SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ALPHA I MARKETING CORP., KRASDALE FOODS,INC., KOOLTEMP FOODS LLC, AND CONSOLIDATED SUPERMARKET SUPPLY LLC,

Plaintiff(s),

- against -

TWO BROTHERS SUPERMARKET CORP., JOSE JAQUEZ, OSCAR NUNEZ, THREE GUYS FOOD LLC, THREE GUYS SUPERMARKET CORP.,

Defendant(s).

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DECISION AND ORDER

Index No: 30487/19E

In this action for breach of contract and account stated, after an inquest, this Court awards plaintiffs the damages discussed below.

According to the complaint, this action is for breach of contract and account stated. It is alleged that plaintiffs are affiliates of one another and in the business of supplying wholesale groceries and loans to their customers, which are comprised of owners of supermarkets. It is alleged that on March 23, 2018, defendant TWO BROTHERS SUPERMARKET CORP. (Two Brothers), which operated a supermarket at 67 Broadway, Patterson, NJ 07507, executed a promissory note obligating it to pay plaintiff ALPHA I MARKETING CORP. (Alpha) $135,349.32, with interest. Per the note, beginning on April 13, 2018, Two

Brothers was to pay weekly installments of $758. On July 2, 2018, Two Brothers executed another promissory note obligating it to pay Alpha $653,294.07, with interest. Per the note, Two Brothers was to pay 13 weekly payments of $1,006 and then 312 weekly payments of $2,639. The foregoing notes were secured by a security agreement, whereby Two Brothers pledged as security all assets and inventory in the its supermarket. On September 8, 2009, defendants JOSE JAQUEZ (Jaquez), OSCAR NUNEZ (Nunez) and defendants THREE GUYS FOOD LLC and THREE GUYS SUPERMARKET CORP. (hereinafter collectively referred to as "Three Guys") guaranteed the sums due to Alpha under the notes. It is alleged Two Brothers defaulted under the terms of the foregoing notes by failing to pay the sums due thereunder. Plaintiffs allege that Two Brothers owes $125,405.75 under the note executed on March 23, 2018, and $677,461.61 on the note executed on July 8, 2012. In addition to the foregoing, plaintiffs allege that they are owed $51,638.60 by Two Brothers, said sum representing groceries delivered to Two Brothers by plaintiffs and for which Two Brothers did not pay. Based on the foregoing, plaintiffs interpose a cause of action for breach of contract, asserting that in failing to pay the sums due under the notes, Two Brothers breached the agreement between the parties and owe plaintiffs $826,468. Plaintiffs also interpose a cause of action for

account stated, alleging that the defendants were provided with statements memorializing that Two Brothers owe plaintiffs $51,638.60 for groceries delivered to the supermarket owned by Two Brothers and that it failed to object to the sums reflected therein. Plaintiffs thus seek the entry of judgment in the amounts above, plus interest.

On December 10, 2021, the Court (McShan, J.) issued a decision partially granting plaintiffs' motion for the entry of a default judgment. The Court noted that plaintiffs had discontinued their action against Three Guys and that plaintiffs had not timely moved for the entry of a default judgment against defendant Jaquez. The Court dismissed the action against Jaques and held that plaintiffs had established entitlement to a default judgment against Two Brothers and Nunez. Concluding that extrinsic evidence as to damages was required, the Court held that an inquest on damages was warranted.

On July 11, 2022, plaintiffs appeared before this Court and an inquest was held on the record.

At inquest, plaintiffs sought to limit their evidence on the issue of damages, since liability had already been determined by the grant of plaintiffs' application for the entry of a default judgment. The Court held that plaintiffs were correct since "a defendant whose answer is stricken as a result of a default

admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (*Rokina Optical Co., Inc. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]; *McClelland v Climax Hosiery Mills*, 252 NY 347, 351 [1930]; *Arent Fox Kinter Plotkin & Kahn, PLLC v Gmbh*, 297 AD2d 590, 590 [2d Dept 2002]). The Court noted that at a trial on inquest, the defendants would be afforded an opportunity to present and try a case in mitigation of damages (*Rokina Optical Co., Inc.* at 730; *Arent Fox Kinter Plotkin & Kahn, PLLC* at 590]).

On the issue of damages, rather than introduce testimony, plaintiffs sought to avail themselves of 22 NYCRR 202.46 and submitted an affidavit detailing their damages. The Court granted plaintiffs application, since pursuant to 22 NYCRR 202.46(a), "if the defaulting party fails to appear in person or by representative, the party entitled to judgment . . . may be permitted to submit . . . properly executed affidavits as proof of damages." Additionally, 22 NYCRR 202.46(b) states that "[i]n any action where it is necessary to take an inquest before the court, the party seeking damages may submit the proof required by oral testimony of witnesses in open court or by written statements of the witnesses, in narrative or question-and-answer form, signed and sworn to."

Because neither Nunez nor Two Brothers appeared at the inquest, this Court admitted the affidavit on damages into evidence (Plaintiffs' Exhibit 1) and credited[1] the same.

The affidavit submitted by plaintiffs is by Dennis Wallin (Wallin), Alpha's Vice President. Wallin reiterates the allegations in the complaint. Specifically, with regard to the sums owed by Two Brothers and Nunez, Wallin states that as to the first promissory note, as of September 28, 2018, $121,222.97 is due and owing. With regard to the second promissory note, Wallin states that as of September 21, 2018, $653,302.29 is due and owing. With regard to the sums owed by Two Brothers and Nunez for groceries delivered to them, but for which they did not pay, Wallin states that as of September 21, 2018, $51,916.29 is due and owing. Wallin states that the total due to plaintiffs from Two Brothers and Nunez is $826,441.55.

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[1] It is well settled that "in a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]). Indeed, when findings of fact rest in large measure on considerations related to the credibility of witnesses, a trial court's determination on this issue is accorded great deference (*Ning Xiang Liu v Al Ming Chen*, 133 AD3d 644, 644 [2d Dept 2015]). Absent conclusions that cannot be supported by any fair interpretation of the evidence, a judgment rendered after a bench trial should not be disturbed (*Saperstein v Lewenberg*, 11 AD3d 289, 289 [1st Dept 2004]).

Based on the foregoing, plaintiffs have established their damages, thereby warranting the entry of judgment in their favor. It is hereby

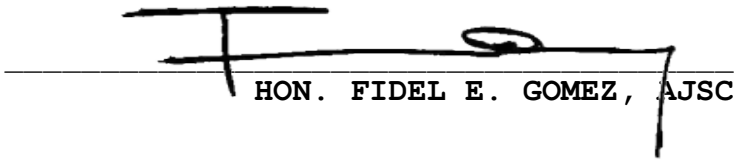
ORDERED that plaintiffs are granted a judgment in the amount of $826,441.55, plus interest, costs and disbursements. It is further

ORDERED that plaintiffs submit a judgment to the Clerk of the Court within 60 days hereof. It is further

ORDERED that plaintiffs serve a copy of this Decision and Order with Notice of Entry upon Two Brothers and Nunez within 30 days hereof.

This constitutes this Court's decision and Order.

Dated : July 11, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC