

Brown Bark I, L.P. v Nunez

2007 NY Slip Op 33838(U)

November 27, 2007

Supreme Court, New York County

Docket Number: 0601009/2007

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SOLOMON
Justice

PART 55

Index Number : 601009/2007
BROWN BARK I, L.P.
vs.
NUNEZ, ANDRES
SEQUENCE NUMBER : # 001
DEFAULT JUDGMENT

INDEX NO. 60100907
MOTION DATE 10-12-07
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

re read on this motion to/for default judgment

PAPERS NUMBERED
1-3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and orders.

FILED
NOV 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/27/07

JANE S. SOLOMON /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
BROWN BARK I, L.P., as successor in
interest to BANK OF AMERICA, N.A.,
successor in interest to FLEET BANK,

Plaintiff,

INDEX NO. 601009/2007

-against-

ANDRES NUNEZ, individually and d/b/a
ANDRES CLEANERS,

DECISION and ORDER

Defendant.

-----X
JANE S. SOLOMON, J.

FILED
NOV 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

In this action to collect an amount borrowed on a revolving line of credit, plaintiff Brown Bark, I, L.P., as successor in interest to Bank of America, N.A., successor in interest to Fleet Bank ("Plaintiff"), seeks a default judgment against Andres Nunez, individually and d/b/a Andres Cleaners ("Defendant"). The motion is decided as follows.

On or about May 26, 1995, Defendant entered into an Easy Business Banking Secured Line of Credit Agreement (the "Agreement") with the bank then known as Fleet Bank. The Agreement evidenced a line of credit on a demand basis for Defendant's borrowing needs, allowing him to borrow, repay and re-borrow up to a maximum principal sum of \$50,000 "until the

Bank's decision to collect the balance due on the [amount borrowed] and/or termination of the Bank's commitment upon the occurrence of an Event of Default."

Paragraph (I)(8) of the Agreement states that "[a]fter the occurrence of an Event of Default all principal and other amounts outstanding and payable under this Agreement shall bear interest at the rate of sixteen percent (16%) per annum until paid in full. Interest shall be calculated on the basis of a 360-day year using the actual number of days elapsed." Paragraph (II)(10) provides for a late fee equal to five percent of any payment not paid within ten days of its due date. Paragraph (VII)(4) obligates Defendant to pay reasonable attorneys' fees and expenses incurred in collecting amounts due under the Agreement. Finally, Paragraph (VII)(10) permits Fleet Bank to sell its rights under the Agreement.

On June 13, 2005, Fleet Bank merged with and into Bank of America, N.A., and Bank of America, N.A. acquired all of Fleet Bank's right, title and interest in and to the Agreement, and any account receivable or debt obligations relating thereto, including, Fleet Bank's right to receive all payments due and to become due from Defendant. Then, on October 24, 2006, Bank of America, N.A., sold, assigned and transferred to Plaintiff all of

its right, title and interest in the Agreement, and any account receivable or debt obligation relating thereto.

Plaintiff submits no documentation evidencing Plaintiff's borrowing under the Agreement, but submits a copy of an Allonge executed on November 2, 2006 by a Bank of America Assistant Vice President, Kimberly H. Blackwater, in connection with the sale of the Agreement to Plaintiff. The Allonge states that it is "attached and made part of that certain evidence of indebtedness dated **05/26/1995**, together with all renewals, extensions and modifications, if any, executed and given by **ANDRES NUNEZ DBA ANDRES CLEANER** in the original amount of \$50,000.00. It is to be read together with and is hereby incorporated by reference in the attached instrument and constitutes an integral part thereof." (Emphasis in original.)

Plaintiff's Executive Vice President and Chief Operating Officer James Hrebenar states that, based on his review of Plaintiff's records, at the time of the transfer, Defendant owed an outstanding balance of principal and interest of \$51,959.76 under the Agreement, and that Defendant has failed to repay this amount despite Plaintiff's demand that he do so.

Plaintiff commenced this action on or around March 28, 2007, by filing a Summons and Complaint with the New York County Clerk. There is an Affidavit of Service which states Defendant

[* 5]

was served personally on April 5, 2007, at 1988 Amsterdam Avenue, New York, NY 10032, and proof thereof was filed with the Clerk on April 6. Plaintiff's attorney states that he sent an additional copy of the Summons by first class mail to Defendant at this same address on April 13. This address is the one listed for Defendant in the Agreement; Plaintiff's attorney states it is Defendant's last known place of business and that Defendant's actual residence is unknown. To date, Defendant has failed to answer or otherwise appear, and the time to do so has now expired.

Plaintiff now moves under CPLR § 3215 for default judgment, seeking repayment of \$51,959.76 under the Agreement, plus interest at a rate of 16% per annum from October 24, 2006, late fees of \$2,597.99 (representing 5% of the outstanding balance of principal and interest not timely paid), attorneys' fees of \$1,000 (representing five hours of work at \$200 per hour), plus the costs and disbursements of this action.

Plaintiff's attorney states that he served a copy of the motion papers on Defendant by first class mail on September 18, 2007.

Plaintiff has not established a prima facie case to show that it is owed the amount sought. The Agreement shows that Defendant established a line of credit in 1998, and Plaintiff has provided much documentation to establish that it is entitled to

assert a claim under the Agreement. However, Plaintiff has not submitted any evidence to show when Defendant borrowed under the Agreement, when Defendant defaulted in his payments, or when demand was made for repayment. Therefore, an inquest must be held on the timeliness of the claim and the amount due.

Accordingly, it hereby is

ORDERED that Plaintiff's motion is granted on default to the extent of holding Defendant in default, and it is ordered that an inquest against Defendant is directed as to all issues; and it further is

ORDERED that, within 60 days from the date hereof, Plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall thereupon place this action on the appropriate trial calendar for the inquest herein above directed; and it further is

ORDERED that if Plaintiff fails to comply with the immediately preceding paragraph, the action will be dismissed.

Dated: November 27, 2007

ENTER:
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NOV 28 2007
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J.S.
JANE S. SOLOMON
J.S.C.