

Ecker v Ingk Labs, LLC
2013 NY Slip Op 31301(U)
June 18, 2013
Sup Ct, NY County
Docket Number: 157437/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

DAVID ECKER,

Plaintiff,

INDEX NO. 157437/2012

MOTION DATE _____

- v -

MOTION SEQ. NO. _____

MOTION CAL. NO. 001

**INGK LABS, LLC, PAYZ, INC., DAMION HANKEJH,
INDIVIDUALLY AND AS GENERAL PARTNER OF
INGK LABS, LLC AND PAYZ, INC., AND ANTHONY
CRAIG ALBERINO, INDIVIDUALLY AND AS
PRESIDENT/CEO OF INGK LABS, LLX AND
PAYZ INC.,**

Defendants.

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2, 3</u>
Answer — Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>5</u>

Plaintiff David Ecker (“Plaintiff”) commenced this action with the filing of the Summons and Complaint dated October 19, 2012. Defendants Damion Hänkejh (“Hänkejh”) and Anthony Craig Alberino (“Alberino”) are alleged to be the owners of defendants Ingk Labs, LLC (“Ingk”) and Payz, Inc. (“Payz”).

Plaintiff now moves pursuant to CPLR §3215(a) for a default judgment against Defendants. Plaintiff submits a supporting affidavit and the affirmation of Kate Elizabeth DiGeronimo.

The Complaint alleges five causes of action. The first cause of action alleges that Plaintiff was an employee of Defendants within the meaning of Labor Law §190(2) and that they failed to pay him in wages in violation of Labor Law §191(1)(d). The second alleges that Ingk breached a contract between the parties.

The third alleges fraud based on Alberino and Hänkejh's misrepresentations that Ink and Payz had secured capital commitments that would be called upon at any time, Hänkejh would personally fund Ingk and Payz until they called-in the capital commitments, and Hänkejh was able and intended to pay Plaintiff's wages out of his own funds until they called-in capital investments. The fourth and fifth causes of action seeks to pierce Ingk and Payz's corporate veil and hold Alberino and Hänkejh personally liable for their debts.

Ingk was served via the New York Secretary of State with the Summons and Complaint on October 24, 2012. Payz was served on October 26, 2012 by personally delivery of the Summons and Complaint on Salli Saunders, managing agent of Payz.

Plaintiff provides an Affidavit of Service, which states that service was attempted on Alberino at his place of residence on October 25, 2012 at 7:20 pm, October 27, 2012 at approximately 1:35 pm, and on November 6, 2012 at 9:30 am, and that a copy of the Summons and Complaint were left with the doorman on November 6, 2012 and another copy mailed to Alberino on November 6, 2012.

Plaintiff provides an Affidavit of Service, which states that service was attempted on Hänkejh at his place of residence on October 25, 2012 at 7:21 pm, October 27, 2012 at approximately 1:35 pm, and on November 6, 2012 at 9:30 am, and that a copy of the Summons and Complaint were left with the doorman on November 6, 2012 and another copy mailed to Hankejh on November 6, 2012.

Pursuant to CPLR §3215(g), on March 5, 2013, Defendants were served with an additional copy of the Summons and Complaint by first class mail.

Defendants Alberino and Hänkejh submit affidavits in opposition to Plaintiffs' motion on behalf of themselves individually and on behalf of Ingk and Payz. In their opposition, Alberino and Hänkejh challenge the service that was purportedly rendered and state that they tried to settle the matter. An answer was subsequently e-filed on April 10, 2013, an amended answer on April 30, 2013, and another amended answer on May 15, 2013, on behalf of Hänkejh, Alberino, Ingk, and Payz pro se, which does not assert a defense based on service.

As defendants Alberino and Hänkejh have now answered by way of their

Amended Answer e-filed on May 15, 2013 and in light of New York courts' preference that controversies to be resolved on the merits, Plaintiff's motion for default judgment as against them is denied and issue is joined.

However, as the corporate defendants may not appear without an attorney as provided in CPLR § 321, the corporate defendants, to date, have failed to appear.

“While a default judgment constitutes an admission of the factual allegations of the complaint and the reasonable inferences which may be made therefrom, plaintiff must present some proof of liability so that the reviewing court can determine that the ‘prima facie validity’ of the uncontested cause of action has been established because the granting of a default judgment does not become a ‘mandatory ministerial duty’ upon a defendant's default.” *See generally Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 845-46 [2001].

Here, in light of the terms of the “Consulting Agreements” that Plaintiff entered with Ingk and the compensation he alleges he is due, Plaintiff has not established prima facie validity that he was an employee under New York Labor Law §190(2) to warrant a default judgment for relief he seeks under Labor Law §191(1)(d). *See Akgul v. Prime Time Transp., Inc.*, 293 A.D. 2d 631, 633 [2d Dept. 2002]. Plaintiff has established factual allegations to warrant default judgment on his claim for breach of those agreements and fraud, entitling him to damages and a declaratory judgment that the Convertible Promissory Note he entered on April 30, 2012 with Payz for the amount he had earned under the first agreement is void.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for default judgment is granted only as to defendants Ingk Labs, LLC, and Payz, Inc.; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff David Ecker and against defendant Ingk Labs, Inc., in the amount of \$44,111.34, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED and ADJUDGED that the Convertible Promissory Note issued on April 30, 2012 between David Ecker and Payz, Inc. is void; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs owed by Ingk, Inc. to David Ecker pursuant to the terms of the Consulting Agreements is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing; and it is further

ORDERED that Plaintiff's action against Damion Hänkejh and Anthony Craig Alberino is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 6/18/13



Check one: FINAL DISPOSITION X HON. EILEEN A. RAKOWER
NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE