

**NYC Firefighters Hockey Club, Inc. v AWSM
Endeavors, Ltd.**

2011 NY Slip Op 31854(U)

May 27, 2011

Supreme Court, Nassau County

Docket Number: 013555/10

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**NYC FIREFIGHTERS HOCKEY CLUB, INC.
a/k/a FIRE DEPARTMENT OF NEW YORK
HOCKEY TEAM,**

Plaintiff,

-against-

**AWSM ENDEAVORS, LTD. and MICHAEL A.
KRAMER,**

Defendants.

**TRIAL/IAS, PART 4
NASSAU COUNTY**

INDEX NO.: 013555/10

MOTION DATE: 3/11/11

MOTION SEQ. NO.: 001

The following papers read on this motion (number 1-3):

Notice of Motion.....1
Defendant Affidavit in Response.....2
Reply Affirmation.....3

This is an action for breach of contract, conversion and breach of the covenant of good faith. Pursuant to a "Cancelled Program Reimbursement and Mutual Non-Disparagement Agreement" (the "Agreement"), plaintiff seeks to recover from defendants (i) \$8,575 allegedly due on or before June 1, 2010; (ii) \$8,625 in the form of a donation, due on or before June 1, 2012; and (iii) attorney's fees of \$7,500 and punitive damages.

Plaintiff alleges that in 2005, defendant MICHAEL A. KRAMER ("KRAMER") contacted Edward Burke ("Burke"), Sports Chairman of the Uniformed Firefighters Association, with a proposal to arrange for plaintiff NYC FIREFIGHTERS HOCKEY CLUB, INC. a/k/a FIRE DEPARTMENT OF NEW YORK HOCKEY TEAM (the "Team"), to participate in a trip to Russia. Burke put KRAMER in touch with William Kammerer ("Kammerer"), General Manager of the Team, who agreed to KRAMER's proposal, and in accordance therewith, KRAMER collected \$47,700 from the Team and their invited guests, paid in several installments between March 27, 2005 and April 12, 2005. Plaintiff alleges that as a result of KRAMER's purported difficulties in making the arrangements, the TEAM canceled the trip and requested reimbursement of the funds which had been forwarded to KRAMER.

Plaintiff claims that KRAMER made payments to the Team of \$20,000, \$2,500, \$6,000, and \$2,000 between August 2005 and May 2007. Plaintiff alleges that defendants continued to make promises to pay the balance but failed to do so. In May 2009, defendant AWSM ENDEAVORS, LTD (“AWSM”) by defendant KRAMER, and plaintiff, by Kammerer, entered into the Agreement. The Agreement provides that the total reimbursement balance owed by AWSM to FIRE DEPARTMENT OF NEW YORK ICE HOCKEY TEAM is \$8,575 to be payable in two installments on or before June 1, 2010. The Agreement also provides that AWSM was to make a donation to the Team of an additional \$8,625 on or before June 1, 2012. Plaintiff claims that the outstanding balance is \$17,200, which includes the \$8,625 due on or before June 2012, on grounds that defendants failure to comply with their obligations constitutes an anticipatory breach. Plaintiff now moves for a default judgment pursuant to **CPLR §3215** against defendants based upon the failure of defendants to answer or appear within the requisite statutory time period.

In support of its motion, plaintiff has presented (i) a copy of the summons and verified complaint filed on July 16, 2010; (ii) an Affidavit of Service, sworn to on August 19, 2010, attesting to service on that date of the Summons and Verified Complaint upon defendant AWSM pursuant to **CPLR §311(a)(1)** by service on the Secretary of State; and (iii) an Affidavit of Service, sworn to on September 8, 2010 (the “Affidavit”), attesting to service of the “subpoena/subpoena duces tecum” on defendant KRAMER. According to the Affidavit, a “subpoena/subpoena duces tecum” was affixed to the door at “310 East 83rd Street, Suite 2B” (the “Address”) as KRAMER’s “actual place of business, dwelling place, or usual place of abode” after several attempts at personal service, on three different dates, including the date of affixation. The process server attempted personal service as follows: Thursday, 8/5/10 at 12:35 p.m. and 1:05p.m., Monday, 8/9/10 at 7:45 p.m. and 8:30 p.m. and Saturday 8/14/10 at 9:00 a.m. the last being the date and time that the papers were affixed to the door. Plaintiff also proffers an affidavit of merit by plaintiff’s attorney and an affirmation of plaintiff’s attorney attesting to defendants’ failure to answer or appear.

The Court finds this application insufficient to grant the relief requested. The Affidavit on its face attests to service of a “subpoena/subpoena duces tecum” rather than the summons and complaint. The process server also fails to indicate on the form whether the Address was KRAMER’s “actual place of business, dwelling place, or usual place of abode.” In reply, plaintiff submits what appears to be a redone affidavit of service attesting to service of the summons and complaint upon KRAMER *and* AWSM on the same dates and times set forth in the Affidavit, together with an Affidavit of Merit from plaintiff’s attorney stating he “accidentally used a form that is meant to be used for subpoenas.” The new affidavit also indicates that the Address is KRAMER’s and AWSM’s actual place of business. Even if the Court were to accept plaintiff’s excuse and the redone affidavit, the Court finds that plaintiff has failed to demonstrate compliance

with the additional notice requirement of **CPLR §3215(g)(3)** and **CPLR §3215(g)(4)**. The motion may be denied on that basis alone.

Of further concern to this Court, however, is the sufficiency of plaintiff's proof with respect to the merits of its claim. "**CPLR §3215** does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action." **Joosten v. Gale**, 129 AD2d 531. The Court recognizes that standard of proof set forth in **Joosten** is not stringent. Generally, all that is required is some first-hand confirmation of the facts. **Id.**, at 535.

The Court notes that in its original application plaintiff did not sufficiently set forth a *prima facie* case on the merits on grounds that plaintiff failed to submit a copy of the Agreement from which defendants' obligation derives. The Agreement was subsequently submitted by defendants in opposition and by plaintiff in reply. However, even considering the Agreement, the Court finds plaintiff has failed to submit any documentary evidence to substantiate the amounts claimed and provides no basis for its claim of anticipatory breach.

In opposition, defendant KRAMER, *pro se*, essentially disputes the amount due and owing and claims plaintiff has further breached the Agreement based on plaintiff's alleged harrasing and threatening behavior. The Court notes that the opposition submitted by KRAMER *pro se* is valid only as to KRAMER, and to the extent that said opposition is submitted on behalf of AWSM ENDEAVORS, LTD, it must be disregarded on the basis that a corporation is required to be represented by counsel. **CPLR §321(a)**.

A party opposing a motion for a default judgment based on failure to timely answer must demonstrate a reasonable excuse for the delay and a meritorious defense. **Newton v. The Nutty Irishman**, 398 AD3d 630; **Thompson v. Steuben Realty Corp.**, 18 AD3d 864; **Freulich-Woodruff v. B.A. Auto Repair, Inc.**, 14 AD3d 593. With respect to defendants' opposition, although KRAMER has not demonstrated a reasonable excuse, the Court need not reach the merits of said opposition on grounds that the Court has determined that plaintiff's application is insufficient to grant the relief requested.

Based upon the foregoing, it is

ORDERED, that plaintiff's motion for a default judgment pursuant to **CPLR §3215** is **denied**; and it is further

ORDERED, that plaintiff, and defendants KRAMER *pro se* or represented by counsel, and AWSM ENDEAVORS, LTD by counsel, if any, shall appear personally in Part 4 of the Supreme Court, Nassau County, 100 Supreme Court Drive, Mineola, New York on **August 25, 2011 at 11:00 a.m.** The parties are directed to telephone

ADW chambers after 3:00 p.m. on August 24, 2011 to confirm their appearance and the Court's availability.

Plaintiff shall serve a copy of this Order upon defendants upon receipt from any source and shall submit proof of such service at the aforementioned conference.

This constitutes the Order of the Court.

Dated: *May 27*

, 2011

[Handwritten Signature]

J.S.C.

ENTERED
JUN 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE