

Lius Group Intl. Endwell, LLC v HFS Intl., Inc.

2010 NY Slip Op 32653(U)

September 16, 2010

Supreme Court, Nassau County

Docket Number: 017343-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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LIUS GROUP INTERNATIONAL ENDWELL, LLC,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 017343-09
Motion Seq. No: 3
Submission Date: 7/30 /10**

**HFS INTERNATIONAL, INC. and
XIANGYUN ZHANG,**

Defendants.

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Papers Read on this Motion: ¹

**Notice of Motion, Affirmation in Support,
Affidavits in Support and Exhibits.....X**

This matter is before the court on the motion by Plaintiff LIUS Group International Endwell, LLC ("LIUS" or "Plaintiff") filed July 6, 2010 and submitted July 30, 2010. For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Plaintiff LIUS Group International Endwell, LLC ("LIUS") moves for an Order, pursuant to CPLR §§ 2221(d) and (e), granting Plaintiff leave to renew and reargue the prior decision of the Court dated June 2, 2010 ("Prior Decision") denying Plaintiff's application for a default judgment.

¹ Although Plaintiff's Notice of Motion only makes reference to one affidavit, specifically the affidavit of Susan Liu, Plaintiff's motion also includes an affidavit of Ming Yeou Liu, which the Court has considered.

B. The Parties' History

By decision dated February 17, 2010 ("Original Decision"), the Court denied Plaintiff's motion for a default judgment against the Defendants HFS International, Inc. ("HFS") and Xiangyun Zhang ("Zhang"), with leave to renew upon a more complete factual showing. In so holding, the Court noted, *inter alia*, that Plaintiff 1) had not provided copies of the Contract and Disclaimer Form to which the Complaint referred; and 2) provided no documentation in support of its claims that the Premises was located in a flood plain/zone and suffered flooding when HFS owned the Premises. Plaintiff subsequently renewed its motion, which the Court again denied in the Prior Decision. Plaintiff now moves for renewal and reargument of the Prior Decision.

The parties' history is set forth in detail in the Original Decision and the Court incorporates the Prior and Original Decisions herein by reference. The Complaint contains three (3) causes of action. They are: 1) fraud against both Defendants, 2) piercing the corporate veil against Zhang, and 3) breach of contract against HFS. As outlined in the Original Decision, Plaintiff alleges that it relied on the written representations of Defendants that 1) they were not aware of any flooding at the Premises; 2) the Premises was not located in a flood plain; and 3) Defendants did not have flood hazard insurance on the property.

In support of its renewed motion leading to the Prior Decision, Plaintiff provided an Affidavit in Support of Susan Liu ("Liu") dated April 1, 2010 in which she, *inter alia*, 1) affirmed that she was an agent of the Plaintiff who negotiated the real estate transaction at issue; 2) outlined the relevant aspects of the transaction; and 3) provided documentation and photographs in support of Plaintiff's motion. In denying Plaintiff's renewed motion for a default judgment, the Court held as follows:

Preliminarily, Plaintiff has failed to allege sufficient facts demonstrating that the owners of HFS exercised complete domination over it, or that those owners abused the privilege of doing business in the corporate form. Accordingly, Plaintiff has failed to demonstrate its right to judgment on the cause of action for piercing the corporate veil.

The Court further concludes that Plaintiff has not demonstrated its right to a default judgment on the causes of action for breach of contract and fraud. Plaintiff's action is based on its allegations that Defendants made misrepresentations regarding whether the Premises had suffered flood damage and was located in a flood zone. The Affidavit of Liu and the Disclaimer Form on which Plaintiff relies in support of its claims are insufficient to establish Plaintiff's right to judgment on its causes of action for contract and fraud. First, while Liu alleges that "HFS and Zhang" executed the Disclosure

Form, the documentation submitted suggests that it was, in fact, Wang who executed that Form on behalf of HFS. Second, given the lack of 1) details regarding the circumstances under which the Disclaimer Form was signed, including any conversation that might bear on whether Wang was aware of the flooding issues at the Premises, 2) a date on the Disclaimer Form, and 3) information regarding the extent to which Wang was involved with the operation of the Premises that might bear on his knowledge of the flooding issues and the reasonableness of Plaintiff's reliance, the Court cannot conclude that Plaintiff has demonstrated its right to default judgment against the Defendants on the remaining claims.

Prior Decision at pp. 4-5.

C. The Parties' Positions

Plaintiff now seeks reconsideration of the Prior Decision on the following grounds:²

1) the Court incorrectly concluded that Plaintiff had not established a *prima facie* case as to the causes of action in the Complaint; 2) the Court mistakenly required Plaintiff to demonstrate that Defendant Zhang was aware of the flooding issue at the Premises, and the submissions demonstrate fraudulent misrepresentations that are proof of active concealment that would support the cause of action for fraud; and 3) Plaintiff now presents additional facts that would entitle Plaintiff to the requested relief.

Liu provides an Affirmation in Support of the motion *sub judice*. Many of the assertions in her Affirmation are upon information and belief and do not state the source of that information and belief. By way of example, Liu asserts that “[u]pon information and belief, during the time that Xiangyun Zhang owned the Premises, she oversaw the complete operation of the Premises” (Liu Aff. in Supp. at ¶ 12). In addition, other assertions, while not specifically designated as “upon information and belief” do not include language reflecting, or permitting the inference, that Liu has personal knowledge as to the matters asserted therein.

As these assertions are hearsay statements that may not form the basis for the requested relief, the Court will outline the affirmations that the Court may consider in determining Plaintiff's motion. Those affirmations include: 1) from July through August of 2005, Liu and her husband visited the Premises on several occasions, Defendant Zhang was the only person they ever spoke with regarding the sale of the Premises, and every time they visited the Premises, they saw Defendant Zhang exiting Unit 1 where she resided; 2) prior to closing on the

² A portion of Plaintiff's Affirmation in Support is devoted to addressing the timeliness of the instant motion. The Court will excuse any timeliness issue, and will address the substantive aspects of Plaintiff's motion.

sale of the Premises, Zhang sent a fax to “us” with financial information regarding her operation of the Premises (Ex. D to Liu Aff. in Supp.); 3) after receiving the unsigned Disclosure Form from Zhang, Liu and her husband advised Zhang that the closing could not proceed without an executed Disclosure Form; 4) Zhang subsequently provided Liu and her husband with signed but undated copies of the Disclosure Form which were unusable; and 5) Liu and her husband proceeded with the closing, notwithstanding the absence of a properly executed Disclosure Form, based on the representations that Zhang allegedly made in the forms that she filled out.

Liu also affirms that, at the closing “we witnessed [Zhang] personally execute the deed” (Liu Aff. at ¶ 31) and that the signature on the deed appears to be the same as the signature on the Purchase Contract. Liu does not specify that she, as opposed to her husband, witnessed Zhang execute that deed.

Liu also provides copies of mortgage agreements and deeds recorded with the Broome County Clerk (Ex. J) containing Zhang’s notarized signature. Liu submits that these signatures appear to be the same signature that appears on the Purchase Contract

Liu provides two other deeds recorded with the Broome County Clerk containing the notarized signature of Zhang. Liu concedes that “[t]hese signatures differ significantly from the signatures appearing on Exhibit H, the Purchase Contract and Structural Disclosure Form,” but then asserts, remarkably, that “**Upon information and belief, Defendant Xiangyun Zhang does not use a consistent signature and intentionally changes her signature in contemplation of committing fraud**” (Liu Aff. at ¶ 34) (emphasis added).

Plaintiff also provides an Affidavit of Ming Yeou Liu who affirms, *inter alia*, that s/he once operated a restaurant located approximately one mile from the Premises and, on or about April 4, 2005, drove by the Premises and observed that it had been flooded.

RULING OF THE COURT

Preliminarily, the Court notes that, in paragraphs 15 through 18 of his Affirmation in Support of the instant motion, Plaintiff’s counsel suggests that the Court did not appreciate or understand the level of proof required to entitle a movant to a default judgment. A careful reading of the Prior and Original Decisions demonstrates that the Court understood the relevant principles, but concluded that Plaintiff had not made a sufficient showing of its right to relief.

Moreover, the Court concludes that Plaintiff has not met its burden to warrant renewal of

its motion because the purportedly new facts that Plaintiff now submits were available to Plaintiff when it filed its original motion and its renewed motion, and Plaintiff has not offered a reasonable justification for the failure to submit the additional facts on those prior motions.

The Court also concludes that Plaintiff has not met its burden to warrant reargument of its motion because it has not demonstrated that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law.

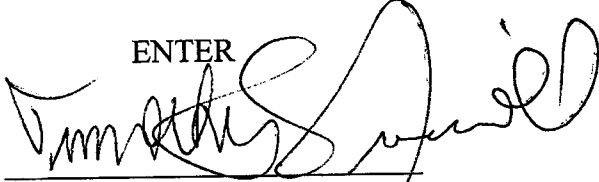
In the interests of judicial economy, however, the Court will consider Plaintiff's motion to determine whether it has now demonstrated its right to relief. Having considered the instant motion, including the most recent Affidavit of Liu, the Court denies Plaintiff's motion for a default judgment. The same weaknesses outlined in the Prior Decision still exist, and the Court may not consider the hearsay assertions of Liu to fill in those gaps.

In light of the foregoing, the Court denies Plaintiff's motion for a default judgment.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
September 16, 2010

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
SEP 22 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE