

General Elec. Capital Corp. v Cinematrec, Ltd.

2011 NY Slip Op 31788(U)

June 28, 2011

Supreme Court, New York County

Docket Number: 603942/07

Judge: Paul G. Feinman

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

PRESENT: PROV. JUDGE G. BERNARDI
Justice

PART 12

GE Capital Corp.

INDEX NO. 603942/07

MOTION DATE _____

MOTION SEQ. NO. 05

MOTION CAL. NO. _____

Rector, Herbert

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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED

County Copies mailed to both sides

JUL 01 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/28/2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
GENERAL ELECTRIC CAPITAL CORPORATION,
Plaintiff,

against

CINEMATREC, LTD. and HERBERT RECTOR,
Defendants.
-----X

Index Number 603942/2007

Mot. Seq. No. 005

DECISION AND ORDER

For Plaintiff:

Therese M. Reyes, Esq.
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Astoria, New York 11103
(718) 777-8887

For Individual Defendant:

Tabore Rector, *Power of Attorney*
561 W. 147th Street
New York, New York 10031
(347) 464-8329

For Corporate Defendant:

No Appearance

FILED

Papers considered in review of this motion to vacate a default judgment:

Papers

Document Number

JUL 01 2011

Defendants' Order to Show Cause with T.R.O. in Civil Action 1
Affirmation in Opposition, Exhibits 2

**NEW YORK
COUNTY CLERK'S OFFICE**

PAUL G. FEINMAN, J.:

Defendant Herbert Rector, through his son Tabore Rector as power of attorney, moves pursuant to CPLR 5015 for an order vacating the judgment issued on September 21, 2010. For the reasons which follow, the motion is denied.

According to the verified complaint, corporate defendant Cinematrec, Ltd is a domestic corporation with a place of business in New York County, New York (Plaintiff Aff. in Opp., Ex. A: Ver. Complaint ¶ 2). The individual defendant Herbert Rector is president of Cinematrec, Ltd. and resides in South Carolina (Def. Order to Show Cause, Ex. B: Business Lease Agreement). Plaintiff, a Delaware corporation with a place of business in Iowa, leased film equipment to defendants through plaintiff's predecessor in interest, Apple Financial Services

(Plaintiff Aff. In Opp., Ex. D: Decision and Order). Herbert Rector signed as a personal guarantor. Defendants failed to make payments (Plaintiff Aff. In Opp., Ex. A: Verified Complaint ¶ 18). Thereafter, plaintiff commenced this action.

Plaintiff filed a summons and verified complaint on November 29, 2007 (Plaintiff Aff. in Opp., Ex. A) and the defendants answered *pro se* on March 24, 2008, by Tabore Rector, Cinematrec's CEO and Herbert Rector's son with power of attorney (Plaintiff Aff. in Opp., Ex. B: Answer). Plaintiff filed a motion for summary judgment on July 21, 2008, which was opposed by defendants (Plaintiff Aff. in Opp., Ex. C). On October 28, 2008, the plaintiff's motion was denied without prejudice based on certain insufficiencies not at issue here. The court noted that the corporate defendant could not appear in Supreme Court without an attorney, pursuant to CPLR 321 (a) (Plaintiff Aff. in Opp., Ex. C: Decision and Order). The court set the matter down for a preliminary conference on November 12, 2008.

On November 12, 2008, based on plaintiff's failure to appear at the preliminary conference, the court dismissed the action (Plaintiff Aff. in Opposition, Ex. C). Plaintiff moved to vacate the dismissal by motion dated March 9, 2009, and to restore the matter to the pre-note of issue calendar; it also sought to renew its motion for summary judgment (Def. Mot. Ex. A). Herbert Rector by Tabore Rector submitted opposition papers and cross-moved for sanctions (Plaintiff Aff. in Opp., Ex. D). On October 14, 2009, the court granted the motion to vacate the dismissal and restored the action to active pre-note of issue status. Upon renewal of the summary judgment motion, the court granted a default judgment as against the corporate defendant which had still failed to appear through an attorney as required by CPLR 321 (a), and granted summary judgment as against the individual defendant based on his inability to provide any evidence of a triable issue of fact. The court also denied the cross motion for sanctions

(Plaintiff Aff. in Opp. Ex. D). The court directed that an inquest be held to determine the amount of damages and attorney's fees.

The inquest was held on June 14, 2010, at which Tabore Rector testified, as did plaintiff's representative, and plaintiff's counsel (Plaintiff Aff. In Opp. ¶ 6, Ex. I). The June 14, 2010 determination by Judicial Hearing Officer William McCooe found that plaintiff is owed \$46,808.55 plus interest at the rate of 18% from June 15, 2010 to the date of entry of judgment, in addition to attorney's fees in the amount of \$4,898.00 and costs in the amount of \$965.00 (Plaintiff Aff. in Opp. ¶ 6, Ex. E). The court then confirmed the calculation and directed that the plaintiff settle a final judgment on notice. Subsequently, on December 3, 2010 the court signed a final judgment, which was then filed by the Clerk of Court on December 16, 2010, who calculated the interest at \$3,342.65. The total judgment owed by both defendants is \$56,014.20 (Plaintiff Aff. In Opp. Ex. F). Plaintiff subsequently served Notice of Entry of the final judgment (Plaintiff Aff. In Opp. Ex. F).

Defendant now move to vacate this decision, pursuant to CPLR 5015. This motion must be considered for the individual defendant only because the corporate defendant still has never appeared with an attorney and remains in default. Herbert Rector alleges that as to the summary judgment motion, the default occurred either because he did not receive the plaintiff's summons and verified complaint, or he did not receive the papers in time (Def. Order To Show Cause, Aff. ¶ 1).

CPLR 5015 concerns vacating a judgment or motion issued on default, and is not applicable here because the individual defendant fully participated in this litigation from its commencement. The individual defendant appeared *pro se* by his son Tabore Rector with power of attorney, but as he did not submit any evidence in opposition to the motion that raised a

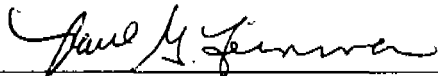
question of fact, the motion was decided in plaintiff's favor (Plaintiff Aff. in Opp., Ex. D).
 Because the amount at issue owed by defendants could not be determined from the papers, the
 matter was set down for an inquest as to damages and also as to attorney's fees (Plaintiff Aff. in
 Opp. Ex. D). At the inquest, Tabore Rector testified on behalf of his father (Plaintiff Aff. in
 Opp. Ex. E, I). At no point during the course of this action was the individual defendant ever
 deemed to be in default. Therefore, it is

ORDERED that the defendant's motion to vacate the judgment is denied; and it is further

ORDERED that any stay of enforcement of the monetary judgment or the stay of any
 restraints is vacated.

This constitutes the decision and order of the court.

Dated: June 28, 2011
 New York, New York



 J.S.C.

FILED

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