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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

FIRORU INTERNATIONAL CORP.,	**TRIAL/IAS PART: 20** **NASSAU COUNTY**
Plaintiff,	**Index No: 003164-10**
-against-	**Motion Seq. No: 3** **Submission Date: 11/23/10**
EMPIRE STATE MEDICAL TESTING, P.C. and WILLIAM TODD PORDY,	
Defendants.	

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support, and Exhibits....x

This matter is before the Court for decision on the motion filed by Plaintiff Firoru International Corp. on November 3, 2010 and submitted on November 23, 2010. For the reasons set forth below, the Court 2) grants Plaintiff's motion for a severance of the third and fourth causes of action against Defendant William Todd Pordy ("Pordy") and directs that the severed causes of action against Pordy will proceed; and 2) denies Plaintiff's motion for a default judgment against Defendant Empire State Medical Testing, P.C. ("Empire") on the first and second causes of action in the Verified Complaint, with leave to renew.

BACKGROUND

A. Relief Sought

Plaintiff Firoru International Corp. ("Firoru" or "Plaintiff") moves for an Order, 1) pursuant to CPLR § 3215, granting Plaintiff a default judgment against Defendant Empire on the first and second causes of action in the Verified Complaint ("Complaint"); 2) pursuant to CPLR § 603, granting the Plaintiff a severance of its third and fourth causes of action against

Defendant William Todd Pordy ("Pordy"); and 3) granting Plaintiff costs and disbursements.

B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated August 25, 2010 ("Prior Decision") in which the Court, *inter alia*, granted Defendant Pordy's motion to dismiss the fifth and sixth counts of the Complaint and the Court incorporates the Prior Decision herein by reference.

As noted in the Prior Decision, the Complaint alleges that this is an action is to recover damages for financing provided by the Plaintiff to the Defendants for purposes of funding the start up costs of a medical professional corporation, which funds were not repaid.

The Complaint further alleges as follows:

Plaintiff and Defendant Empire are New York corporations, and Pordy is a physician licensed to practice medicine in the State of New York. Pordy was the sole stockholder, director and officer of Empire. Empire was formed on October 19, 2009 for the purpose of providing medical services and treatment, including various forms of medical testing, at offices in the New York City metropolitan area.

Between on or about August 20 and December 4, 2009, Plaintiff agreed to provide financing to Empire and Pordy to fund its start-up costs and expenses, including subletting office space and purchasing/leasing equipment. Financing payments were made payable to Empire, Pordy and other persons and entities, including Defendants' employees and landlords, on behalf of Defendants. In accordance with the parties' agreement, Plaintiff lent Defendants money, which loans were to be repaid on demand with interest of nine percent (9%) per annum. In addition, the parties agreed that Plaintiff would be reimbursed, in part, through Empire's accounts receivable. Without notice to its creditors, Empire filed a certificate of dissolution on January 21, 2010. Plaintiff alleges that Empire owes Plaintiff the sum of $165,000.00 and is in default of its loan obligations.

In light of the Court's dismissal of the fifth and sixth causes of action against Pordy, the Complaint now contains four viable causes of action: 1) against Empire for breach of the loan agreement, 2) against Empire for unjust enrichment due to its breach of the loan agreement, 3) against Pordy for breach of the loan agreement, and 4) against Pordy for unjust enrichment due to his breach of the loan agreement.

In his Affirmation in Support of the instant motion, counsel for Plaintiff affirms as follows:

Following the issuance of the Prior Decision, Pordy filed an Answer with Counterclaims dated October 8, 2010 (Fryer Aff. at Ex. E) in which he denied many of the allegations in the Complaint and asserted twelve (12) affirmative defenses and three (3) counterclaims. Plaintiff filed a Reply to Pordy's counterclaims (*Id.* at Ex. F).

Plaintiff effected service on Empire on March 4, 2010 as reflected by the Affidavit of Service provided (Fryer Aff. at Ex. G). Empire has defaulted in answering, appearing or otherwise moving with respect to the Complaint.

C. The Parties' Positions

Plaintiff submits that the Court should award Plaintiff a default judgment against Empire on the first and second causes of action in the Complaint in light of the allegations in the Complaint, which was verified by Anatoly Potik, President of Firoru and Empire's failure to appear.

Defendant Pordy has interposed no opposition or other response to the instant motion.

Defendant Empire has failed to appear in this action and has provided no opposition or other response to the instant motion.

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. Severance

CPLR § 603, titled "Severance and separate trials," provides as follows:

> In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

The determination to grant or deny a request for a severance pursuant to CPLR § 603 is a matter of judicial discretion which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking the severance. *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d 726, 727 (2d Dept. 2006).

C. Application of these Principles to the Instant Action

In light of the default of Empire State, and to avoid prejudice to Plaintiff, the Court grants Plaintiff's motion for a severance of the third and fourth causes of action against Defendant Pordy and directs that the severed causes of action against Pordy will proceed.

With respect to Plaintiff's motion for a default judgment with leave to renew, Plaintiff has not provided an Affidavit, or Affidavits, of someone with personal knowledge of the relevant events in support of its motion. Moreover, as outlined in the Prior Decision, the parties dispute the existence of the loan on which the allegations in the Complaint are based, and the evidence provided by Plaintiff to date has not been compelling. Specifically, the Court previously noted as follows:

> The Court is mindful of the almost glaring weaknesses of Plaintiff's case including 1) the absence of any reference to a loan in relevant correspondence, 2) the absence of any loan documents, 3) the suspicious convenience of the Letter, whose authenticity Pordy disputes, to provide some writing evidencing the alleged loan, and 4) Plaintiff's

failure to produce the Checks. The Court, however, is constrained to deny Defendant's motion to dismiss the remaining counts of the Complaint. With respect to the Statute of Frauds, Pordy argues that Plaintiff alleges that it loaned Defendant over $100,000 but was only paying Defendant $50,000 per year and, therefore, repayment of the loan could not be performed within one year. While it is Pordy's position that he was to receive $50,000 annually, however, Plaintiff does not concede that agreement in its supporting papers. Finally, the Letter does provide at least some evidence that the loan existed. Thus, there are disputed issues of fact that prevent the Court from voiding the purported agreement based on the Statute of Frauds and dismissing the remaining counts of the Complaint.

Prior Decision at p. 10.

Given that the trial of the severed case against Pordy may reveal evidence relevant to the merits of the complaint, which in turn may be relevant to the Court's consideration of the motion for a default judgment against Defendant Empire, the Court denies Plaintiff's motion for a default judgment, with leave to renew.

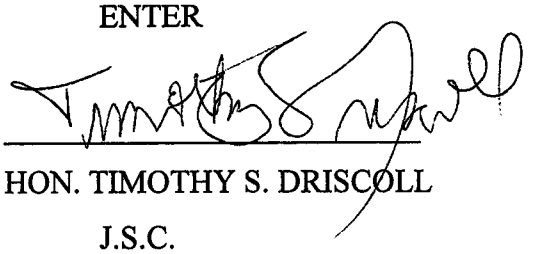
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on January 14, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
January 5, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.