

Yuen v Liao

2011 NY Slip Op 30330(U)

February 10, 2011

Sup Ct, New York County

Docket Number: 108069/10

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Justice

Index Number : 108069/2010

YUEN, MARK

vs.

LIAO, RAY H.

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. 108069/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2, 3, 4, 5
6, 6

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

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

FEB 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/10/11

HON. EILEEN A. RAKOWER

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 15

-----X

MARK YUEN, et al,

Index No.:108069/10

Plaintiffs,

- against -

Decision and Order
Motion Sequence 001

RAY H. LIAO, KWOK CHI LIU, CHEUNG FU LAU,
AND YOU DWEN ENG,

FILED

Defendants.

FEB 14 2011

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EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs are all investors/shareholders in a company called IMA Group, Inc. And Guang Yi Expo Group ("IMA"). IMA allegedly solicited plaintiffs via websites, brochures, and other means, seeking funding for a theme park to be located in Guilin City, China tentatively named Eastern Giant Dragon Theme Park ("the theme park"). Plaintiffs allege that they collectively invested a total of approximately \$1,510,000.00 in IMA, for which they were issued stock certificates.

Plaintiffs allege that defendants represented to them that the potential theme park had already received investments exceeding \$3,500,000.00, plus an investment of \$2,500,000.00 from Apple Computer. Defendants told plaintiffs that they had procured 300 acres of land, two offices and an "Amino Acid" factory, completed development plans and obtained permits. Plaintiffs allege that they were made to believe their investments would double or triple. The founder of IMA died in 2006, and plaintiffs claim that thereafter, they learned that there was no actual theme park project, but defendants refused to return their money. Defendants represent that IMA ceased doing business in 2009.

Plaintiffs allege, among other things, fraud, conversion and breach of fiduciary duty. As part of their fraud claim, plaintiffs allege that defendants, since about March 2007, made unauthorized cash withdrawals from IMA's corporate account; and that they diverted cash assets of the corporation and converted them for personal use.

Defendant Ray H. Liao is the alleged owner, treasurer, and managing shareholder of IMA. Defendant Kwok Chi Liu is alleged to have been the executive director and treasurer of IMA. Defendant Cheung Fu Lau is alleged to have been a board member and assistant to J.P. Liao, the founder of IMA. Defendant You Dwen Eng is alleged to have been the executive director and treasurer of the corporation.

Plaintiffs now move for an order entering default judgments against all defendants. Defendants oppose and cross-move to dismiss the action pursuant to CPLR §§ 3013, 3016(b), 3211(a)(7) and 3211(a)(8). Plaintiff Kwok Chi Liu also submits separate opposition papers and a cross-motion to dismiss. Plaintiffs oppose the cross-motions.

Plaintiffs submit three affidavits of service dated June 22, 2010, showing that a copy of the summons and complaint was served upon Liao personally, and upon Lau and Eng by leaving the summons and complaint with Liao, a person of suitable age and discretion, at 401 Broadway, Suite 1006, NY, NY. No affidavit is submitted showing service upon Kwok Chi Liu. On July 12, 2010, the parties entered into a stipulation which extended defendant Liao's time to answer until August 16, 2010. Plaintiffs assert that, to date, defendants have failed to answer, and are well beyond the time to do so.

Defendants, in opposition, and in support of their cross-motion, submit: the affidavit of Eng; the affidavit of Liao; the affidavit of Liu; a copy of the amended summons; an affidavit of service for Eng; several stock certificates issued by IMA; a document titled "Termination of Employment Notice to Lei Lan Tang; photocopies of several IMA business cards; several documents written in Chinese, with several pages of signatures; and more stock certificates.

Eng states, in his affidavit, that he never lived or was employed at 401 Broadway. Mr. Liao does not deny receipt of personal service, either for himself or on behalf of Eng. However, Liao asserts that he never received the summons and complaint by mail at 401 Broadway.

Liu, in his cross-motion to dismiss, points out that plaintiffs fail to append an affidavit of service showing that he was served. Liu also avers that he does not live or work at the address where the papers were served. Lau does not deny service.

Defendants assert that because of the lack of proper service, the court has no personal jurisdiction over them. Even if the Court finds that service was proper, defendants argue that the action should be dismissed because: (1) the first cause of action, for fraud, is not plead with particularity, and that the fraud claim is “flatly contradicted by documentary evidence;” (2) the cause of action for intentional infliction of emotional distress cannot be maintained because there is no alleged physical injury; (3) plaintiffs cannot recover attorneys fees unless by statute or contract; (4) the conversion claim is without merit; (5) some of the plaintiffs, who as corporate officers, were the parties who owed a fiduciary duty and had an obligation for an accounting.

§3215(a) states, in relevant part:

When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . .the plaintiff may seek a default judgment against him.

Initially, as to Liu, the motion is denied. CPLR 3215(f) requires plaintiff to file “proof of service of the summons and complaint,” when seeking to enter a default judgment for defendant’s failure to appear. Plaintiffs do not file an affidavit of service for Liu.

As to Liao and Lau, plaintiffs submit properly executed affidavits of service showing that Liao was personally served with a copy of the summons and complaint, and that Lau was served by leaving a copy with Liao, a person of suitable age and discretion. Liao and Lau have failed to answer the complaint. As to Liao’s statement that he never received a copy of the summons complaint by mail, conclusory denial of receipt of service by mail is insufficient to defeat a default motion. (see generally; *Chinese Cosol. Benev. Ass’n v. Tsang*, 254 AD2d 252[1st Dept. 1998]).

Neither Liao nor Lau submit an excuse for their failure to answer. Their cross motion to dismiss was made after the time within which to answer, and did not serve to extend their time to answer. “Failure to offer any excuse, let alone a reasonable one, for its default in timely answering the action is fatal to [defendant’s] claim . . .” (*JP Morgan Chase Bank, N.A. v. Bruno*, 57 AD3d 362[1st Dept. 2008]). Thus, the motion for a default judgment is granted as to Liao and Lau.

Although an affidavit of service is submitted showing that Eng was served by leaving a copy of the summons and complaint with Liao, Eng avers that he “never resided” at 401 Broadway . . . where Vincent Ko allegedly served a copy of the amended summons and complaint upon Ray Liao on June 22, 2010.” Eng also denies ever being employed at 401 Broadway. Service pursuant to CPLR 308(2) may be made by:

delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons by first class mail to the person to be served at his or her last known residence or by mailing the summons to the person to be served at his or her actual place of business . . .

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459[1 Dept. 2004]). In light of Eng's sworn denial that he never lived or worked at 401 Broadway, a traverse hearing is directed in order to grant plaintiffs an opportunity to demonstrate that 401 Broadway is Eng's “actual place of business, dwelling place, or usual place of abode.”(*Deluca v. Ricci*, 194 AD2d 457,458[1st Dept. 1993]). The cross-motion is denied without prejudice to renew upon resolution of the traverse issue.

Wherefore it is hereby

ORDERED that the motion for a default judgment is granted as to defendants Ray H. Liao and Cheung Fu Lau only, and it is further

ORDERED that an assessment of damages against defendants Ray H. Liao and Cheung Fu Lau is directed; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office(Room 158), who is directed, upon the filing of a note of issue and a statement of readiness, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that defendants Liao, Liu and Lau' cross-motion to dismiss is denied; and it is further

ORDERED that defendant Eng's motion to dismiss is denied without prejudice to renew upon resolution of the travers issue; and it is further

ORDERED that the parties shall appear for a Traverse Hearing regarding service upon You Dwen Eng on Tuesday April 5, 2011 at 9:30 a.m. at 80 Centre Street Room 308.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: February 10, 2011



EILEEN A. RAKOWER, J.S.C.

FILED

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