

Crowdpay.Us, Inc. v Midnight Gaming Corp.

2019 NY Slip Op 30232(U)

January 23, 2019

Supreme Court, New York County

Docket Number: 653908/2018

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

CROWDPAY.US, INC. Plaintiff,
- v -
MIDNIGHT GAMING CORPORATION ALSO KNOWN AS MCGRAW, INC., Defendant.
INDEX NO. 653908/2018
MOTION DATE 11/19/2018
MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 were read on this motion for JUDGMENT - DEFAULT

Upon the foregoing documents:

This is a breach of contract case. Plaintiff asserts that it entered into a license agreement with Defendant which Defendant allegedly breached. Defendant did not respond to the Complaint. Plaintiff seeks a default judgment pursuant to CPLR §3215. For the following reasons, Plaintiff's motion is granted.

Plaintiff has submitted unrebutted evidence demonstrating compliance with the requirements of CPLR § 3215. Therefore, Plaintiff's motion for default judgment is granted as to liability. As for damages, the relief sought in the third cause of action is for a sum certain of \$12,156, with statutory interest of 9% as of July 1, 2018. As such, Plaintiff's motion for default judgment is granted as to damages for the third cause of action (account stated). The relief sought for the first and second cause of action (breach of contract and specific performance) is not for a sum certain, and Plaintiff shall be directed to an Inquest to determine damages as to those claims.

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At the January 15, 2019 hearing, the Court expressed doubt as to whether a default judgment can or should be granted because the contract at issue contained a provision requiring that disputes arising under the contract “shall” be arbitrated. NYSCEF 11 (license agreement) at paragraph 6.5.¹ That doubt was driven in part by the general policy in favor of arbitration. *See, e.g., Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America*, 37 N.Y.2d 91, 95 (1975) (“It is always useful to bear in mind that the announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties.”)

At the hearing, Plaintiff’s counsel asserted that Defendant waived any right to arbitration by failing to respond to the Complaint. Counsel did not cite any authority in support of that position but noted – fairly – that he did not anticipate that the issue would be raised by the Court. Since the hearing, the Court has found authority indicating that a default judgment *can* be granted despite a binding arbitration provision. *See Charming Shoppes, Inc. v. Overland Constr., Inc.*, 186 Misc.2d 293, 297 (Sup. Ct., Monroe Cty. 2000) (“The Defendant effectively waived its right to enforce the arbitration clause when it failed to answer in response to the summons and complaint under circumstances where there was no reasonable excuse for such default.”) Upon reflection, the Court believes the proper approach is to grant the default motion

¹ Defendant argued at the hearing that another provision in the agreement – section 6.4 “Choice of Law; Forum Selection” – provides that this matter must be litigated in this court. NYSCEF 11 at 7. Viewed in isolation, the provision might be read to provide that this court is the exclusive forum for resolving instant dispute. However, that provision is followed immediately by a provision that unambiguously provides for mandatory arbitration. In order to read the provisions together, without rendering either of them meaningless, one might conclude that the contract provides that any issues *adjacent* to the mandatory arbitration (*e.g.*, enforcement of the award) must be litigated in this Court. For the reasons described herein, the Court need not to decide that issue at this time. The issue will be ripe if and when Defendant moves to vacate the default judgment and asserts a right to arbitrate.

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(given Plaintiff's compliance with CPLR §3215) and defer a ruling on whether Defendant has waived its right to arbitrate unless and until Defendant makes a motion to vacate the default judgment and asserts a right to arbitrate the dispute.

Accordingly, Plaintiff's motion for a default judgment is granted. Defendant may seek a vacatur of the instant default judgment if he can satisfy the requirements of CPLR §5015, CPLR §317, or any other relevant law.

Therefore, it is:

ORDERED that Plaintiff's Motion for a Default Judgment against Defendant is Granted, and the Clerk of the Court is directed to enter a judgment in favor of Plaintiff and against Defendant for the amount alleged in the third cause of action in the complaint, \$12,156.00, plus interest at 9% per annum from July 1, 2018, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Plaintiff's entitlement to damages under the first and second causes of action is referred to a JHO to hear and determine; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the attorneys' fees owed to Plaintiff; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/suptmanh at the

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"Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defendant within five days and that counsel for plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/ljd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

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This constitutes the Decision and Order of the Court.

1/23/2019

DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE