

eSilicon Corp. v Wireless Ventures USA, Inc.

2013 NY Slip Op 31971(U)

August 14, 2013

Supreme Court, New York County

Docket Number: 650996/2011

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice
Index Number : 650996/2011
ESILICON CORPORATION
vs
WIRELESS VENTURES, USA, INC.
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8/12/13
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) 41-55

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 ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 8/14/13

SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

- 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 54

-----X
eSILICON CORPORATION,

Index No.: 650996/2011

Plaintiff,

DECISION & ORDER

-against-

WIRELESS VENTURES USA, INC.,

Defendant.

-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff eSilicon Corporation moves for summary judgment against defendant Wireless Ventures USA, Inc. pursuant to CPLR 3212. Plaintiff's motion is granted, on default, for the reasons that follow.

Background

On April 14, 2011, plaintiff commenced this action to recover payments owed by defendant under written contracts for the development of a semiconductor chip. The total sum allegedly owed, as set forth in 11 invoices, is \$706,489.94. The parties' agreements further provide that (1) amounts more than 15 days past due accrue interest at the rate of 1% per month; and (2) defendant must pay plaintiff's litigation costs and reasonable attorneys' fees.

This is not defendant's first default, which occurred when it served a late answer. That default was excused when defendant finally retained counsel. Shortly thereafter, defendant's counsel withdrew. In an order dated February 19, 2013, defendant (a corporation, which cannot appear *pro se*) was ordered to retain new counsel to appear at a discovery conference on April 16, 2013. Defendant violated the order by not retaining counsel and defaulted on that appearance. *See* NYSCEF Doc. No. 40. On July 25, 2013, after defendant still refused to retain

counsel and provide discovery to plaintiff, plaintiff filed the instant summary judgment motion, which was duly served. Again, defendant defaulted by not submitting an opposition.

Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff has established its *prima facie* case by submitting evidence of (1) defendant's failure to make the required contractual payments; and (2) defendant's failure to object to any of the invoiced amounts. Since defendant defaulted, it has waived all defenses. Therefore, the

court grants summary judgment to plaintiff against defendant in the amount of the owed payments, which total \$706,489.94. The calculation of (1) interest on that amount; and (2) attorneys' fees is referred to a Special Referee to hear and report (unless plaintiff submits an affidavit waiving such amounts, at which time the Clerk will immediately be directed to enter judgment). Accordingly, it is

ORDERED that the motion for summary judgment by plaintiff eSilicon Corporation is granted against defendant Wireless Ventures USA, Inc. in the amount of \$706,489.94; and it is further

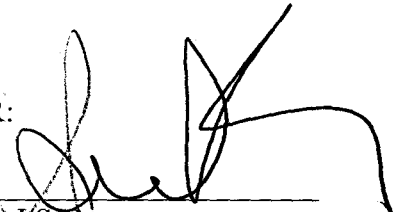
ORDERED that the calculation of (1) the total amount of 1% monthly interest on late payments; and (2) plaintiff's attorneys' fees and litigation costs are referred to a Special Referee to hear and report with recommendations, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine said issues; and it is further

ORDERED that pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance, unless (1) the parties consent to a determination by the Special Referee; or (2) plaintiff waives its claim for interest and attorneys' fees, which, if it does, shall submit an affidavit stating so and a proposed order directing the Clerk to enter judgement; and it is further

ORDERED that, if plaintiff does not waive such amounts, a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee; and it is further

ORDERED that the compliance conference scheduled for September 3, 2013 is cancelled.

Dated: August 14, 2013

ENTER: 

J.S.C.