

**Fashion Exch. LLC v Ludlow Sports Wear Inc.**

2010 NY Slip Op 32078(U)

August 2, 2010

Supreme Court, New York County

Docket Number: 115635/09

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_ J.S.C.  
*Justice*

PART 10

Index Number : 115635/2009

THE FASHION EXCHANGE LLC

vs.

LUDLOW SPORTS WEAR INC.

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**  
AUG 06 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 8/2/10

*JJG*  
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

THE FASHION EXCHANGE LLC,  
  
Plaintiff,

-against-

LUDLOW SPORTS WEAR INC. and A&A  
LADIES WEAR, INC.,

Defendants.  
-----X

**Decision/Order**

Index No.: 115635/09  
Seq. No. : 001

**Present:**

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

**FILED**

AUG 06 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in review of this, (these) motion(s):

**Papers**

Pltf's n/m [§ 3215] w/JSK affirm, exhs . . . . . 1

**Numbered**

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

This is an action for breach of contract, unjust enrichment, and account stated. 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, Ludlow Sports Wear Inc. ("Ludlow") and A&A Ladies Wear, Inc. ("A&A").

This motion has been submitted to the court on default, though due proof of service on defendants has been filed. Plaintiff served the summons and complaint on Ludlow and A&A through the Secretary of State on December 22, 2009 and mailed a copy to each defendants' address on May 13, 2010. LLC § 303; BCL § 306 and CPLR § 3215[g][4][i].

Despite such notice and additional 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**

Plaintiff is entitled to a default judgment, provided it otherwise demonstrate 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 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).

Plaintiff's complaint is verified by Franklin Sheydwasser ("Sheydwasser"), who states he is an officer of plaintiff. Plaintiff asserts three causes of action against defendants for breach of contract, unjust enrichment, and account stated. Plaintiff alleges that, from 2007 to 2009, plaintiff agreed to sell and distribute clothing to defendants pursuant to agreements. Plaintiff states that, based on those agreements, it sent numerous invoices to defendants, which were never paid. Plaintiff alleges that Ludlow owes plaintiff \$66,181.04, with interest from 6/7/09 to 5/7/10, at the statutory rate of 9%, thereby totaling \$72,150.97. Plaintiff alleges that A&A owes plaintiff

\$40,511.00, with interest from 12/7/08 to 5/7/10, at the statutory rate of 9%, thereby totaling \$46,034.98.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2d Dept. 1990).

Plaintiff has failed to provide the court with a copy of the agreements it alleges defendants breached. It is therefore unclear which parties entered into the agreements or what terms and conditions the agreements set forth. Plaintiff has, therefore, not established the elements of a *prima facie* cause of action for breach of contract.

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 A.D.3d 610 (3d Dept. 2005).

Based on the foregoing, plaintiff has established a *prima facie* cause of action for account stated against the defendant. Plaintiff has provided detailed invoices, mailed to each defendant, regarding clothing it provided to defendants.

Accordingly, plaintiff's first cause of action for breach of contract is severed and dismissed. Plaintiff is entitled to entry of default judgment against defendants on its third cause of action for account stated. Plaintiff's second cause of action for quantum meruit has been waived by defendants, and nevertheless, is duplicative of its third cause of action and is hereby severed and dismissed.

Plaintiff has provided a statement of damages, including interest, costs, and

fees, which is reflected in the following amounts, to wit: plaintiff is entitled to \$72,150.97 from Ludlow and \$46,034.98 from A&A.

Conclusion

*In accordance herewith, it is hereby:*

ORDERED that plaintiff's motion for entry of a default judgment against defendants, LUDLOW SPORTS WEAR INC. and A&A LADIES WEAR, INC., is granted on its third cause of action for account stated; and it is further

ORDERED that its first and second causes of action for breach of contract and quantum meruit are hereby severed and dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff and against defendant, LUDLOW SPORTS WEAR INC., in the sum of seventy-two thousand, one hundred fifty dollars and ninety-seven cents (\$72,150.97); and it is further


ORDERED that the clerk shall enter judgment in favor of plaintiff and against defendant, A&A LADIES WEAR, INC., in the sum of forty-six thousand, thirty-four dollars and ninety-eight cents (\$46,034.98); and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied; and it is further

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

Dated: New York, New York  
August 2, 2010

So Ordered:

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

**FILED**

AUG 06 2010

NEW YORK  
COUNTY CLERKS OFFICE