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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 116447/2006

GUARDSMAN ELEVATOR

VS.

APARTMENT INVESTMENT

SEQUENCE NUMBER : 007

DEFAULT JUDGMENT

INDEX NO. 116447/06

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-F Notice of Cross-Motion	1, 2
Answering Affidavits — Exhibits	3, 4, 5, 6
Replying Affidavits	7, 8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED
AUG 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 20, 2010

MARTIN SHULMAN 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):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

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GUARDSMAN ELEVATOR CO., INC.,

Plaintiff,

Index No. 116447/06

-against-

APARTMENT INVESTMENT & MANAGEMENT CO., et al,

Defendants.

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MARTIN SHULMAN, J.:

Motion sequence nos. 007 and 008 are consolidated for disposition. In motion sequence no. 007, plaintiff Guardsman Elevator Co., Inc. ("Guardsman" or "plaintiff") moves for: 1) a default judgment against defendants Apartment Investment & Management Co., Aimco Properties L.P., Aimco Capital, Inc., OP Property Management, LLC and 107-145 135th Street Associates, LLP (collectively "AIMCO" or "defendants") based upon their failure to timely answer the supplemental complaint herein; and 2) an order pursuant to Debtor and Creditor Law ("DCL") §279 directing defendant 107-145 135th Street Associates, LLP to post an undertaking in the amount of $10,520,000. AIMCO opposes plaintiff's motion and cross-moves to compel Guardsman to accept service of its answer to the supplemental complaint. In motion sequence No. 008, which is unopposed, plaintiff moves for a default judgment against newly added defendants United States Elevator, Inc. and United Elevator Company, Inc. (collectively the "elevator defendants") based upon their failure to appear in the action.

Default Judgment Against AIMCO

By prior decision and order dated February 10, 2010, this court *inter alia* granted plaintiff's unopposed motion for leave to serve a supplemental summons and complaint and directed AIMCO to serve their answer thereto within 20 days of service of a copy of the February 10, 2010 decision and order with notice of entry. Guardsman served notice of entry by first class mail on March 2, 2010, giving defendants until March 27, 2010 to answer. Upon AIMCO's failure to answer, plaintiff served its default motion on April 23, 2010. Defendants served their answer on May 11, 2010.

Here, defendants' delay in serving their answer to the supplemental complaint was relatively short and attributable to law office failure. See *DeMarco v. Wyndham Int'l, Inc.*, 299 A.D.2d 209 (1st Dept. 2002); CPLR §§ 2005 and 3012(d). Public policy favors the resolution of cases on the merits, and in this case there is no claim of specific prejudice to plaintiff. *Sippin v. Gallardo*, 287 A.D.2d 703 (2nd Dept. 2001); *Duerr v. 1435 Tenants Corp.*, 309 A.D.2d 607 (1st Dept. 2003)(court properly exercised its discretion in granting defendant's cross-motion to compel acceptance of answer where delay was short and plaintiff was not prejudiced). Further, defendants have possible meritorious defenses to this action. Accordingly, in this court's discretion, Guardsman's motion for a default judgment against the AIMCO defendants is denied and AIMCO's cross-motion to compel acceptance of their untimely answer is granted.

Undertaking

Motion sequence 007 also requests an order directing defendant 107-145 West 135th Street Associates, LLP ("135th Assoc.") to post an undertaking in the amount of

$10,520,000 pursuant to DCL §279 based upon its alleged fraudulent conveyance of its only asset during the pendency of this action. It is undisputed that 135th Assoc. sold the building where plaintiff had contracted to perform elevator modernization work on December 22, 2008, more than two years after this action was commenced. Guardsman alleges this transfer rendered the owner insolvent.

This branch of Guardsman's motion must be denied. Plaintiff cites no authority for requiring 135th Assoc. to post an undertaking in connection with its DCL §279 cause of action. Undertakings are typically directed where required by statute and "in conjunction with a particular procedure", such as obtaining certain provisional remedies or obtaining a stay of execution of a judgment pending appeal. *See generally*, Siegel, NY Prac § 206, at 340-341 (4th Ed.). Here, plaintiff essentially attempts to ensure that it will obtain an enforceable money judgment against this defendant. The court is unaware of any precedent for requiring an undertaking for such purpose prior to judgment.

Default Judgment Against Elevator Defendants

In motion sequence 008, Guardsman seeks a default judgment against the elevator defendants on the supplemental complaint's first through fourth causes of action, all of which arise from the elevator defendants' alleged improper use of certain licenses Guardsman obtained from the New York City Department of Buildings ("DOB") to perform elevator modernization work pursuant to Guardsman's contract with the AIMCO defendants. After the AIMCO defendants terminated their contract with plaintiff,

the elevator defendants allegedly completed the work without obtaining their own permits or amending the permits issued to Guardsman.

Here, plaintiff has established proof of service of the supplemental summons and complaint upon the elevator defendants and that they are in default. However, Guardsman must nonetheless establish viable causes of action. Plaintiff is entitled to judgment on default against the elevator defendants solely with regard to the first (unjust enrichment) and fourth causes of action (unfair competition).

As to the second cause of action, Guardsman attempts to assert a cause of action against the elevator defendants for identity theft in violation of General Business Law ("GBL") §380-s, which is contained in New York's Fair Credit Reporting Act, and provides:

> No person, firm, partnership, corporation, or association or employee thereof shall knowingly and with the intent to defraud, obtain, possess, transfer, use, or attempt to obtain, possess, transfer, or use credit, goods, services or anything else of value in the name of another person without his or her consent.

The basis for Guardsman's claim herein does not involve credit reporting in any way and thus does not appear to fall within the intended scope of GBL § 380-s. See *Leser v KarenKooper.com*, 18 Misc.3d 1119(A), 856 N.Y.S.2d 498, at *3 (N.Y. Sup. 2008, Kapnick, J.).

Similarly, the third cause of action for deceptive business practices in violation of GBL §349, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce . . .", must also fail. The essential elements of a cause of action under GBL §349 are: "(1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act (citations

omitted)." *Exxonmobil Inter-America, Inc. v. Advanced Info. Eng'g Servs., Inc.*, 328 F.Supp.2d 443, 447 (S.D.N.Y. 2004). "A defendant engages in 'consumer-oriented' activity if his actions cause any 'consumer injury or harm to the public interest.'" *New York v. Feldman*, 210 F.Supp.2d 294, 301 (S.D.N.Y. 2002), citing to *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2nd Cir. 1995), *cert. den.*, 516 U.S. 1114 (1996).

Guardsman's supplemental complaint fails to allege any consumer-oriented act by the elevator defendants. "A defendant engages in 'consumer-oriented' activity if his actions cause any 'consumer injury or harm to the public interest.'" *New York v. Feldman*, 210 F.Supp.2d 294, 301 (S.D.N.Y., 2002), citing to *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2nd Cir., 1995), *cert. den.*, 516 U.S. 1114 (1996). "The critical question . . . is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor." *Id.* Here, the court can discern no harm to the public interest in this dispute between plaintiff and the elevator defendants. Accordingly, plaintiff's motion for a default judgment against the elevator defendants is granted on the first and fourth causes of action as to liability. The issue of the amount of the judgment to be entered shall be determined at the trial herein.

For the foregoing reasons, it is

ORDERED that plaintiff's motion (seq. 007) is denied; and it is further

ORDERED that the AIMCO defendants' cross-motion (seq. 007) is granted and the answer to the supplemental complaint (Exh. 6 to cross-motion) is deemed interposed; and it is further

ORDERED that plaintiff's motion (seq. 008) is granted in part and denied in part to the extent that plaintiff is granted judgment as to liability against defendants United States Elevator, Inc. and United Elevator Company, Inc. on the first and fourth causes of action alleged in the supplemental complaint and an assessment of damages is directed, which shall be conducted at the time of trial.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for plaintiff and the AIMCO defendants.

Dated: New York, New York
August 20, 2010

Hon. Martin Shulman, J.S.C.