773, 774 (2nd Dept. 1983). In determining whether a party has a viable cause of action, such that the party has a right to recover upon a defendant's failure to appear or answer, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff. Beaton v. Transit Facility Corp., 14 A.D.3d 637, 637 (2nd Dept.

2005). A plaintiff who submits proof of service of summons and a factually detailed verified complaint is entitled to a default judgment against a defendant on the issue of liability, where the defendant has failed to appear or answer. Zino v. Joab Taxi, Inc., 20 A.D.3d 521, 522 (2nd Dept. 2005).

In support of this motion, Residue submitted the verified complaint along with an affidavit from a process server detailing service on the defendant corporation. Service was perfected delivering a copy of the summons and complaint to Vince DeBono, CEO of Launch Pad.

B. Breach of Contract

To establish a cause of action for breach of contract, a plaintiff must show 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).

Residue alleges that it entered into a valid and binding contract with Launch Pad for the sale of ten containers of foam scrap at a price of $.2731 as evidenced by the Quote. Launch Pad refused to ship the ten containers at the agreed upon price despite Residue being ready, willing and able to accept such goods. Plaintiff alleges that it has

been damaged in the amount of $225,000 when it had to purchase replacement goods in the amount of $331,695.[1] Plaintiff also seeks interest from July 16, 2008.

2. Interference with Prospective Advantage

With respect to a cause of action for interference with prospective economic advantage, "a plaintiff must demonstrate that the alleged interferer used unlawful or improper means or that the interference by lawful means constituted the infliction of intentional harm done without excuse or justification'". Goldberg v. Bell Atlantic, 304 A.D.2d 789 (2nd Dept. 2003), citing Bogdan v. Peekskill Community Hosp., 211 A.D.2d 692, 693 (2nd Dept. 1995).

"(U)nder New York law, in order for a party to make out a claim for tortious interference with prospective economic advantage, the defendant must ... direct some activities towards the third party ...". Carvel Corp. v. Noonan, 3 N.Y.3d 182, 191 (2004), citing Piccoli A/S v. Calvin Klein Jeanswear Co., 19 F Supp 2d 157, 167-168 (S.D.N.Y.1998). "While economic pressure brought to bear by one contracting party on the other may, on rare occasions, be tortious, it cannot constitute the tort of interference with economic relations." *Id.* Thus, a claim for interference with economic advantage requires a plaintiff to plead "conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship". *Id.*

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[1]Plaintiff has claimed damages in the amount of $229,950 on the breach of contract claim calculated by subtracting the agreed purchase price [$106,695] from the actual cost of replacement goods, ($331,693), plus interest.

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Residue alleges that Launch Pad had knowledge that Residue planned to enter into a contract to re-sell the foam scrap and that Launch Pad deliberately interfered with Residue's proposed contract of re-sale and that this interference was done by wrongful means. Residue also alleges that had it not been for Launch Pad's interference, Residues would have re-sold the scrap foam.

There are no allegations that Launch Pad directed any of its activities towards Alliance. Consequently, Residue has not made out a *prima facie* case for interference with prospective advantage. Thus, there can be no recovery on default for this cause of action.

Accordingly, it is,

ORDERED, that Plaintiff's motion for a leave to enter a default judgment is **granted** with respect to its first cause of action and **denied** with respect to its second cause of action; and it is further,

ORDERED, that Plaintiff, Residue National Corp., is hereby granted leave to enter a clerk's judgment in its favor and against Defendant, Launch Pad Distribution Inc., in the principle sum of $225,000 together with interest from July 16, 2008 and costs and disbursements as taxed by the Clerk.

This constitutes the decision and Order of this Court.

Dated: Mineola, NY
February 4, 2009

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

ENTERED
FEB 09 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE