

CBS Outdoor, Inc. v IMI Resort Mktg., LLC

2009 NY Slip Op 32882(U)

December 7, 2009

Supreme Court, New York County

Docket Number: 601128/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

CBS Outdoor Inc.

INDEX NO. 6011 28/09

- v -

MOTION DATE _____

IMI Resort marketing

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 7 2009

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

CBS Outdoor, Inc., a Delaware
corporation

Plaintiff,

-against-

IMI Resort Marketing, LLC, a Delaware
Limited Liability Company,

Defendant.

Decision/Order

Index No.: 601128-2009
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Papers	Numbered
Pltf's motion [§3215] w/NB affid, JML affirm, non-mil affirm, exhs	1
Affirm of Malling (sep back)	2

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

This is a breach of contract action brought by CBS Outdoor, Inc. ("plaintiff"), a Delaware corporation authorized to do business in the State of New York, arising from two (3) advertising agreements and one production/installation agreement had with defendant IMI Resort Marketing, LLC ("IMI"). IMI is a Delaware limited liability company located in South Carolina.

Plaintiff now seeks entry of a default judgment against IMI in the principal sum of \$81,146.04 plus interest of 18% per annum on the unpaid amounts.

Plaintiff has established that on April 21, 2009, it served IMI's designated agent for service of process. Pursuant to paragraph 19 of the agreement, the parties agreed that New York is the exclusive jurisdiction and venue for any claims arising from the

3] agreement. Therefore, the manner in which plaintiff served IMI complies with the requirements of (CPLR § 311-a [a][iv]; LLC §§ 304). The further notice requirements of CPLR § 3215 do not apply, although plaintiff seeks a money judgment, because defendant is not a natural person (CPLR § 3215 [g] [4] [i]).

Despite such notice and additional notice, IMI has not answered the complaint or appeared in this action. This motion for a default judgment is timely, having been brought within one (1) year of IMI's default. Though proof of service of this motion has been filed, IMI has not filed opposition to it and therefore, it is before the court on default as well.

Since a defaulting party is deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]), plaintiff is entitled to the relief sought in the verified complaint provided it demonstrates that it has a prima facie cause of action.

The following facts have been established by the plaintiff in the complaint, and through the sworn affidavit of Neil Best, plaintiff's Director of Credit and Collections:

Plaintiff had three (3) agreements with IMI. The first agreement [No. 0378561] is dated May 7, 2007 and signed by Jennifer Spellman, on behalf of IMI. Pursuant to that agreement, IMI agreed that plaintiff would provide billboard advertising services in Orlando, Florida at a cost of \$5,024.34 per month for the twelve month period commencing June 2, 2007 for a total net cost of \$60,292.08. IMI made several payments but then stopped making payments December 1, 2007. IMI retained the invoices and did not object to any of them; they remain unpaid.

The second agreement [No. 0407799] is dated August 23, 2007, also signed by

Jennifer Spellman and also for a twelve month period. The commencement date of this advertisement display was September 17, 2007 at a cost of \$5,000 per month for a total net cost of \$60,000. IMI paid some invoices but stopped making payments on November 1, 2007. IMI retained those bills and did not object to any of them; they remain unpaid.

The third agreement [No. 0430206] is for production and installation of the billboard. This agreement is dated October 17, 2007 and signed by Caroline Skelly, IMI's production assistance. That agreement is for a \$1,000 installation charge. Although plaintiff sent IMI an invoice in that amount, IMI did not object to the bill nor pay it and it remains unpaid.

Pursuant to paragraph ten (10) of the agreement, any bill not paid "shall constitute an account stated unless [a] written objection is made by the Advertiser within fifteen (15) days from the rendering thereof. This conclusive presumption shall apply to both the specifics of the showing and the dollar amount due." Paragraph 10 also provides for the imposition of interest on all unpaid invoices after thirty (30) days at the rate of 1½ % per month (18% per year). Defendant presently has an unpaid aggregate balance of \$81,146.04 on all three agreements. The interest on the unpaid balance is \$18,908.82 as of July 13, 2009, the date of this motion. Plaintiff is, therefore, entitled to a money judgment in the principal amount of \$81,146.04 with interest of \$18,908.82 as of July 13, 2009. Interest accrues and is awarded at the contract rate through date of entry of the judgment and thereafter at the statutory rate.

Although the complaint also seeks attorneys fees which it claims are recoverable under the agreement, no request is made for such relief in the motion. In any event,

plaintiff has not provided the contractual provision under which it claims it may recover those fees from the defendant. Therefore, the claim for legal fees is hereby severed and dismissed.

Conclusion

It is hereby

ORDERED that plaintiff's motion for entry of a default judgment against defendant IMI Resort Marketing, LLC is granted on default; and it is further

ORDERED that plaintiff is entitled to and the Clerk shall enter a money judgment against defendant IMI Resort Marketing, LLC. in the principal amount of Eighty One Thousand One Hundred Forty Six and 04/100 Dollars (\$81,146.04) with interest on the unpaid balance of Eighteen Thousand Nine Hundred and Eight and 82/100 Dollars (\$18,908.82), as of July 13, 2009; interest accrues and is awarded at the contract rate through date of entry of the judgment and thereafter at the statutory rate; and it is further


ORDERED that the claim for legal fees is hereby severed and dismissed; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
December 7, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE