

Cook v Kim

2010 NY Slip Op 33585(U)

December 22, 2010

Sup Ct, Nassau County

Docket Number: 026362-09

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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ANN COOK,

Plaintiff,

-against-

**HELEN KIM, a.k.a CHANG M. KIM, a.k.a
CHANG JOO AN, a.k.a CHANG KIM, a.k.a
CHANG ANG., a.k.a, CHUNG AN, a.k.a C AN,
a.k.a JANE DOE, FIRST SECURITY L.I. GROUP
INC. & LMK ENTERPRISES INC.,**

Defendants.

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

**Index No: 026362-09
Motion Seq. No: 1
Submission Date: 11/12/10**

Papers Read on this Motion:

Notice of Motion, Affirmation of Regularity and Exhibits....x

This matter is before the court on the motion by Plaintiff Ann Cook ("Cook" or "Plaintiff") filed October 29, 2010 and submitted November 12, 2010. For the reasons set forth below, the Court denies Plaintiff's motion without prejudice.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3215(a), for an Order directing entry of judgment in favor of Plaintiff and against Defendants for the relief demanded in the verified complaint ("Complaint"). Defendants have submitted no opposition or other response to the motion.

B. The Parties' History

Counsel for Plaintiff ("Counsel") affirms that Plaintiff commenced this action for foreclosure on a Notice of Pendency ("Notice") and Complaint alleging causes of action for breach of contract, dissolution of corporate entities, accounting, constructive trust, breach of a

fiduciary trust, unjust enrichment, money lent, and money had and received. Plaintiff filed the Notice and Complaint on December 24, 2009 and effected service on the Defendants as reflected by the Affidavits of Service provided (Ex. B to Maccarone Aff.). More than thirty (30) days have elapsed since that service and Defendants have not answered, filed a notice of appearance or filed a motion raising any defense or objection to the Complaint, although their time to answer or move has expired.

The Notice pertains to premises ("Premises") located at 220 Roosevelt Way, Westbury, New York 11590 described as follows: Section 44, Block 78, Lot 109, Unit 3204.

The Complaint alleges as follows:

Defendant Helen Kim, a.k.a Chang M. Kim, a.k.a, Chang Joo An, a.k.a Chang Kim, a.k.a, Chang Ang, a.k.a, Chung An, a.k.a C An, a.k.a Jane Doe ("Kim") is the chief executive officer of Defendant First Security L.I. Group Inc. ("First"), a New York corporation with an office located at 16 Godfrey Lane, Huntington, New York ("Business Address"). Defendant LMK Enterprises Inc. ("LMK") is a New York corporation with an office also located at the Business Address.

Plaintiff entered into three (3) separate agreements ("Agreements") with Kim pursuant to which Plaintiff invested money in different ventures. Some aspects of these Agreements were memorialized in written documents, but all the Agreements also included oral terms agreed to by Plaintiff and Defendants, or their agents.

On February 3, 2005, Plaintiff lent \$100,000 to Kim ("February Agreement"). The February Agreement provided that, in return, Kim would pay Plaintiff the sum of \$1,250.00 per month. The Complaint refers to Exhibit A which is a document dated February 3, 2005 that is signed by Kim, contains Kim's name and the Office Address, and reads as follows:

Received from Jim Cook. Amount of \$100,000 (one hundred thousand U.S.A dollars only) check #1011.

Payable every month amount of \$1250 (one thousand two hundred fifty only interest).

Plaintiff funded the February Agreement by providing a check (Ex. B to Complaint) dated February 3, 2005 payable to First, drawn on the account of Ann L. and James Cook and signed by James Cook. That Exhibit includes a copy of a business card ("Business Card") of

Kim reflecting that she is the President of First and that First's address is 1160 E. Jericho Turnpike, Suite 113, Huntington, New York 11743. The Complaint alleges that the February Agreement included an oral agreement that Plaintiff could demand the total repayment of the entire sum lent, within two (2) weeks from demand being made upon Kim.

On August 4, 2005, Plaintiff entered into a second agreement with Kim ("August Agreement") relating to the purchase of a condominium ("Condo") located at the Premises that is owned by Kim. Pursuant to the August Agreement, Plaintiff lent \$110,000 to Kim. The August Agreement provided that the profit from this venture was to be divided on a 50/50 basis. The Complaint refers to Exhibit C which is a document dated August 4, 2005 and signed by Kim which reads as follows:

Received [sic] from Jim Cook & Ann Cook amount of \$110,000 check # 101 for Investment Condominium in Westbury. Helen Kim will pay all the interests [sic] & mortgages. After any profit we will share 50% to 50¹

On September 26, 2005, Plaintiff entered into a third agreement with Kim ("September Agreement") which called for an investment by Plaintiff of \$385,000.00 with Defendants Kim and LMK. The purpose of the September Agreement was to invest, with LMK, in a hotel located at 134-32 35th Street, Flushing, New York. Plaintiff's check reflecting her investment in the September Agreement (Ex. D to Compl.), however, is drawn on an account in the name of Plaintiff only and is payable to First, not to Kim or LMK. With respect to the terms of the September Agreement, the Complaint refers to Ex. D which includes a document dated September 26, 2005, signed by Kim, which reads as follows:

I Helen Kim received [sic] from James Cook amount of \$385,000 (three hundred eighty five thousand USA dollar) for Hotel Investment on Flushing, 134-32 35th Av Flushing NY. LMK ENTEPRISES [sic] (lease).

The Complaint alleges that Plaintiff obtained the funds for the August and September Agreements by securing a home equity loan ("Home Equity Loan") on her home located at 11 Oak Lane, Northport, New York. The September Agreement allegedly included a personal guaranty by Kim to Plaintiff to make all interest payments on the Home Equity Loan until it was paid off. Those payments were expected to come from profits from the parties' ventures.

¹ The writing is cut off on the right margin but it appears that a "%" sign follows the "50."

The Complaint contains sixteen (16) causes of action which are as follows:

First Cause of Action - The Condo has been listed with a real estate broker and Defendants, despite demand, have failed to provide Plaintiff with written proof of the financial position of her investment. Plaintiff seeks a judgment that Plaintiff has a valid lien in the amount of \$100,000 against the Premises as well as a direction that the Premises be sold and Plaintiff be paid the sum of \$100,000 from the proceeds of that sale.

Second Cause of Action - Kim has unlawfully dominated and controlled the financial and business affairs of LMK and First to the exclusion of Plaintiff. Defendants promised Plaintiff the sum of \$90,950.00 of which Plaintiff has received only \$6,250.00. Plaintiff seeks compensatory damages against the Defendants in excess of \$1,000,000.00 as well as punitive damages of at least \$5,000,000.00.

Third Cause of Action - Plaintiff seeks dissolution of LMK, pursuant to New York Business Corporation Law ("BCL") § 720, and appointment of a receiver, based on Kim's allegedly improper conduct.

Fourth Cause of Action - Plaintiff invested substantial monies with Kim who has provided no documentation regarding those investments. Plaintiff seeks an accounting.

Fifth Cause of Action - Plaintiff invested substantial monies with First and cannot determine the amount owed to her from those investments. Plaintiff seeks an accounting.

Sixth Cause of Action - Plaintiff invested substantial monies with LMK and cannot determine the amount owed to her from those investments. Plaintiff seeks an accounting.

Seventh Cause of Action - Defendants hold certain assets of the Plaintiff as fiduciaries and constructive trustees for the benefit of Plaintiff. Plaintiff requests the imposition of a constructive trust over the assets of the Defendants, including the Premises, for the benefit of Plaintiff.

Eighth Cause of Action - Plaintiff seeks dissolution of First, pursuant to BCL § 720, and appointment of a receiver, based on Kim's allegedly improper conduct.

Ninth Cause of Action - Kim breached her duties of loyalty and trust to Plaintiff for which Plaintiff seeks compensatory damages in excess of \$1,000,00.00 and punitive damages of at least \$5,000,000.00.

Tenth Cause of Action - Defendants have been unjustly enriched as a result of their conduct for which Plaintiff seeks damages believed to be in excess of \$1,000,00.00 and punitive damages of at least \$5,000,000.00.

Eleventh Cause of Action - Kim and First owes Plaintiff \$100,000, plus interest, for money lent in connection with the February Agreement.

Twelfth Cause of Action - Kim owes Plaintiff \$110,000.00, plus interest, for money lent in connection with the August Agreement.

Thirteenth Cause of Action - Defendants owe Plaintiff \$385,000.00, plus interest, for money lent in connection with the September Agreement.

Fourteenth Cause of Action - Kim and First owe Plaintiff \$100,000, plus interest, for money had and received in connection with the February Agreement.

Fifteenth Cause of Action - Kim owes Plaintiff \$110,000, plus interest, for money had and received in connection with the August Agreement.

Sixteenth Cause of Action - Defendants owe Plaintiff \$385,000.00, plus interest, for money had and received in connection with the September Agreement.

Plaintiff provides a verification dated December 15, 2009 in which she affirms the truth of the allegations in the Complaint.

C. The Parties' Positions

Plaintiff seeks a default judgment against Defendants on the Complaint in light of Defendants' failure to answer or file a notice of appearance, or make any motion raising a defense or objection to the complaint.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

Although a defaulting defendant is deemed to have admitted all the allegations in the complaint, the legal conclusions to be drawn from such proof are reserved for the Supreme Court's determination. *McGee v. Dunn*, 75 A.D.3d 624, 624 (2d Dept. 2010), quoting *Venturella-Ferretti v. Ferretti*, 74 A.D.3d 792 (2d Dept. 1992) and citing, *inter alia*, CPLR § 3215(b). There is no mandatory ministerial duty to enter a default judgment against a defaulting party. *Id.*, citing *Resnick v. Lebovitz*, 28 A.D.3d 533, 534 (2d Dept. 2006), quoting *Gagen v. Kipany Prods.*, 289 A.D.2d 844, 846 (2d Dept. 2006) (internal citations omitted). Instead, the court must determine whether the motion was supported with enough facts to enable the court to determine that a viable cause of action exists. *Id.*, quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003). In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff. *Id.* at 625, quoting *Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 627 (2d Dept. 2007).

B. Application of these Principles to the Instant Action

The Court has an insufficient basis on which to award Plaintiff judgment against the Defendants, notwithstanding Defendants' failure to appear or answer. While the documentation provided supports Plaintiff's claim that there were three Agreements, that documentation provides minimal information regarding the terms of those Agreements and does not clearly reflect which Defendants were parties to those Agreements. While Plaintiff has attested to the truth of the allegations in the Complaint, she has not provided an Affidavit in Support amplifying the allegations in the Complaint, including the circumstances under which she met Defendant Kim and what information, if any, Kim provided Plaintiff regarding Kim's relationship to LMK and First.

The Court also notes that Plaintiff has not provided an Affidavit in Support of James Cook, or explained her failure to do so. The motion papers reflect that James Cook, whose relationship to Plaintiff is not provided, was closely involved in the Agreements that are the subject of the Complaint, which allegedly contain oral components in addition to the documentation provided. Specifically, 1) the February Agreement reflects that Kim received \$100,000 from James Cook; 2) the check for the February Agreement was signed by James Cook; 3) James Cook would presumably have knowledge of the alleged oral component of the

February Agreement whereby Plaintiff could demand the total repayment of the entire sum lent, within two (2) weeks from demand being made upon Kim; 4) the August Agreement reflects that Kim received the funds from Plaintiff and James Cook; and 5) the September Agreement reflects that Kim received the funds from James Cook.

In addition, Plaintiff has not provided sufficient evidence demonstrating the relationship between Kim, and First and LMK. By way of example, although the Business Card reflects that Kim is the President of First, Plaintiff has provided no sworn allegations regarding the circumstances under which she received that Business Card. In addition, Plaintiff has not provided an explanation of why the documentation regarding the September Agreement refers to LMK but the check for that investment is payable to First. There is also no documentation from an official source, such as the New York State, Department of State, Division of Corporations, reflecting Kim's relationship to LMK and First.

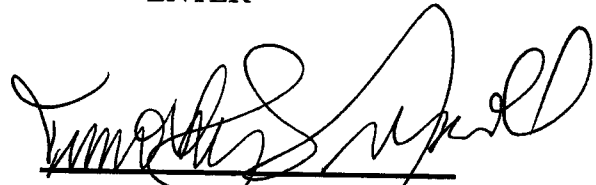
In light of the foregoing, the Court denies Plaintiff's motion, without prejudice.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
December 22, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

DEC 29 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**