

**Jonathan A. Bagdon, LLC v Frank's Laundromat,
LLC**

2006 NY Slip Op 30849(U)

October 12, 2006

Supreme Court, Nassau County

Docket Number: 1558/06

Judge: Leonard B. Austin

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NO. 1558/06

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 10/3/06

Submission Date: 10/3/06

Motion Sequence No.: 002/MOT D

JONATHAN A. BAGDON, LLC,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF

**Tarshis & Hammerman, LLP
118-35 Queens Boulevard
Forest Hills, NY 11375**

**FRANK'S LAUNDROMAT, LLC and
FILIPPO GALLINA,**

Defendants.

COUNSEL FOR DEFENDANT

NO APPEARANCE

The following papers were read on Plaintiff's motion for leave to enter a default judgment against Defendants:

- Notice of motion dated September 11, 2006;
- Affirmation of Stuart Tarshis, Esq. dated September 11, 2006;
- Affidavit of Jonathan A. Bagdon sworn to on September 11, 2006.

ORDER

Plaintiff moves for leave to enter a default judgment against the Defendants.

BACKGROUND

This is an action in which Plaintiff seeks to recover the balance due in connection with the sale of its business. The Sales Agreement provided for payments

of \$25,000 on March 1, 2004 and January 1, 2005. A promissory note executed by Defendant Frank's Laundromat LLC ("Frank's"), which was personally guaranteed by Defendant Filippo Gallina ("Gallina"), provided for payment of the balance of the purchase price of \$85,000 in 48 monthly payments of \$1996.23 inclusive of interest at the rate of 6% per annum. The first payment was due on October 1, 2003. The remaining payments were due on the first day of each successive month.

By motion returnable April 20, 2006, Plaintiff had moved for leave to enter a default judgment against the Defendants and to have the matter set down for an assessment of damages.

That motion was denied with leave to renew upon presentation of proper papers by order of this Court dated August 1, 2006. Although Plaintiff had established that the Defendants had been served and were in default, the motion was denied because Plaintiff had failed to establish a *prima facie* case against the defaulting parties. Plaintiff had also failed to establish compliance with CPLR 3215(g)(3) and (4).

Plaintiff now seeks to renew the application for a default judgment. Jonathan A. Bagdon, the principal of the plaintiff, submits an affidavit incorporating by reference the allegations of the complaint. The complaint alleges that Frank's is in default making the lump sum payments due pursuant to the terms of the Sales Agreement. The complaint further alleges that Defendants are in default of on promissory note since April 2005. Plaintiff also seeks legal fees in accordance with the terms of the note.

The papers submitted in support of the motion also establish compliance with CPLR 3215(g)(3)(4).

DISCUSSION

In its August 1, 2006 decision, the Court found that Defendants had been duly served with process in this matter and were in default in appearing and answering the complaint. Plaintiff has now remedied the defects in its prior application by providing the Court with an affidavit of merit made by a person with personal knowledge of the facts.

Plaintiff establishes a *prima facie* action on a promissory note by establishing the existence of a promissory note executed by the defendant, and unequivocal and unconditional obligations to repay and the defendant's default. Constructamax, Inc. v. CBA Associates, Inc., 294 A.d.2d 460 (2nd Dept. 2002); and Colonial Commercial Corp. v. Breskel Associates, 238 A.d.2d 539 (2nd Dept. 1997). See also, Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept., 1968), *aff'd*, 29 N.Y.2d 617 (1971); Chemical Bank v. Nemeroff, 233 A.D.2d 239 (1st Dept., 1996); and Key Bank v. Munkenbeck, 162 A.D.2d 503 (2nd Dept. 1990).

Plaintiff establishes a *prima facie* case on a guarantee by establishing the existence of the underlying promissory note, the guarantee and failure of the prime obligor to make payment as required by the promissory note. Royal Commercial Corp. v. Kotrulya, 304 A.D.2d 742 (2nd Dept. 2003); and E.D.S. Security Systems, Inc. v. Allyn, 262 A.D.2d 351 (2nd Dept. 1999).

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Plaintiff has established a *prima facie* case on the issue of liability. However, the Plaintiff has not established a *prima facie* case on the issue of the amount due on the note, the default rate of interest and late payment penalty. It is also unclear from the papers as to whether Defendant made the lump sum payment of \$25,000 due on March 1, 2004. Therefore, the matter must be set down for a hearing to determine the amount due.

The promissory note provides for the payment of the holder's legal fees should the maker default in payment and should an action be required to be brought to collect the balance due on the note. Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See, Simoni v. Time-Line, Ltd., 272 A.D.2d 537 (2nd Dept. 2000); and Borg v. Belair Ridge Development Corp., 270 A.d.2d 377 (2nd Dept. 2000). Therefore, the matter must be set down for a hearing before a Special Referee to determine the reasonable legal fees to which Plaintiff is entitled.

Accordingly, it is,

ORDERED, that Plaintiff's motion for leave to enter a default judgment is **granted** on the issue of liability; and it is further,

ORDERED, that the matter is set down for a hearing before Special Referee Thomas V. Dana on December 7, 2006 at 11:00 a.m. to conduct an inquest to determine the amount due on the promissory note, the amount due on the Sales Agreement, the default rate of interest, the late payment penalty and reasonable legal fees; and it is further,

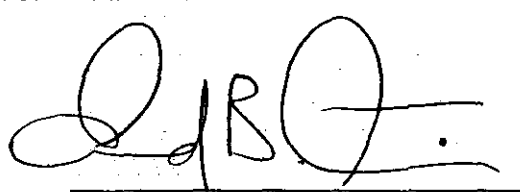
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ORDERED, that counsel for Plaintiff shall serve Defendants by certified mail return receipt requested and regular mail together with a certificate of mailing, and file with the Clerk of the Court, a copy of this Order, a Notice of Inquest and Note of Issue and pay all appropriate fees for the filing thereof on or before November 22, 2006; and it is further,

ORDERED, that the County Clerk of Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendants in the amount determined by the Special Referee together with costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
October 12, 2006



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
OCT 20 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE