

Commerce Bank, N.A. v A.S.M. of NY Corp.
2008 NY Slip Op 30148(U)
January 16, 2008
Supreme Court, New York County
Docket Number: 0109433/2007
Judge: Jane S. Solomon
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PRESENT: SOLOMON

PART 55

Index Number : 109433/2007

COMMERCE BANK, N.A.

VS.

A.S.M. OF NY

SEQUENCE NUMBER : # 001

DEFAULT JUDGMENT

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INDEX NO.

109433-07

MOTION DATE

11-30-07

MOTION SEQ. NO.

#001

MOTION CAL. NO.

ad on this motion to/for

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 order.

FILED

JAN 22 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/16/08

JAMES S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

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

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

COMMERCE BANK, N.A.,

INDEX NO. 109433/2007

Plaintiff,

-against-

A.S.M. OF NY CORP. and BYUNG SOO KIM

DECISION and ORDER

Defendants.

-----X

JANE S. SOLOMON, J.

Plaintiff Commerce Bank, N.A. ("Commerce Bank") moves under CPLR § 3215 for default judgment against defendants A.S.M. of NY Corp. ("ASM") and Byung Soo Kim ("Kim") for \$40,939.18 plus interest and attorneys fees. The motion is granted as follows.

ASM is a New York domestic corporation with its principal place of business at 87 Church Avenue in Brooklyn, and Kim is its president. On or about April 4, 2006, Commerce Bank extended a Master Business Account line of credit to ASM in the amount of \$50,000. To access the credit line, ASM executed and delivered a Promissory Note and Security Agreement in that same principal amount (the "MBA Credit Line Agreement"). Kim executed an Unconditional Personal Guaranty of Payment dated April 4, 2006 (the "First Guaranty"), unconditionally guaranteeing full payment of any and all of ASM's obligations under the MBA Credit Line

Agreement to Commerce Bank. The First Guaranty states that "if [Commerce Bank] institutes any legal action or proceeding against any Guarantor, each Guarantor agrees to pay any and all expenses, including reasonable attorneys fees, incurred by [Commerce Bank]."

On May 4, 2007, Kim executed and delivered to Commerce Bank a Promissory Note and Security Agreement (the "Term Loan Agreement") on behalf of ASM, consolidating the amount then outstanding on the MBA Credit Line Agreement (\$40,939.18). The Term Loan Agreement provides for monthly accruals of interest at an annual rate of 7.750%, and states that in the event of default, Commerce Bank "shall have the right to declare the Obligations immediately due and payable without notice" to ASM. It further states that "[u]pon the occurrence of an Event of Default, [Commerce Bank], at its option, may, if permitted under applicable law, increase the interest rate on this Note by 3.00 percentage points."

The Term Loan Agreement defines "default" as when "(i) Borrower fails to make any payment when due under this Note or otherwise exceeds the maximum amount of the loan hereunder; (ii) Borrower fails to comply with or perform any other term, obligation, covenant or condition contained in this Note or in any of the other Loan Documents or fails to comply with or to

perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower ..."

The Term Loan Agreement also provides that ASM and Kim "agree to pay, upon demand, costs of collection of all amounts under this Note, including, without limitation, principal and interest, or in connection with the enforcement of, or realization on any security for this Note, including, without limitation, to the extent permitted by applicable law, reasonable attorneys' fees and expenses."

Kim executed an additional Unconditional Guaranty of Payment dated April 4, 2006 (the "Second Guaranty"), unconditionally guaranteeing full payment and performance of all of ASM's obligations to Commerce Bank under the Term Loan Agreement. The Second Guaranty provides that if Commerce Bank "institutes any legal action or proceeding against any Guarantor, each Guarantor agrees to pay any and all expenses, including reasonable attorneys fees, incurred by" Commerce Bank.

In its Verified Complaint, Commerce Bank alleges that ASM failed to make any payments due on the Term Loan on or after June 4, 2007, and that on June 15, 2007, it demanded payment of all obligations due thereunder. Commerce Bank further contends that as of June 4, 2007, \$40,393.18 remains outstanding on the

Term Loan Agreement, as well as interest from that date and reasonable attorneys fees.

Commerce Bank commenced this action by filing a Summons and Verified Complaint with the New York County Clerk on July 10, 2007. The Affidavit of Service with respect to Kim states that a process server for Commerce Bank attempted to serve Kim with the Summons and Complaint on August 21, August 22 and August 23, 2007, and then affixed them to the door of his last known residence on August 23, 2007, and mailed a copy by first class mail in an envelope marked "Personal and Confidential" on August 24, 2007. The Affidavit of Service with respect to ASM states that a process server served a copy of the Summons and Complaint on ASM by delivering the same to the Secretary of State on August 24, 2007. Additional Affidavits of Service provide that on October 1, 2007, Commerce Bank mailed additional copies of the Summons and Complaint with Notice to both defendants at their last known addresses.

Discussion

Kim was properly served under CPLR § 304(4) and ASM was properly served under Business Corporation Law § 306. Neither defendant has answered or otherwise appeared, and the time for them to do so has expired. They are therefore both in default and liable to Commerce Bank under the Term Loan Agreement for

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\$40,393.18, plus interest at the Agreements's default rate of 10.75% from the date of default, June 4, 2007.

Commerce Bank has also moved for costs and expenses, including reasonable attorneys' fees, to which it is entitled under the Term Loan Agreement and Second Guaranty. It has requested that the amount be determined at a separate inquest; therefore, the calculation shall be submitted to a Special Referee.

Accordingly, it hereby is

ORDERED that Commerce Bank's motion for default judgment against ASM and Kim is granted, and Commerce Bank is entitled to judgment under the Term Loan Agreement and Second Guaranty in the amount of \$40,393.18, together with interest at the rate of 10.75% per annum from June 4, 2007; and it further is

ORDERED that the issue of how much defendants owe Commerce Bank for reasonable attorneys' fees, costs and expenses is referred to a Special Referee to hear and report with recommendations; and it further is

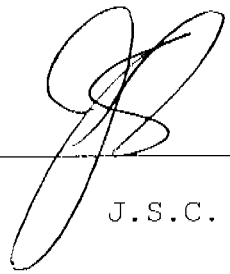
ORDERED that this motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it further is

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days of entry on the Judicial

Support Office (Room 311) to arrange a date for the reference to a Special Referee, failing which the Clerk is directed to enter judgment in favor of Commerce Bank and against ASM and Kim for \$40,393.18, together with interest at the rate of 10.75% per annum from June 4, 2007, together with costs and disbursements as taxed.

Dated: January 16, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
JAN 22 2008
NEW YORK
COUNTY CLERK'S OFFICE