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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 100429/2009
ZHONG, MICHAEL
vs
CAPSTONE BUSINESS CREDIT
Sequence Number : 009
___ DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

AUG 17 2012

Dated: 8/17/12

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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Michael Zhong,

Plaintiff (s),

*-against-*

Capstone Business Credit, LLC, John Rice, III, Yecheskel Menashe, Esq., and "John Doe,"

Defendant (s).

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**DECISION/ORDER**
Index No.: 100429-2009
Seq. No.: 008

**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 | Numbered |
|---|---|
| Pltf's n/m (3215) w/WXZ affirm, MZ affid, exhs | 1 |
| Regina's affid in opp w/exhs | 2 |
| Pltf's affirm for extension of time w/WXZ affirm | 3 |
| Pltf's reply w/WXZ affirm, exh | 4 |

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

The reader is presumed familiar with the underlying facts of the parties' dispute. The court granted plaintiff's prior motion for permission to serve an amended complaint to assert claims against two new defendants ("Regina" and "Narmin Crowne, Inc.") (Order, Gische J., 8/12/11). The time to serve the defendants was extended by the court in its order dated The time to serve the defendants was extended by court order (Order, Gische J., 2/29/12).

Plaintiff has now served the amended summons and complaint[1]. Regina was

[1]The court observes that plaintiff has self styled the caption by putting the newly named defendants first. While there may be nothing technically wrong with this, that amended caption

served personally on April 6, 2012. At the same time Regina accepted service on behalf of Narmin, in his capacity as an officer/director/agent of that corporation. Narmin, a domestic corporation was previously served (October 25, 2011) through the Secretary of State.

Following service, Armand P. Mele, Esq., sent plaintiff's counsel correspondence dated May 4, 2012 stating that "[we] represent Frank Regina ("Regina") and Narmin Crowne, Inc. ("Narmin"). We are writing to request...a two week adjournment of time in which they may serve you with an Answer to the Amended Verified Complaint." The balance of the letter states that Attorney's Mele's clients were improperly served, but that they "agreed to waive their jurisdictional defenses in this matter, including improper service of process, in exchange for your agreeing to extend their time to Answer or otherwise move with respect to the Amended Verified Complaint up to and including May 21, 2012." Following that correspondence, the attorneys for each side entered into a written stipulation dated May 7, 2012 on those terms.

The motion at bar is for entry of a default judgment against Regina and Narmin because they have not answered the complaint, despite the agreed to extension of time to do so.

Regina and Narmin have appeared by counsel. After this motion was served, however, Regina's attorney wrote to plaintiff's counsel on May 30, 2012, requesting that plaintiff's counsel withdraw the motion. In that correspondence, Attorney Mele warns plaintiff's counsel that he is considering filing a motion for sanctions against plaintiff and

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is not reflected in SCROLL and the lead defendant continues to be Capstone.

plaintiff's attorney on the basis that Regina has answered the Amended Verified complaint. In earlier correspondence, Attorney Mele states the firm does not represent the defendants and that they are proceeding pro se.

Regina has, in fact, prepared an answer and opposition papers stating he is "temporarily acting pro se..." Both are submitted on his behalf and on behalf of Narmin. Since Narmin cannot appear without an attorney, as it is a corporation (CPLR 321 [a]), the answer and opposition on Narmin's behalf is a nullity. Therefore, Narmin is in default of answering the complaint and opposing this motion.

A party cannot sometimes appear by an attorney and then proceed as if s/he were unrepresented. Partly this is to avoid the pitfalls of DR 7-104, prohibiting direct communications by an attorney with a party the lawyer knows to be represented by counsel. This is also to protect the client because an attorney is not relieved unless discharged by the client, by order of the court granting a motion to be relieved as counsel, or by consent to change attorneys filed with the court (CPLR § 321 [b]).

Regina's answer is dated May 21, 2012. It was not until May 29, 2012 that Attorney Mele notified plaintiff's counsel that the firm does not represent Regina. Since there has been no substitution of counsel filed with the court, Junge & Mele, LLP is still the attorney of record for Regina. Therefore, Regina's *pro se* answer and opposition is a nullity as well and this motion is before the court without opposition.

On a motion for default judgment, the moving party must establish the prima facie elements of the cause of action (see, Joosten v. Gale, 129 A.D.2d 531 [1st Dept 1987]). Plaintiff alleges that defendants committed a fraud by falsely representing they were copper dealers and had copper to sell to the plaintiff. After making payment of

approximately 1 million dollars, plaintiff discovered there had never been any copper for sale and that he had been defrauded. Plaintiff has checked with the Chinese Commissioner of Customs to see whether there was any shipment of copper from Russia to China and discovered there was none. According to plaintiff, he made two separate payments for the fictitious copper. The first payment was for 4,500,000 RMB (approximately $700,00 as of April 2007). The second payment was in U.S dollars ($277,650), made in May 2007. The payments were wired to Regina and Narmin. Regina is the principal of Narmin.

In the court's August 12, 2011 order, plaintiff was allowed to serve an amended complaint to assert fraud and conspiracy claims against the new defendants, although they were dismissed against the other defendants. The Amended complaint contains the following claims against Regina and Narmin:

Plaintiff's 1st cause of action is for fraud and his 2nd cause of action is for "conspiracy to defraud." The necessary elements of a fraud cause of action are that there has been a misrepresentation of material facts, falsity, scienter, reliance and injury (Standish-Parkin v. Lorillard Tobacco Co., 12 AD3d 301 [1st Dept 2004]). A "conspiracy to defraud" is punishable as a felony under Penal Law § 190.65 and there is no private right of action because it is prosecuted by the state (People v. First Meridian Planning Corp., 86 NY2d 608 [1995]). A "conspiracy to commit fraud" is, however, a civil action than can be pursued by a private individual.

Assuming that plaintiff's claim is really for a "conspiracy to commit fraud," he must allege facts showing a sufficient connection between the actions of the named individuals and the fraud alleged, such as a scheme or plan in common (Agostini v.

Sobol, 304 AD2d 395 [1st Dept. 2003]; *see*, Callahan v. Gutowski, 111 AD2d 464 [3rd Dept. 1985]). These requirements are satisfied, based upon the unopposed facts asserted in the Amended complaint and plaintiff is entitled to a default judgment on his 1st cause of action and on his 2nd cause of action, only to the extent it is deemed a claim for "conspiracy to commit fraud."

Plaintiff's 3rd cause of action is based upon an alleged violation of General Business Law § 349. GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." It is an intentionally broad statue, applying "to virtually all economic activity." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324 (2002). To establish a violation of GBL § 349 the conduct complained of must be consumer-oriented and have a broad impact on consumers at large as compared to a private contract dispute that is unique or particular to one of the parties to the lawsuit. New York University v. Continental Ins. Co., 87 NY2d 308, 324 (1995); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 NY2d 20, 25 (1995).

Even if plaintiff can prove at trial that he is a consumer within the meaning and spirit of the law, the deceptive acts alleged only involve him, not the public at large. Therefore, plaintiff's motion for entry of a default judgment on his 3rd cause of action against Regina and Narmin is denied and this claim against Regina and Narmin is severed and dismissed.

Plaintiff's 4th cause of action is for breach of fiduciary duty and his 5th cause of action is for punitive damages. Plaintiff's motion for a default judgment on each of these claims is denied. There is no fiduciary relationship among plaintiff, Regina and

Narmin. In deciding whether a fiduciary relationship exists between parties, the court looks at "whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge" (Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 12 [1998]). Even accepting plaintiff's facts, they do not establish this cause of action.

In order to recover punitive damages, a plaintiff must establish by clear, unequivocal and convincing evidence, "egregious and willful conduct" that is "'morally culpable, or is actuated by evil and reprehensible motives" (Munoz v. Puretz, 301 A.D.2d 382, 384 [1st Dept. 2003] internal citations omitted). Plaintiff has failed to state sufficient facts to prove his claim for enhanced or exemplary damages. The actions by the defendants do not rise to the level of being a recklessness or a conscious disregard of the rights of others (Hartford Accident & Indemnity Co. v. Hempstead, 48 N.Y.2d 218 [1979] and punitive damages are not available for ordinary negligence. Therefore, plaintiff's motion for default on his punitive damages claim is denied and this claims is severed and dismissed.

Although plaintiff has established defendants' liability, the amount of damages he is entitled to must be decided at a hearing. The issue of damages is will be heard at the time of trial.

**Conclusion**

It is hereby,

ORDERED that plaintiff's motion for entry of a default judgment against defendants Frank Regina and Narmin Crowne, Inc. is granted on the issue of liability

and that there will be an inquest on damages at the time of trial; and it is further

ORDERED that any relief any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 17, 2012

So Ordered:

Hon. Judith J. Gische, JSC