

**Golden v Nichinson**

2024 NY Slip Op 32673(U)

July 4, 2024

Supreme Court, New York County

Docket Number: Index No. 656284/2023

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

DAVID GOLDEN,		INDEX NO. <u>656284/2023</u>
Plaintiff,		MOTION DATE _____
- v -		MOTION SEQ. NO. <u>001</u>
JASON NICHINSON, YE OLDE TIMEKEEPERS, INC., and THE SIGNATURE WATCH GROUP, INC.,		
Defendants.		<b>DECISION + ORDER ON MOTION</b>

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

Upon the foregoing documents, it is

In motion sequence number 001, plaintiff David Golden moves, pursuant to CPLR 3215, for a default judgment against defendants Jason Nichinson and Ye Olde Time Keepers, Inc. (Ye Olde).

“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 appearing.” (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, \*6-7 [Sup Ct, NY County 2018] [citations omitted].) “Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.”

(*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994] [citations omitted].)

### Proof of Service

Plaintiff submits proof that Nicholson and Ye Olde were served with the summons and complaint by personal service and service via the Office of the Secretary of State, respectively. (NYSCEF 13 & 11, aff of service.) Plaintiff also complied with the additional service requirements of CPLR 3215 (g)(4)(i). (NYSCEF 12 & 14, aff of additional service.)

### Proof of Facts

CPLR 3215 (f) requires a plaintiff to submit “proof of the facts constituting the claim, the default and the amount due . . . by affidavit made by the party.” “Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party’s attorney.” (CPLR 3215 [f].) Here, plaintiff submits an affidavit in support of his application. (NYSCEF 15, Golden aff.)

Plaintiff avers that he and nonparty Dennis Nicholson, individually and on behalf of Ye Olde and the Signature Watch Group, Inc. (Signature), entered into various agreements, including a Consignment Agreement and Co-Investing Agreement, to purchase and sell collectable jewelry and timepieces. (*Id.* ¶5.) Pursuant to the Consignment Agreement, Ye Olde and the Signature, held certain pieces owned by plaintiff. (*Id.* ¶21.) There were nine pieces co-owned by plaintiff, Ye Olde, and Signature under the Co-Investing Agreement. (*Id.* ¶22.) Plaintiff also entered into an agreement with Ye Olde regarding certain Chinese clocks that plaintiff purchased which were later determined to be counterfeit. (*Id.* ¶¶31-34.) Pursuant to this agreement, Ye Olde agreed to repay plaintiff for the clocks. (*Id.* ¶¶36-37; *see also* NYSCEF 18, Clock

Agreement.) Plaintiff avers he received partial payment under this Agreement and still owed \$289,875. (*Id.* ¶40.)

In June 2023, Dennis Nicholson passed away. (*Id.* ¶23.) Plaintiff states that he reached out to Jason Nicholson, Dennis' son, about the pieces at issue to no avail. (*Id.* ¶¶24-25.) Plaintiff brings this action against defendants for breach of the Consignment Agreement, breach of the Co-Investing Agreement, Replevin, Conversion (in the alternative), and breach of the Clock Agreement. (NYSCEF 10, Complaint.)

Plaintiff's affidavit is sufficient proof of the claims against Ye Olde for his three claims for breach of contract as plaintiff alleges "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].) However, there is not sufficient proof as to the breach of contract claims against Jason Nicholson as there is no allegation that Jason Nicholson was a party to the agreements at issue.

"To prevail on a claim of replevin, a plaintiff must demonstrate that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff." (*Stewart Family LLC v Stewart*, 184 AD3d 487, 490 [1st Dept 2020] [citation omitted].) Stated another way, "a plaintiff must establish a superior possessory right to property in a defendant's possession." (*Reif v Nagy*, 175 AD3d 107, 120 [1st Dept 2019] [citation omitted].)

Here, plaintiff has not identified specific items of personal property owned by him. (See *Khoury v Khoury*, 78 AD3d 903, 904 [2d Dept 2010] [plaintiff must clearly identify specific items of personal property that belonged to him].) Although plaintiff sufficiently

alleges that Ye Olde holds property owned by plaintiff pursuant to the Consignment Agreement, plaintiff only provides a general description of the property. (NYSCEF 15, Golden aff ¶¶21.) Further, as to the items subject to the Co-Investing Agreement, plaintiff admits that, pursuant to the Co-Investing Agreement, he co-owns those items with Ye Olde and Signature and it was agreed that Ye Olde and Signature would hold the items. (*Id.* ¶7.) Thus, plaintiff has not sufficiently alleged a superior possessory right as to items held pursuant to the Co-Investing Agreement.

Although plaintiff alleges that Jason Nicholson assumed control of Ye Olde and Signature, this allegation is based upon information and belief. (NYSCEF 10, Complaint ¶¶7, 18.) When the allegations supporting the claim are solely on upon information and belief, the default motion shall be denied. (*Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227, 228 [1st Dept 1997].) Thus, as to Jason Nicholson, a default judgment on this claim is denied.

To be successful on a conversion claim, plaintiff must show “(1) ... a possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. Even where possession of the property is originally lawful, a conversion occurs when the defendant refuses to return the property after a demand.” (*Core Dev. Group LLC v Spaho*, 199 AD3d 447, 448 [1st Dept 2021] [internal quotation marks and citations omitted].) Again, plaintiff must be able to specifically identify the items allegedly converted and has not sufficiently done so. (*Mohrman v Johns*, 210 AD3d 1075, 1076 [2d Dept 2022] [citations omitted] [dismissing conversion claim where plaintiff failed to “identify the specific property allegedly converted”].)

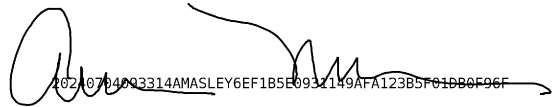
Proof of Default

Plaintiff submits sufficient proof of Ye Olde’s failure to answer the complaint or otherwise appear in this action. (NYSCEF 9, Sluka aff ¶¶ 15-16.)

Accordingly, it is

ORDERED that plaintiff’s motion for a default judgment is granted, in part, in so far as granting judgment on the first and second causes of action for breach of contract against defendant Ye Olde Time Keepers, Inc. and an inquest on damages shall be held. The parties are directed to contact the Part 48 Clerk for an inquest date on damages; and it is further

ORDERED that remainder of the motion is denied.



20240704093314AMASLEY6EF1B5E0932149AFA123B5F01B00F96F

7/4/2024  
DATE

\_\_\_\_\_  
ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: