

Debs Corp. v Agenti, Inc.

2013 NY Slip Op 33248(U)

December 17, 2013

Supreme Court, New York County

Docket Number: 653197/2013

Judge: O. Peter Sherwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

DEBS CORPORATION, et al.,

Plaintiffs,

-against-

ARGENTI, INC.,

Defendant.

INDEX NO. 653197/2013

MOTION DATE Oct. 23, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for a default judgment.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

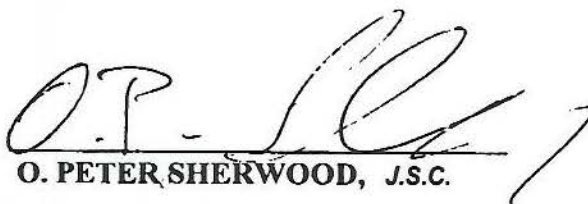
PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for a default judgment is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
13_653197

Dated: December 17, 2013


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49**

-----X
DEBS CORPORATION, SOBHI EL DEBS,

Plaintiffs,

-against-

ARGENTI, INC.,

Defendant.
-----X

**DECISION AND
ORDER**

**Index No. 653197/2013
Motion Sequence 001**

O. PETER SHERWOOD, J.:

On this motion for default pursuant to CPLR 3215(b), plaintiffs, Debs Corporation and Sobhi El Debs (“Debs”) allege that the defendant Argenti, Inc. (“Argenti”) failed to respond to the three causes of action in the complaint, (1) breach of contract, (2) account stated, and (3) unjust enrichment. The motion is unopposed.

I. BACKGROUND

Argenti was a manufacturer of ladies garments who created samples of ladies clothing, solicited orders for clothing based on those samples, and filled those orders from goods manufactured overseas. In January 2009, Argenti approached Debs and solicited an arrangement whereby Debs would finance the merchandise to be imported. In return, Argenti agreed to pay an invoice price for the goods plus a percentage of the net profit. Between March 31, 2010 and July 3, 2012, Debs provided goods to Argenti, who failed to pay the invoice price or any portion of the net profit.

Debs commenced this action by filing of a summons and complaint on September 16, 2013. Argenti did not answer or otherwise appear. Debs filed the instant motion for default on October 23, 2013, returnable on November 14, 2013 for the sum of \$2,106,713.82 plus interest, representing the invoice price of the goods provided. Debs waives his entitlement to seek the net profit (Strassberg

affirmation at 4 n 1). Argenti has not opposed the motion.

II. DISCUSSION

A. Default Judgment

It is well settled that a party may obtain a default judgment against a Defendant who fails to appear or answer (CPLR 3215 [a]). On an application for a default judgment, the moving party must present proof of service of the summons and complaint, proof of the claim by a person with personal knowledge of the facts and proof of the default (*see* CPLR 3215 [f]; *Woodsen v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]).

The affidavit of service is *prima facie* evidence that defendant was properly served (*see Benjamin v Avis Rent-A-Car Systems*, 208 AD2d 449, 450 [1st Dept 1994]; *see also 425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 845 [2d Dept 2008]). Plaintiffs have submitted an affidavit of service dated September 17, 2013, evidencing service on the New York Secretary of State. Plaintiffs completed an additional mailing of the summons and verified complaint on September 19, 2013. Plaintiffs have also submitted an affidavit of additional service pursuant to CPLR 3215 dated October 23, 2013. In the absence of any opposition the Court finds that Plaintiff properly effectuated service upon Defendant pursuant to Business Corporation Law § 306 (b) (*see Perkins v 686 Halsey Food Corp.*, 36 AD3d 881 [2d Dept 2007]; *Shimel v 5 South Fulton Ave. Corp.*, 11 AD3d 527 [2d Dept 2004]) and CPLR 308. Therefore, jurisdiction over Argenti has been obtained. Under CPLR 320(a), Defendant was required to answer or otherwise appear in this action within 30 days of service, which Defendant failed to do. Having failed to answer the allegations of the complaint, Defendant is deemed to have admitted “all traversable allegations in the complaint, including the basic allegation of liability” (*Curiale v*

Andra Ins. Co., 88 NY2d 268, 279 [1996]).

Nevertheless, in order to be entitled to a default judgment, Plaintiff must allege enough facts to enable a court to determine whether it has established a prima facie case (*see, Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept. 2007]; *Dyno v Rose*, 260 AD2d 694 [3d Dept. 1999]). The Court may consider the complaint, affidavits and affirmations submitted by Plaintiff in support of the motion for default in order to determine whether the Plaintiff has a viable cause of action (*see McGee v Dunn*, 75 AD3d 624, 625 [2d Dept 2010]). “Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default” (*Venturella-Ferretti v Ferretti*, 74 AD3d 792 [2d Dept 2010], quoting *Cardo v Board of Mgrs. Jefferson Vil. Condo*, 29 AD3d 930 [2d Dept 2006]).

B. Breach of Contract

The elements for a cause of action for breach of contract are: (1) the existence of a contract; (2) plaintiff's performance under the contract; (3) defendants' failure to perform; and (4) damages resulting from the failure to perform (*see JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694 [2d Dept. 1986]).

Here, plaintiffs' complaint, their attorney's affirmation and the exhibits annexed thereto are sufficient to establish a prima facie case for breach of contract against Argenti.

Based upon the foregoing, it is

ORDERED, that plaintiffs' motion for a default judgment as to defendant Aurora (motion sequence no. 001) is GRANTED and it is further;

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiffs DEBS CORPORATION and SOBHI EL DEBS and against ARGENTI, INC., in the principal


amount of \$2,106,713.82, together with interest until entry of judgment at the statutory rate in the sum of \$ _____, plus costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs in the sum of \$ _____, making in all a sum total of \$ _____ and that plaintiff have execution therefor; and it is further

ORDERED, that within 30 days of entry, Plaintiffs shall serve a copy of this order with notice of entry upon Defendants.

This constitutes the decision and order of the Court.

DATED: December 17, 2013

ENTER,


O. PETER SHERWOOD
J.S.C.