

American DG Energy Inc v DCCA, LLC

2020 NY Slip Op 33804(U)

November 13, 2020

Supreme Court, New York County

Docket Number: 652881/2020

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

[* 1]

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ANDREA MASLEY</u>	PART	IAS MOTION 48EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>652881/2020</u>
AMERICAN DG ENERGY INC,		MOTION DATE	_____
Plaintiff,		MOTION SEQ. NO.	<u>001</u>
- v -			
DCCA, LLC,		DECISION + ORDER ON	
Defendant.		MOTION	
-----X			

MASLEY, J.:

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

Plaintiff American DG Energy, Inc. moves, pursuant to CPLR 3215, for a default judgment against defendant DCCA, LLC¹ for failure to timely respond to plaintiff's July 2, 2020 verified complaint. Plaintiff seeks a default judgment on its claims for breach of contract (NYSCEF Doc. No. [NYSCEF] 7 ¶¶ 21 – 25) and an account stated (*id.* ¶¶ 26 – 30). To date, defendant has not answered, responded, or otherwise appeared.

"On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or

¹DCCA is the owner of real property located in Westchester County, New York and is commonly known as the Doral Arrowood Conference Center and Hotel (Doral Arrowood) which includes 114 acres, a 373 room hotel with more than 70,000 square feet of meeting space, a 9 hole golf course, a sport center, five tennis courts, squash and basketball courts, a restaurant, a pub, a café, and both indoor and outdoor swimming pools (NYSCEF 7, Complaint ¶ 3).

appearing" (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, *6-7 [Sup Ct, NY County 2018] [citations omitted]).

Proof of Service

CPLR 3215 (g)(4)(i) provides,

"When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment."

In support of this motion, plaintiff provides proof of service of the summons and the complaint upon the defendant on July 16, 2020 through service on the office of the New York Secretary of State (NYSCEF 14, Aff of Service). Plaintiff also satisfied the additional service requirement by serving the summons and complaint by first class mail at their defendant's known address on August 18, 2020 (NYSCEF 15, Aff of Service Pursuant to CPLR 3215 [g][4][i]).

Proof of Claim

Plaintiff adequately states a viable cause of action for breach of contract against defendant, and proof of the facts constituting the breach of contract claim against the defendants are set forth in the complaint, verified by plaintiff's General Counsel, John K. Whiting, IV (NYSCEF 7, Verified Complaint at 6), and the exhibits annexed to counsel's affidavit (NYSCEF 8-15, Exhibits B-I).

"To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [citation omitted]).

Plaintiff alleges the parties entered into an equipment lease agreement and two subsequent amendments to the lease agreement (NYSCEF 7, Verified Complaint ¶¶ 7, 8). Plaintiff also submits a copy of the equipment lease and amendments (NYSCEF 8, Equipment Lease; NYSCEF 9, First Amendment; NYSCEF 10, Second Amendment). Plaintiff also sufficiently alleges that it performed under these agreements (NYSCEF 7, Verified Complaint, ¶ 23). Plaintiff also sufficiently alleges that, in December 2018, defendant defaulted on its obligation to pay plaintiff pursuant to the equipment lease after having made the required payments for the prior years of the term of the equipment lease (*id.* ¶¶ 11, 13). As a result, plaintiff suffered damages in the amount of \$1,242,680.73 plus interest which included: (1) \$168,694.23 for accrued but unpaid thermal and electrical usage charges; (2) \$950,000 for the Stipulated Early Termination Charge; and (3) \$123,986.50 for 10 months of accrued but unpaid charges due for the Chillers (*id.* ¶ 18; see also NYSCEF 12, Aff of Receiver Appointed for Defendant; NYSCEF 13, Receiver's Estimate of Cash Needs).

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. An account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated." (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250-251 [1st Dept 2007] [internal quotation marks and citations omitted]). Here, the account stated is duplicative of the contract claim as it is "simply another means to attempt to collect under a disputed contract" (*Hagman v Swenson*, 149 AD3d 1, 7 [1st Dept 2017] [internal quotation marks and citation omitted]).

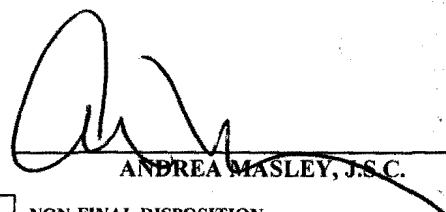
Proof of Default

Finally, plaintiff's attorney affirms that defendant has not appeared or responded to the complaint (NYSCEF 6, Solomon aff ¶ 28).

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment, motion sequence number 001, is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff American DG Energy, Inc. and against defendant DCCA, LLC in the sum of \$1,242,680.73 together with interest at the rate of 9% per annum from the date of January 27, 2020 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, for a total sum of \$ _____, and plaintiff shall have execution thereof.

11/13/2020
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE