

Kleyburn v Schneider

2010 NY Slip Op 30421(U)

February 25, 2010

Supreme Court, New York County

Docket Number: 600757/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: J.S.C. PART 10

Index Number : 600757/2009

KLEYNBURD, MAX

vs

SCHNEIDER, LAURIE

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
MAR 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

FEB 25 2010

Dated: _____

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
Max Kleynburd and Marina Kleynburd,

Plaintiffs,

-against-

Laurie Schneider, Craig Peterson,
Darrell Martin, Janitorial Close-Out LLC,
Sax + Sounds Productions Inc., All Clean
Janitorial Supply, Inc., Janitorial Close-Out
City LLC, Cambia Inc. and Janitorial Close
Out Citigroup,

Defendants.
-----X

Decision/Order

Index No.: 600757/09
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers

Pltf's n/m [§ 3215] w/PA affirm, MK affid, exhibits

Numbered

FILED

1
MAR 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for, *inter alia*, breach of contract, common law fraud, and negligent misrepresentation. Defendants Craig Peterson and Darrell Martin are the only defendants who have answered and appeared in this action. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor and against defendant, Laurie Schneider.

This action was commenced with the filing of the summons and complaint on March 11, 2009, pursuant to CPLR § 305(a). Although there is due proof of service of

the underlying summons and verified complaint, as well as the instant motion, Laurie Schneider has not answered or appeared and her time to do so has expired. It has not been extended by the court. This motion is before the court unopposed although there is due proof of service on Ms. Schneider and the other defendants.

Plaintiffs have also filed proof they complied with the additional notice requirements of CPLR § 3215 [g] since they are seeking a money judgment against Ms. Schneider. Therefore, Laurie Schneider has defaulted in this action and on the motion.

Applicable Law

Plaintiffs are entitled to a default judgment against the defendant, provided they otherwise demonstrate that they have a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd dept. 2001). The defendant's default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1984). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 AD2d 227 (1st Dept 1997)]; and CPLR § 3215 (f) or a complaint verified by a person with actual knowledge of the facts surrounding the claim [Hazim v. Winter, 234 AD2d 422 (2d Dept 1996)]; and CPLR § 105 (u)].

Plaintiffs provide the sworn affidavit of Max Kleyburd, a plaintiff in the underlying action, who has personal knowledge of the facts surrounding the claim. The following facts have been established by the plaintiffs in the summons and complaint, a copy of the

investment agreement, and through the sworn affidavit of Max Kleynburd:

Discussion

Plaintiffs assert a cause of action against defendant for, *inter alia*, breach of contract, common law fraud, and negligent misrepresentation. Plaintiffs claim that as a result of a "Ponzi Scheme" orchestrated by the defendants, plaintiffs lost their \$408,000.00. Plaintiffs provide a copy of their investment agreement (the "Agreement") with the defendants. The Agreement, dated January 15, 2009, is only signed by Craig Peterson and provides, in relevant part, that:

Paragraph 1: "On this date of 15 January, 2009 Max Kleynburd of Max Kleynburd Ventures, Inc. . . . agrees to invest \$250,000 (two hundred fifty thousand dollars) with All Clean Janitorial Supply Inc. and Janitorial Close-Out City, LLC. . . . All Clean Janitorial Supplies/Janitorial Close-Out City agrees to issue appropriate earnings/tax forms to Investor in a timely manner for all profits earned on principal at the end of each calendar year."

Paragraph 1 of the Agreement does not indicate that this is an agreement between plaintiffs and Ms. Schneider. Rather, it states that it is an agreement between plaintiffs and All Clean Janitorial Supply Inc. and Janitorial Close-Out City, LLC. In fact, the only section of the Agreement that even makes reference to Laurie Schneider is on page 2, which provides:

"Guarantee of Funds: Laurie Schneider and Craig Peterson of All Clean Janitorial Supply and Janitorial Close-Out City, LLC, guarantee full payment of both profit and original investment to be returned to the Investor within approximately six months from the date of this agreement (no later than July 15, 2009)."

However, Ms. Schneider is not a party to this contract and her signature is not affixed thereto. Additionally, plaintiffs fail to provide documentary evidence or proof that

Ms. Schneider is responsible for plaintiffs losing their \$408,000.00 investment.

Although plaintiffs have established that Ms. Schneider is in default, plaintiffs have not set forth a *prima facie* case.

The motion is therefore granted only to the extent that defendant Laurie Schneider is in default and that plaintiffs may prove, at inquest, the right to the relief sought. The inquest shall be held at the time of the trial in the underlying matter.

This shall constitute the decision and order of the Court.

Dated: New York, New York
February 25, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
MAR 04 2010
NEW YORK
COUNTY CLERK'S OFFICE