

Sing for Serv., LLC v United Serv. Contr. Group, LLC
2023 NY Slip Op 30615(U)
March 1, 2023
Supreme Court, New York County
Docket Number: Index No. 654737/2022
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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SING FOR SERVICE, LLC,	INDEX NO. <u>654737/2022</u>
Plaintiff,	MOTION DATE <u>02/15/2023</u>
- v -	MOTION SEQ. NO. <u>001</u>

UNITED SERVICE CONTRACT GROUP, LLC, UNITED
SERVICE CONTRACT GROUP OF FLORIDA, INC., CRAIG
RUBINO, MALLORY RUBINO

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73 were read on this motion to/for JUDGMENT - DEFAULT.

Plaintiff SING for Service, LLC (d/b/a Mepco) moves, pursuant to CPLR 3215, for leave to enter a default judgment as against defendants United Service Contract Group, LLC (“USCG”), United Service Contract Group of Florida, Inc. (“USCGF”), Craig Rubino, and Mallory Rubino¹ (together, the “Defendants”). The unopposed motion is granted in part.

Plaintiff has established *prima facie* entitlement to a default judgment, as to liability only, against the Defendants on the first, second, and third causes of action in the complaint (Complaint [NYSCEF Doc. No. 2]). Specifically, plaintiff demonstrates, *prima facie*, that it entered into an Administrator Agreement and a Settlement Agreement (the “Agreements”) with defendants USCG and USCGF (together, the “USCG Entities”) (NYSCEF Doc. Nos. 45-46), that defendant Craig Rubino and Joseph Rubino personally guaranteed the USCG Entities’ obligations under the Settlement Agreement (Guaranty Agreements [NYSCEF Doc. Nos. 47-48]), and that the USCG Entities failed to satisfy their obligations under the Settlement Agreement.

Specifically, plaintiff established that the USCG Entities owed plaintiff “Refund Amounts” under the parties’ Administrator Agreement and that the USCG Entities agreed to pay certain Refund Amounts, designated “Potential Liabilities,” pursuant to the Settlement Agreement.

¹ Mallory Rubino is a named defendant in this case in her capacity as the personal representative of the Estate of Joseph Rubino (Order Appointing M. Rubino as Personal Rep. of J. Rubino Estate [NYSCEF Doc. No. 64]).

Plaintiff established that the USCG Entities failed to pay the amounts owed for Potential Liabilities under the Settlement Agreement when they became due on January 10, 2022, and that the individual defendants failed to satisfy their associated obligations under the Guaranties.

Plaintiff also demonstrates proof of service of the summons and complaint (NYSCEF Doc. Nos. 59, 61, 63, 65), proof of the facts constituting its claim for liability for breach of the agreements and guaranties (Affidavit of Kevin Diamond [NYSCEF Doc. No. 44]), proof of the defendants' default (Affidavit of Jesenia Ruiz de la Torre [NYSCEF Doc. No. 57]), proof of individual defendants' non-military service status (NYSCEF Doc. Nos. 63, 65) and proof of compliance with CPLR 3215(g) and 3215(j) (NYSCEF Doc. Nos. 66-67). Defendants have not yet appeared in this case, answered plaintiff's complaint, and have not opposed plaintiff's motion for default judgment.

While plaintiff is entitled to a default judgment against the defendants on the issue of liability for the first, second, and third causes of action, the court cannot determine the amount of damages on this record. Specifically, plaintiff's submissions establish that an event of default occurred under the Settlement Agreement when the USCG Entities failed to tender payment for Potential Liabilities on January 10, 2022. Plaintiff's damages calculations impermissibly include interest on interest, however, because plaintiff's calculations include both the 18% per annum prejudgment interest specified in the Agreements as well as the statutory 9% prejudgment interest available in New York.

While it does not appear that the Agreements here constitute a usurious loan, for example, both the 18% per annum interest rates specified in the Administrator Agreement (NYSCEF Doc. No. 45, Section 3 [c]) and the Settlement Agreement (NYSCEF Doc. No. 46, Section 3 [g]) are pre-judgment interest, despite the fact that the Agreements do not expressly label those rates "pre-judgment" or "pre-verdict" interest rates (*see e.g. NML Capital v Republic of Argentina*, 17 NY3d 250, 258-259 [2011]). The Administrator Agreement defines "Refund Amount" as

"(i) the amount of the Seller Cost funded by SING, plus (ii) the amount of Seller Profit funded by SING, plus (iii) the Discount Amount, plus (iv) all late fees and other fees and charges assessed pursuant to the provisions of the Payment Plan Agreement, less (v) any payments received by SING with respect to such Account"

(Administrator Agreement at 8).

Contrary to plaintiff's arguments in support of this motion, the "Refund Amount" is not inclusive of 18% interest, and the Administrator Agreement plainly demonstrates that the 18%

interest is a contractual pre-judgment interest rate (Administrative Agreement Section 3 [c] ["If USCG does not pay any amount owing pursuant to this Agreement within 30 days of the due date, interest shall accrue thereon at the rate of 18% per annum from the due date until payment is made."]]).

Plaintiff's calculations also fail to set forth the principal amount that the USCG Entities owed plaintiff as of the January 10, 2022 breach of the Settlement Agreement, so the court cannot readily correct the calculations itself for the first, second, or third causes of action for breach of the Settlement Agreement and the underlying Administrator Agreement and breach of the personal Guaranties.

Thus, the court grants plaintiff's motion to the extent that plaintiff is entitled to a default judgment against defendants on the issue of liability for the first, second, and third causes of action. Plaintiff's damages will need to be assessed at an inquest. Notably, plaintiff conceded, for the purposes of this motion, that it reduced the amounts due and owing from defendants by \$6 million to account for sums plaintiff recovered from USCG's insurer (Plaintiff's Memorandum of Law in Support [NYSCEF Doc. No. 43, pg. 12]). Plaintiff further abandoned its claim for attorneys' fees, costs, and disbursements (*id.*, pg. 9). Plaintiff did not move for a default judgment on the fourth and fifth causes of action and has not established prima facie entitlement to relief for those claims.

The court has considered the party's remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that plaintiff SING for Service, LLC's unopposed motion for default judgment is granted in part; and it is further

ORDERED that plaintiff is awarded a default judgment against defendants United Service Contract Group, LLC, United Service Contract Group of Florida, Inc., Craig Rubino, and Mallory Rubino, as the personal representative of Estate of Joseph Rubino, on the issue of liability only for the first, second, and third causes of action; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that an inquest on the issue of damages will be conducted on papers on 4/10/23. Any submissions in support of the inquest must be e-filed on NYSCEF and emailed to SFC-Part60@nycourts.gov, copying all counsel of record, by 4/9/23, otherwise waived (*see* Part

Rule 9 concerning inquest procedures). Plaintiff must file the Note of Issue by **4/3/23** in advance of the inquest. If the plaintiff does not timely file its submissions in accordance with this order, the court will remove this case from the calendar and mark the action as “disposed.”

3/1/2023

DATE



MELISSA A. CRANE, 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