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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 : 110921/2008
VG RE GROUP HOLDINGS, INC.
VS.
UPSIDE VENTURES NYC, LLC
SEQUENCE NUMBER : # 001
DEFAULT JUDGMENT

INDEX NO. 110921-08
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

were read on 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

FILED
APR 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 4/3/09

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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VG RE GROUP HOLDINGS, INC.,

Plaintiff,

-against-

UPSIDE VENTURES NYC, LLC, UPSIDE VENTURES, LLC and RALPH TRIONTO,

Defendants.

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Decision/Order
Index No.: 110921/08
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/BF affid, CVV affirm, exhs	1

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

Plaintiff VG RE Group Holdings, Inc. ("VG") moves for a default judgment on the issue of liabity against defendants Upside Ventures NYC, LLC ("Upside NYC"), Upside Ventures, LLC ("Upside Ventures") and Ralph Trionfo ("Trionfo"). CPLR § 3215. Trionfo has submitted to the court an affidavit in opposition to the motion, *pro se*. Along with his affidavit, Trionfo has submitted a Verified Answer and Counter Claim. Neither Upside NYC nor Upside Ventures have appeared in this action, nor opposed the motion, despite due proof of service of the underlying summons and complaint, as well as the instant motion. Therefore, both Upside NYC and Upside Ventures have defaulted in this action.

VG contends that Trionfo has also defaulted, despite his late answer submitted along with his affidavit in opposition to the instant motion. For the reasons that follow, the court holds that Trionfo has not defaulted in this action. Although Trionfo has not

specifically asked this court to vacate his default, such relief is nonetheless implicit in Trionfo's opposition wherein he seeks to file an answer to the complaint. Trionfo's answer is dated December 2, 2008, which is just more than two weeks after Trionfo's time to answer the complaint expired, namely, November 17, 2008. CPLR 320. This is not an egregious delay; in fact, the delay is *de minimus*. There is a strong public policy in this state that matters be disposed of on their merits in the absence of real prejudice. Lirit v. S.H. Laufer World, Inc., 84 A.D.2d 704 (1st Dept 1981). VG has not demonstrated any prejudice resulting from Trionfo's late answer. The fact that VG has expended attorneys fees in connection with the instant motion is not prejudice which would otherwise warrant the harsh penalty of holding Trionfo in default in this action.

Trionfo has, however, failed to provide any proof that he served his affidavit in opposition and verified answer on the plaintiff. In fact, VG contends that it has never been properly served with the answer. Therefore, with respect to Trionfo, the court denies VG's motion for entry of a default judgment without prejudice, and grants Trionfo leave to serve, by regular mail, the Verified Answer and Counter Claim in the form annexed to his opposition papers as "Exhibit A" within ten days from the date of entry of this decision/order. If Trionfo fails to answer the complaint or otherwise appear in this action, VG may renew its motion for default judgment against Trionfo.

As a related matter, VG asks for an award for its attorneys fees incurred in making the instant motion if the court does not hold Trionfo in default. The court may, in its discretion, award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1.

Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false. The court declines VG's request for relief, since it has not demonstrated frivolous conduct. Motion practice is a necessary aspect of litigation and as the court has already noted, Trionfo's delay in answering the complaint was not egregious, and therefore, not sanctionable. Routine motions for default judgments do not *per se* carry with them a right to legal fees. Accordingly, this ancillary request for relief is denied.

As for the remaining defendants who have defaulted in answering the complaint, such default 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)]. Therefore, VG 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)].

On or about March 1, 2007, VG and Upside Ventures entered into an Operating Agreement for Upside NYC. VG and Upside Ventures planned to use their joint venture, Upside NYC, to integrate their existing real estate brokerage business operations and pursue real estate investment opportunities. Pursuant to the Operating Agreement, Upside Ventures was the managing member and VG was the non-managing member. At that time, Upside Ventures and VG each owned a 50% membership interest in Upside NYC. VG Made a loan to Upside in the amount of $275,000, as detailed in Section 4.1 of the Operating Agreement (the "Loan").

Based upon the affidavit of Ben Friedman ("Friedman"), Officer and General Manager of VG, VG claims the following. The relationship between VG and Upside Ventures "quickly deteriorated." On or about February 20, 2008, VG and Upside NYC entered into a "Membership Interest Redemption and Loan Repayment Agreement" (the "Repurchase Agreement") whereby Upside NYC agreed to buy back VG's 50% membership interest in Upside NYC and redeem the Loan. VG and Upside NYC executed a Promissory Note wherein Upside NYC promised to pay VG the total sum of $264,496.50 (the "Purchase Price") plus any accrued interest as consideration for VG's sale of its membership interest in Upside NYC.

Section 2.1 of the Repurchase Agreement details the sources of Upside NYC's revenue from which VG would be repaid. Section 2.2 provides that all amounts due under Section 2.1 are to be paid to VG in immediately available funds within five business days of Upside NYC's receipt of cleared funds from any covered transaction. Section 2.2 also provides that real estate brokerage commission payments due under the purchase agreement are to be paid by Upside NYC to Equinet properties Inc. ("Equinet") on account of VG. Pursuant to Section 5.3 of the Repurchase Agreement, within sixty days of execution of the agreement, Upside NYC was also required to become current on all lease obligations with respect to a lease for certain Dell computer equipment (the "Dell Lease") previously entered into by Vision Real Estate Group LLC (an affiliate of VG) for the benefit of Upside NYC.

Friedman claims that on or about July 1, 2008, Upside NYC brokered the closing for units 106, 508 and 511 in Greenpoint Lofts and that, pursuant to the Repurchase Agreement, VG is entiteld to receive 80% of the brokerage fee that Upside NYC

received for the July 1, 2008 closing, in total sum of $10,788. VG demanded payment in July 2008 and in an email dated July 11, 2008, Trionfo represented on behalf of Upside NYC that he would pay as much as possible as soon as possible and that he would release all future commissions due to VG. This email has not been provided to the court. VG also claims that based upon an examination of the books and records of Upside NYC, there have been other transactions from which VG is entitled a portion of the revenue thereof and has not received from Upside NYC. Friedman maintains that "Upside [NYC] and Trionfo have concealed a number of transactions from VG in order to avoid paying VG the amounts of the revenue received from those transactions."

On July 3, 2008, Friedman claims that VG received a "notice of deliquency" from Dell Financial Service regarding the Dell Computer Lease advising that there is $8,991.64 due and owing on the Dell Lease. Friedman claims that via email dated July 14, 2008, VG promptly forwarded the notice of delinquency from Dell to the defendants.

On July 25, 2008, Friedman states that VG sent a letter of default pursuant to paragraph 11.1 of the Repurchase Agreement to Upside NYC, addressed to Trionfo. Despite such demand, VG claims that Upside NYC and Trionfo have failed and refused to make any payments to VG and failed to cure the Dell Lease default.

Plaintiff's first and second causes of action are for breach of contract against Upside NYC and Trionfo, respectively. The elements 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 AD2d 694 (2d Dept 1990). Based upon the foregoing, plaintiff has established a *prima facie* cause of action

for breach of contract against Upside NYC. Accordingly, plaintiff is entitled to a default judgment on the issue of Upside NYC's liability on the first cause of action.

Plaintiff has also asserted causes of action against both Upside NYC and Trionfo sounding in fraud (third cause of action) and fraudulent inducement (fourth cause of action), and against Upside NYC, Upside Ventures and Trionfo for unjust enrichment (fifth cause of action) and conversion (sixth cause of action).

To state a cause of action for fraud, plaintiff must show: (1) that the defendant 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 defendant; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 N.Y.2d 425 (1998). VG's assertions are that the defendants altered books and records to conceal certain entries in order to avoid their obligations under the Repurchase Agreement. These claims are insufficient to support a cause of action for fraud because they merely relate to the defendant's breach of the Repurchase Agreement and generally, a separate cause of action for fraud does not arise from a defendant's breach of a contract (see, e.g., Tierney v. Capricorn Investors, 189 AD2d 629 [1st Dept 1993]; Garwood v. Sheen & Shine, 175 AD2d 569 [4th Dept 1991] lv. denied 78 NY2d 864). Accordingly, VG's motion for a default judgment on the third cause of action is denied and the third cause of action against Upside NYC and Upside Ventures is hereby severed and dismissed.

The elements of a cause of action for fraudulent inducement are: defendant's representation of a material existing fact, falsity, scienter, justifiable reliance, and damages (CPLR 3016[b]; see Raytheon Co. v. AES Red Oak, LLC, 37 AD3d 364 [1st Dept 1997];

Brown v. Wolf Group Integrated Communications, Ltd., 23 AD3d 239 [1st Dept 2005]). These elements must be plead with specificity (id). Misrepresentations amounting to mere promises about what will be done in the future does not give rise to a fraudulent inducement claim. Deerfield Communications Corp. v. Chesebrough-Ponds, Inc. 68 NY2d 954 (1986). Rather, the mistatements must be of a material fact or a promise made with a present, albeit undisclosed, intent not to perform them. Here, plaintiff's claims are insufficient to support a cause of action for fraudulent inducement, and therefore, the fourth cause of action against Upside NYC and Upside Ventures is hereby severed and dismissed.

In order to recover for unjust enrichment under New York Law, a plaintiff must show that: (i) the defendant was enriched; (ii) the enrichment was at plaintiff's expense; and, (c) the circumstances were such that equity and good conscience require defendant to make restitution. VG's cause of action for unjust enrichment against Upside NYC fails in the face of a valid contract, to wit, the Repurchase Agreement. Clark-Fitzpatrick v. L.I.R.R., 70 NY2d 382 (1987). Nor has VG demonstrated a *prima facie* cause of action for unjust enrichment against Upside Ventures. VG has not provided any proof of the brokerage commissions paid to Upside Ventures, other than Friedman's affidavit, nor has it explained its failure to do so. Friedman does not have personal knowledge of this information. VG has also failed to establish that Upside Ventures itself took and/or retained the brokerage commissions in the total amount of $21,168, and therefore, defendant's motion for a default judgment on its fifth cause of action is denied without prejudice to renew upon a proper showing.

Similarly, VG's motion for a default judgment on the conversion cause of action

must be denied at this time. 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 has not provided sufficient proof of the brokerage commissions, and it is unclear to whom those brokerage commission payments were made to. Therefore, plaintiff is unable to establish, *prima facie*, a cause of action for conversion because there is no proof that property was converted by either Upside NYC or Upside Ventures or that VG had an ownership interest in such property. The motion for default judgment on the sixth cause of action against Upside NYC and Upside Ventures is denied without prejudice to renew upon a proper showing.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion by plaintiff VG RE Group Holdings, Inc. is granted only to the extent that plaintiff is granted a default judgment on the first cause of action against Upside Ventures NYC, LLC; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the third and fourth causes of action, only against Upside Ventures, LLC and Upside Ventures NYC, LLC, are hereby severed and dismissed in their entirety; and it is further

ORDERED that defendant Trionfo shall be given 10 days from the date of entry of this decision/order to serve an answer in the form annexed to his affidavit in

opposition to the instant motion as Exhibit "A"; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiff VG RE Group Holdings, Inc. and against defendant Upside Ventures NYC, LLC in the amount of $264,496.50.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 3, 2009

So Ordered:

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

FILED
APR 15 2009
COUNTY CLERK'S OFFICE
NEW YORK