

Littler Mendelson, P.C. v CPJFK, LLC

2010 NY Slip Op 30762(U)

March 31, 2010

Supreme Court, New York County

Docket Number: 110357/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 110357/2009
 LITTLER MENDELSON, P.C.
 vs.
 CPJFK, LLC, MORAIS, CHARLES
 SEQUENCE NUMBER : 001
 DEFAULT JUDGMENT

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

FILED

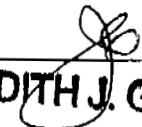
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NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MAR 31 2010

Dated: 3/31/10


HON. JUDITH J. GISCHE 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

LITTLER MENDELSON, P.C.,
Plaintiff,

-against-

CPJFK, LLC, CHARLES MORAIS, and
SUNIL MIR,

Defendants.
-----X

Decision/Order

Index No.: 110357/09
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's n/m [§ 3215] w/KS affirm, exhs	1

-----X

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

This is an action for breach of contract, account stated, quantum meruit, and breach of a promissory note. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor and against defendants, CPJFK, LLC ("CPJFK") and Sunil Mir ("Mir"). Plaintiff has not yet served defendant Charles Morais ("Morais"), and plaintiff asks that its claims against Morais be deferred until after it has completed service on him. This motion has been submitted to the court on default, though due proof of service on defendant CPJFK and Mir has been filed. CPJFK was served with the summons and complaint through the Secretary of State on August 3, 2009. Mir was served with the summons and complaint through the Office of the Sheriff, Fulton County on September 8, 2009. On February 1, 2010,

* 3]

plaintiff mailed the instant notice of motion to all defendants.

This action was commenced by the filing of the summons and verified complaint on July 22, 2009. CPJFK is a foreign limited liability company authorized to do business in this state. CPJFK was served through the Secretary of State on August 3, 2009. LLC § 303 and BCL § 306. CPJFK's time to answer has expired without CPJFK interposing an answer or otherwise appearing in this action. Its time to do answer has not been extended by the court. Therefore, CPJFK has defaulted in appearing in this action and answering the complaint. This motion is timely brought within one year of CPJFK's default [CPLR § 3215 (c)].

While plaintiff establishes proper service on CPJFK, plaintiff has not complied with the service requirements of CPLR § 308 and the additional notice requirements of CPLR § 3215 (g)(3)(i) as to defendant Mir, as will be addressed at greater length later in this decision/order.

Discussion

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). 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 N.Y.2d 728 [1st Dept. 1984]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 AD2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a

* 4]
complaint verified by a person with actual knowledge of the facts surrounding the claim [Hazim v. Winter, 234 AD2d 422 (2d Dept. 1996); and CPLR § 105 (u)].

The following facts have been established by the plaintiff in the summons and verified complaint and through the sworn affirmation of Karl E. Scheuerman, Esq., who states he is familiar with the facts surrounding the claim.

Plaintiff asserts four causes of action against defendants for breach of contract, account stated, quantum meruit, and breach of a promissory note. Plaintiff claims that at the request of defendants, plaintiff provided legal services for CPJFK at its customary hourly rates. Plaintiff alleges that defendants owe plaintiff a balance \$157,852.28 for legal services through April 2009 and that although it demanded payment by defendants, defendants failed to reimburse plaintiff for such services.

In October 2009, plaintiff and defendants settled their fee dispute by entering into a promissory note ("the Note"). In the Note, the parties agreed that defendants would pay six installments totaling \$95,000.00, in full settlement and resolution of the balance of the legal fees owed in the amount of \$157,852.28.

The Note provides, in relevant part:

FOR VALUE RECEIVED, Crowne Plaza JFK, LLC (also known as CPJFK, LLC and including but not limited to, any and all of its owners and officers, individually and jointly, and any related companies, affiliated companies, subsidiaries, parent entities, or companies otherwise owned in any capacity by any of the principals of CPJFK, LLC - - i.e. Kronos Hotels, Studio Lodge, etc.) (collectively "you" and "your"), the undersigned, hereby promises, jointly and severally to pay to Littler Mendelson, P.C. ninety-five thousand dollars and zero cents (\$95,000.00).

...

If payment is not received when due, the entire unpaid principal balance shall be due and payable immediately...

Defendants defaulted in making the installments due under the Note and now plaintiff seeks payment of the entire unpaid principal balance of \$157,852.28 because the Note specifically allows plaintiff to collect the full amount of the fees if the installment payments are not made.

These facts support the claims in the complaint and plaintiff is entitled to entry of a default judgment based on the Note against CPJFK on its fourth cause of action. Since the other three causes of action (breach of contract, account stated, and quantum meruit) are redundant of its fourth cause of action, seeking the same damages, they are hereby severed and dismissed.

Plaintiff has not, however, complied with the service requirements of CPLR § 308 and the additional notice requirements of CPLR § 3215 (g)(3)(i) as to defendant Mir. The proof of service filed as to defendant Mir is incomplete. The affidavit of service is prepared by the Office of the Sheriff, Fulton County Georgia is insufficient. It merely states the name of Mir and his address and it does not state how he was served.

The affidavit of service of this motion indicates service was made on Mir on February 1, 2010. CPLR § 3215(g)(3)(i) sets forth additional service requirements. It requires that another copy of the summons and complaint be served more than 20 days prior to entry of judgment. Since this motion was not served more than 20 days prior to entry of judgment and plaintiff did not serve another copy of the summons and complaint after the sheriff served Mir, plaintiff has not complied with the requirements of

* 6]

CPLR § 3215. Accordingly, this motion is denied against Mir without prejudice to renewal, which shall be no later than ninety (90) days after this decision/order is entered. Failure to renew the motion within the time provided will be deemed an abandonment of the action and the case will be dismissed.

Although plaintiff contends that its time to serve Morais has been extended pursuant to CPLR § 306-b, there has been no showing for why plaintiff has not yet been served or for why it is entitled to an extension of 120 days to serve its summons and complaint on Morais. Therefore, all claims against Morais are dismissed without prejudice.

The motion for entry of a default judgment is, therefore, granted on default against CPJFK for breach of promissory note and plaintiff is entitled to a money judgment in the amount of \$157,852.28 with interest from July 22, 2009. The Note did not set forth a date for which interest would begin to accrue, therefore interest will accrue from the date this action was commenced, July 22, 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 N.Y.2d 1 (1986). Here, the Note expressly provides that defendants are liable to pay plaintiff "reasonable attorney's fees incurred by such prevailing party in such action or proceeding . . ." Plaintiffs have not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The court, therefore, refers the issue of what plaintiffs may

recover from CPJFK for its reasonable attorneys fees, costs, and disbursements to hear and determine. Plaintiffs are hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted in part and denied in part; and it is further

ORDERED that the clerk is hereby directed to enter a money judgment in favor of plaintiff, Littler Mendelson, P.C., and against defendant, CPJFK, LLC in the amount of one hundred fifty-seven thousand eight hundred fifty-two and twenty-eight cents (\$157,852.28); and it is further

ORDERED that interest shall run from the date this action was commenced, July 22, 2009, at the statutory rate; and it is further

ORDERED that the issue of what plaintiff may recover from CPJFK for its reasonable attorneys fees, costs, and disbursements is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant, Sunil Mir, is hereby denied without prejudice to renewal, which shall be no later than ninety (90) days after this decision/order is entered; and it is further

ORDERED that all claims against defendant, Charles Morais, are hereby severed and dismissed without prejudice; and it is further

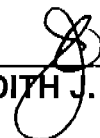
ORDERED that requested relief not expressly addressed herein has nonetheless

been considered by the court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
March 31, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

APR 05 2010

NEW YORK
COUNTY CLERK'S OFFICE