

Miskin & Tsui-Yip, LLP v Morsy

2010 NY Slip Op 32558(U)

September 16, 2010

Supreme Court, New York County

Docket Number: 601802/2009

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.

PART 10

Index Number : 601802/2009

MISKIN & TSUI-YIP, LLP

vs

MORSY, ALAA KHALIL

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/16/10

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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
Miskin & Tsui-Yip, LLP

Plaintiff,

-against-

Alaa Khalil Morsy and Delta Trading Import
and Export Corporation,
Defendants.
-----X

Decision/Order
Index No.: 601802/2009
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

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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) | 1 |
| HSC affd., exhibits | 2 |

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

This is an action to recover unpaid legal fees. Plaintiff moves, pursuant to CPLR § 3215, for entry of a default judgment against the defendants. Although there is due proof of service of the underlying summons and verified complaint, as well as the instant motion, the defendants have not opposed or otherwise appeared in this action within the time provided for in the CPLR. Defendant's time to do so has not been extended by the court. Plaintiff has also filed proof of additional services in compliance with CPLR § 3215 [g]. The motion was also mailed to each of the defendants and no opposition to the motion has been interposed.

Based upon defendants default in answering the complaint, plaintiff is entitled to

a default judgment against the defendants, 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). The defendant's 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).

Defendant is a successor law firm to Stoll, Miskin and Badie ("SMB"). The complaint contains three causes of action, to wit: [1] breach of contract; [2] quantum meruit and [3] account stated.

According to Howard C. Miskin, the predecessor law firm, of which he was a member provided legal service to defendants for the period beginning August 2001 through September 2006. SMB ceased doing business in 2008. Miskin claims that plaintiff is the assignee of the claims for fees against the named defendants. He has signed the "confirmatory assignment" on behalf of SMB. Nobody contests that such an assignment was made. He also provides the Court with detailed invoices for services rendered from August 2001 through September 8, 2006. Miskin claims that he spoke over the telephone with defendant Morsy who "assured that they would be paid."

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).

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).

Plaintiff has not produced or otherwise proven any contract between the parties and therefore the court declines to grant a default judgment on the cause of action for breach of contract. Plaintiff has established, however, a *prima facie* cause of action for account stated against the defendants. While defendants might have been able to assert a statute of limitations defense against some of the fees sought, they have not come forward to assert such affirmative defense. Accordingly, plaintiff is entitled to entry of default judgment against the defendant on its third causes of action. However, plaintiff's second cause of action for quantum meruit duplicates the relief sought in the third cause of action for account stated. It is therefore dismissed. Plaintiff is entitled to a money judgment in the amount of \$33,516.06 with interest from September 8, 2006.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendants, is granted on the third cause of action for account stated; and it is further

ORDERED that the first and second causes of action are hereby severed and dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff and against defendants, in the sum of thirty three thousand five hundred sixteen dollars and six

cents (\$33,516.06); and it is further

ORDERED that interest shall run from September 8, 2006, at the statutory rate;

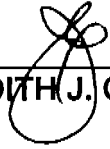
and it is further

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
 September 16, 2010

So Ordered:



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

FILED
SEP 17 2010
NEW YORK
COUNTY CLERKS OFFICE