

Signature Bank v Lead Me Out Envtl. Servs., Inc.

2009 NY Slip Op 31672(U)

July 24, 2009

Supreme Court, New York County

Docket Number: 101077/09

Judge: Judith J. Gische

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

JUDITH J. GISCHE, J.S.C.

PRESENT: _____

PART 10

Index Number : 101077/2009

SIGNATURE BANK

VS.

LEAD ME OUT ENVIRONMENTAL

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

FILED

JUL 28 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/24/09



J.S.C.
JUDITH J. GISCHE, J.S.C.
NON-FINAL DISPOSITION

Check one: 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: IAS 10

-----x

Signature Bank,

Plaintiff,

Decision/Order

-against-

Index # 101077/09
Seq # 001

Lead Me Out Environmental Services, Inc.
And Edward Weinstein a/ka Edward M.
Weinstein, individually,

Defendants.

-----x
Hon. Judith J. Gische

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Pursuant to CPLR 2219(a) the following numbered papers were considered by the court in connection with this motion for a default judgment:

PAPERS	NUMBERED
Notice of Motion, JBR affirm., LA verification and exhibits.....	1

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

This is an action to recover amounts due under a Revolving Credit Account Agreement ("Agreement") made with defendant Lead Me Out Environmental Services, Inc. ("Lead") that was personally guaranteed in a separate writing ("Guarantee") by defendant Edward Weinstein ("Weinstein"). Plaintiff moves, pursuant to CPLR § 3215, for entry of a default judgment against the defendants. The motion was served upon both of the defendants, neither of whom have answered. The underlying summons and verified complaint were served upon Lead by service upon the New York State Secretary of State in accordance with BCL §306. The summons and verified complaint were also served on Weinstein by serving the doorman as a person of suitable age and discretion at the building identified by plaintiff as Weinstein's residence. A copy was

also mailed to Weinstein within one day thereafter. Additional copies of the summons and verified complaint were thereafter mailed to each defendant on February 10, 2009 in accordance with CPLR §3215(g). Neither defendant has interposed an answer or otherwise appeared in this action and their time to do so has expired. Therefore, the defendants have defaulted in answering this action and the motion for a judgment will be considered by the court without opposition.

Plaintiff is entitled to a default judgment against the defendants, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001). The defendants' default in answering the complaint 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 N.Y.2d 728 (1984).

Plaintiff relies on the verification of the complaint made by Lorna Allen, a consumer loan administrator for plaintiff in support of this motion, as well as certain documents. The Agreement and the separate Guarantee are part of the complaint. Plaintiff has also provided a loan statement inquiry showing that as of 12/08/08 plaintiff's records reflected a balance due from Lead of \$24,979.00 in connection with loan transactions. The agreement provided for interest in an amount of 1% over prime. Plaintiff has further provided historical data reflecting the prime rate and its calculation of interest applicable to this account. Finally plaintiff provides proof that a demand was made for defendants to pay the outstanding balance, but that no payment was made.

The complaint served asserts three causes of action against Lead respectively

for breach of contract, account stated and unjust enrichment. A fourth cause of action is separately asserted against Weinstein under the Guarantee.

The elements of a cause of action 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, 116 A.D.2d 694 (2d Dept 1986).

Plaintiff has prima facie shown that it has a breach of contract action against Lead on the Agreement and against Weinstein on the Guarantee.

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 AD2d 868 (3d Dept. 1993), *lv. denied* 82 NY2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 AD3d 610 (3rd Dept. 2005).

Plaintiff has not provided the court with any statements rendered to Lead and otherwise not established the basis for a cause of action based upon account stated.

Plaintiff's cause of action for unjust enrichment must fail in the face of a valid contract. Clark-Fitzpatrick v. L.I.R.R., 70 N.Y.2d 382 (1987).

Although in the June 3, 2009 affirmation of Janelle Rosenbaum a passing reference is made to the court making an award of attorneys fees in favor of plaintiff, the motion is otherwise devoid of any support for such an award. Attorneys fees are therefore denied.

Accordingly it is hereby:

ORDERED that plaintiff's motion for a default judgment against defendants is granted on the first and fourth causes of action asserted in the complaint and denied on

the second and third causes of action asserted in the complaint, and it is further

ORDERED that the clerk of the court is directed to enter a judgment in the principal amount of \$24,979.00 in favor of plaintiff and joint and severally against both defendants plus interest in the amount of \$755.04 representing interest through and including May 22, 2009 and such further interest as may have accrued thereafter until the date of judgment, interest to be calculated at the rate of 1% over the prime rate of interest, plus the statutory costs and disbursements of this action, and it is further

ORDERED that the clerk shall enter a judgment severing and dismissing the second and third causes of action, and it is further

ORDERED that any relief demanded but not expressly granted herein is denied and that this shall constitute the decision and order of the Court.

Dated: New York, New York
July 24, 2009

So Ordered:



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

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK