

Wei v Citibank, N.A.

2008 NY Slip Op 32217(U)

August 4, 2008

Supreme Court, New York County

Docket Number: 0109555/2006

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE
J.S.C.

PRESENT: _____

PART _____

Index Number : 109555/2006

WEI, CHARMAINE YU

VS.

CITIBANK, N.A.

SEQUENCE NUMBER : 006

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

FILED
AUG - 7 2008
NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: _____

8/4/08

HON. JUDITH J. GISCHE

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

CHARMAINE YU WEI, YU LIN YU, GUO GANG WEI,

Plaintiffs,

-against- .

CITIBANK, N.A., JEANETTE WEI, EDWARD LAI, and
MESBAH UDDIN CHOWDHURY,

Defendants.

-----X

Decision/Order

Index No.: 109555/06
Seq. No. : 006

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Citibank's motion [d j/mt] w/SFE affirm, exhs	1

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant Citibank N.A. ("Citibank") moves for an order granting it a default judgment on its cross-claims against defendants Jeanette Wei ("J. Wei") and Mesbah Uddin Chowdhury ("Chowdhury"). This motion has been submitted to the court without opposition, although proof of service has been provided. Therefore, the motion is on default.

In this action, plaintiffs allege that J. Wei, as attorney-in-fact, obtained a Home Equity Line of Credit (the "credit line") from Citibank and granted a mortgage in favor of Citibank on a house in Queens belonging to her mother, Yu Lin Yu, father, Guo Gan Wei and sister, Charmaine Wei, via fraudulent obtained powers of attorney. Plaintiffs further allege that J. Wei fraudulently withdrew the sum of \$244,000 from the credit line, even though plaintiffs informed Citibank not to allow J. Wei to withdraw any money from

the credit line.

In its Verified Answer, Citibank denied the material allegations of the complaint and asserted twenty affirmative defenses. In addition, Citibank asserted cross-claims against J. Wei for indemnification, contribution and unjust enrichment, and against Chowdhury for indemnification and contribution.

Because Chowdhury had not appeared in this action, Citibank served Chowdhury with the Summons on Cross-Claims and the Verified Answer and Cross-Claims (the "Chowdhury Cross-Claim") on January 24, 2007, pursuant to CPLR § 308 (2). By order dated June 7, 2007, the court granted Citibank's application for a *nunc pro tunc* order deeming the Affidavit of Service of the Chowdhury Cross-Claim timely filed as of February 1, 2007, provided that a copy of the court's order and Citibank's summons and answer and cross-claims are served upon Chowdhury within ten days thereof. Citibank has provided proof of compliance with the court's June 7, 2007 order.

Because J. Wei had not appeared in this action, on May 22, 2007, Citibank served J. Wei with the Summons on Cross-Claims and Verified Answer and Cross-Claims (the "Wei Cross-Claim"), pursuant to CPLR § 308 (4). The affidavit of service of same was filed on June 18, 2007.

Neither Chowdhury nor J. Wei have served an answer to the Cross-Claims nor otherwise appeared in this action. Chowdhury and J. Wei have not requested an extension of their respective times to do so. Therefore, Chowdhury and J. Wei are in default with respect to the cross-claims.

On September 17, 2007, the court granted plaintiffs' motion for a default judgment against J. Wei. Plaintiffs also moved for entry of a default judgment against

Chowdhury, however, this motion was denied by decision dated March 19, 2008 because of plaintiffs' failure to properly serve Chowdhury with the motion papers.

Discussion

A default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)]. Citibank is only entitled to a default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)].

An action to recover on the theory of unjust enrichment is based on the equitable principle that a person must not be allowed to enrich himself or herself unjustly at the expense of another (Waldman v. Englishtown Sportswear, Ltd., 92 AD2d 833 (1st Dept 1983)). Executive Law § 135 provides, in part, that "[f]or any misconduct by a notary public shall be liable to the parties injured for all damages sustained therein.

Based upon the Verified Answer and Cross-Claims, Citibank alleges as follows. Citibank agreed to extend the credit line and accept the mortgage on the property in reliance upon J. Wei's authority to execute such instruments as attorney-in-fact for the plaintiffs. Citibank contends that if plaintiffs recover judgment against Citibank, J. Wei should be held liable for Citibank's damages because of her wrongful and tortious conduct, by which she has been unjustly enriched. Citibank's claimed damages are the unpaid balance of the mortgage, together with accrued and unpaid interest thereon, and its attorneys fees and expenses incurred in defending the lien of the mortgage.

Chowdhury acknowledged a power of attorney purportedly signed by plaintiff Go

Gang Wei in favor of J. Wei (the "G. Wei Power of Attorney"). Citibank's claims against Chowdhury are as follows. Citibank relied upon the authority conferred on J. Wei in the G. Wei Power of Attorney in agreeing to close on the credit line and accepting the mortgage. However, Chowdhury violated RPL § 303 by acknowledging Go Gang Wei's signature without satisfactory evidence that the person making the signature was Go Gang Wei. Citibank contends that if plaintiffs recover judgment against Citibank, Chowdhury should be held liable for Citibank's damages, which are the unpaid balance of the mortgage, together with accrued and unpaid interest thereon, and its attorneys fees and expenses incurred in defending the lien of the mortgage.

Based on these claims, Citibank has established that J. Wei was unjustly enriched. Citibank has also sufficiently alleged "misconduct by a notary public" in the performance of Chowdhury's duties (Executive Law § 135, see generally Mars v. Grant, 36 AD3d 561 [1st Dept 2007]). Therefore, Citibank has *prima facie* causes of action for common law indemnification and contribution against J. Wei and Chowdhury. However, Citibank has not established its damages at this time.

Accordingly, Citibank is entitled to entry of default judgment on liability with respect to the cross-claims against J. Wei and Chowdhury. Since damages can only be ascertained at a hearing, the court directs that there be an inquest at the time of trial in the main action.

Any requested relief not expressly addressed herein has been nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
 August 4, 2008

So Ordered: 

HON. JUDITH J. GISCHE, J.S.C.