

Ludwig v Wilder

2022 NY Slip Op 34419(U)

December 27, 2022

Supreme Court, New York County

Docket Number: Index No. 157994/2014

Judge: Melissa A. Crane

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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. MELISSA A. CRANE PART 60M

Justice

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ANDREW LUDWIG,

Plaintiff,

- v -

DAVID WILDER, SYNERGY GRAPHIX, INC., SYNERGY
NETWORKX, INC., WILDER & ASSOCIATES

Defendant.

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INDEX NO. 157994/2014

MOTION DATE 03/06/2020

MOTION SEQ. NO. 001

**DECISION, ORDER, AND
JUDGMENT AFTER INQUEST**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 13
were read on this motion to/for JUDGMENT - DEFAULT.

INTRODUCTION

Plaintiff is a former employee of Defendant Synergy Graphix, Inc. (“Synergy”). Plaintiff filed the complaint in this action on August 13, 2014, alleging causes of action for breach of contract and fraud based on Defendants’ alleged failure to pay Plaintiff wages, insurance benefits, and expense reimbursements to which he was entitled.

On September 15, 2014, the parties entered into a stipulation extending Defendants’ time to answer or otherwise respond to the complaint through November 17, 2014 (NYSCEF Doc. No. 7). Subsequently, the parties agreed to extend the time to respond to the complaint further, without a specific date, while the parties attempted to resolve the dispute (NYSCEF Doc. No. 4, ¶ 4). These attempts were unsuccessful. Plaintiff’s counsel sent Defendants a letter on November 12, 2019 stating that Plaintiff could not agree to further extensions and that the answer would be due on or before December 11, 2019 (NYSCEF Doc. No. 8). None of the Defendants filed an answer to the complaint by that date.

Plaintiff moved for entry of a default judgment on February 12, 2020 (NYSCEF Doc. Nos. 2-10). The court issued an order on April 30, 2020 granting Plaintiff's unopposed motion for a default judgment only as to liability and requiring an assessment of damages (NYSCEF Doc. No. 13). Continuing the pattern of delay in this action, Plaintiff waited two and a half more years to file his affirmation in support of his claim for damages.¹ Plaintiff's inquest papers were unopposed, and the court will now determine on submission Plaintiff's damages against Defendants for the causes action within the complaint.

DISCUSSION

Plaintiff has met his burden to establish his damages in the amount of \$62,454.19 with applicable interest. Even where the opposing party has defaulted in appearing or failed to answer, a plaintiff is still required to prove their actual damages sustained (*see Fernandez v Atias*, 50 Misc3d 127(A), *1 [1st Dept App Term 2015] [citing *Paulson v Kotsilimbas*, 124 AD2d 513, 514 [1st Dept 1986]).

Here, Plaintiff seeks a total amount of damages of \$149,038.18, plus \$17.11 per day after October 31, 2022—the date on which the inquest papers were filed—along with any statutory costs and expenses (NYSCEF Doc. No. 15, ¶ 18). This total amount is comprised of \$62,454.19 in wages, insurance benefits and unreimbursed expenses, \$81,583.99 in interest due as of October 31, 2022, and \$5,000.00 in attorney's fees in this case (NYSCEF Doc. No. 15, ¶¶ 6, 17).

¹ The court notes that the order granting default judgment required that Plaintiff, “within 20 days after the Clerks Office opens as to non-essential matters following the COVID-19 public health crisis,” serve the Clerk of the Trial Support Office a copy of the order with notice of entry and file the note of issue (NYSCEF Doc. No. 13). Plaintiff only filed note of issue on February 9, 2022 (NYSCEF Doc. No. 14). Despite Plaintiff's persistent and inexcusable delay, the court will not vacate the default judgment or dismiss the complaint based on Plaintiff's failure to timely file note of issue as the order required. While failure to comply with a court order can serve as a basis for dismissal, the order in this case did not provide notice to Plaintiff of the potential for such consequences if he failed to comply with the order (*see Armstrong v B.R. Fries & Associates, Inc.*, 95 AD3d 697, 697-698 [1st Dept 2012] [finding dismissal for failure to file note of issue as required by a status conference order improper because the order did not comply with CPLR 3216[b]'s requirement of 90-days' notice and notice that failure to file note of issue could be the basis for dismissal]).

Plaintiff supports this claim by attaching a promissory note executed by Synergy on September 8, 2009 (“Promissory Note”) in which Synergy promised to pay Plaintiff \$62,454.10², including \$53,956.14 in unpaid wages, \$7,204.95 in unpaid health insurance benefits, and \$1,293.10 in work-related expenses (NYSCEF Doc. No. 20, § 1.1). Plaintiff additionally proves his entitlement to interest. The Promissory Note required Synergy to pay the principal amount in monthly installments of \$4,000.00 on the first day of every month (NYSCEF Doc. No. 20, § 1.2[a]). In the event of a default, “interest [would] accrue on the unpaid principal balance from the date of the default until the date upon which all obligations [t]hereunder ha[d] been paid in full at the per annum rate of ten (10) percent” (NYSCEF Doc. No. 20, § 1.4). Here, Defendants failed to make any payments under the Promissory Note (NYSCEF Doc. No. 15, ¶¶ 9-10), entitling Plaintiff to interest at the rate of 10%.

However, Plaintiff arbitrarily selected October 8, 2009 as the date from which to calculate interest (*see* NYSCEF Doc. No. 15, ¶ 15). While the parties executed the Promissory Note on September 8, 2009, payments were due on the **first** day of every month (NYSCEF Doc. No. 20, § 1.2[a]). Therefore, interest should be calculated from October 1, 2009 until entry of judgment at the rate of 10%.

Further, Plaintiff failed to support his claim for \$5,000.00 in attorney’s fees. While the Promissory Note does state that if payment is not made under the note, “Corporation agrees to pay all costs of collection when incurred, including reasonable attorney’s fees” (NYSCEF Doc. No. 20, § 1.4), Plaintiff failed to provide the court with any documentation whatsoever to substantiate

² The total amount in the Promissory Note appears to be incorrect, as the \$53,956.14, \$7,204.95, and \$1,293.10 amounts set forth in the note total \$62,454.**19**—the total principal amount that Plaintiff is seeking (*see* NYSCEF Doc. No. 15, ¶ 15).

that those attorney’s fees were actually incurred. In the absence of any such documentation, the court cannot award those fees to Plaintiff.

Accordingly, it is

ORDERED and **ADJUDGED** that Plaintiff Andrew Ludwig have judgment and recover on the three causes of action within the complaint against Defendants David Wilder, Synergy Graphix, Inc. Synergy Networx, Inc., and Wilder & Associates, all with an address of 750 Third Avenue, Floor Nine, New York, New York 10017, in the amount of \$62,454.19, together with pre-judgment interest at an annual rate of 10% percent running from October 1, 2009, as well as post-judgment interest at the statutory rate, as calculated by the clerk of the court; and it is further

ORDERED that the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the clerk is directed to mark this matter disposed.

MELISSA A. CRANE, JSC

DATE: 12/27/2022

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify Decision, Order, and Judgment after Inquest)