

Jockey Hollow LLC v Dicker

2013 NY Slip Op 33044(U)

December 3, 2013

Supreme Court, New York County

Docket Number: 152140-2012

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Jockey Hollow LLC,
-v-
Gabriel Scott Dicker, ET AL.

INDEX NO. 152140/12
MOTION DATE
MOTION SEQ. NO. 002

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12-3-13
DEC 03 2013

[Signature]
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: [X] 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 IAS 10

-----X
JOCKEY HOLLOW LLC,

Plaintiff,

-against-

GABRIEL SCOTT DICKER a/k/a GABRIEL SCOTT
a/k/a GABRIEL DICKER d/b/a PPX HOSPITALITY
LIMITED LIABILITY COMPANY,

Defendant.
-----X

HON. KATHRYN E. FREED:

DECISION/ORDER

Index No.: 152140-2012

Seq. No.: 002

PRESENT:

Hon. Kathryn E. Freed

J.S.C.

Recitation, as required by CPLR §2219[a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1,2, 3,4,....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....Ex A-X....
OTHER.....(Memo of Law).....5.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR§ 2221, granting it leave to renew its previous motion, submitted on September 9, 2012, and upon such renewal, granting it a default judgment pursuant to CPLR§ 3215, to issue forthwith by the Clerk of the Court for a money judgment against defendant in the sum of \$127,479.88, plus interest, costs and expenses. No opposition has been filed by defendant.

After a review of the papers presented, all relevant statutes and caselaw, the Court grants both the motion to renew and the default judgment.

In a decision/order dated December 10, 2012, this Court denied said September 9, 2012 motion by plaintiff for entry of a default judgment against defendant, "without prejudice to renew upon proof of facts constituting the claim of damages." Plaintiff now seeks to remedy any deficiencies in the previous motion.

In support of the instant motion, plaintiff annexes the affidavits of Ronald Castellano and Loren Goetz. Said affidavits make reference to over twenty e-mails (Annexed as Exhibits "C" through "X") between the parties demonstrating that defendant had agreed to take over the day-to-day operations of the subject restaurant, pay all expenses incurred in operating said restaurant and pay to plaintiff an "owners fee".

Factual and procedural background:

The instant matter concerns the breach of an oral agreement. Plaintiff Jockey was the tenant at 171 East Broadway, New York, New York 10002, pursuant to a written lease agreement between it and Wing Ning Corp, the owner of said building. Defendant Scott Dicker conducted business as "PPX Hospitality, Limited Liability Company," (hereinafter, "PPX"), on the premises, wherein he was the President, Chief Executive Officer and Manager of PPX. PPX existed under the laws of New Jersey, with a principal place of business there, however, it was not authorized to do business here in New York.

On January 25, 2011, the parties entered into an oral agreement, wherein defendant agreed to operate the subject premises as a "pop-up restaurant," wherein the expenses incurred would be assumed by either the guest chefs who contracted to utilize it or the profits generated from it. The contract required defendant to pay plaintiff, the sum of \$10,000 on the first of each month as an owner's fee. In return, plaintiff would permit defendant to operate the restaurant, "LTO," retain all the profits generated from it and also use plaintiff's liquor license, restaurant equipment, reservation

system, operating bank account and all permits associated with its operation.

Additionally, defendant agreed to reimburse plaintiff for all expenses incurred in operating LTO, including rent, additional payables, sales tax, labor costs, charges to an American Express account and payments made from the restaurant's operating account, if neither the chefs or profits covered these expenses. Defendant also agreed to indemnify plaintiff at his sole cost and expense and hold plaintiff harmless for his managing and operating the restaurant.

On March 15, 2011, defendant commenced operation of the premises. On April 27, 2011, LTO opened and was in operation from April 27, 2011 through June 12, 2011. On May 1, 2011, defendant failed to pay the \$10,000 owners' fee for the month of May 2011, to plaintiff. He also failed to pay the \$9,000 rent for both May and June of 2011 and also the \$35,748.88 amount for the additional payables that were not reimbursed by the chefs or covered by the revenue generated from the restaurant. Defendant also failed to pay the New York State Sales Tax collected from customers for liquor and food sold at the premises in the amount of \$11,626.00, as well as the wages and tips to the staff of LTO, in the amount of \$6,303.00.

Plaintiff also discovered that during the period of operation, defendant put through 41 American Express charges, without plaintiff's knowledge or consent. These charges totaled the amount of \$21,684.00. Defendant did not reimburse any amount of money to plaintiff. Consequently, the parties cancelled their oral contract on June 12, 2011. At the culmination of said contract, plaintiff discovered that kitchen equipment worth \$2,000 and belonging to it, was missing. Plaintiff attributes this to defendant because during their business arrangement, he was responsible for supervising the kitchen equipment.

Conclusions of law:

It is well settled that "[o]n motion for leave to enter a default judgment pursuant to CPLR

§3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc., 89 A.D.649, 651 [2d Dept. 2011]). Moreover, a default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them (*see* Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]).

In the case at bar, this Court in its decision/order dated December 10, 2012, had found that plaintiff provided proof of service of the original summons and complaint on Richard Scott Dicker, defendant's father on May 17, 2012 and also to "Jane Doe," his employee, on May 22, 2012. This Court additionally, found that defendant failed to answer the complaint and that his time to do so had expired. The original motion for entry of a default judgment was brought within one year of the default and more than twenty days prior to the entry of judgment. In the matter herein, plaintiff has provided proof of the service of the instant motion on defendant "Gabriel Scott-Dicker" on June 10, 2013, at both addresses designated for that purpose: 1 Sunset Road, West Caldwell, New Jersey, 07006 and at 71 Gansevoort Street, New York, New York 10014-1411. The Court finds the affidavit of service, sufficient to comply with the additional notice requirements of CPLR § 3215(g)(4)(i). Finally, the Court notes that defendant has also defaulted on answering the motion herein and that his time to do so has long expired.

A motion for leave to renew, pursuant to CPLR §2221(e), "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion. The granting of a motion for leave to renew is "granted sparingly, and only in cases where there exists a valid excuse

for failing to submit additional facts on the original application” (Matter of Beiny, 132 A.D.2d 190, 219 [1st Dept. 1987], lv. dismissed 71 N.Y.2d 994 [1988]; Alpert v. Wolf, 194 Misc.2d 126, 133, 2002 N.Y. Slip Op. 2726 (Civ Ct, NY County 2002)).

The Court finds that plaintiff has provided the Court herein with additional facts, not previously provided, sufficient to warrant the granting of a motion for leave to renew. Additionally, in the within motion, the Court finds that plaintiff has provided it with facts sufficient to constitute proof of plaintiff’s claim for damages and for entry of a default judgment in the amount of \$127,479.88, plus interest, cost and disbursements.

Therefore, in accordance with the aforementioned, it is hereby

ORDERED that plaintiff’s motion for leave to renew the motion submitted on September 9, 2012 is granted; and it is further

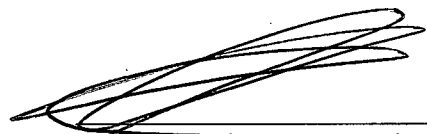
ORDERED that plaintiff’s motion for a default judgment pursuant to CPLR§ 3215, to issue forthwith by the Clerk of the Court, for a money judgment against defendant in the sum of \$127,479.88, plus interest, costs and expenses is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly and it is further

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

DATED: December 3, 2013

DEC 03 2013


Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT