

**Tuchman v Deam Props. (U.S.), LLC**

2010 NY Slip Op 31927(U)

July 16, 2010

Supreme Court, New York County

Docket Number: 101056/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C.  
*Justice*

PART 10

Index Number: 101056/2010

TUCHMAN, MAURICE

vs.

DEAM PROPERTIES, (U.S.) LLC

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**  
JUL 23 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

*Inquest set for 9/2/10 @ 2:15 P.M.*

Dated: JUL 16 2010

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

MAURICE TUCHMAN and ADLIN DE  
DOMINGO,

Plaintiffs,

-against-

DEAM PROPERTIES (U.S.), LLC and  
EVEREST REALTY HOLDINGS, INC. d/b/a  
ERH CONTRACTING,

Defendants.

-----X

**Decision/Order**

Index No.: 101056/10  
Seq. No. : 001

**Present:**

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

**FILED**  
JUL 23 2010  
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):

<b>Papers</b>	<b>Numbered</b>
Pltf's n/m [§ 3215] w/JAS affid, exhs . . . . .	1

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

This is an action for negligence and breach of contract. Plaintiffs now move, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in their favor and against defendants, Deam Properties (U.S.), LLC ("Deam") and Everest Realty Holdings, Inc. d/b/a ERH Contracting ("Everest").

Plaintiffs jointly own Unit 17-B at the Trump Palace Condominium, located at 200 East 69<sup>th</sup> Street, New York, New York (the "Apartment"). Deam owns Unit 18-B, located directly above the Apartment. Everest is a general contractor who was hired by Deam to perform renovation work in Deam's unit.

This motion has been submitted to the court on default, though due proof of

service on defendants has been filed. Plaintiffs served the summons and complaint on Deam and Everest through the Secretary of State on February 16, 2010 and mailed a copy to each defendants' address on April 14, 2010. LLC § 303; BCL § 306 and CPLR § 3215[g][4][i].

Despite such notice, defendants have not appeared, answered the complaint, or moved. Their time to do so has expired and this motion is brought within one year of their default.

### **Discussion**

Plaintiffs are entitled to a default judgment, provided they otherwise demonstrate that they have 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 A.D.2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim. Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u).

Plaintiffs provide the sworn affidavit of Jason A. Stern, Esq, who states he is associated with plaintiffs and is familiar with the facts surrounding the claim. Plaintiffs assert a cause of action for negligence against Deam and Everest and for breach of

contract against Deam. Plaintiffs allege that, as a result of Deam and Everest's negligent renovations, their Apartment has suffered from severe water damage, including damage to carpeting, wood flooring, tiling, walls, ceilings, and light fixtures.

In support of its motion, plaintiffs have provided the affidavit of Jason A. Stern, Esq., plaintiffs' attorney. However, plaintiffs have not provided the court with a verified complaint, a sworn affidavit of someone with personal knowledge, a copy of any contract, or any evidence of property damage.

Although the 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]), there is not sufficient information for the court to determine what the parties agreed to in the contract, or whether property damage even occurred. Therefore, plaintiffs have not demonstrated that they have a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844, *supra*.

The Court, therefore, determines that there has been a default in answering, but, otherwise, sets this matter down for an inquest on issues of liability and damages.

## **Conclusion**

*It is hereby*

**ORDERED** that plaintiffs' motion for entry of a default judgment against defendants, Deam Properties (U.S.), LLC and Everest Realty Holdings, Inc. d/b/a ERH Contracting, is granted to the extent that defendants have defaulted in answering; and it is further

**ORDERED** that plaintiffs are directed to file the Note of Issue by August 20, 2010;

and it is further


ORDERED that plaintiffs are to appear for an Inquest on liability and damages on **September 2, 2010 at 2:15p.m.**, at 60 Centre Street, Part 10, Room 232; and it is further

ORDERED that any relief requested but not addressed is hereby expressly denied; and it is further

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

Dated: New York, New York  
July 16, 2010

So Ordered:

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

**FILED**  
JUL 23 2010  
NEW YORK  
COUNTY CLERK'S OFFICE