

<b>Liquid Media, Inc. v TGG Digital Media, LLC</b>
2010 NY Slip Op 30648(U)
March 23, 2010
Supreme Court, Nassau County
Docket Number: 017918-07
Judge: Timothy S. Driscoll
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**LIQUID MEDIA, INC.,**

**Plaintiff,**

**-against-**

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

**Index No: 017918-07  
Motion Seq. No: 4  
Submission Date: 2/1/10**

**TGG DIGITAL MEDIA, LLC, f/k/a/ THE GARR  
GROUP, LLC; TGG SOUTH, LLC f/k/a GP SOUTH  
LLC, PAUL DONOHUE, RICHARD DURAND d/b/a  
DURAND GROUP and RICHARD DURAND d/b/a  
PROCLAIM GROUP,**

**Defendants.**

-----x

**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 filed by Plaintiff on January 15, 2010 and submitted on February 1, 2010. For the reasons set forth below, the Court grants Plaintiff's motion for a default judgment and refers this matter to an inquest on the issue of interest.

**BACKGROUND**

**A. Relief Sought**

Plaintiff Liquid Media, Inc. ("Liquid Media" or "Plaintiff") moves for an Order, pursuant to CPLR § 3215, directing the entry of a default judgment against Defendant TGG South, LLC f/k/a GP South, LLC ("TGG South") on the ground that it failed to respond to the Amended Complaint in this action within the time period provided by the CPLR, together with costs and disbursements.

TGG South has submitted no opposition or other response to Plaintiff's motion.

## B. The Parties' History

Plaintiff first filed a Complaint ("Initial Action") in this matter on October 5, 2007. Pursuant to a stipulation dated November 20, 2008, which was so-ordered by the Court (Austin, J.) on December 3, 2008, 1) Plaintiff discontinued the Initial Action against certain named defendants; 2) Plaintiff agreed to serve an amended complaint substituting a designated defendant for one of the named defendants; and 3) the parties agreed to amend the caption accordingly.

Plaintiff filed its Amended Complaint ("Complaint") (Ex. D to Aff. in Support) on December 8, 2008. Plaintiff provides proof that it served the Amended Complaint on all Defendants. In the Complaint, Plaintiff alleges as follows:

Liquid Media is a New York corporation with its principal place of business in Nassau County, New York. Defendant TGG Digital Media, LLC, formerly known as The Garr Group, LLC ("TGG Digital"), is, upon information and belief, a New Jersey limited liability company with its principal place of business in New Jersey. Defendant TGG South, LLC, formerly known as GP South, LLC ("TGG South"), is a Delaware limited liability company with its principal place of business in New Jersey. Defendant Paul Donohue ("Donohue") is a resident of New Jersey. Defendant Richard Durand d/b/a Durand Group ("Durand Group") is an individual residing in Tennessee who does business as Durand Group. Defendant Richard Durand d/b/a Proclaim Group ("Proclaim") is an individual residing in Tennessee who does business as Proclaim Group.

The causes of action in the Complaint arise out of the transaction of business in New York by virtue of the Defendants' delivery of digital linear tapes, masters and other property to New York for Plaintiff to work and perform services on the delivered property. In addition, Defendants traveled to New York in connection with these transactions.

The Complaint contains six (6) causes of action which are as follows:

First: against TGG Digital for services rendered and goods sold and delivered,

Second: against TGG Digital for breach of contract,

Third: against TGG South for services rendered and goods sold and delivered,

Fourth: against TGG South for breach of contract,

Fifth: against Durand Group for services rendered and goods sold and delivered, and

Sixth: against Proclaim Group and TGG South as the successor to the entity formerly known as the Proclaim Group, and

Seventh: against Donohue for payment pursuant to his personal guaranty.<sup>1</sup>

In the third cause of action, Plaintiff seeks judgment in the sum of \$76,103.87, together with interest. In the fourth cause of action, Plaintiff seeks judgment in the sum of \$76,103.87, plus interest, counsel fees, costs and expenses.

By Stipulation of Discontinuance with Prejudice with Respect to Certain Defendants dated December 23, 2008, Plaintiff 1) discontinued this action against certain Defendants pursuant to a separate settlement agreement; and 2) agreed that the action would continue only against Defendants TGG South, Durand Group and Proclaim Group.

Subsequently, counsel for TGG South moved to be relieved. By Decision and Order dated November 6, 2009, the Court, *inter alia*, 1) granted the motion by counsel for TGG South to be relieved; 2) stayed the action until December 21, 2009; 3) directed that the action would be the subject of a conference before the Court on February 1, 2009 at 9:30 a.m.; and 4) granted Plaintiff permission to file a motion for a default judgment against TGG South after December 21, 2009. TGG South has failed to answer or move with respect to the Amended Complaint, and has not requested an extension of time to respond.

Plaintiff provides an Affidavit in Support of Philip John (“John”) dated January 7, 2010 in which he affirms as follows:

John is the vice president of operations and finance of Liquid Media, a company that provides digital imaging, production, distribution and related services to its clients. On or about June 20, 2007, TGG South entered into a written agreement (“Agreement”) with Liquid Media (Ex. G to John Aff.) pursuant to which TGG South agreed to pay its invoices in full within thirty (30) days of the invoice date. The Agreement also provided that failure to pay the invoices within thirty days constituted a default and designated the interest rate charged on late payments.

From July through September of 2007, at TGG South’s request, Plaintiff provided goods and services to TGG South that included the replication of digital video discs (“DVDs”) and

---

<sup>1</sup> As Plaintiff seeks a judgment only against Defendant TG South with respect to the third and fourth causes of action, the Court’s analysis will focus on those causes of action.

compact discs (“CDs”) and the packaging and shipping of those items (“Delivered Goods”). TGG South accepted the Delivered Goods without objection.

The balance (“Balance”) of the Delivered Goods is \$76,103.87 and TGG South has made no payments towards the Balance, despite Liquid Media’s demand. John provides a document titled “Liquid Media, Inc. Customer Open Balance” (“Summary”) and corresponding Liquid Media invoices (“Invoices”) and affirms that 1) these records were made in the ordinary course of Liquid Media’s business; and 2) it was the usual course of Liquid Media’s business to make these records at or around the time of the sale to which they correspond. The final Invoice for which Plaintiff is seeking to recover in this action was dated September 21, 2007. The Summary reflects that TGG South owes Liquid Media the sum of \$76,103.87 for Delivered Goods for which TGG South did not tender payment.

### C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to a default judgment by demonstrating its right to payment from TGG South and TGG South’s failure to answer or move with respect to this action.

## RULING OF THE COURT

### A. Standards for Default Judgment

CPLR §§ 3215(a) and (f) provide in pertinent part:

(a) When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff’s claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest.

(f) On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party... Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party’s attorney.

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).

#### B. Applicable Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

In an action for goods sold and delivered, a plaintiff must demonstrate that on a certain date, it sold and delivered certain goods to the defendant at the defendant's request; that the goods were of reasonable value or agreed price; and that payment was demanded by the plaintiff, but not made. See *United Consolidated Industries v. Mendel's Auto Parts, Inc.*, 150 A.D.2d 768 (2d Dept. 1989). A plaintiff may elect to include with the pleadings a schedule of goods or services rendered, listing the individual goods, the date of each transaction, and the agreed value or price. See CPLR §3014. See also, Siegel, *Practice Commentaries*, McKinney's CPLR § 3016(b), C3016:9 (1991); and *Duban v. Platt*, 23 A.D.2d 660 (2d Dept. 1965), *aff'd*, 17 N.Y.2d 526 (1966).

#### C. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its right to judgment against Defendants in the sum of \$76,103.87, plus interest, by establishing that 1) Plaintiff and TGG South executed the Agreement; 2) Plaintiff provided the goods and services as set forth in the Invoices and outlined in the Summary; 3) Defendant TGG South accepted those goods and services; and 4) despite Plaintiff's demand, Defendant TGG South has not tendered payment.

In light of the foregoing, it is hereby

**ORDERED**, that Plaintiff have judgment by default against Defendant TGG South, LLC f/k/a GP South, LLC in the principal sum of \$76,103.87; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Thomas V. Dana to hear and determine all issues relating to the determination of interest, on April 19, 2010 at 10:00 a.m.; and it is further

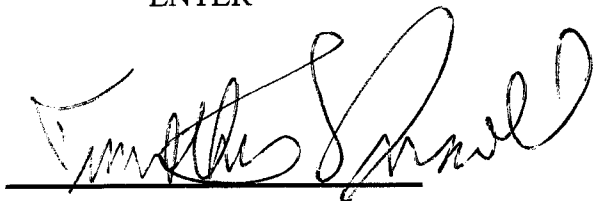
**ORDERED**, that Plaintiff's attorneys shall serve upon the Defendants TGG South, LLC f/k/a GP South, LLC; Richard Durand d/b/a Durand Group; and Defendant Richard Durand d/b/a Proclaim Group by certified mail, return receipt requested a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before April 5, 2010; and it is further

**ORDERED**, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendant TGG South, LLC f/k/a GP South, LLC in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER



HON. TIMOTHY S. DRISCOLL

DATED: Mineola, NY  
March 23, 2010

J.S.C.

**ENTERED**

MAR 24 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**