

<b>GDH Capital Corp. v Lis</b>
2011 NY Slip Op 33514(U)
December 13, 2011
Supreme Court, Nassau County
Docket Number: 000477-11
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  
**GDH CAPITAL CORP.,**

**Plaintiff,**

**-against-**

**ROBERT LIS,**

**Defendant.**

-----x

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 000477-11  
Motion Seq. Nos. 1 and 2  
Submitted: 11/2/11**

**The following papers having been read on these motions:**

- Order to Show Cause, Affidavit in Support and Exhibits.....x**
- Notice of Motion, Affirmation of Attorney and Exhibits.....x**
- Affidavit of Service.....x**

This matter is before the Court for decision on 1) the Order to Show Cause filed by Plaintiff GDH Capital Corp. ("Plaintiff") on January 12, 2011; and 2) the motion filed by Plaintiff on October 21, 2011 and submitted on November 2, 2011. For the reasons set forth below, the Court 1) grants the Order to Show Cause to the extent that the Court directs that the temporary restraining order issued by the Court (Parga, J.) on January 12, 2011 shall remain in effect until the entry of judgment as directed herein; and 2) grants the motion to the extent that the Court awards Plaintiff judgment against Defendant on the second and third causes of action in the Verified Complaint and refers the determination of damages and interest to an inquest.

## BACKGROUND

### A. Relief Sought

In its Order to Show Cause, Plaintiff moves for an Order, pursuant to CPLR § 6301, restraining and enjoining the Defendant Robert Lis (“Defendant”), his agents, assigns, and those holding monies on his behalf from transferring, withdrawing, hypothecating, pledging, or using for security any and all monies belonging to Daniel Hesse and/or in the possession of Defendant, pending a determination of this action.

In its motion, Plaintiff moves for an Order of default pursuant to CPLR § 3215.<sup>1</sup>

Defendant has not appeared in this action and has submitted no response to Plaintiff’s Order to Show Cause or motion.

### B. The Parties’ History

The Summons with Notice and Verified Complaint (“Complaint”) are annexed as Exhibit A to Plaintiff’s motion. The Summons with Notice describes this action as one for breach of contract, breach of agreement and conversion and states that Plaintiff seeks damages of no less than \$2,700,000. The Complaint, filed January 11, 2011, alleges as follows:

Plaintiff is a domestic corporation doing business in Suffolk County and Defendant is an individual residing in Nassau County. Defendant has \$2,677,000.00 of money belonging to Plaintiff, which funds were provided to Defendant “not as a loan, but as a short term investment, returnable on demand” (Compl. at ¶ 4).

The Complaint alleges that approximately 22 months before the Complaint was filed, Defendant “won the confidence of the Plaintiff when he brokered a real estate transaction with a third party” (Compl. at ¶ 7). In December of 2010, Defendant proposed a different investment that involved Defendant taking a cashier’s check from Plaintiff’s corporation and using it as proof of funds that served as the basis for a casino to provide Defendant with a gambling account.

Plaintiff’s corporation made its initial investment with Defendant on December 7, 2010 and the parties’ agreement was formalized in a written agreement (“Agreement”) (Ex. A to

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<sup>1</sup> Plaintiff’s notice of motion states that Plaintiff seeks relief pursuant to CPLR § 3214 but, given that Plaintiff is seeking an “order for default,” the Court surmises that Plaintiff is seeking relief pursuant to CPLR § 3215.

Compl.). The Agreement provides, in pertinent part, as follows:

This agreement made this 7<sup>th</sup> day of December, 2010, between GDH Capital Corp., Daniel A. Hesse, President...and Robert Lis...agree to the following terms and conditions:

- 1) GDH Capital Corp. agrees to provide a cashier's check in the amount of, One Million Dollars, (\$1,000,000.00), made payable to Robert Lis.
- 2) Robert Lis agrees that this check shall be used for the sole purpose of proof of funds to be held by a Casino mutually agreed upon by both parties.
- 3) Robert Lis states and agrees that this check shall be held by agreed upon designated Casino, shall never be negotiated, deposited or cashed and shall be returned to Daniel A. Hesse of GDH Capital Corp. on a daily basis or upon Daniel A. Hesse['s] immediate request.

The Agreement is signed by Robert Lis and Daniel A. Hesse and witnessed by an individual named Ashley Schenck.

The Complaint alleges that on December 7, 2010, GDH provided Defendant with a cashier's check ("Check") in the amount of \$1 million (Compl. at Ex. B). The Check was returned to Plaintiff without having been cashed, negotiated or deposited, as per the Agreement. The Complaint alleges that "[t]his occurred each day, approximately 10 times" (*id.* at ¶ 14). Daniel Hesse ("Hesse") sometimes accompanied Defendant to a casino in Atlantic City or Connecticut where Defendant would gamble, return the Check to Plaintiff at the end of the day, and Hesse would then give the Check back to Defendant "for his next gambling episode" (*id.* at ¶ 15).

Lis subsequently requested the return of the initial Check, as well as additional funds to offer as proof of funds at a casino in Las Vegas. On or about December 17, 2010, Plaintiff gave Defendant the Check, as well as another cashier's check totaling \$580,000 ("Second Check") (*id.* at Ex. C). Again, on or about December 28, 2010, Plaintiff provided Defendant with a cashier's check in the amount of \$1,334,000 ("Third Check") (*id.* at Ex. D). On this last date, Defendant did not return the Checks and Plaintiff learned that Defendant had cashed the Checks, totaling \$2,914,000.00.

The Complaint contains three (3) causes of action: 1) fraud, 2) conversion and 3) breach of the Agreement, for which Plaintiff seeks damages in the amount of \$2,914,000.00, as well as

costs and disbursements and reasonable attorney's fees.

In his Affidavit in Support of Plaintiff's Order to Show Cause, Hesse affirms that he is the President and shareholder of Plaintiff corporation. He affirms the truth of the allegations in the Complaint, and provides copies of the Checks as well as proof they have been cashed.

Hesse affirms that Defendant made partial repayment of \$196,000 by check on January 2, 2011 and \$400,000 by wire on January 6, 2011. Defendant has agreed to return the remaining funds but has not done so. Hesse avers, further, that he "verily believe[s]" (Aff. at ¶ 19) that Defendant is attempting to, and will, abscond with Plaintiff's money if restraints are not placed on Defendant as well as agents or companies holding funds of Defendant.

On January 12, 2011, the Court (Parga, J.) issued an Order ("TRO") directing that:

Defendants, their agents, employees, pledges, assignees, nominees or anyone acting on or for their behalf are hereby stayed and enjoined from transferring withdrawing, hypothecating, pledging, or using for security any and all monies belonging to [Hesse] and/or in the possession of [Defendant], pending a determination of this action, pursuant to CPLR 6301 pending a final determination of the Court[.]

Plaintiff's counsel affirms that Defendant has been served with the Complaint and provides an Affidavit of Service reflecting service of the Summons with Notice, Request for Judicial Intervention and Order to Show Cause and supporting documents on January 18, 2011 pursuant to CPLR 308(4). By Order dated February 4, 2011 ("Prior Order"), the Court directed that Plaintiff's Order to Show Cause would be the subject of oral argument before the Court on March 1, 2011 at 11:00 a.m. On March 1, 2011, the Court called the matter on the record at 12:00 noon and there was no appearance by the Defendant. The Court adjourned the matter and directed Plaintiff to serve the Complaint on Defendant. Plaintiff's counsel provides an Affidavit of Supplemental Mailing dated July 1, 2011 reflecting the mailing of the Complaint to Defendant at his home and business addresses via certified mail, return receipt requested.

### C. The Parties' Positions

Plaintiff submits that the Court should award the relief sought in the Order to Show Cause in light of the evidence presented establishing Defendant's wrongful possession of monies belonging to Plaintiff and in consideration of Plaintiff's concerns that Defendant will abscond with that money if not restrained.

Plaintiff also contends that it has demonstrated its right to a default judgment by

1) establishing service of the Complaint on Defendant and Defendant's failure to answer or appear; and 2) and demonstrating Defendant's breach of the parties' Agreement, fraud and conversion by failing to return the sums provided to Defendant by Plaintiff.

### 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

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to rely upon it, 3) justifiable reliance of the other party on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007).

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's 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. *Id* at 50.

C. Application of these Principles to the Instant Action

Plaintiff has established its right to judgment against Defendant on the second and third causes of action in the Complaint by presenting proof of service of the Complaint on Defendant and presenting an affidavit and supporting documentation establishing that 1) Defendant breached the parties' agreement, as evidenced by the written Agreement and the parties' conduct as described by Hesse, by failing to return the Checks to Plaintiff and, instead, cashing them; and 2) Defendant committed a conversion by improperly assuming control over the Checks and cashing them, instead of returning them to Plaintiff as agreed. The Court denies Plaintiff's motion for judgment on the first cause of action alleging fraud based on the Court's determination that the evidence does not support the conclusion that Defendant misrepresented to Plaintiff his intention to return the Checks; it is equally plausible that Defendant intended to return the Checks but lost money while gambling and became unable or unwilling to return the Checks to Plaintiff as promised.

The Court denies Plaintiff's application for attorney's fees, given the absence of language in the Agreement, or statutory authority, for such an award.

The Court refers to an inquest the determination of Plaintiff's damages in light of the fact that the Court cannot determine from the motion papers the precise amount of Plaintiff's damages. The Summons with Notice reflects that Plaintiff seeks damages of at least \$2,700,000.00. The Complaint alleges that Plaintiff has been damaged in the amount of \$2,914,000.00. Hesse, in his Affidavit in Support dated January 11, 2011 affirms that Defendant has promised to wire back to Plaintiff funds of \$2,677,000.00. and that Defendant made partial repayment of \$196,000 by check on January 2, 2011 and \$400,000 by wire on January 6, 2011. Plaintiff's counsel, in his Affirmation in Support of Plaintiff's motion dated October 1, 2011, affirms that there is now due and owing to Plaintiff the sum of \$ \$2.677 million, with interest thereon from January 12, 2011. In light of the foregoing, the Court cannot determine Plaintiff's precise damages, and refers that issue to an inquest. Plaintiff shall be entitled to interest from January 12, 2011.

The Court further directs that the TRO shall remain in effect until entry of judgment.

In light of the foregoing, it is hereby

**ORDERED**, that the motion of Plaintiff GDH Capital Corp. for a default judgment against Defendant Robert Lis is granted to the extent that Plaintiff is awarded judgment against Defendant on the second and third causes of action in the Verified Complaint, with interest from January 12, 2011; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of damages and interest to be awarded to Plaintiff on January 18, 2012 at 9:30 a.m.; and it is further.

**ORDERED**, that Plaintiff shall serve upon Defendant at his residence, by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before January 9, 2012; and it is further

**ORDERED**, that the County Clerk, Nassau County is directed to enter a judgment in favor of Plaintiff GDH Capital Corp. and against Defendant Robert Lis in accordance with the decision of the Special Referee; and it is further

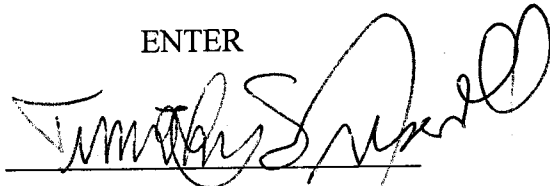
**ORDERED**, that the temporary restraining order issued by the Court (Parga, J.) on January 12, 2011 shall remain in effect until the entry of judgment as directed herein.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY  
December 13, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
DEC 20 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE