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Case Number: 08-0414-CV
N/A

FOR PUBLICATION

IN THE SUPERIOR COURT OF TIlE

COMMONWEALTH OF TIlE NORTHERN MARIANA ISLANDS

MAMORU UEDA, Plaintiff, v. BIDEIDTO BIDA and MUGEN CORPORATION, Defendants.	CIVIL ACTION NO. 08-0414 ORDER PARTIALLY GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

THIS MATTER came for hearing on March 17, 2009, at 1:30 p.m. on plaintiff Mamoru Ueda's ("Plaintiff') motion for partial summary judgment against defendant Hidehito Hida ("Hida") and default judgment against defendant Mugen Corporation (collectively, "Defendants"). Mark Scoggins, Esq., appeared on behalf of Plaintif[Danilo Aguilar, Esq., appeared on behalf of Defendants. Having considered the arguments of counsel, the pleadings, materials on record, and the relevant rules and case law, the Court is prepared to rule.[1]

[1] Plaintiff moved *ex parte* for an order to strike Hida's opposition to the instant motion because it was filed past the deadline. Under Com. R. Civ. P. 6(d)(I), "any opposition to the motion shall be served not later than nine days after service of the motion." The word "days" in this context means working days, and excludes weekends and CNMl government holidays. Plaintiff's motion for summary judgment was served on Defendants on January 2,2009. Defendants' opposition was therefore due on January 15,2009. Hida did not file his opposition until March 2, 2009, thirty-nine working days after he was served. Attorney Aguilar's Secretary filed a declaration with the Court indicating that their office did not receive notice of Plaintiff's motion until February 25,2009. (pamintuan Decl. ¶¶ 1-6.) The Court notes the lateness of the opposition, but nevertheless prefers to rule on the merits of the instant motion. Therefore, Hida's arguments in his opposition will be considered.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or about January 12, 2008, Plaintiff and Hida entered into a contract, the Stock Transfer Agreement, wherein Plaintiff agreed to purchase 180,000 shares of Mugen Corporation for $180,000. (Complaint Ex. A at 1-2.) The balance was to be paid by May 31,2008. *(ld.* at 2.) Hida was to issue an assignment of the stock to Plaintiff within a reasonable time after receiving payment. *(ld.)* The contract also provided that Plaintiff would buy Hida's remaining shares on or before November 30, 2009, though the contract did not specify a quantity or price. *(Id.* at 3.) Hida warranted that he owned 180,000 shares of Mugen Corporation and that he was authorized to transfer the shares. *(ld.* at 2.) The contract also provided that upon any party "failing to do specific performance, the other party shall be entitled to damages and reasonable attorney's fees." *(ld.)* Furthermore, the contract stated that "[i]n the event that Buyer is found to be in breach for unilaterally cancelling [the] agreement, Buyer shall pay liquidated damages in the amount of$150,000." *(ld.)* Despite the language of the contract, Plaintiff seeks to recover liquidated damages from Hida, the "Seller." (Complaint ¶ 26.) In his Answer, Hida admitted that "the Stock Transfer Agreement provides for liquidated damages ... to be paid by a party who breaches the agreement." (Hida Answer ¶ 17.)

Hida also admitted in his Answer that Plaintiff paid him $180,000 for the shares of Mugen Corporation. (Hida Answer ¶ 16.) Thereafter, Hida claims he introduced Plaintiff to his employees as the new owner of Mugen Corporation, which owned and operated the Waft By the Sea restaurant. (Hida Decl. ¶ 6.) Hida asserts that Plaintiff held a general meeting with the employees of Waft By the Sea in which he required them to wear new uniforms. *(ld.* ¶ 7.) Hida also claims that Plaintiff left Saipan sometime after the meeting and said he would return on August 6, 2008. *(Id.* ¶ 8.) After August 6, 2008, however, Hida claims that Plaintiff never returned to take over Waft by the Sea, that he resided at the Grand Hotel under a false name, and that he would not answer Hida's phone calls. (*Id.* ¶¶ 9-10.) When Hida went to look for Plaintiff at the Grand Hotel, he states that Mr. Mori, one of Plaintiff's affiliates, walked quickly away from him. (*Id.* ¶ 11.) Eventually, Hida claims he met a common friend who showed him Plaintiff's business card indicating that Plaintiff was the President of Waft by the Sea. (*Id.* ¶ 14, Ex. A) When Hida finally got in touch with Plaintiff on the phone, however, Plaintiff allegedly told Hida he could not speak with him anymore. (*Id.* ¶ 17.) Hida later

learned through another common friend that Plaintiff was no longer interested in continuing their deal. *(ld.* ¶ 20.)

Plaintiff alleges that he paid for the shares of Mugen Corporation and that Hida never transferred any shares to him. (Hida Answer ¶ 16; Ueda Dec!. ¶ 3.) Accordingly, Plaintiff is suing Hida for breach of contract damages. Hida does not argue that he transferred any shares of Mugen Corporation to Plaintiff. (Hida Opposition.) Instead, Hida argues that Plaintiff "frustrated" his efforts to transfer the shares and that he was always ready, willing, and able to make the transfer. (Hida Opposition at 2.) Hida further defends on the basis that Plaintiff never requested the shares be transferred to him and that he never refused to transfer the shares to Plaintiff. *(ld.* at 3.) At oral argument, Hida explained that the reason he did not transfer any shares to Plaintiff was because Plaintiff never appeared to take over managing Waft by the Sea and Hida felt obligated to maintain control of the restaurant for the sake of the employees.

On March 14,2007, an Annual Corporate Report for Mugen Corporation was filed covering the year 2006. (PI.'s Mot. for Partial Summ. J. and Default J. Ex. B.) That report listed Naomi Hirata as the only shareholder of Mugen Corporation and showed that there were 250,000 shares issued. *(Id.)* On July 3, 2008, an Annual Corporate Report was filed for Mugen Corporation covering the year 2007. (Pl.'s Mot. for Partial Summ. J. and Default J. Ex. C.) That report listed Mayumi Hida, Hidehito Hida (defendant), and Misaki Kazuo as the only shareholders of Mugen Corporation and reflected that there were 370,000 issued. *(ld.)* On August 5, 2008, another Annual Corporate Report was filed for Mugen Corporation covering the year 2007. (PI.'s Mot. for Partial Summ. J. and Default J. Ex. D.) That report listed Hida and Mugen Corporation as the only shareholders of Mugen Corporation and showed that there were 620,000 shares issued. *(ld.)*

II. MOTION FOR SUMMARY JUDGMENT

A. Standard

Summary Judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Com. R. Civ. P. 56(c). In bringing a summary judgment motion, the "moving party bears the 'initial and ultimate' burden of establishing

its entitlement to summary judgment." *Santos v. Santos,* 4 N.M.I. 206, 210 (1995) *(citing Lopez v. Corporacion Azucarera de Puerto Rico,* 938 F.2d 1510, 1516 (1st Cir. 1991)).

Where the party moving for summary judgment bears the ultimate burden of proof at trial, they must produce affirmative evidence establishing the undisputed material facts to satisfy each element of the cause of action. Where the party moving for summary judgment does not bear the ultimate burden of proof at trial, the moving party may demonstrate its entitlement to summary judgment either by showing an absence of evidentiary support in the nonmoving party's case or by showing that the undisputed facts disprove a necessary element of a claim against them or satisfy each element of an affirmative defense. *See generally, Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In bringing a "defensive" motion for summary judgment, a moving party may satisfy its initial burden by either submitting evidence (affidavits or otherwise) to demonstrate its entitlement or it may merely pinpoint the nonmoving party's lack of evidence. *Id.*

Once the moving party meets its initial burden, the burden shifts to the opponent to show that a genuine issue of material fact exists to survive summary judgment. *Cabrera v. Heirs of De Castro,* 1 N.M.I. 172, 176 (1990). In opposing a motion for summary judgment, the nonmoving party may not rest simply upon mere allegations or denials of the moving party's pleading, but must "set forth specific facts showing that there is a genuine issue for trial." Com. R. Civ. P. 56(e); *Eurotex (Saipan), Inc. v. Muna,* 4 N.M.I. 280,284-85 (1995). "The party opposing summary judgment does not have a duty to present evidence in opposition to a motion under Rule 56 in all circumstances, however ... [T]hat obligation does not exist when ... the matters presented fail to foreclose the possibility of a factual dispute." lOA C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2727 (2d ed. 1983) (interpreting Federal Rules of Civil Procedure after which the Commonwealth Rules are modeled). When the party opposing the motion does not offer counter-affidavits or other evidentiary material showing that a genuine issue of material fact remains, or does not show a good reason, in accordance with Rule 56(f), why he is unable to present facts in opposition to the motion, judgment must be entered against him. *Id.* In considering a motion for summary judgment, the trial court must review the evidence and inferences drawn therefrom in light most favorable to the non-moving party. *Estate of Mendiola v. Mendiola,* 2 N.M.I. 233, 240 (1991).

B. Discussion

1. *PlaintitfPresented Undisputed Evidence Supporting a Prima Facie Case for Breach of Contract Against Hida.*

Plaintiffhas established undisputed material facts showing a prima facie case against Hida for breach of contract. "When performance of a duty under a contract is due any non-performance is a breach." *Reyes* v. *Ebeteur,* 2 N. Mar. I. 418, 429 (1992) (citing RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981)). On or about January 12,2008, he and Hida entered into a contract titled "Stock Transfer Agreement". (Complaint Ex. A.) The contract provided that Hida would sell 180,000 shares of Mugen Corporation to Plaintiff for $180,000. *(Id.* at 1-2) Hida admits that Plaintiff paid him $180,000. (Hida Answer ¶ 16.) Plaintiff never received any shares in return. (Ueda Decl. at 1.) Instead of arguing that he transferred the shares, Hida argues that Plaintiff "frustrated" his attempts to transfer the shares. (Hida Opposition at 2.) In making this argument, however, Hida impliedly admits he did not perform his contractual obligation to transfer the shares. Plaintiff has therefore presented undisputed evidence that Hida breached the contract, shifting the burden to Hida to show that a genuine issue of material fact exists for trial.

2. *Hida Has Not Shown that a Genuine Issue ofMaterial Fact Remains for Trial Because The Facts He Contends Are In Dispute Do Not Constitute a Defense and Are Not Material.*

Hida claims that he should not be found in breach of contract because Plaintiff "frustrated" his attempts to transfer the shares by refusing to speak to him. *(Id.)* To the extent Hida is relying on the defense of frustration of purpose, he has not presented a factual scenario under which such a defense would apply. Frustration of purpose is a term of art used in contract law, which the Restatement defines as follows:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981). Our Supreme Court has stated that "[f]rustration of purpose arises when a change in circumstances makes one party's performance

virtually worthless to the other." *Commonwealth Dev. Auth.* v. *Tenorio,* 2004 MP 22, ¶ 28 (citing *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach.,* 909 P.2d 408, 412 (Ariz. 1995); also citing RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a). Here, Hida argues that Plaintiff "frustrated" his attempts to transfer the shares to Plaintiffby avoiding him. *(See* Hida Decl. ¶¶ 9-13, 17-20.) When Hida finally contacted Plaintiff, Hida asserts that Plaintiff told him he could not speak with Hida anymore. *(ld.* ¶ 17.) Despite these factual allegations, Hida does not argue that there was a change in circumstances which made Plaintiff's performance worthless to him. It is undisputed that Hida bargained for and received $180,000 from Plaintiff, which has obvious value to Hida. (Hida Answer " 16.) Consequently, Hida's duties under the contract were not discharged due to frustration of purpose.

Even ifHida had argued that his duties were discharged based on the common law premise that one should not be able to take advantage of one's own wrongful act, Hida has not made factual allegations that would constitute such a defense. There is a long-established principle of common law that a person who prevents another from performing may not avail himself of the non-performance he has occasioned. *See Cox v. Dep't of Highways,* 252 La. 22, 28 (La. 1968) ("Where the promisee makes performance impossible, it is unimaginable that any civilized system of law would allow that promisee to recover damages for the promisor's failure to perform under the contract."); *see also Marshall v. Craig,* 4 Ky. 379,395 (Ky. 1809) ("[T]he principle which denies to a party who prevents a thing from being done, the right to avail himself of the non performance he has occasioned, is ... founded upon the basis of moral equity, and is essential to the preservation of good faith in the intercourse of society."); *Keefer* v. *Guffin,* 38 Ill. App. 622, 626 (Ill. App. Ct. 1890) ("No one is required to do what is impossible, in law or reason. It is equally true that he who prevents a thing from being done can not avail himself of the non-performance he has occasioned ...."). Although Hida argues that he was unable to perform his contractual obligations because he was unable to contact Plaintiff, he has not explained how or why Plaintiffs participation was necessary for him to transfer the shares. At oral argument, Hida indicated that he felt obligated to maintain control of the restaurant for the sake of the employees. Nevertheless, conceivably, Hida could have transferred the shares and

kept running the restaurant for the sake of his employees if he desired to do so. Thus, Hida has not made factual allegations supporting a valid defense to Plaintiffs breach of contract claim.

Although Hida argues that summary judgment should not be granted because there are facts that remain in dispute, the facts Hida contends are in dispute are not material because they do not affect the outcome of the case. For example, Hida alleges that he never refused to transfer the shares to Plaintiff and that he was always "ready, willing, and able to transfer the shares ...." (Hida Opposition at 2.) Additionally, he alleges that Plaintiff never made "a demand or request to transfer the shares ...." *(ld.* at 3.) Even if these factual allegations are taken as true, they do not create a genuine issue of material fact for trial. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Scott* v. *Harris,* 550 U.S. 372,380 (2007) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986)). "[A] fact in contention is considered material only if its determination may affect the outcome of the case." *Merci Corp. v. World Int'l Corp.,* 2005 MP 10 ¶ 19 (citing *PAC United Corp. (CNMI) v. Guam Concrete Builders,* 2002 MP 15 ¶ 24, further citing *Anderson,* 477 U.S. at 248-49). Here, the Stock Transfer Agreement did not require Plaintiff to affirmatively request that the shares be transferred to him. (Complaint Ex. A at 2.) Similarly, the contract did not require Hida not to refuse to transfer the shares. *(ld.)* The contract merely provided that Hida was to transfer the shares within a reasonable time after receiving the payment. *(ld.)* This did not happen. Furthermore, Hida has not stated facts which, if true, would prevent a ruling in Plaintiffs favor.

Finally, Hida argues that summary judgment must be denied where the "credibility of the affiants raises a material issue that can only be resolved by a trial (citations omitted)[,]" citing *Transway Finance Company, Inc. v. Gershon, BVI, et al.,* 92 F.R.D. 777, 778 (1982). (Hida Opposition at 4.) In essence, Hida argues that the Court cannot weigh his credibility in considering the facts presented in his Opposition. *(ld.)* As just discussed, however, the facts Hida contends are in dispute are not material because, even if taken as true, they would not affect the outcome of the case. The Court therefore does not need to determine Hida's credibility in granting partial summary judgment to Plaintiff.

3. *Plaintiff Is Not Entitled to Summary Judgment on His Claim for Liquidated Damages Because He Has Not Established that the Parties Intended Liquidated Damages to Flow to the Buyer.*

Although Plaintiff has shown his entitlement to summary judgment on his breach of contract claim, he has not shown that he is entitled summary judgement on his claim for liquidated damages. The Stock Transfer Agreement states that "[i]n the event that Buyer is found to be in breach for unilaterally cancelling this agreement, Buyer shall pay liquidated damages in the amount of $150,000." (Pl.'s Mot. for Partial Summ. J. and Default J. Ex. A at 2.) Here, Plaintiff, the "Buyer," asserts that he is entitled to liquidated damages from Hida, the "Seller." (PI.'s Mot. for Partial Summ. J. and Default J. ¶ 16.) In other words, Plaintiff is asking the Court to look beyond the plain language of the contract and interpret the word "Buyer" so that it refers to either the Buyer or the Seller.

In general, the intent of contracting parties is presumed to be encompassed by the plain language of contract terms. *Riley* v. *Public Sch. Sys.*, 4 N.M.I. 85, 88 (1994) (citing *Fidelino* v. *Sadhwani*, 3 CR 284, 287 (N.M.I. Trial Ct. 1988)). "[W]here the language of a writing is plain and precise, a court can, as a matter of law, establish the intentions of the parties as declared in the writing." *Ada* v. *Sadhwani's Inc.*, 3 N. Mar. I. 303,310 (1992) (citing *Dumas* v. *First Fed. Savings and Loan Ass'n*, 654 Fold 359 (5th Cir. Unit B Aug. 1981)). Here, the contract states in plain and precise language that the "Buyer" is liable for liquidated damages if he breaches the agreement. (PI.'s Mot. for Partial Summ. J. and Default 1. Ex. A at 2.) There is no mention of the "Seller" being potentially liable for liquidated damages.

While it is possible, in certain circumstances, for contracting parties to assign different meanings to commonly understood words, Plaintiff has not presented sufficient evidence to establish that the parties intended Plaintiff's proposed meaning of the word "Buyer." The Restatement provides the following guidance regarding contract interpretation:

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. See §§ 202, 219-23. But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.

RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b (1981). The following illustration is also helpful:

> A and B are engaged in buying and selling shares of stock from each other, and agree orally to conceal the nature of their dealings by using the word "sell" to mean "buy" and using the word "buy" to mean "sell." A sends a written offer to B to "sell" certain shares, and B accepts. The parties are bound in accordance with the oral agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b, illus. 4 (1981).

At oral argument, Plaintiff argued that the parties' intent at the time of contracting was to make liquidated damages available to either party upon the other's breach. He further indicated that the parties did not speak English very well, and that the discrepancy between the parties' intent and the language of the contract was perhaps due to poor drafting. The only affirmative support for Plaintiffs interpretation of the word "Buyer," however, is Plaintiffs citation to Hida's Answer wherein Hida admitted that the contract "provides for liquidated damages in the amount of $150,000 to be paid by a party who breaches the agreement." (Complaint at 7, Hida Answer ¶ 17.) First, this admission is not true. The contract provides that "[i]n the event that Buyer is found to be in breach for unilaterally cancelling this agreement, Buyer shall pay liquidated damages ...." (Pl.'s Mot. for Partial Summ. J. and Default 1. Ex. A at 2.) Second, the fact that the parties did not speak English very well works against Plaintiffs proposed interpretation of the contract. Third, neither party has submitted affidavits, declarations, or other evidence suggesting that, despite the plain language of the contract, the parties intended that liquidated damages would be available to either party. Unlike illustration 4, above, where the parties assigned different meanings to commonly understood words "to conceal the nature of their dealings," Plaintiff has not provided any such explanation here. Plaintiff has also not presented any evidence of the parties' course of conduct, course of dealings, trade usage, preliminary negotiations, or other context which might reveal that the parties truly intended to depart from the common meaning of the word "Buyer."

4. *Hida's Breach of Contract Entitles Plaintiff to Summary Judgment on Hida's Counterclaims Insofar as They Are Based on the Same Contract.*

a. *Hida's Counterclaim for Anticipatory Repudiation/Liquidated Damages*

According to the contract, after purchasing the initial 180,000 shares of Mugen Corporation, Plaintiff was obligated to purchase Hida's remaining shares on or before November 30, 2009.

(Complaint Ex. A at 3.) Hida asserts that Plaintiff's filing of the instant lawsuit is an anticipatory repudiation of the agreement to purchase Hida's remaining shares. (Hida Counterclaim ¶ 7.) He therefore filed a counterclaim requesting liquidated damages. *(Id* ¶ 11.) Plaintiff has moved for summary judgment by arguing that his obligation to purchase Hida's remaining shares was excused once Hida breached the contract. Pl.'s Mot. for Partial Summ. J. and Default J. ¶ 7.) Alternatively, Plaintiff argues that filing the instant lawsuit was not an anticipatory repudiation. *(ld* ¶ 18.)

Our Supreme Court has held that "[0]nce a party materially breaches a contract, that party cannot insist on the second party's performance of the same contract." *Triple J Saipan v. Agulto, 2002* MP 11, *5 (2002) (citing *Windward Partners v. Lopes,* 640 P.2d 872, 874 (Haw. Ct. App. 1982)). In fact, "[t]he material breach of an 'entire' contract by one party justifies termination by the nonbreaching party." *Triple J Saipan,* 2002 MP at *5 (citing I B. WITKIN, SUMMARY OF CALIFORNIA LAW 804 (9th ed. 1987)). As discussed above, Plaintiff is entitled to summary judgement on his breach of contract claim against Hida. Because Hida breached the contract, Plaintiff was justifIed in terminating the contract. Thus, Plaintiff did not anticipatorily breach the contract by filing the instant lawsuit.[2]

b. *HUla's Claim for Specific Performance.*

As an alternative to his anticipatory repudiationlliquidated damages argument, Hida seeks specifIc performance of Plaintiff's obligation to purchase Hida's remaining shares of Mugen Corporation. For the same reasons we grant summary judgment in favor of Plaintiff on Hida's anticipatory repudiationlliquidated damages counterclaim, we also grant Plaintiff's motion for summary judgment on Hida's counterclaim for specifIc performance. Because the Court fmds that Plaintiff is entitled to summary judgment on his breach of contract claim, Plaintiff was excused from performing under the contract.

5. *PlaintiffIs Not Entitled to a Default Judgement Against Mugen Corporation Because Plaintiff Has Not Shown How Mugen Corporation Is Liable For Any Damages.*

Plaintiff argues that Mugen Corporation should be held jointly and severally liable with Hida for damages flowing from Hida's breach of contract. (Pl.'s Mot. for Partial Summ. J. and Default J. at 9.) Pursuant to Com. R Civ. P. Rule 55 (b)(2), Plaintiff has therefore applied to the Court for a default

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2 Because Plaintiff was relieved of his duty to perform under the contract, it is unnecessary for the Court to address whether filing the instant lawsuit could be an anticipatory repudiation.

judgment against Mugen Corporation. (*Id* ¶ 20.) On December 30, 2008, an Entry of Default was entered by the Clerk of Court against Mugen Corporation after it failed to answer or otherwise plead to the Complaint. (Entry of Default Against Mugen Corporation at 1.) At oral argument on the instant motion, Mr. Aguilar made an appearance on behalf of Mugen Corporation and stated he had no objection to a default judgment being entered against Mugen Corporation, although he contested whether Mugen Corporation had any liability in this matter. The Court agrees. Mugen Corporation was not a party to the Stock Transfer Agreement. Accordingly, the Court does not see how or why Mugen Corporation should be held liable for damages flowing from Hida's breach of contract.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Plaintiffs motion for summary judgment with regard to Plaintiff's breach of contract claim, but DENIES summary judgment on Plaintiffs claim for liquidated damages. The Court also hereby GRANTS Plaintiffs motion for summary judgment with regard to Hida's counterclaims for anticipatory repudiation/liquidated damages and specific performance. Lastly, the Court DENIES Plaintiff's Motion for a Default Judgment against Mugen Corporation.

So ORDERED this 31st day of August 2009.

/s/
PERRY B. INOS, Associate Judge