

SKC Import Inc. v Top Wings Logistics (USA) Inc.

2016 NY Slip Op 30707(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 652109/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SKC IMPORT INC.,

Index No.
652109/2015

Plaintiff,

**DECISION
and ORDER**

- v -

TOP WINGS LOGISTICS (USA) INC.,
NCHB CORP.,
QITAI ENTERPRISE INC.,

Mot. Seq. #001

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This action arises from the nondelivery of a shipping container holding 3500 cases of vinyl gloves. Plaintiff SKC Import, Inc. ("SKC") filed a summons and complaint on June 15, 2015 seeking the recovery of Container No. SZLU9008129 (the "Container") with 3500 cases of vinyl gloves belonging to the plaintiff, and seeking damages incurred, including lost profits and foreseeable damages.

Defendants Top Wings Logistics (USA) Inc. ("Top Wings"), NCHB Corp. ("NCHB") and Qitai Enterprise Inc. ("Qitai") were served with the Summons and Complaint on June 24, 2015, June 29, 2015, and June 29, 2015, respectively. The affidavits of service were filed with the Court on July 14, 2015. Defendants have not appeared or interposed an answer.

Plaintiff now moves for an Order, pursuant to CPLR 3215, entering default judgment in favor of the Plaintiff, SKC Import Inc., and against defendants Top Wings, NCHB, and Qitai, in the amount of \$43,225, plus \$5775 in lost profits from plaintiff's sale of the gloves to Royal Disposable Import & Domestic, Inc. ("Royal"), and \$69,000 in foreseeable damages based on plaintiff's annual sales to Royal and plaintiff's loss of Royal's business due to this incident, together with fees, costs, and disbursements.

Plaintiff submits the attorney affirmation of Yinghui He, Esq., and the affidavit of Jianhua Feng, President of SKC, sworn to on December 17, 2015, annexing the following exhibits: (a) a purchase order dated September 9, 2014 between Royal and SKC, whereby Royal ordered 3500 vinyl gloves at a total cost of \$49,000; (b) a purchase order dated September 9, 2014 between SKC and vendor Practical Protective Plastic (“PPP”), whereby SKC ordered 3500 cases of vinyl gloves at a total cost of \$43,225; (c) the packing list, dated September 25, 2014, prepared by PPP Medical and Safety Products Co., Limited (“PPP Medical”), indicating that 3500 cases of vinyl gloves would be shipped from Shanghai, China on the vessel “E.R. Sweden 006A” on or about September 29, 2014; (d) the Bill of Lading, dated September 29, 2014, listing PPP Medical as the Shipper, Top Wings as the Consignee, SKC as the Notify Party, Logistics Pan-America Corp. (“LOPA”) as the Forwarding Agent; (e) the arrival notice issued by LOPA on October 16, 2014; (f) a U.S. Customs Service power of attorney form executed by SKC authorizing other customs brokers to act as its agent; (g) a delivery order issued by NCHB c/o Top Wings directing Better Way Transport to pick up the Container and deliver it to Royal; (h) a check in the amount of \$2,730.50 from SKC to Top Wings, and an invoice from Top Wings to SKC in the amount of \$491.50 for customs fees and charges; and (i) a Trailer Interchange Receipt Reprint listing Qitai as the trucking company that picked up the Container on October 31, 2014.

As alleged in the Verified Complaint, on September 9, 2014, plaintiff received a purchase order from Royal for 3500 cases of vinyl gloves. Shortly thereafter, plaintiff placed a purchase order with Chinese manufacturer PPP for 3500 cases of vinyl gloves.

On September 25, 2014, PPP shipped the gloves through LOPA on Vessel No. E.R. Sweden 006A. On September 29, 2014, LOPA issued a Bill of Lading listing plaintiff as the Notify Party and defendant Top Wings as the Consignee. On October 16, 2014, LOPA issued an arrival notice to plaintiff and Top Wings, indicating that the Container had been loaded at the Port of Shanghai on September 29, 2014 and would arrive at Maher Terminal of Port of Elizabeth, New Jersey on or about October 25, 2014.

On October 16, 2014, plaintiff directed Top Wings, plaintiff's shipping forwarder, to clear the customs fee. Plaintiff delivered the arrival notice to Top Wings with instructions for the Container to be released to Better Way Transport (USA) Inc. ("Better Way"), a trucking company that would deliver the Container to Royal at the address 5700 49 Pl. Maspeth, New York. Top Wings appointed defendant NCHB as its customs broker to clear the custom fee for the Container. On October 22, 2014, "NCHB CORP C/O TOP WINGS LOGISTICS USA INC" issued a delivery order to Better Way, plaintiff's pickup trucking company, to pick up the Container. On October 23, 2014, plaintiff paid customs clearance fees and all other charges related to customs clearance to Top Wings.

On November 3, 2014, plaintiff was informed that Better Way could not pick up the Container because the Container had been picked up by defendant Qitai on October 31, 2014. Plaintiff contacted Qitai several times and asked Qitai to return the Container. Qitai rejected plaintiff's request and held the Container for over 50 days. Qitai told plaintiff that NCHB had authorized Qitai to pick up the Container.

Plaintiff alleges that the vinyl gloves in the Container were custom-made for Royal with its trademark, and that plaintiff cannot resell the gloves to another supplier. Plaintiff seeks the return of the 3500 cases of vinyl gloves and damages in the amounts of \$43,225, the amount plaintiff paid to PPP for the gloves; \$5,775, the difference between plaintiff's purchase price and the resale price of \$49,000; and \$69,000, the amount plaintiff would have made annually from Royal's orders had it not lost Royal's business.

CPLR 3215 provides, in relevant part, "When a defendant has failed to appear ... the plaintiff may seek a default judgment against him." CPLR § 3215(a). A defaulting defendant admits all traversable allegations in the complaint, and thus concedes liability, but not damages. *Christian v. Hashmet Mgmt. Corp.*, 189 A.D.2d 597, 598 (1st Dept. 1993) (internal citations omitted). As the First Department explained in *Feffer v. Malpeso*, 210 A.D.2d 60, 61 (1st Dept. 1994):

CPLR § 3215 does not contemplate that default judgments are to be rubberstamped 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. The standard of proof on an application for judgment by default is not stringent, amounting only to some firsthand confirmation of the facts.

Although the plaintiff did not label the theory of his complaint, the Court has an obligation to inquire as to whether it states in some recognizable form any cause of action. *See Silberstein v. Presbyterian Hosp. in City of New York*, 95 A.D.2d 773, 774 (2d Dept. 1983); *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70–71 (2003) (“The affidavit, or verified complaint, need only allege enough facts to enable a court to determine that a viable cause of action exists.”).

Under New York law, allegations of the “unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” sound in conversion. *Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 44 (1995). To establish a cause of action in conversion, “the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff’s rights.” *Batsidis v. Batsidis*, 778 N.Y.S.2d 913, 913 (2d Dept. 2004).

The essential elements of a cause of action to recover damages for breach of contract are: (1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of that contract, and (4) resulting damages. *See JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dept. 2010).

Here, Plaintiff engaged Top Wings to be the shipping forwarder for 3500 cases of vinyl gloves. Plaintiff paid Top Wings \$2,730.50. NCHB and Top Wings issued a delivery order directing Better Way to pick up the 3500 cases of vinyl gloves. When Better Way arrived to pick the Container, the Container had already been picked up by Qitai. Qitai refused to return the merchandise to plaintiff. Based on the allegations in the Verified Complaint, the plaintiff has alleged facts sufficient to state causes of action for breach of contract and conversion.

Generally, damages for conversion are the value of the property at the time of conversion; however, lost profits are allowed “where either from the nature of the article or peculiar circumstances of the case they might reasonably be supposed to follow from the conversion.” *Rajeev Sindhvani, M.D., PLLC v. Coe Bus. Serv., Inc.*, 52 A.D.3d 674, 676, (2d Dept. 2008) (internal citations omitted).

It is well settled that in breach of contract actions “the nonbreaching party may recover general damages which are the natural and probable consequence of the breach.” *Bi-Econ. Mkt., Inc. v. Harleystville Ins. Co. of New York*, 10 N.Y.3d 187, 192, 886 N.E.2d 127, 130 (2008) (citing *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 319, 540 N.Y.S.2d 1, 537 N.E.2d 176 (1989)). Consequential damages are recoverable only upon a showing that they were foreseeable and within the contemplation of the parties at the time the contract was made. *Am. List Corp. v. U.S. News & World Report, Inc.*, 75 N.Y.2d 38, 43 (1989).

Here, plaintiff may recover general damages in the amount that plaintiff would have received from the resale of the 3500 cases of vinyl gloves had the shipment been delivered to Royal. *See Pacol (Canada) Ltd. v. M/V Minerva*, 523 F. Supp. 579, 582 (S.D.N.Y. 1981) (“It is proper to award the plaintiff anticipated profits where it has been satisfactorily shown that this amount was in fact lost and was not realizable by substitution of other goods.”). However, plaintiff has not established entitlement to consequential damages in the form of lost future profits based on the loss of plaintiff’s account with Royal. *See Kenford Co. v. Erie Cty.*, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 235 (1986) (loss of future profits as damages “may not be merely speculative, possible or imaginary” and must be “fairly within the contemplation of the parties to the contract at the time it was made”).

Wherefore, it is hereby,

ORDERED that Plaintiff’s motion for leave to enter a default judgment against Defendants Top Wings Logistics (USA) Inc., NCHB Corp., and Qitai Enterprise Inc. is granted without opposition; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff and against Defendants Top Wings Logistics (USA) Inc., NCHB Corp., and Qitai Enterprise Inc., in the amount of \$49,000, together with interest prayed as allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: APRIL 14, 2016

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EILEEN A. RAKOWER, J.S.C.