

**Mashantucket Pequot Gaming Enter. v Shing Chun
Yau**

2010 NY Slip Op 30320(U)

February 9, 2010

Supreme Court, New York County

Docket Number: 117849/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.

PART 10

Index Number : 117849/2009
MASHANTUCKET PEQUOT GAMING
vs.
YAU, SHING CHUN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

FEB 17 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 09 2010

HON. 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**

-----x
Mashantucket Pequot Gaming
Enterprise, d/b/a Foxwoods Resort Casino

Plaintiff,

-against-

Shing Chun Yau

Defendant.
-----x

DECISION/ORDER

Index No.: 117849/09
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 n/m (CPLR 3213) w/ AB affirm and NG affid, exhs ¹ | 1 |

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

This is plaintiff's motion for summary judgment in lieu of a complaint based upon a validly entered foreign judgment which remains unpaid. CPLR § 3213. This motion has been submitted to the court without opposition, and is, therefore, considered by the court on default.

Plaintiff has filed proof that the summons and motion were personally served upon the defendant. CPLR § 308(1). Despite such notice, defendant has neither

¹ While the court accepts plaintiff's motion papers, Rule 12 of the Rules of Court which states, "[e]xhibits should be tabbed and be legible. . ." None of the exhibits to this motion were separately tabbed.

appeared in this action nor opposed the motion. His time to do so has expired and has not been extended by the court. Therefore, this motion is submitted on default and plaintiff is entitled to summary judgment provided it otherwise establishes a *prima facie* case.

Arguments

This action is based upon a judgment obtained by plaintiff in the Mashantucket Pequot Tribal Court (the "Judgment"). Plaintiff has provided a certified copy of the Judgment, dated September 25, 2009. The facts of the underlying action are set forth in the affidavit of Norberto Gonzalez, Jr., collections manager for plaintiff. The motion is also supported with the affirmation of Andrew J. Bayne, attorney for plaintiff. The facts are as follows:

On or about March 29, 2007, defendant applied for credit from plaintiff and signed a credit application agreement. Defendant was, thereafter, granted a \$130,000.00 line of credit. On December 22, 2008 and January 9, 2009, defendant borrowed \$100,000.00 against the line of credit by signing "markers" drawn from Cathay Bank, New York, NY. Plaintiff honored the "markers" and presented them to Cathay Bank for collection. Cathay Bank, however, dishonored the demand for payment because the account contained insufficient funds. On May 20, 2009, plaintiff filed a complaint against defendant with the Mashantucket Pequot Tribal Court, based upon defendant's failure to pay the loan and the unpaid debt. On June 23, 2009, plaintiff served the complaint on defendant by personal service. Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino v. Shing Chun Yau, MPTC-CV-DC-2009-160.

Defendant failed to answer or appear and on September 25, 2009, the Mashantucket Pequot Tribal Court entered a default judgment against defendant in the amount of \$106,984.56. This amount represents \$100,000.00 in principal; \$6,289.61 in interest through September 25, 2009; \$194.95 in costs; and \$500.00 in attorney's fees.

Defendant now seeks to enforce that judgment by bringing this motion for summary judgment in lieu of complaint. Defendant asks that the Court direct entry of a money judgment in the amount of \$106,984.00 plus interest, attorney's fees, and the cost of this motion. Alternatively, plaintiff seeks enforcement of its marker under the Tribe's Debt Collection law.

Discussion

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims that are presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). A motion for summary judgment in lieu of complaint is available when the "action is based upon an instrument for the payment of money only or upon any judgment." CPLR § 3213. Summary judgment in lieu of a complaint is proper when: (1) the instrument itself, and (2) proof of non-payment, without more, make out a prima facie cause of action. Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1968), *aff'd* 29 N.Y.2d 617 (1971). The instrument at issue here, the Judgment, is for payment of money only, within the meaning of CPLR § 3213.

CPLR § 5303 provides recognition and enforcement of a foreign country judgment in a motion for summary judgment in lieu of complaint and the foreign judgment

becomes enforceable like a New York judgment. The Mashantucket Pequot Tribal Court is deemed a foreign country court; therefore, it is entitled to treatment under CPLR § 5303. [CIBC Mellon Trust Co. V. Mora Hotel Corp. N.V., 100 N.Y.2d 215 (1st Dept. 2002)].

This action is based on a Judgment obtained by plaintiff in the Mashantucket Pequot Tribal Court in the amount of \$106,984.56. Plaintiff has provided a certified copy of the Judgment filed September 25, 2009. Post-judgment interest has been accruing since September 26, 2009.

The instrument at issue here, the Judgment, is for payment of money only, within the meaning of CPLR § 3213, and there are no material issues of fact precluding summary judgment because it is for a sum certain. Accordingly, plaintiff's motion for summary judgment in lieu of complaint is granted. The clerk shall enter \$106,984.56 with interest from September 26, 2009.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the credit application contract, on which the underlying Judgment is based, expressly provides that defendant is liable to pay plaintiff "all costs of collection, including attorney's fees." However, the issue of legal fees requires a determination of whether they are "reasonable." Since a hearing is required and the sum sought is not certain, the Court cannot determine this issue under the provision of CPLR § 3213. The Court hereby severs and converts the issue of legal fees into a conventional action and plaintiff shall serve a summons and

complaint on defendant. Since the court already has personal jurisdiction over defendant, service may be by regular mail to defendant's last known residential address.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiff Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino's motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendant Shing Chun Yau is granted to the extent that plaintiff is entitled to a money judgment in its favor and against defendant Sing Chun Yau, for the unpaid principal sum of \$106,984.56 with interest from September 26, 2009; and it is further

ORDERED that the issue of legal fees is hereby severed and converted into a conventional action and plaintiff shall serve a summons and complaint on defendant within twenty (20) days.

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

This shall constitute the decision and order of the Court.

Dated: New York, New York
February 9, 2010

So Ordered:

HON. JUDITH G. SISCHE, J.S.C.

FILED
FEB 17 2010
NEW YORK COUNTY CLERK'S OFFICE