

Jewelers Mut. Ins. Co. v S.H. Zell & Sons, LLC
2022 NY Slip Op 32722(U)
August 12, 2022
Supreme Court, New York County
Docket Number: Index No. 158591/2021
Judge: William Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY

PART

23

Justice

-----X

JEWELERS MUTUAL INSURANCE COMPANY ON ITS
OWN BEHALF AND AS SUBROGEE OF K & D
DIAMONDS, INC.,

Plaintiff,

- v -

S.H. ZELL & SONS, LLC, D/B/A S.H. ZELL & SONS,
JOSEPH ZELL,

Defendant.

-----X

INDEX NO. 158591/2021MOTION DATE 04/05/2022MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for INQUEST.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for JUDGMENT - DEFAULT.

In this subrogation action, plaintiff Jewelers Mutual Insurance Company, Inc., moves, pursuant to CPLR 3215, for a default judgment against defendant S.H. Zell & Sons, LLC d/b/a S.H. Zell & Sons (S.H. Zell). Submitted on the motion are the summons and complaint, affidavits of service, an affidavit from plaintiff's representative, and other exhibits. S.H. Zell has not submitted opposition. Defendant Joseph Zell, appearing *pro se*, has not opposed the motion.

A motion for a default judgment must be supported with "proof of service of the summons and complaint[,] ... proof of the facts constituting the claim, [and] the default" (CPLR 3215 [f]; *see also Gordon Law Firm, P.C. v Premier DNA Corp.*, 205 AD3d 416, 416 [1st Dept 2022]). "[A] complaint verified by someone or an affidavit executed by a party with personal

knowledge of the merits of the claim” satisfies this statutory requirement (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] [stating that “the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists”]). The plaintiff must also offer “some proof of liability ... to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*id.*). A party in default “admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff’s conclusion as to damage” (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

The affidavit of service sworn to on October 18, 2021 shows that plaintiff served S.H. Zell with process pursuant to Limited Liability Company Law § 303 by delivering the summons, complaint and notice of electronic filing to the Secretary of State on October 12, 2021 (NY St Cts Elec Filing [NYSCEF] Doc No. 8, Christopher A. Wong [Wong] affirmation, Ex B at 2). Service upon S.H. Zell was complete upon service to the Secretary of State (*see Darbeau v 136 W. 3rd St., LLC*, 144 AD3d 420, 420 [1st Dept 2016]). Plaintiff has established that S.H. Zell has not timely answered or otherwise appeared (*see* CPLR 320) or sought an extension of time to do so (*see* CPLR 3012).

Plaintiff has also furnished proof of additional service of the summons upon S.H. Zell at its last known address by first class mail on November 1, 2021 (NYSCEF Doc No. 12, Wong affirmation, Ex D). Additionally, plaintiff’s counsel advised S.H. Zell by letter dated December 6, 2021 that it had not answered the complaint (NYSCEF Doc No. 13, Wong affirmation, Ex E).

According to the complaint, plaintiff's subrogor, K & D Diamonds, Inc. (K & D), is engaged in the business of selling diamonds (NYSCEF Doc No. 8, Wong affirmation, Ex A, ¶ 5). Plaintiff issued an insurance policy to K & D insuring its jewelry from certain perils, such as theft (*id.*, ¶ 9). K & D extended credit to S.H. Zell (*id.*, ¶ 8). John Ganga (Ganga), a claim representative employed by plaintiff, avers that K & D delivered the following three diamonds to S.H. Zell on consignment memorialized in three separate memoranda:

1. Diamond no. ED-0744 under memoranda no. 69531 dated September 23, 2020;
2. Diamond no. RK-170 under memorandum no. 69596 dated October 6, 2020; and
3. Diamond no. EK-6863 under memorandum no. 69622 dated October 13, 2020

(NYSCEF Doc No. 7, Ganga aff, ¶¶ 5-7). Ganga avers that S.H. Zell failed to return the diamonds to K & D despite due demand, causing K & D to incur losses totaling \$50,737.40 (*id.*, ¶¶ 9-10). Ganga further avers that K & D presented plaintiff with a claim for property damage in the amount of \$50,737.40, and that plaintiff has paid the claim in full (*id.*, ¶ 12).

The complaint dated September 17, 2021 pleads five causes of action for: (1) breach of contract; (2) conversion; (3) breach of a personal guaranty; (4) treble and/or punitive damages; and (5) recovery of plaintiff's reasonable attorneys' fees (NYSCEF Doc No. 8, Wong affirmation, Ex A, ¶¶ 14-38). Plaintiff does not specify whether it is seeking a default judgment on all five causes of action, although it is evident that the third cause of action is inapplicable to S.H. Zell.

To prevail on a cause of action for breach of contract, the plaintiff must establish the existence of a valid contract, the plaintiff's performance, the defendant's breach and damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, Ganga and the complaint allude to three written memoranda memorializing the agreement between K & D and

S.H. Zell, but plaintiff has not furnished copies of those agreements to the court or specified which provision in each memorandum was allegedly breached (*see Gordon v Curtis*, 68 AD3d 549, 550 [1st Dept 2009]). Thus, plaintiff has not furnished adequate proof of the facts constituting this claim.

Turning to the second cause of action, conversion is “an intentional act of ‘dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel’” (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288 [2007] [citation omitted]). To prevail on a cause of action for conversion, the plaintiff must prove its “possessory right or interest in the property” and the “defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Here, plaintiff has established the merits of this cause of action.

The fourth cause of action seeks treble or punitive damages for S.H. Zell’s “willful, wanton, and malicious” conversion of K & D’s diamonds (NYSCEF Doc No. 8, ¶¶ 34-35). “Punitive damages are permitted when the defendant’s wrongdoing is not simply intentional but ‘evinces a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations’” (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007] [citation omitted]). A demand for punitive damages is not considered a separate cause of action but is considered part of the plaintiff’s damages on an underlying cause of action (*Jean v Chinitz*, 163 AD3d 497, 498 [1st Dept 2018]).

Plaintiff has not established that S.H. Zell was “motivated by actual malice or acted in reckless disregard of” plaintiff’s rights (*Rivera v City of New York*, 40 AD3d 334, 344 [1st Dept 2007], *lv dismissed* 16 NY3d 782 [2011] [internal quotation marks and citation omitted]).

Indeed, both the complaint and Ganga's affidavit are deficient in this regard. Accordingly, plaintiff has not furnished adequate proof of the facts constituting the fourth cause of action.

Finally, attorneys' fees are ordinarily considered incidents of litigation unless an agreement, statute or court rule allows the prevailing party to recover its fees (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Here, the complaint alludes to a provision in the Application of Credit that allows for the recovery of attorneys' fees and collection costs (NYSCEF Doc No. 8, ¶ 37). However, plaintiff has not furnished a copy of that agreement to the court nor was a copy annexed to the complaint filed on NYSCEF (Doc No. 1). In any event, the recovery of attorneys' fees is not considered a separate cause of action but as an element of contract damages (*Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006]). In view of plaintiff's failure to demonstrate the viability of its breach of contract claim, plaintiff has, likewise, failed to meet its burden on the fifth cause of action.

Accordingly, it is hereby

ORDERED that the motion brought by plaintiff Jewelers Mutual Insurance Company, Inc. on its own behalf and as subrogee of K & D Diamonds, Inc. for a default judgment against defendant S.H. Zell & Sons, LLC d/b/a S.H. Zell & Sons (motion sequence no. 001) is granted, without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment as to liability in favor of plaintiff against defendant S.H. Zell & Sons, LLC d/b/a S.H. Zell & Sons on the second cause of action, only; and it is further

ORDERED that that the taking of an inquest and assessment of damages against defendant S.H. Zell & Sons, LLC d/b/a S.H. Zell & Sons shall be conducted at the time of the trial or other disposition of the action against the remaining defendant.

<u>8/12/2022</u>			
DATE		WILLIAM PERRY, 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