

LIUS Group Intl. Endwell, LLC v HFS Intl., Inc.

2010 NY Slip Op 30397(U)

March 3, 2010

Supreme Court, Nassau County

Docket Number: 017343-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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LIUS GROUP INTERNATIONAL ENDWELL, LLC

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

**Index No: 017343-09
Motion Seq. No: 1
Submission Date: 12/18/09**

-against-

**HFS INTERNATIONAL, INC. and
XIANGYUN ZHANG,**

Defendants.

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Papers Read on this Motion:

**Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....X**

This matter is before the court on the motion by Plaintiff filed December 8, 2009 and submitted December 18, 2009. For the reasons set forth below, the Court denies Plaintiff's motion for an Order, pursuant to CPLR § 3215, granting Plaintiff a default judgment against the Defendants, with leave to renew upon a more complete factual showing.

BACKGROUND

A. Relief Sought

Plaintiff LIUS Group International Endwell, LLC ("LIUS") moves for an Order, pursuant to CPLR § 3215(a), granting a default judgment in favor of Plaintiff on the grounds of the failure of Defendants HFS International, Inc. ("HFS") and Xiangyun Zhang ("Zhang") to interpose an Answer or request an extension of their time to interpose an Answer.

Defendants have submitted no opposition or other response to this motion.

B. The Parties' History

Plaintiff filed its summons and verified complaint ("Complaint") on August 26, 2009. The Complaint alleges as follows:

LIUS is a New York corporation whose primary business is the management of commercial real estate. HFS is a New York corporation whose principal place of business is located at 1055 Willis Avenue, Albertson, Nassau County, New York ("HFS Address"). Zhang is the founder, president and/or primary shareholder of HFS. The Complaint alleges that Zhang resides in Nassau County, but does not provide his address.

In or around July 2005, LIUS entered into negotiations with HFS and Zhang for the purchase of property located at 3600 George F. Highway in Broome County, New York ("Premises"). For the "sole purpose of the negotiations" (Compl. at ¶ 6), Susan Liu ("Liu") represented LIUS. Zhang represented HFS.

During those negotiations, Zhang represented to LIUS that the Premises 1) had never suffered flood damage; 2) was not in a flood zone; and/or 3) was not subject to floods. On or about August 5, 2009, LIUS and HFS entered into a Purchase Contract ("Contract") pursuant to which LIUS purchased the Premises from HFS for the sum of "approximately Two Hundred Fifth Thousand Dollars (\$250,000.00)" (Compl. at ¶ 8). In connection with the Contract, HFS and Zhang provided LIUS with a Structural Disclosure Form ("Disclosure Form"). On the Disclosure Form, Defendants allegedly checked the "No" box next to the following statements: 1) I am aware of any flooding or recurring leakage problems; and 2) I am aware that the property is located in a flood plain or that I currently have flood hazard insurance on the property.

On or about December 20, 2005, LIUS took possession of the Premises. LIUS alleges that it relied on the written representations of Defendants that 1) they were not aware of any flooding at the Premises; 2) the Premises was not located in a flood plain; and 3) Defendants did not have flood hazard insurance on the property. In reliance on Defendants' written and oral representations, Plaintiff did not obtain flood insurance on the Premises. On or about June 26, 2006, the Premises became flooded as a result of a rainstorm, resulting in damage to the Premises and Plaintiff's loss of rental income.

In or about August 28, 2006, LIUS applied to the Federal Management Agency ("FEMA") for flood relief. In connection with that application, Plaintiff learned that the Premises is located in a flood plain and/or zone, and had previously suffered flooding when HFS

owned the Premises. On or about November 5, 2006, Plaintiff obtained flood insurance on the Premises.

The Complaint contains three (3) causes of action. The are: 1) fraud against both Defendants, 2) piercing the corporate veil against Zhang, and 3) breach of contract against HFS. The Complaint does not contain copies of the Contract and Disclosure Form that the parties allegedly executed.

Counsel for Plaintiff (“Counsel”) affirms that Defendants were personally served with copies of the Complaint on or about September 14, 2009. He provides copies of the Affidavits of Service reflecting that service (Ex. B to Motion). Those Affidavits of Service reflect that Plaintiff served the Complaint on the Defendants by delivering a copy to an individual named Jack Beards at the HFS Address. In the Affidavit of Service for HFS, Jack Beards is described as a “general agent.” In the Affidavit of Service for Zhang, Jack Beards is described as a person of suitable age and discretion. The Zhang Affidavit of Service also reflects that a copy of the Complaint was mailed to Zhang at the HFS Address. Those Affidavits of Service were filed with the Clerk of the Court on September 18, 2009.

Counsel affirms, further, that on or about September 24, 2009, Zhang contacted Liu to discuss the instant lawsuit. On or about October 14, 2009, Defendants’ time to interpose an Answer expired. On or about October 19, 2009, Counsel attempted to contact the Defendants by mail to resolve their apparent default. Counsel affirms that, “upon information and belief, Defendants changed addresses after receiving the Complaint and left no forwarding address” (Affirmation in Support at ¶ 10). In support thereof, Counsel provides copies of letters dated October 19, 2009 that Counsel sent to the Defendants at the HFS Address, advising them of Plaintiff’s intent to file a motion for a default judgment unless Defendants contact Counsel prior to November 1, 2009. Counsel provides copies of the envelopes in which those letters were sent which contain the notation “Return to Sender, Not Deliverable as Addressed, Unable to Forward” (Ex. C to Motion).

Plaintiff also provides an Affidavit in Support of Liu dated November 10, 2009. She affirms that she is an agent of Plaintiff and that she negotiated the real estate transaction that is the subject of this action. On or about September 17, 2009 she received a telephone message on her cellular phone from “Defendant,” presumably Zhang, in which she demanded that Plaintiff withdraw the instant lawsuit. On or about September 24, 2009, Liu called Zhang and spoke with

her. Liu affirms that the “sum and substance” of that conversation was that Zhang had received the Complaint and did not have any money (Affidavit in Support at ¶ 8).

C. The Parties’ Positions

Plaintiff asks the Court to issue a default judgment in Plaintiff’s favor in light of the facts that Defendants’ time to answer has expired and Defendants have failed to answer or seek an extension of their time to answer.

Defendants have submitted no opposition or other response to the instant motion.

RULING OF THE COURT

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

The Court concludes that Plaintiff has not demonstrated its right to a default judgment. First, Plaintiff has not provided copies of the Contract and Disclaimer Form to which the Complaint refers. Thus, the Court does not have sufficient documentation from which it can conclude that there was an enforceable agreement between the parties, and that the agreement was as Plaintiff describes it.

Moreover, the Complaint alleges that the parties entered into the Contract in 2009 (Compl. at ¶ 8) but also alleges that LIUS took possession of the Premises in 2005 (Compl. at ¶ 10), four years *before* the parties allegedly entered into the Contract. It appears that paragraph 8 of the Complaint contains a typographical error regarding the year that the parties entered into the Contract, but the Court cannot discern the correct year from the record before it. Thus, without proof that the Contract and Disclaimer exist, and when those documents were executed, the Court also cannot be certain that the alleged agreement does not violate General Obligations Law § 5-701(a)(1) which provides in pertinent part that:

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

By its terms is not to be performed within one year from the making thereof...

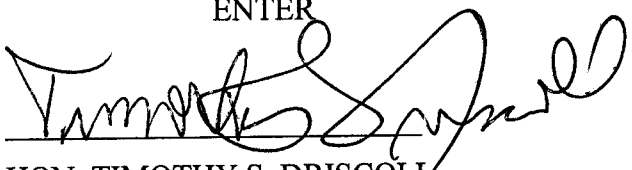
Finally, Plaintiff has provided no documentation in support of its claims, *inter alia*, that 1) the Premises is located in a flood plain and/or zone, and suffered flooding when HFS owned the Premises; and 2) on or about June 26, 2006, the Premises became flooded as a result of a rainstorm, resulting in damage to the Premises and Plaintiff's loss of rental income.

In light of the foregoing, the Court denies Plaintiff's motion for a default judgment, with leave to renew upon a more complete factual showing.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
February 17, 2010

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
FEB 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

~~NASSAU INDEX # _____ 20
FILED
FEB 23 2010
COUNTY CLERK OF
NASSAU COUNTY~~