

Fedex Customer Info. Serv., Inc. v Chetta B, Inc.

2010 NY Slip Op 33137(U)

October 28, 2010

Supreme Court, New York County

Docket Number: 602217/2009

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. _____

PART 10

Index Number : 602217/2009

FEDEX CUSTOMER INFORMATION

vs.

CHETTA B, 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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 10/28/10

[Signature]
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: IAS PART 10**

-----x

Fedex Customer Information Services, Inc.

Plaintiff (s),

-against-

Chetta B, Inc.

Defendant (s).

DECISION/ ORDER

Index No.: 602217/2009

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

UNFILED JUDGMENT

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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

Pltffs' motion [CPLR 3215] w/ DAF affirm, JS affid, exhs 1

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

This is an action by plaintiff Fedex Customer Information Services, Inc., ("Fedex") for breach of contract, unjust enrichment, and account stated against Chetta B, Inc. ("Chetta B"). Fedex now moves for an entry of default judgment against Chetta B pursuant to CPLR § 3215 on the basis that Chetta B has not answered the complaint or appeared in this action.

This action was commenced with the filing of the summons and complaint on July 20, 2009. The summons and complaint were served upon the Secretary of State on August 4, 2009, as required under BCL § 306 (b). Chetta B has not appeared or answered the complaint within the time provided under the CPLR, nor has it obtained an order from the Court extending its time to do so.

This motion is submitted on default, although proof of service has been filed. Since Chetta B is a corporation, Fedex has also complied with the additional notice requirements of CPLR § 3215 (g) (4) by mailing another copy of the summons and complaint on August 20, 2009 to Chetta B at its last known business address more than 20 days prior to entry of judgment. Chetta B is, therefore, in default and Fedex is entitled to entry of a default judgment, provided Fedex can demonstrate a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd Dept. 2001).

The following is established through the complaint and sworn affidavit of Joe Singler, the manager for Fedex:

There is due and owing by Chetta B to Fedex the amount of \$29,882.32, for services rendered and collection fees. Fedex has not received, directly or indirectly, any part of the money claimed due in Mr. Singler's affidavit.

In the first cause of action, Fedex claims Chetta B's failure to pay the monies due for services rendered (in the amount of \$23,905.86), plus collection fees (in the amount of \$5,976.47), is a breach of contract. Fedex contends that Chetta B must also pay interest on the unpaid balance, from November 3, 2008. No copy of a written contract has been provided to the court on this motion.

In the second cause of action, for unjust enrichment, Fedex alleges that it provided transportation services upon Chetta B's request and that the agreed payment for the services rendered totaled \$23,905.86, plus collection fees in the amount of \$5,976.47, (totaling \$29,882.33) and that defendant has failed and refused to pay the invoices and collection fees.

The third cause of action is for an account stated. Fedex alleges accounts stated between Fedex and Chetta B, account number 103924723, for transportation services rendered by Fedex, with an amount due to Fedex of \$29,882.33, representing \$23,905.86 for services rendered, plus \$5,976.47 for collection fees incurred. Chetta B did not object to the statement amounts for the services rendered and the sum stated remains unpaid, although Fedex has made demand for payment.

Copies of the statement of account and the supporting invoices have been provided to the court, with the exception of invoice number 9-227-40204 of June 15, 2009, in the amount of \$174.26.

Further, Fedex has provided two invoices representing collection fees, including the invoice summary for April 7, 2009 in the amount of \$5,922.91 and the invoice summary for May 5, 2009, in the amount of \$9.99. The total for these collection invoices is \$5,932.90, not \$5,976.47, as stated by Fedex.

Discussion

The essential elements of an account stated are that Fedex sent bills to Chetta B which were retained, without any objection within a reasonable period of time. Herrick Feinstein LLP v. Stamm, 297 AD2d 477 (1st Dept 2002). Fedex has provided a statement of account, as well as the supporting invoices for services rendered (with the exception of invoice number 9-227-40204 for \$174.26, which was not provided) and has therefore proven that there is an amount due of \$23,731.60. Fedex has also provided two collection fee invoices totaling \$5,932.90. Fedex claims that no objections were made to their invoices. Fedex has, therefore, proved its account stated cause of action and it is entitled to entry of a default judgment in the amount of \$29,664.50.

In its complaint Fedex requests attorney's fees, but it has not requested such relief in the moving papers; nor is any contract provided that would support the award of such fees. Generally, parties involved in an action are responsible for payment of all legal fees and costs incurred and cannot recover the same from an opposing party unless there is an agreement, contract, or statute that provides otherwise. Hooper Associates, Ltd. v. AGS Computers, Inc., 74 NY2d 487 (1989). Therefore, Fedex's request for attorney's fees is denied.

Fedex is entitled to interest, at the statutory rate, from June 16, 2009, the date of the last invoice, until entry of judgment.

A default on Fedex's cause of action for breach of contract, is however, denied because Fedex fails to provide a copy of the agreement or contract for services rendered.

Fedex's request for a default on its cause of action for unjust enrichment is also denied because it duplicates the relief sought in the other causes of action. Where, as here, there is a legal remedy available, a claim for unjust enrichment will not lie. Cirri v. Daily News LP, 9 Misc. 3d 1130(A) (NY Sup. Ct. 2005).

Conclusion

In accordance with the foregoing,

It is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendant Chetta B, Inc., for the relief sought in the complaint is granted as to the third cause of action for account stated, and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiff,

[* 6] ✓
Fedex Customer Information Services, Inc., against defendant, Chetta B, Inc., in the total amount of Twenty Nine Thousand Six Hundred and Sixty-Four and 50/100 Dollars (\$29,664.50), with interest from June 16, 2009, together with costs and disbursements, and it is further

ORDERED that plaintiff's first cause of action as to breach of contract and second cause of action as to unjust enrichment are hereby severed and dismissed, and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
October 28, 2010

So Ordered:



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

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