

Lucero v Matallana

2009 NY Slip Op 32023(U)

August 28, 2009

Supreme Court, New York County

Docket Number: 104484/09

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.

PI

Index Number : 104484/2009

PART _____

LUCERO, WILSON

vs.

MATALLANA, DANIEL

SEQUENCE NUMBER : 001

DEFAULT JUDGEMENT

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

FILED
SEP - 4 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/28/09

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

Wilson Lucero,

Plaintiff,

Decision/Order

-against-

Index#104484/09

Mot. Seq. # 001

Daniel Matallana and
Clasp Connection, Inc.,

Defendants.

Hon. Judith J. Gische:

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS

NUMBERED

Notice of Motion, GS affirm, exhibits.....1

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

Plaintiff moves for a default judgment against both defendants based upon their non-appearance in this action.

A verified summons and complaint were filed with the Court on April 9, 2009. Defendant Daniel Matallana ("Matallana") was served by the delivery of the summons and complaint to a person of suitable age and discretion at Matallana's actual place of business on April 8, 2009. Within a day thereafter an appropriate mailing was made sufficient to complete service of process. CPLR §308.2. Defendant Clasp Connection, Inc. ("Clasp") was served by the delivery of the summons and complaint to a general agent at its place of business on April 8, 2009. CPLR §311(a)(1). The court, therefore, has personal jurisdiction over both defendants in this action.

Additional notice was provided pursuant to CPLR §3215. Defendants have not answered the complaint nor otherwise appeared in this action and the time to do so has expired. Defendants have not opposed this motion for a default judgment. The motion and the underlying action are, therefore, considered and decided on the default of defendants. The Court's decision follows.

A 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 NY2d 728 (1984). Plaintiff is entitled to default judgment in his favor, provided he otherwise demonstrates that he has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001).

Plaintiff asserts four causes of action in his complaint respectively for: conversion (first cause of action); fraud (second cause of action); unjust enrichment (third cause of action) and for the imposition of a constructive trust (fourth cause of action). The same facts underlie each cause of action. Plaintiff was an employee of Clasp, which was owned by Matallana. In March of 2008, Matallana offered to invest ,in recognized securities and on plaintiff's behalf, the sum of \$40,000.00. Matallana was to receive a 10% commission on all gains made trading on plaintiff's account. On or about March 14, 2008 plaintiff gave \$40,000 to defendants, which was then deposited into an account in the name of Clasp. Instead of investing the funds as agreed, the monies were then withdrawn from Clasp's account and used for the personal benefit of Clasp and Matallana.

Conversion has been identified as the unauthorized assumption and exercise of

the right of ownership over property belonging to another to the exclusion of the owner's rights. Thyroff v. Nationwide Mut. Ins. Co., 8 NY3d 283 (2007). The property converted can be money, provided that it is specifically identifiable. Sperrazza v. Kail, 267 AD2d 692 (3rd dept. 1999). Where funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion. Hoffman v. Unterberg, 9 AD3d 386 (2nd dept. 2004).

Under the facts presented plaintiff has made a *prima facie* case of conversion of his funds provided for a particular purpose.

Fraud requires proof of a misrepresentation which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance by the plaintiff and resulting injury. Ross v. Louse Wise Services, Inc., 8 NY3d 478 (2007). At bar, plaintiff has established that defendants falsely represented that they would invest his funds for plaintiff's personal benefit and that plaintiff, in justifiable reliance upon such representations, gave defendants \$40,000 of his personal funds. The monies, however, were used for purposes other than plaintiff's benefit, causing plaintiff monetary damages. Plaintiff has established a *prima facie* case of fraud.

Plaintiff's claim for unjust enrichment, however, is not viable. Unjust enrichment is equitable in nature and will not lie if an adequate remedy at law exists. Here damages for conversion and fraud constitute an adequate remedy at law, precluding an cause of action for unjust enrichment based on the same set of facts and circumstances. Boyle v. Kelley, 42 NY2d 88 (1977); Cirri v. Daily News LP, 9 Misc.3d 1130(A) (Sup. Ct. Kings co. 2005).

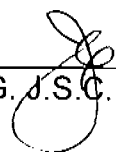
Plaintiff's claim for a constructive trust must also be denied because there is no identifiable property at this time over which the court can impose a trust. According to the verified complaint the monies had at one time been deposited in a Clasp account, but they have since been disbursed. Thus, there is no identifiable property left at this time over which a trust can be imposed. O'Brien v. Dalessandro, 43 Ad3d 1123 (2nd dept. 2007).

Accordingly, the motion for a default judgment is granted and the Clerk of the Court is directed to enter a money judgment in favor of plaintiff and against both defendants, jointly and severally, on the first and second causes of action, in the total amount of \$40,000.00 plus pre judgment interest from March 14, 2008 and the statutory costs and disbursements of this action.

Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, NY
August 28, 2009

SO ORDERED:



J.G. J.S.C.

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NEW YORK