

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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NEWBANK,

Plaintiff,

- against -

Index No. 22652/2020E

Hon. FIDEL E. GOMEZ
Justice

**A&N FOOD ENTERPRISES INC. DBA
PIONEER SUPERMARKET, BROOK'S AVE
FOOD ADVANTAGE CORP., N&A PRODUCE
& GROCERY CORP., YOKASTA D. MEDINA,
NAFTALI MEDINA, LOURDES ROJAS,
ASSOCIATED FOOD STORES, L.L.C. AKA
ASSOCIATED FOOD STORES, LLC,
ASSOCIATED SUPERMARKET GROUP LLC,
AFS CAPITAL LLC, DERLE FARMS INC,
SIGNAPAY OF NY LLC, INTERNAL
REVENUE SERVICE – UNITED STATES OF
AMERICA, KRASDALE FOODS, INC.,
ALPHA I MARKETING CORP.,
CONSOLIDATED SUPERMARKET SUPPLY
LLC, AND KOOL TEMP FOODS, LLC,**

Defendants.

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The following papers numbered 1, read on this motion, noticed on 7/8/2022, and duly submitted as no. 3 on the Motion Calendar of 7/8/2022.

| | <u>PAPERS NUMBERED</u> | |
|--------------------------------------------------------------------------|------------------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1 | |

Defendants Krasdale Foods, Inc., Alpha I Marketing Corp., Consolidated Supermarket Supply LLC, and Kool Temp Foods, LLC's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 8/17/22

Hon. 
FIDEL E. GOMEZ, A.J.S.C.

- 1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
 NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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NEWBANK,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **22652/2020E**

**A&N FOOD ENTERPRISES INC. DBA
PIONEER SUPERMARKET, BROOK’S AVE
FOOD ADVANTAGE CORP., N&A PRODUCE
& GROCERY CORP., YOKASTA D. MEDINA,
NAFTALI MEDINA, LOURDES ROJAS,
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AMERICA, KRASDALE FOODS, INC.,
ALPHA I MARKETING CORP.,
CONSOLIDATED SUPERMARKET SUPPLY
LLC, AND KOOL TEMP FOODS, LLC,**

Defendants.

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Defendants Krasdale Foods, Inc., Alpha I Marketing Corp., Consolidated Supermarket Supply, LLC, and Kool Temp Foods, LLC (“Defendants”) move for default judgment against Co-Defendants A&N Food Enterprises, Inc. (“A&N Food”) and Neftali Medina (“Medina”)¹ (collectively, “Co-Defendants”) on Defendants’ first cross-claim against Co-Defendants. The motion is unopposed.

For the reasons which follow, Defendants’ motion is granted, on default and without opposition.

BACKGROUND:

On February 21, 2020, Plaintiff commenced the instant action by filing a summons and verified complaint, alleging causes of action for breach of contract, preliminary and permanent

¹ Although the complaint spells Mr. Medina’s first name with an “a”, the documents submitted by Defendants spell his name with an “e”.

injunction, and unjust enrichment. The complaint is verified by Moon Soo Kwon, Plaintiff's Vice President.

The complaint alleges that on June 20, 2014, Plaintiff extended a SBA loan to A&N Food in the principal amount of \$400,000 (the "SBA Loan") (Compl. ¶ 17). To secure payment of the SBA Loan, A&N Food signed a security agreement with Plaintiff (the "Security Agreement") (Compl. ¶ 20). Plaintiff alleges that N&A Produce, a guarantor of the SBA Loan, also signed a security agreement with Plaintiff (Compl. ¶ 21).

The complaint alleges that to further secure payment of the SBA Loan, on June 20, 2014, N&A Produce, along with a number of other named defendants, executed written guarantees to guarantee the payment by A&N Food of all amounts owed to Plaintiff under the SBA Loan (Compl. ¶ 24).

The complaint alleges that Defendant Krasdale Foods, Inc. ("Krasdale") holds a junior security interest in the same collateral against A&N Food, which Plaintiff seeks to peacefully repossess and/or auction (Compl. ¶ 14).

On March 13, 2020, Krasdale filed a verified answer with eight affirmative defenses, two counterclaims, and two cross-claims against A&N Food and Medina for breach of contract and an order of seizure.

On August 25, 2020, counsel for Plaintiff filed a notice indicating that N&A Produce had filed for bankruptcy under chapter 11 of the United States Bankruptcy Code on November 1, 2018.

On September 24, 2020, Krasdale filed a motion for leave to file and serve a supplemental summons and amended verified answer with a cross-claim against A&N Food and Medina, and to join Krasdale's affiliated entities in this action with respect to the cross-claim. On March 9, 2022, Krasdale filed a motion for an order to lift the bankruptcy stay as it applied to Krasdale's then pending motion or the prosecution of its cross-claims against A&N Food and Medina. On April 22, 2022, this Court granted the motions.

On April 26, 2022, Defendants filed a supplemental summons and verified answer² with a cross-claim for breach of contract against A&N Food and Medina. In its crossclaim, Defendants allege that on or around February 1, 2018, A&N Food executed a promissory note, pursuant to which it agreed to pay back to Defendants the amounts loaned and advanced by Defendants (Answer, ¶ 14). Defendants allege that A&N Food also entered into a security agreement with

² The answer is verified by counsel.

Defendants pursuant to which A&N Food agreed to purchase and obtain grocery supplies from Defendants on credit (Answer, ¶ 15). Defendants allege that the monetary obligations owed by A&N Food to Defendants were secured by granting Defendants a security interest in the collateral located at the store operated by A&N Food (Answer, ¶ 16). Defendants allege that Medina personally guaranteed the aforementioned obligations owed by A&N Food to Defendants (Answer, ¶ 17). Defendants allege that A&N Food and Medina are in default of the promissory note, security agreement, and personal guaranty (Answer, ¶ 18). Defendants seek a money judgment against A&N Food and Medina, with interest, attorney's fees, costs and disbursements (Answer, ¶ 19).

On June 16, 2022, Defendants filed the instant motion. The motion was marked fully submitted on July 8, 2022.

DISCUSSION:

Defendants seek a default judgment on their cross-claim against the Co-Defendants in the amount of \$921,065.18, with interest from June 15, 2022.³ Defendants assert that the Co-Defendants were properly served with the supplemental summons and verified answer with cross-claim. Defendants argue that the Co-Defendants have not filed an answer, and the time to answer or otherwise appear and respond to the cross-claim has expired. Defendants also argue that the Co-Defendants were served with the additional mailing required by CPLR § 3215(g).

CPLR § 3215(a) provides in relevant part that: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him."

CPLR § 3215(f) provides in relevant part that:

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

³ Defendants discontinued their request for attorney's fees, without prejudice (Affidavit of Dennis Wallin, ¶ 12).

(See also *Zelnik v Biedermann Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; *Stevens v Law Office of Blank & Star, PLLC*, 155 AD3d 917 [2d Dept 2017]). Thus, “[o]n a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant’s default” (*Deutsche Bank National Trust Company v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005]). “To demonstrate ‘the facts constituting the claim’ the movant need only submit sufficient proof to enable a court to determine that ‘a viable cause of action exists’. CPLR 3215(f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint” (*Fried*, 110 AD3d 56 at 59-60).

In support of their motion, Defendants submitted, *inter alia*, the affirmation of their counsel; the affidavit of Dennis Wallin, the Vice President of Alpha I Marketing Corp.; the affidavits of service upon Co-Defendants; a promissory note dated February 1, 2018; two security agreements dated December 19, 2017; two guarantees dated December 19, 2017; a notice of default dated January 17, 2019; a statement of note balance; a consolidated statement of accounts receivables; and an affirmation of additional mailing pursuant to CPLR § 3215(g).

Service of the Cross-Claim:

CPLR § 3011 provides, in relevant part, that:

. . . An answer may include a counterclaim against a plaintiff and a cross-claim against a defendant. . . *There shall be* a reply to a counterclaim denominated as such, an answer to an interpleader complaint or third-party complaint, and *an answer to a cross-claim that contains a demand for an answer. If no demand is made, the cross-claim shall be deemed denied or avoided.* (emphasis added).

“The denial that is ‘deemed’ by law to have been made occurs at the time that an answer to the cross claim would otherwise be due. In instances where an answer is not demanded in response to a cross claim, the denial that is ‘deemed’ to have been made under CPLR 3011 will foreclose any motion for a default judgment on the cross claim” (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 310 [2d Dept 2011]; *Green Point Sav. Bank v Pagano*, 103 AD2d 735, 735-736 [2d Dept 1984]; *Fleet Natl. Bank v Harley*, 153 AD2d 1005, 1005 [3d Dept 1989]).

As a preliminary matter, the Court notes that the supplemental summons dated September 25, 2020, filed with the Court on April 26, 2022, contains a demand for an answer to the cross-claim. As such, the Co-Defendants were required to answer.

The affidavit of service dated April 27, 2022, states that A&N Food was served with the supplemental summons and verified answer with crossclaim on April 27, 2022, by service upon the Secretary of State of the State of New York (Defendants' Exhibit E).

Business Corporation Law § 306(b)(1) states, in relevant part, that:

Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served.

Service upon the Secretary of State as agent for a defendant corporation constitutes valid service (*Union Indem. Ins. Co. of New York v 10-01 50th Ave. Realty Corp.*, 102 AD2d 727, 728 [1st Dept 1984]; *Perkins v 686 Halsey Food Corp.*, 36 AD3d 881, 881 [2d Dept 2007]). Service of process is complete when plaintiff serves the Secretary of State, “irrespective of whether the process subsequently reache[s] the corporate defendant” (*Fisher v Lewis Construction NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020]).

Here, A&N Food was served with the supplemental summons and verified answer with crossclaim on April 27, 2022, the date on which the Secretary of State was served with the supplemental summons and verified answer with cross-claim (BCL § 306[b][1]). As such, it had until May 27, 2022, to serve an answer (CPLR 320[a]). A&N Food did not serve an answer by that date and is thus in default.

The affidavit of service dated May 2, 2022, states that Medina was served with the supplemental summons and verified answer with cross-claim pursuant to CPLR 308(2) by delivering a copy of the supplemental summons and verified answer with cross-claim to a person of suitable age and discretion on April 30, 2022, and by mailing a copy on April 30, 2022 (Defendants' Exhibit F). The affidavit of service was filed with the Court on May 2, 2022. As such, Medina had until June 11, 2022, to answer (CPLR § 308[2] [“proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such

delivery or mailing, whichever is effected later; service shall be complete ten days after such filing”]; CPLR 320[a] [“An appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant by . . . pursuant to section . . . subdivision two . . . of section 308 . . . the appearance shall be made within thirty days after service is complete”]). Medina did not serve an answer by that date and is thus in default.

Defendants have demonstrated compliance with the additional mailings required by CPLR § 3215(g) by submitting an affirmation of mailing dated May 2, 2022 (Defendants’ Exhibit G).

Breach of Contract:

The elements of a cause of action for breach of contract are: (1) the existence of a contract, (2) the plaintiff’s performance thereunder, (3) the defendant’s breach thereof, and (4) resulting damages from the breach (*Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]; *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Fuentes v LOMTO Federal Credit Union*, 200 AD3d 1032, 1033 [2d Dept 2021]; *East Ramapo Central School District v New York Schools Insurance Reciprocal*, 199 AD3d 881, 886 [2d Dept 2021]; *Plainview Properties SPE, LLC v County of Nassau*, 181 AD3d 731, 733 [2d Dept 2020]).

Here, Defendants have demonstrated that they are entitled to default judgment on its cross-claim for breach of contract against Co-Defendants. Defendants demonstrated the existence of agreements between the parties by submitting the affidavit of Mr. Wallin and copies of the promissory note, security agreements and guarantees.

In his affidavit, Mr. Wallin reiterates the allegations in the cross-claim. He asserts that on or around February 1, 2018, A&N Food executed a promissory note in favor of Defendants, and that Medina personally guaranteed the note (Affidavit of Dennis Wallin, ¶ 17). He also asserts that A&N Food entered into security agreements with Defendants pursuant to which A&N Food agreed to purchase and obtain grocery supplies from Defendants on credit (Affidavit of Dennis Wallin, ¶ 18). He asserts that the monetary obligations owed by A&N Food were secured by granting Defendants a security interest in the collateral located at the store operated by A&N Food (Affidavit of Dennis Wallin, ¶ 19). He asserts that the obligations owed by A&N Food were personally guaranteed by Medina (Affidavit of Dennis Wallin, ¶ 20).

Defendants submitted a copy of the promissory note dated February 1, 2018, signed by Medina, on behalf of A&N Food, and guaranteed by Medina. The note was made in favor of Alpha I Marketing Corp. (Defendants’ Exhibit I). Defendants also submitted a copy of a security

agreement dated December 19, 2017, by A&N Food, in favor of Krasdale, and a security agreement dated December 19, 2017, by A&N Food, in favor of Alpha I Marketing Corp., Beta II Marketing Corp., Consolidated Supermarket Supply, LLC and Kool Temp Foods, LLC (Defendants' Exhibit J). Defendants submitted a copy of a guarantee dated December 19, 2017, by Medina, unconditionally guaranteeing to Krasdale the obligations owed by A&N Food, and a guarantee dated December 19, 2017, by Medina, unconditionally guaranteeing to Alpha I Marketing Corp., Beta II Marketing Corp., Consolidated Supermarket Supply, LLC, and Kool Temp Foods, LLC the obligations owed by A&N Food (Defendants' Exhibit K).

Defendants demonstrated that Co-Defendants defaulted on these agreements by the affidavit of Mr. Wallin, who asserts that the Co-Defendants are in default of the promissory note, security agreements, and personal guarantees (Affidavit of Dennis Wallin, ¶ 21). Mr. Wallin also asserts that on or around January 18, 2019, Defendants served Co-Defendants with a notice of default/acceleration, which accelerated the amounts owed under the promissory note (Affidavit of Dennis Wallin, ¶ 22; Defendants' Exhibit L).

Defendants have also demonstrated resulting damages by the affidavit of Mr. Wallin, who asserts that as of June 15, 2022, Co-Defendants owe the principal sum of \$733,464.90 under the note. He asserts that the balance of both principal and interest owed under the note is \$911,780.15 as of June 15, 2022, with interest accruing at the rate of \$171.29 per day (Affidavit of Dennis Wallin, ¶ 23; Defendants' Exhibit M).

Mr. Wallin also asserts that as of May 18, 2020, Co-Defendants owe \$9,285.03 for accounts receivable for the supermarket supplies delivered to them on credit (Affidavit of Dennis Wallin, ¶ 24-25; Defendants' Exhibit N).

Accordingly, Defendants' motion for default judgment on its cross-claim is granted.

It is hereby

ORDERED that the Clerk enter judgment in favor of Defendant Alpha I Marketing Corp. and against Defendants A&N Food Enterprises, Inc. and Neftali Medina in the amount of \$911,780.15, plus interest⁴; and it is further

ORDERED that the Clerk enter judgment in favor of Defendants Krasdale Foods, Inc., Alpha I Marketing Corp., Consolidated Supermarket Supply LLC, and Kool Temp Foods LLC

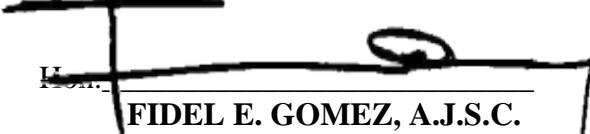
⁴ The promissory note is made in favor of Defendant Alpha I Marketing Corp. only.

and against Defendants A&N Food Enterprises, Inc. and Neftali Medina in the amount of \$9,285.03, plus interest; and it is further

ORDERED that Defendants serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 8/17/22



FIDEL E. GOMEZ, A.J.S.C.