

Ledesma v Good Luck Reality Corp.
2012 NY Slip Op 32063(U)
August 6, 2012
Supreme Court, New York County
Docket Number: 107578/2010
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

Justice

PART 10

Index Number : 107578/2010
LEDESMA, JORGE P.
VS.
GOOD LUCK REALTY
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
annexed decision + order.

FILED
AUG - 6 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/18/12

JUDITH J. GISCHE, J.S.C.
JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ 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: PART 10**

----- X
JORGE P. LEDESMA,

Plaintiff,

-against-

GOOD LUCK REALITY CORP., FEMME FATALE, INC
d/b/a COME, K CONSTRUCTION COMPANY, INC., and
LIAM TREANOR CONSTRUCTION CORP. d/b/a
LT CONSTRUCTION,

Defendants,

----- X
GOOD LUCK REALITY CORP.,

Defendant/Third-Party Plaintiff

- against -

EMMA CLEARY, FREDERICK Y. LOH, and
FEMME FATALE, INC.,

Third-Party Defendants.

----- X
Recitation, as required by CPLR 2219 [a], of the papers considered in review of this (these)
motion(s):

Papers

3P Def's n/m (3215) w/DK affirm, JM affid, exhs.....1

Numbered

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

The underlying action by Plaintiff, Jorge Ledesma, against Defendant, Good Luck Realty Corp. ("Good Luck" or "third-party plaintiff") is for damages resulting from injuries sustained due to a fall on the premises known as 173 Mott Street, New York, New York. Good Luck, the landlord, seeks to renew its prior motion for entry of a default judgment

Decision/Order

Index No.: 107578/2010

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

T.P. Index No.:

590400/2011

FILED

AUG - 6 2012

**COUNTY CLERK'S OFFICE
NEW YORK**

against third-party defendant and tenant, Femme Fatale, Inc. ("Femme Fatale") and for indemnification against third-party defendants, Emma Cleary ("Cleary") and Frederick Loh ("Loh") as guarantors under the lease between Good Luck and Femme Fatale (collectively "third-party defendants").

Good Luck's prior motion for a default judgment was dismissed without prejudice and with leave to renew within 90 days, because Good Luck did not comply with the additional service requirement pursuant to CPLR § 3215 and because it failed to establish its prima facie case (order, Gische, J, 2/15/12). Good Luck has timely renewed its motion. Furthermore, since this motion has been submitted without opposition, it will be decided on default.

Additional Mailing CPLR § 3215

CPLR § 3215 requires the party seeking a default judgment against another person to serve the defaulting party with additional notice at least twenty (20) days prior to the entry of a default judgment "by mailing a copy of the summons...to the defendant at his place of residence". CPLR § 3215(g)(i). The additional notice may be mailed "simultaneously with or after service of the summons on the defendant." CPLR § 3215(g)(ii). In its renewed motion for a default judgment, Good Luck maintains and submits proof that it has now complied with the additional notice requirement of CPLR § 3215(g) by mailing a copy of the third-party summons and complaint to the residence of both Cleary and Loh on April 20, 2012. In light of this evidence, service of process upon third-party defendants Cleary and Loh is proper.

In regard to the additional notice requirement for service of process on corporations, CPLR § 3215 requires that the party seeking a default judgment against a foreign or domestic corporation submit "an additional service of the summons by first class mail...upon

the defendant corporation at its last known address at least twenty days prior to the entry of judgment." CPLR § 3215(g)(4)(i).

Good Luck maintains that service was effected upon Femme Fatale by serving a copy of the summons and verified complaint upon the New York Secretary of State on June 16, 2011. In its renewed motion, Good Luck asserts and introduces evidence that the additional notice requirement for service upon Femme Fatale was completed on November 7, 2011, when it mailed a copy of the summons and complaint to Femme Fatale's place of business. In light of these facts, service of process upon third-party defendant Femme Fatale is proper as is the additional notice requirement.

Contractual Indemnification

The Court considers whether Good Luck has made out a prima facie claim for indemnification against the third party defendants.

In order to prevail on a motion for default judgment, the moving party must demonstrate that it has a prima facie cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd Dept. 2001). Failure to answer the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be drawn therefrom. Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 (2003). When one party claims a right to indemnification, "it is elementary that the right...depends on the specific language of the contract." Gillmore v. Duke/Flour Daniel, 221 A.D.2d 938, 939 (4th Dept. 1995).

Here, Good Luck is entitled to contractual indemnification from third-party defendant, Femme Fatale. The lease, dated October 5, 2007, between Good Luck and the named third-party defendants ("lease"), expressly provides that "tenant covenants and agrees to

indemnify..landlord...from and against any and all liability...to which they may be subject...by reason of...any injury to any person or persons...arising from or in connection with the occupancy" (lease ¶ 68). It is well-settled that when a contract is clear and unambiguous on its face, it must be enforced in accordance with the plain meaning of its terms. Greenfield v. Phillies Records, Inc., 98 N.Y.2d 562 (2002). Good Luck and Femme Fatale expressly contracted that Femme Fatale would indemnify Good Luck in the event that an injury to a third party occurs on the premises. Therefore, third-party plaintiff's first cause of action is granted on default against third-party defendant, Femme Fatale, as to liability. Damages, if any, shall be determined at an inquest, which shall be held at the same time as the underlying trial in this matter.

In the second cause of action, third-party plaintiff, Good Luck, seeks its attorneys' fees from third-party defendants. Parties are expected to bear their own legal fees, absent a statute, court rule, or contractual agreement to the contrary. I/M/O A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986). Here, the lease provides that the tenant agrees "to pay expenses, including attorneys' fees, in any action or proceeding brought by or against landlord arising out of or connected with this lease" (lease ¶ 52). Therefore, third-party plaintiff, Good Luck, has established its legal entitlement to attorneys' fees. The amount of such fees, if any, shall also be determined at the inquest, which shall be held at the same time as the trial in the underlying case.

Third-party defendants, Emma Cleary and Frederick Loh, also personally guaranteed "the full performance and observance of all the covenants, conditions and agreements" to be performed by Femme Fatale under the lease. The guaranty, which begins on page 13 of the lease, however, is incomplete as pages 14-16 are missing. Accordingly, the motion is

granted only to the extent of noting that Cleary and Loh are in default. Liability and damages may be proven at the inquest, which shall take place at the same time as the underlying trial in this matter.

In accordance herewith, it is hereby:

ORDERED that third-party plaintiff Good Luck Realty Corp.'s motion for entry of a default judgment against third-party defendant, Femme Fatale, Inc., is granted on default, as to liability on the first cause of action; damages, if any, shall be determined at the inquest, which shall be held at the same time as the trial of the underlying case; and it is further

ORDERED that third-party plaintiff Good Luck Realty Corp. is entitled to recover attorneys' fees from third-party defendant, Femme Fatale, Inc., in an amount, if any, which shall be determined at the inquest to be held at the same time as the trial underlying this case; and it is further

ORDERED that third-party plaintiff Good Luck Realty Corp.'s motion for entry of a default judgment against third-party defendants, Emma Clearly and Frederick Loh., is granted only to the extent of noting that Cleary and Loh are in default. Liability and damages may be proven at the inquest, which shall take place at the same time as the underlying trial in this matter; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
July 18, 2012

So Ordered:

FILED

AUG - 6 2012

**COUNTY CLERKS OFFICE
NEW YORK**

HON. JUDITH J. GISCHE, J.S.C.