

Rodriguez v Diaz

2012 NY Slip Op 31099(U)

April 11, 2012

Sup Ct, Nassau County

Docket Number: 24990-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
TONY RODRIGUEZ,

Plaintiff,

- against -

VLADIMIR DIAZ,

Defendant.

-----x

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No. 24990-09
Mot. Seq. No. 2
Submission Date: 2/27/12**

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x

This matter is before the Court for decision on the motion filed by Plaintiff Tony Rodriguez ("Rodriguez" or "Plaintiff") on February 17, 2012 and submitted on February 27, 2012. For the reasons set forth below, the Court grants Plaintiff's motion for judgment against Defendant on the first cause of action in the Complaint in the amount of \$401,147.56, plus statutory interest from November 1, 2011 until the date of judgment.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3215, for an Order of judgment on default against Defendant Vladimir Diaz ("Diaz" or "Defendant").

Defendant has not appeared in this action or responded to Plaintiff's motion.

B. The Parties' History

This action was the subject of a prior decision by the Court (Warshawsky, J.) dated

June 21, 2010 (“Prior Decision”) (Ex. E to Stone Aff. in Supp.) in which Justice Warshawsky denied Plaintiff’s prior motion for a default judgment (“Prior Motion”) “without prejudice to renewal upon proper papers in accordance with [CPLR] § 3205(f).” In the Prior Decision, Justice Warshawsky¹ outlined the allegations in the Complaint (*id.* at Ex. A) as follows: Plaintiff sold a supermarket to Defendant and received an indemnification agreement that Plaintiff would be reimbursed for any losses sustained by him as a result of the operation of the market. Plaintiff, in the unverified Complaint, alleges that Defendant instructed National Grid not to change the customer name for the supermarket, and caused Plaintiff to be billed for the expenses of a second business owned by Defendant.

The Complaint contains two (2) causes of action: 1) Defendant breached the Agreement by failing to indemnify Plaintiff for his losses as outlined in the Complaint; and 2) a request for a constructive trust as to certain assets. Justice Warshawsky, in denying the Prior Motion, noted that Plaintiff had failed to provide an accompanying affidavit from Plaintiff as to the factual basis for the claims. In support of the motion now before the Court, Plaintiff has provided an Affidavit in Support (Ex. F to Stone Aff. in Supp.). In that Affidavit, Plaintiff affirms that he has operated the C-Town Supermarket located at 306 Post Avenue, Westbury, New York (“Store”). Before July 11, 2008, Plaintiff owned BJKM Supermarket Corp. (“BJKM”) which then operated the Store. After July 11, 2008, Defendant owned the Store, having purchased the assets of BJKM (“Purchase”).

Plaintiff affirms, further, that as a part of the Purchase, Defendant gave Plaintiff an Indemnification Agreement dated July 11, 2008 (“Agreement”). Pursuant to the Agreement, Defendant promised that if either BJKM or Rodriguez incurred any financial loss as a result of the Purchase and subsequent operation of the Store, Diaz would indemnify them. As BJKM has since been dissolved, Rodriguez is the only remaining indemnified party.

Defendant was not successful in operating the Store, and its assets were foreclosed on by his principal lender. When Defendant began operating the Store, it contained extensive supermarket inventory. As reflected by the inventory provided (Ex. G to Rodriguez Aff. in

¹ Justice Warshawsky recently retired from the Nassau County Supreme Court.

Supp.), Defendant was responsible for \$299,696.00 in inventory which is itemized by category. With the discount to value, as noted on the inventory documentation, Defendant owed Plaintiff the sum of \$238,868, which sum is guaranteed by a Promissory Note dated July 11, 2008 (*id.* at Ex. H).

Plaintiff avers, further, that Defendant failed to pay him, notwithstanding the March 9, 2009 demand letter sent by his attorney (Ex. I to Rodriguez Aff. in Supp.). Plaintiff also affirms that Defendant 1) advised National Grid that the electricity charges were not to be changed, and that BJKM was still responsible for \$68,958.85 in charges reflected on the Long Island Power Authority invoice (*id.* at Ex. J.); 2) told J & J Farms Creamery Co., Inc. that BJKM was responsible for \$5,816.48 in charges for products used by Mr. Diaz's company, as reflected on the correspondence provided (*id.* at Ex. K); and 3) failed to make payments to Newsday in the amount of \$511.02 for advertising, as required by the invoice provided (*id.* at Ex. L). Plaintiff requests that he also be granted judgment for these expenses, for which Defendant was responsible pursuant to the parties' Agreement, in the amount of \$75,286.35.

In sum, Plaintiff requests judgment for the following sums: 1) \$238,868 for the value of the inventory, plus interest of 9% from July 11, 2008 to November 1, 2011 amounting to \$71,032.26, 2) \$68,958.85 for subsequent electricity charges, plus interest of 9% from June 22, 2009 to November 1, 2011 amounting to \$14,639.60, 3) \$5,816.48 for subsequent dairy charges, plus interest of 9% from June 16, 2009 to November 1, 2011 amounting to \$1,225.71, and 4) \$511.02 for subsequent advertising charges, plus interest of 9% from October 4, 2009 to November 1, 2011 amounting to \$95.64. Plaintiff affirms that the total owed is \$401,147.56, and that the per diem on this total, at 9% interest, is \$98.91 for each day after November 1, 2011. Plaintiff seeks judgment in the amount of \$401,147.56 plus per diem interest from November 1, 2011 until the date of judgment.

Counsel for Plaintiff ("Counsel") affirms that Defendant was served with the summons and complaint on December 8, 2009, as reflected by the affidavit of service provided (Ex. B to Stone Aff. in Supp.). By February 16, 2010, Defendant had not responded to the Complaint, at which time Counsel sent a letter to Defendant by regular and certified mail (*id.* at Ex. C) that notified Defendant that Plaintiff would see judgment by default if Defendant failed to respond by

February 24, 2010. Counsel included with that letter a second copy of the summons, pursuant to CPLR § 3215, and a copy of the affidavit of service. The return receipt card was returned, proving Defendant's receipt of the notice (*id.* at Ex. D).

Plaintiff then filed the Prior Motion, which Justice Warshawsky denied in the Prior Decision. Pursuant to the Prior Decision, Plaintiff has provided an Affidavit in Support of the instant motion.

C. The Parties' Positions

Plaintiff submits that he has demonstrated his right to judgment against Defendant by presenting proof of service of the summons and complaint, and providing Plaintiff's affidavit which sets forth the facts constituting the claim, Defendant's default and the amount due.

Defendant has not appeared in this action, and has submitted no response to Plaintiff's motion.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Relevant Causes of Action

A cause of action for breach of contract requires allegations of the existence of a contract, plaintiff's performance under the contract, defendant's breach of the contract and resulting damages. *JPMorgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dept. 2010).

A constructive trust is an equitable remedy, and its purpose is to prevent unjust enrichment. *Marini v. Lombardo*, 79 A.D.3d 932, 933 (2d Dept. 2010), *lv. app. den.*, 17 N.Y.3d 705 (2011). In general, to impose a constructive trust, four factors must be established: 1) a confidential or fiduciary relationship, 2) a promise, 3) a transfer in reliance thereon, and 4) unjust enrichment. *Id.* As these elements serve only as a guideline, however, a constructive trust may still be imposed even if all of the elements are not established. *Id.*

C. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion for a default judgment against Defendant on the first cause of action in the Complaint, based on the Court's conclusion that Plaintiff has presented proof of service of the summons and complaint, and the Affidavit of Plaintiff which sets forth the facts constituting the claim, Defendant's default and the amount due. In addition, Plaintiff has made a *prima facie* showing of a cause of action against Defendant on the first cause of action in the Complaint by demonstrating that Defendant breached the parties' Agreement, and providing documentation supporting his computation of the sums due.

The Court declines to grant Plaintiff judgment on the second cause of action in the Complaint, which asks for the imposition of a constructive trust on certain assets, based in part on Plaintiff's allegation that Defendant commingled certain business assets with his personal assets. The Court denies Plaintiff's motion for judgment on the second cause of action, both because there is no evidence of a confidential or fiduciary relationship between the parties, and because there is no evidence before the Court regarding the alleged commingling of funds by Defendant.

All matters not decided herein are hereby denied.

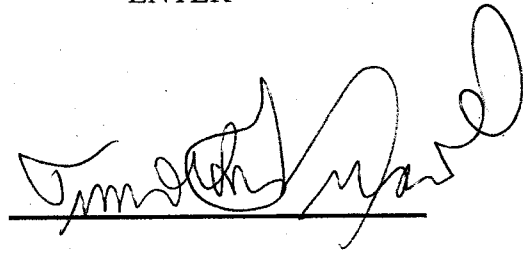
This constitutes the decision and order of the Court.

Submit judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY

April 11, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

XX

ENTERED

APR 16 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**